

**THE CHILD COMPLAINANT/WITNESS IN SEXUAL ASSAULT CASES:
AN EMPIRICAL STUDY OF JUDICIAL DECISION-MAKING
SURROUNDING THE EVIDENTIAL AND PROCEDURAL PROVISIONS
OF BILL C-15 AND RELATED ISSUES**

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DOCTOR OF PHILOSOPHY
IN THE
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The Child Complainant/Witness in Sexual Assault Cases: An Empirical

Study of Judicial Decision-Making Surrounding the Evidential

and Procedural Provisions of Bill C-15 and Related Issues

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ABSTRACT

Child sexual abuse has been formally acknowledged in Canada as an endemic and tragic criminal phenomenon. In response to the recommendations of a Royal Commission mandated to examine the issues relating to the sexual exploitation and abuse of children, Parliament enacted and proclaimed in force, on January 1, 1988, **Bill C-15**, an **Act to Amend the Criminal Code and the Canada Evidence Act**. The purpose of the enactment was to: a) enhance successful prosecutions of child sexual abuse cases; b) provide better protection to child sexual abuse victims or witnesses; c) improve the experience of child sexual abuse victims or witnesses; and d) bring sentencing in line with the severity of the offence. The overall strategy to accomplish these broad policy goals was to modify existing substantive, evidentiary and procedural laws. The legislation liberalized the rules of evidence and created new provisions to govern the scope, admissibility and reception of children's evidence.

The primary objective of the research was to examine the application and judicial interpretation of the evidentiary and procedural amendments created by **Bill C-15**, namely: **s. 16** of the **Canada Evidence Act**; **Criminal Code s. 274** (Repeal of Corroboration); **s. 486(2.1)(2.2)** (Screen and Closed-Circuit T.V.); **s. 715.1** (Videotaped Evidence); **s. 486(3)(4)** (Order Restricting Publication); and the related issues of **s. 486(1)** (Exclusion of Public), the use of expert witnesses; and the hearsay statements of child complainants. The empirical research included court observations, case studies, and analyses of court transcripts and case law.

Since the enactment of Bill C-15, the constitutionality of the procedural provisions has been upheld by the Supreme Court of Canada. The research reveals that the judiciary has become more sensitive and receptive to the unique problems children face as complainants and witnesses in sexual abuse cases. Canadian Courts have demonstrated a willingness to expand the parameters of traditional rules of evidence to admit children's testimony and to adopt a more liberal approach towards the assessment of children's credibility as witnesses. The judiciary is left with the difficult task of balancing society's need to ensure that those who commit sexual offences against children are held accountable by the legal system against the right of an accused to a fair trial. However, even with meaningful judicial interpretation, there are limitations to the legislation in terms of both its conceptualization and its effectiveness. The dissertation proposes changes to the legislation in order that its social policy goals may be better achieved.

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DEDICATION

To everyone who believed in me.

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INTRODUCTION

Child sexual abuse has been formally acknowledged in Canada as an endemic and tragic criminal phenomenon. In 1982, a Royal Commission, with a mandate to examine issues relating to the sexual exploitation and abuse of children, was established to make recommendations to the Minister of Justice, Minister of National Health and Welfare, and other levels of government. After a comprehensive review, which included several National surveys, the **Badgley Report**¹ underscored the manifest need to modify existing criminal laws and evidentiary and procedural rules to facilitate criminal prosecutions of child sexual abuse. The Badgley Commission unequivocally concluded that sexually abused children have special needs and vulnerabilities, which must be recognized and protected by the criminal law and that the current legislation did not accomplish those objectives. Rather, extant rules of evidence governing these cases severely restricted children's testimony or made it impossible for them to testify, resulting in low conviction rates, acquittals and the non-prosecution of legitimate cases.

¹ **Report of the Committee on Sexual Offences Against Children and Youths** (1984), Ottawa: Minister of Supply and Services Canada, commonly known as the **Badgley Report**. The **Badgley Report** underscored the prevalence of child sexual abuse in Canada. The results from its National Population Survey were reported as follows:

The main findings of the survey are that ... about one in two females and one in three males have been the victims of unwanted sexual acts. About four in five of these incidents first happened to these persons when they were children or youths. (at 175)

In a 1992 national probability sample of 3,207 grade 8, 9 and 10 students, researchers found that 18% of girls and 10% of boys reported having been sexually abused (Holmes and Silverman, 1992).

The **Rogers Report** (1990) defines "sexual abuse" as:

[T]he misuse of power by someone who is in authority over a child for the purposes of exploiting a child for sexual gratification. It includes incest, sexual molestation, sexual assault and the exploitation of the child for pornography or prostitution. (at 19)

Several years of intense political lobbying for the recommendations proposed by the **Badgley Report** culminated in the federal government's implementation of new legislation in an attempt to pursue justice for children in sexual abuse cases.

In 1986, the then Minister of Justice and Attorney General for Canada, The Honourable Mr. Hnatyshyn, mandated a legislative committee

...to take appropriate legislative measures as quickly as possible to correct the existing imbalance in the justice system which has denied our children and adolescents adequate protection from the psychological and physical harm that is sexual abuse. (The Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15, First Meeting:18)

It was the objective of this Committee to develop and promulgate a piece of legislation, which provided greater protection for child sexual abuse victims by making the court process more accessible, more equitable, and less traumatic for them, without compromising the fundamental rights of the accused.

Bill C-15², an **Act to Amend the Criminal Code, and the Canada Evidence Act**, was passed by the House of Commons on June 23, 1987 and proclaimed in force on January 1, 1988. The passage of **Bill C-15**, considered by Parliament as the most significant piece of child sexual abuse legislation ever enacted, stemmed significantly from the public's perception that the criminal justice system did not treat fairly children who were victims of sexual abuse. Traditionally, children rarely testified in court. The

2 2nd Sess., 33rd Parl., 1986-87 S.C. 1987, c. 24, now R.S.C. 1985, c. 19 (3rd Supp.). The ministerial statement which accompanied the Bill acknowledged that the legislation was introduced in response to the recommendations of the **Badgley Report** (House of Commons Debate, Hansard; Vol. 129, Number 1, 2nd Session, 33rd Parliament, p. 1037, Tuesday, November 4, 1986). See Vallance (1988) for an analysis of the role played by interest groups in the culmination of the legislation.

involvement of children as complainants and witnesses in criminal prosecutions is a contemporary phenomenon, which evolved from increased societal awareness of the magnitude of child sexual abuse and the apparent need for a legal response.

As children are drawn with more frequency into the adversarial arena, there is growing concern that they are not treated equitably by the legal system. The fact is that criminal rules of evidence and the court system were not designed to accommodate children as participants. Rather, anachronistic and restrictive Canadian evidence laws created a distinction between the testimony of children and that of adults (The Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15, First Meeting:28). In addition, our criminal justice system, with its traditional emphasis on procedural safeguards and due process for the accused, created an imbalance which did not afford children victims "the equal protection and equal benefit of the law" as guaranteed by s. 15 of the Charter of Rights and Freedoms. According to its drafters, the legislative objective of **Bill C-15** was to redress that imbalance (The Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15, First Meeting:18).³

The purpose of the enactment was to satisfy four broad policy goals, namely:

1. to provide better protection to child sexual abuse victims/witnesses;
2. to enhance successful prosecution of child sexual abuse cases;
3. to improve the experience of the child victim/witness; and

³ See Alexander (1990) for a discussion of the Legislative Committee's failure to consider the social science literature on the capabilities of the child witness.

4. to bring sentencing in line with the severity of the offence.⁴

The overall strategy developed to accomplish these goals was to modify existing substantive, evidentiary and procedural laws. **Bill C-15**, *inter alia*:

- a. created substantive offences related to child sexual abuse, such as:
 - s. 151 - Sexual Interference
 - s. 152 - Invitation to Sexual Touching
 - s. 152 - Sexual Exploitation

These new categories of offences were designed to accommodate a certain void in the current provisions, in order to reflect more accurately the types of unacceptable sexual behaviours perpetrated against children:

- b. redefined some of the existing offences which are statutorily worded in archaic and imprecise language; and
- c. created new provisions which govern the proffering of children's evidence.

In particular, the legislation liberalized the rules of evidence and created new evidentiary and procedural provisions to govern the scope, admissibility and reception of children's evidence.

Since the proclamation of **Bill C-15**, many cases have reached the final stage of adjudication and there is a body of authoritative case law, which has captured the judicial interpretation and application of the legislation. The primary objective of the dissertation research is to examine the judicial decision-making process surrounding the invocation and operation of the new evidential and procedural laws created by **Bill C-15** and related issues. To contextualize the dissertation, the research took into account legal issues

⁴ These goals were gleaned from the debates in the House of Commons and from the various legislative pronouncements of the Minister of Justice (at the time), The Honourable Mr. Hnatyshyn. See Schmolka (1992), Bala (1988) and McGillivray (1990) for commentary on the Bill.

raised and decisions made by Crown and defence counsel pursuant to the implementation of the prescribed provisions. However, the main focus of the analysis was the interpretation and application of the legislation by judges, in the forms of judicial comments and rulings in preliminary inquiries, trials and appellate proceedings. This dissertation examines the following evidentiary and procedural changes, their interpretation, application and effectiveness within the context of two of the stated policy goals, namely:

- a. to enhance successful prosecution of child sexual abuse cases; and
- b. to improve the experience of the child victim/witness:⁵

Chapter 1:	s. 16 of the <u>Canada Evidence Act</u>
Chapter 2:	s. 274 - Repeal of Corroboration
Chapter 3:	s. 486(2.1)(2.2) - Screen and Closed-Circuit T.V.
Chapter 4:	s. 715(1) - Videotaped Evidence
Chapter 5:	Expert Witnesses
Chapter 6:	Hearsay (Out-of-Court) Statements of Child Complainants
Chapter 7:	s. 486(3)(4) - Order Restricting Publication
Chapter 8:	s. 486(1) - Exclusion of Public

This dissertation is a socio-legal impact study which examines the legislative intent of the provisions and narrowly focuses on the interpretation and implementation of the legislation and common law developments of the related evidentiary issues.

The dissertation was designed to address the basic research questions:

- What is the existing common law which governs the evidential and procedural provisions (if any)?

⁵ The purpose of the substantive enactments was to satisfy the other two broad policy goals.

- How are judges interpreting and applying the new legislation (i.e. what common law has evolved)?
- What statements are judges making concerning children as witnesses and/or complainants of sexual abuse?
- Given the manner in which judges have interpreted and applied the new legislation, what modifications might better address the unique needs of children in court?

The dissertation will propose changes to the legislation and make recommendations in order that Parliament's social policy goals may be better achieved.

METHODOLOGY

The empirical research included these components:

1. court observation of cases;
2. analyses of **s. 16 Canada Evidence Act** inquiries;
3. analyses of unreported and reported case law;
4. case studies; and
5. literature review.

The methodology for the dissertation research was driven by the inherent nature of the judicial system. Because the evidentiary and procedural issues delineated for examination are based on the common law (law as developed by judges) and statute law (legislative enactments), it is impossible to fit the study into a true scientific model (i.e. manipulating an independent variable, observing the measured effect on the dependent variable and making generalizations about the results). However, the law, arguably, has its own system for generating validity, predictability and reliability.

Our legal system is one that is based on precedent or "*stare decisis*", a "doctrine that, when a court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where facts are substantially the same" (Black's Law Dictionary). The main justifications for courts to stand by precedent are that "it enables a judge to utilize the wisdom of application of law to similar cases, and it makes the law predictable" (Oxford Companion to Law). Thus, the rule of precedent ensures replication. The concept of "*stare decisis*" is also determined by the hierarchy of the court level, such that a higher court decision is always

binding on a lower court within the same jurisdiction. Court decisions from other jurisdictions are not binding but persuasive. Supreme Court of Canada decisions are binding on all courts. Contrary rulings must be based on legitimate judicial distinctions.

I. COURT OBSERVATION OF CASES

The research included in-court observation of **35** child sexual abuse cases conducted during the period of **January 1989** to **December 1991** in the lower mainland of British Columbia. A case was selected for study if it satisfied one or more of the following criteria:

- a. a criminal case involving any of the enumerated **Criminal Code** offences relating to the sexual assault of children;
- b. a case set for preliminary hearing or trial where a child (under 14 years) would be testifying;
- c. a case set for preliminary hearing or trial where a targeted **Bill C-15** application would be made;
- d. a case set for preliminary hearing or trial where a **Charter** challenge to the targeted **Bill C-15** legislation would be made (this requires a notice to be filed with the Attorney General for British Columbia);
- e. a case set for preliminary hearing or trial where an application for the related evidentiary issues of hearsay and expert witnesses were made; and
- f. a case set for preliminary hearing or trial where an application was made for the related **Criminal Code s. 486(1)** - Exclusion of Public.

The cases were identified for study through these methods:

- a. referral by Crown counsel (provincially designated sexual assault prosecutors in each lower mainland region were contacted and requested to advise of any child sexual abuse cases which were set for hearing);
- b. referral by defence counsel (approximately 25 criminal defence lawyers in the lower mainland were contacted by letter requesting referral of any child sexual assault cases which were set for hearing);
- c. referral by Crown Victim Services (various regional offices in the lower mainland were contacted for referral of cases in which children were being prepared for testifying in court); and
- d. the writer attended at various regional Crown offices in the lower mainland (Vancouver, New Westminster, Burnaby, Surrey and Victoria) to check court lists for scheduled preliminary hearings and trials for child sexual assault cases.

The cases studied were from the following levels of courts in British Columbia:

- a. Provincial Court (including both Family and Youth Court);
- b. County Court; and
- c. Supreme Court
- d. Court of Appeal

and were from the following jurisdictions:

- a. Vancouver;
- b. Burnaby;
- c. New Westminster;
- d. Surrey;
- e. Maple Ridge;
- f. Matsqui;
- g. Abbotsford;
- h. Richmond; and
- i. Victoria.

All aspects of the preliminary hearing and/or trial process for each case were observed from the beginning of the criminal proceeding to its final adjudication (including: counsels' opening address; counsels' applications; judicial inquiry pursuant to **s. 16 Canada Evidence Act**; Crown's case, defence's case, counsels' submissions; *voir dire* rulings; judgment; and sentencing). The duration of the cases ranged from a **two-day** proceeding to a **two-month** trial. Some cases were adjourned and required multiple attendances in court.

The cases were monitored to the extent that a transcript was ordered of any significant judicial ruling and/or comments involving the following issues and analyzed (these may include excerpts from preliminary hearings, trials, reasons for judgment, sentencing reasons, and/or appeal decisions):

- a. applicability of the legislation and common law;
- b. judicial interpretations of the legislation and common law;
- c. retrospectivity of the legislation;
- d. procedure to be adopted pursuant to the legislation;
- e. **Charter** challenges to the legislation;
- f. admissibility of expert evidence;
- g. admissibility of hearsay evidence;
- h. judicial non-compliance with the legislation;
- i. judicial comments concerning children's testimonial credibility in general, or with specific reference to child sexual abuse cases;
- j. judicial comments concerning the weight to be given to children's testimony in general, or with specific reference to child sexual abuse cases;
- k. judicial comments relating to children as witnesses and/or complainants in general, or with specific reference to child sexual abuse cases; and
- l. judicial comments concerning the distinctive treatment of children in court in general, or with specific reference to child sexual abuse cases.

From the **35** cases monitored in court, **61** children (42 girls and 19 boys), ranging in age from 5 to 13 years, were observed giving their testimony and being cross-examined. Transcripts of all **61** children's **s. 16 Canada Evidence Act** inquiries were ordered and analyzed. For Chapter 1, **146** transcripts of **s.16** inquiries were analyzed. Sixty-one (**61**) of those inquiries resulted from the in-court observation cases, while the remaining **85 s. 16** inquiries were collected from Crown files, defence counsel files and court files. Court registries, regional Crown offices, the B.C. Attorney General's Criminal Appeals and Special Prosecutions office in Vancouver⁶ were also sources for the collection of the transcripts.

II. CASE LAW

All reported and unreported Canadian cases relevant to the targeted **Bill C-15** and related issues were generated through traditional library methods of case law research, supplemented by commercial database sources and referrals. Cases were collected during a **six-year** period: from the proclamation date of the legislation, namely **January 1, 1988, to December 31, 1993.**

⁶ The writer was conducting research at this office with Special Child Sexual Abuse Prosecutor, Ms. Wendy Harvey, during the period of 1989 to 1991. The joint project consisted of the collection of case law relating to the substantive, evidentiary and procedural provisions of **Bill C-15**. The research was funded by the Department of Justice in Ottawa.

A. REPORTED CASES

The reported decisions collected were from all levels of courts in Canada, including: provincial courts, provincial appellate courts, and the Supreme Court of Canada. Jurisprudence — common law cases and academic commentary — prior to **Bill C-15** was examined in terms of historical relevance and perspective. As well, relevant notable American appellate decisions were included for comparative analyses. Individual judgments were analyzed for judicial rulings and/or *obiter dicta* relevant to the issues described in Section I above. The reported cases were generated primarily from these published sources:

- a. Supreme Court Reports
- b. Canadian Criminal Cases
- c. Criminal Reports
- d. Weekly Criminal Bulletin
- e. B.C. Decisions
- f. Alberta Decisions
- g. Saskatchewan Decisions
- h. Manitoba Decisions
- i. Ontario Decisions
- j. Atlantic Provinces Report
- k. Lawyers' Weekly Case Digest.

B. UNREPORTED CASES

Unreported Canadian cases relevant to the specific matters under investigation were identified through research of:

- a. Criminal Abstracts
- b. Weekly Criminal Bulletin
- c. B.C. Unreported Cases

- d. Alberta Unreported Cases
- e. Saskatchewan Unreported Cases
- f. Manitoba Unreported Cases
- g. Ontario Unreported Cases
- h. Atlantic Provinces Unreported Cases
- i. The Lawyers' Weekly
- j. Court registry files
- k. referrals by Crown, defence lawyers, social workers, victim services and other practitioners.

Cases were also found through the following related research projects:

- a. Bill C-15 Project - Ottawa (Department of Justice) B.C. (Ministry of Attorney General, Criminal Justice Branch, Vancouver) - conducted by Wendy Harvey and Cheryl Angelomatis
- b. Institute for the Prevention of Child Abuse - Toronto
- c. London Family Court Clinic - London, Ontario
- d. Department of Justice - Criminal Law and Policy Section - Ottawa.

The unreported decisions studied were from the following levels of court in all or most provinces: Court of Appeal; Supreme Court; County Court; Queen's Bench; and Provincial Court.

III. CASE STUDIES

Thirty-six (36) child sexual abuse case files were analyzed. All documentation, counsel notes and transcripts were examined with respect to the delineated **Bill C-15** and related issues.

These case study files were identified and generated through:

- a. Crown referrals (completed and closed files);
- b. defence counsel referrals (completed and closed files);
- c. search of Crown registry files (completed and closed files) in Vancouver, New Westminster, Burnaby and Surrey regional offices; and
- d. search of the Attorney General's Criminal Appeals and Special Prosecutions files (closed and pending files for the Court of Appeal - Appeal Books and Factums).

IV. LITERATURE REVIEW

The dissertation research included a dimension of analyses which focused on the legal literature and jurisprudence relevant to the development of the specific provisions. This examination took into consideration the antecedents, legal rationale, basic assumptions and fundamental goals of the legislation.

In addition, the psychological literature and empirical studies concerning the dynamics of child sexual abuse, child victimization and children's development, cognition, and memory capabilities were reviewed.

V. OTHER METHODS

Information and data pertinent to the issues examined in the dissertation were gathered through informal discussions with numerous designated child sexual assault prosecutors, defence lawyers and judges. Several conferences relating to **Bill C-15** and the prosecution of child sexual abuse cases were attended, namely:

- a. Children in the Justice System: A National Conference on the Use of Video Evidence in Child Sexual Abuse Cases (June 1988 at Richmond, B.C.);
- b. Ministry of the Attorney General Crown Counsel Conference (1990 at Whistler, B.C.); and
- c. Ministry of the Attorney General Crown Counsel Conference (1992 at Whistler, B.C.).

VI. DATA-GATHERING INSTRUMENTS: DEVELOPMENT, CODING AND RELIABILITY

The data-gathering instruments, Appendices **A, I, K, L, Q, T, Y, AA** and **BB** were designed to reflect what legal questions are relevant to the issues studied. The kinds of questions formulated were driven by the specific legal imperatives of the existing common law and legislation. The instruments were developed, after a 6-month process of study, which included:

- a. analyses of the language of the Canada Evidence Act and Criminal Code sections and its stated legislative intent;

- b. review of the literature on child sexual abuse;
- c. review of literature on **Bill C-15**;
- d. research into the existing common law (if any) relating to each area under study;
- e. research into relevant areas of the criminal law;
- f. research into criminal trial procedures;
- g. research into criminal rules of evidence;
- h. three months of court observation of criminal trials and two cases of child sexual assault prosecutions; and
- i. three months of informal training with a designated child sexual assault prosecutor.

The author was the only coder of the data. It is submitted that inter-coder reliability could be achieved through replication of the study (if conducted in the same time frame). The research issues were stated in such a manner that an independent researcher (trained in the above-mentioned areas), using the same data-gathering instruments, would arrive at similar results. Furthermore, any data gathered from the instruments can be validated and verified through court transcripts.

Given the evolutionary and fluid nature of the law, the research questions and the data gathered from such questions will vary based on the principle of *stare decisis* and future statutory enactments.

VII. CASE REPRESENTATIVENESS

There was no available data from court or police sources on the number of child sexual abuse cases which actually proceeded to court each year in Canada. In British Columbia, the overwhelming majority of child sexual abuse cases were dealt with in the lower mainland. The in-court observation cases were conducted over a 3-year period at multiple locations in the lower mainland and at different levels of courts. The case studies files were gathered from different sources over a 5-year period, and reflect court proceedings which took place in varying jurisdictions. The reported and unreported cases, collected over a 6-year period, were representative of all geographic locations and court jurisdictions in Canada.

The methodology for the dissertation also served as the source for collection and analyses of limited quantitative information. For example, it was possible to generate data concerning:

- a. case dispositions;
- b. the number of children who have given testimony in the "sworn", "unsworn" or "affirmed" conditions, or those who have been judicially "disqualified" from testifying;
- c. the number and results of screen, videotape, closed-circuit T.V., hearsay and closed-courtroom applications;
- d. **Charter** challenges to the legislation; and
- e. the number and kind of expert witnesses who testified in child sexual abuse cases.

CHAPTER 1: s. 16 CANADA EVIDENCE ACT

To tell the truth.

That I finally got it all out of my system and said it in front of a judge.

He [the judge] just told me to relax — offered me water, said I could ask for a break.

Quotes from child victims
(London Family Court Clinic: Child Witness Project (Sas *et al.*, 1993))

I. INTRODUCTION

Bill C-15 amended s. 16 of the Canada Evidence Act, which codifies the law respecting the receiving of evidence from all child witnesses as follows:

16. (1) Where a proposed witness is a person under fourteen years of age or a person whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine
 - (a) whether the person understands the nature of an oath or a solemn affirmation; and
 - (b) whether the person is able to communicate the evidence.
- (2) A person referred to in subsection (1) who understands the nature of an oath or a solemn affirmation and is able to communicate the evidence shall testify under oath or solemn affirmation.
- (3) A person referred to in subsection (1) who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may testify on promising to tell the truth.

- (4) A person referred to in subsection (1) who neither understands the nature of an oath or a solemn affirmation nor is able to communicate the evidence shall not testify.

This section was enacted to reflect Parliament's explicit intent to relax the competency requirement governing the admissibility of children's evidence (The Minutes and Evidence of the Legislative Committee on Bill C-15, First Meeting:24;28). Since at the heart of a case involving alleged child sexual abuse is the child's evidence, the critical issue is whether a young victim will be deemed "legally competent" to give testimony. Typically, the child is the only witness to the molestation, other than the perpetrator, and the elicitation of the child's testimony in court, under the formal constraints of evidence laws, is necessary to secure a conviction. The intent of the new legislation is to eschew the application of arbitrary and rigid rules of evidence by allowing the child witness to be assessed on a case-by-case basis.

Section 16 creates three categories of children under 14 years of age who may give testimony. When a child is offered as a witness, the presiding judge shall conduct a *voir dire* to determine whether the child is competent to testify. The court will make one of the following determinations:

- (a) those who are able to communicate the evidence and understand the nature of an oath will give **sworn** testimony;
- (b) those who are able to communicate the evidence and understand the nature of a solemn affirmation will give testimony on the basis of an affirmation;⁷

⁷ **Section 14(2)** of the Canada Evidence Act (R.S., c. E-10, s. 14) reads:

Where a person makes a solemn affirmation in accordance with subsection (1), his evidence shall be taken and have the same effect as if taken under oath.

- (c) those who are able to communicate the evidence but do not understand the nature of an oath or solemn affirmation will give **unsworn** testimony by promising to tell the truth; and
- (d) those who are unable to understand the nature of an oath or a solemn affirmation nor able to communicate the evidence will not testify.

Under the new provisions, judges will have considerable discretion to interpret new wordings; determine under what conditions the evidence will be received; and assess the child's ability to communicate the evidence.

The dissertation research was designed to analyze and document judicial interpretation and application of **s. 16** of the new evidence law on a case-by-case basis. (See **Appendix A.**)

II. RESEARCH QUESTIONS

The dissertation research attempts to answer the following questions:

A. Procedural Issues:

1. Is the inquiry mandatory?
2. Who conducts the inquiry?
3. Can counsel question or cross-examine?
4. Do judges ask leading questions?
5. Is a *voir dire* held in the presence of the jury?

B. Substantive Issues:⁸

1. What is the judicial interpretation of "**understand the nature of an oath**"?
2. What is the judicial interpretation of "**solemn affirmation**"?
3. What is the judicial interpretation of "**able to communicate the evidence**"?
4. What is the judicial interpretation of "**promise to tell the truth**"?
5. What are the judicial interpretations of "**sworn**" and "**unsworn**" evidence?
6. What **Charter** challenges have been made to the legislation?
7. What kinds of questions are being asked by the judge in the inquiry?

This chapter will begin with a historical review of the common law and Canadian statutes. The empirical research consists of the analyses of **146** transcripts of **s. 16 Canada Evidence Act** inquiries conducted by British Columbia judges in unreported cases. Significant portions of transcripts from courtroom proceedings are included in order to provide the reader with the flavour of courtroom dynamics and, more importantly, to demonstrate that different judges have widely different approaches to questioning children on the witness stand. Some judges go to great lengths to establish a rapport with children and to put them at ease, while others are much more gruff and perfunctory.

⁸ Referred to hereafter as evidentiary issues.

III. HISTORICAL DEVELOPMENT OF COMMON LAW AND STATUTORY RULES - PREDECESSOR LEGISLATION

Historically, there is a presumption in English, Canadian, and American law that the testimony of children is inferior to that of an adult.⁹ The law traditionally assumes that children's testimony may suffer from "inherent frailties"¹⁰ which diminish its reliability and which render it unsafe for a court to make a legal determination on the basis of a child's uncorroborated evidence.

Common assumptions concerning children, which include their relative immaturity; susceptibility to errors in perception; limited powers of recall and articulation; inferior memory subject to distortions; and vulnerability to the pervasive influence of others, have variously been advanced as justification for special laws governing their testimony (Andrews, 1964; Melton, Bulkley *et al*, 1983; Lloyd, 1983). This differential treatment of children's testimony, vis-a-vis adult's evidence, is firmly embedded in ancient canon law and common law practices, as well as in early cultural beliefs¹¹, and was buttressed by psychological theories and empirical work. A body of early 20th century psychological research on child witnesses was influential in generating negative views concerning their testimony. The majority of the empirical work portrayed

⁹ See Wigmore, 1935; 1940a; and 1940b; Goodman, 1984a; Pepper, 1984; Melton, 1981; Whitcomb, 1992; Bevan, 1989.

¹⁰ **R. v. Kendall** (1962), 132 C.C.C. 216 (S.C.C.); Law Reform Commission of Canada (1977).

¹¹ In 1692, the Salem witch trials in Massachusetts was the most famous example of children's testimony. According to Goodman (1984a), it was a good example of how stereotyped beliefs can be maintained under ambiguous conditions.

children as particularly inaccurate, highly suggestible, and basically unreliable as witnesses (Goodman, 1984a; Angelomatis, 1986).

Early canon law excluded children below a certain age, as well as other groups, from testifying:

...the canon law rejected the testimony of all males under fourteen and females under twelve, of the blind and the deaf and dumb, of slaves, of infamous persons, and those convicted of crime, of ex-communicated persons, of poor persons and women in criminal cases, of persons connected to either party by consanguinity and affinity, or belonging to the household of either party, of the enemies of either party, and of Jews, heretics and pagans. (Sir John Salmond, 1928:p.29)

In the 17th Century, eminent English jurists, Sir Edward Coke (1552-1634) and Sir Mathew Hale (1609-1676), in formulating tests for determining criminal insanity, drew a parallel between children (under 14 years) and insane persons with respect to their evidence.¹² In their view, the court adopting a circumspect approach, should view evidence from either source with great suspicion. In a further elaboration, Lord Coke

¹² The analogy between the criminal capacity of children and of the insane was more recently made by Chief Justice Lamer in R. v. Chaulk (1990), 2 C.R. (4th) 1 at pages 15 and 16. The Chief Justice said:

While the state of insanity and the state of childhood cannot be equated, the connection between these two situations for the purpose of criminal law is apparent. What these two situations have in common is that they both indicate that the individual in question does not accord with one of the basic assumptions of our criminal law model: that the accused is a rational autonomous being who is capable of appreciating the nature and quality of an act and of knowing right from wrong. With respect to the state of childhood, these basic assumptions are brought into question because of the immaturity of the individual — he or she has not yet developed the basic capacity which justice and fairness require be present in a person who is being measured against the standards of criminal law. With the state of insanity, these basic assumptions are brought into question because the accused is suffering from some disease of the mind or from some delusions which cause him or her to have a frame of reference which is significantly different than that which most people share. This mental condition means that the accused is largely incapable of criminal intent and should not, therefore, generally be subject to criminal liability in the same way that sane people are. (at 16)

held that a child under 7 years of age was incapable of being a witness because he or she could not incur criminal liability.¹³ The historical reasoning behind such thinking, according to Sir William Holdsworth (1966), was that "the impossibility of *mens rea* was thought to connote the impossibility of understanding the nature of an oath" (p. 188).

The traditional oath in English jurisprudence can be traced to the ecclesiastical courts in the 12th and 13th Centuries in England where oaths were combined with ordeals in a litigant's appeal to the supernatural to assist in proving the case (Pollock, 1926; Best, *et al*, 1906). In actual practice, oaths for resolving disputes were instituted prior to the acceptance of Christianity. Oaths, however, have always invited a superior power to take vengeance on a witness whose testimony was untrue (Best *et al*, 1906). With the onset of Christianity, the oath evolved into a specific appeal to God to regard the truth of the evidence and to punish falsehoods (Mack, 1908). As English common law developed, a prerequisite of the oath was a belief by witnesses that God would punish them if they lied.

It was established in early common law that children as young as 7 years of age were allowed to testify if they understood "the nature of an oath" (Wigmore, 1953)¹⁴. Thus, the historical justification behind the oath requirement, which also applied to adults, was to admonish witnesses to speak the truth under pain of divine retribution (Best, *et al*, 1906; Mack, 1908; Schiffer, 1978).

¹³ See **Criminal Code s. 12**. Up until 1982, children under 7 years of age could not be convicted of a criminal offence. It has since been modified to age 12, 1953-54, c. 51, s. 12; 1980-81-82, c. 110, s. 72.

¹⁴ Children under 7 years of age were presumed to lack the capacity to commit a crime or to take an oath.

In **Rex v. Braddon and Speke**¹⁵, the earliest reported case which dealt with the issue, a 13-year-old boy's competence was determined after this interrogation by the Lord Chief Justice:

Judge: What age are you of?
Witness: I am 13, my lord.
Judge: Do you know what an oath is?
Witness: No.
Judge: Suppose you should tell a lie, do you know who is the father of lies?
Witness: Yes.
Judge: Who is it?
Witness: The devil.
Judge: And if you should tell a lie, do you know what would become of you?
Witness: Yes.
Judge: What if you should swear to a lie? If you should call God to witness to a lie, what would become of you then?
Witness: I shall go to hell-fire.

Upon completion of this judicial inquiry, the boy was sworn on the grounds that he understood the nature of an oath.

The age requirement of 7 years was subsequently relaxed and English law recognized that children could be competent witnesses in criminal trials provided they understood the "**nature and consequences of an oath**". In a leading common law case, **Rex v. Brasier**¹⁶, a panel of 12 common law judges was asked to determine whether the statements of a 5-year-old would be admissible as evidence in a rape trial. The court had to pose questions to determine if the child had "sufficient knowledge of the nature and consequences of an oath" for competency. The judges held that there is no precise or

¹⁵ (1684), 9 How. St. Tr. 1127, 1148.

¹⁶ (1779), 1 Leach 199, 168 E.R. 202. Compare **Brasier** (which said a child under 7 years could be sworn) with **R. v. Travers** (1726), 2 Stra. 700, 93 E.R. 793 (which set a minimum age of 9 years).

fixed rule governing the age below which infants are excluded from giving evidence, but, rather

...an infant, though under the age seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the Court, to possess a sufficient knowledge of the nature and consequences of an oath. (at 200 Leach)

The court further ruled that only sworn testimony was admissible. If a child lacked the capacity to understand the nature of the oath, the child was not allowed to testify. This landmark case set an important precedent for "**competence**" examinations of child witnesses in Anglo-American jurisprudence and became known as the threshold "**nature and consequences**" test. According to this standard, the evidence of children would be admissible only if the court was satisfied that the child possessed the capacity to understand "**the danger and impiety of falsehood**". This ruling allowed judges wide discretionary power through questioning to determine a child's competence (Goodman, 1984a).

In 1895, the United States followed the common law approach in **Rex v. Brasier**, *supra*. In **Wheeler v. United States**¹⁷, the Supreme Court held as follows:

The boy was not by reason of his youth, as a matter of law, absolutely disqualified as a witness...While no one would think of calling as a witness an infant only two or three years old, there is no precise age which determines the question of competency. This depends upon the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former. The decision of this question rests primarily with the trial judge, who sees the

¹⁷ (1895), 159 U.S. 523.

proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence, as well as his understanding of the obligations of an oath. (at 523)

This pathfinding American decision also established the criteria for "**the capacity and intelligence of a child**". The Wheeler test of a child's competency consisted of four components:

1. present understanding or intelligence to understand, on instruction, an obligation to speak the truth;
2. mental capacity at the time of occurrence in question to observe and register such occurrence;
3. memory sufficient to retain an independent recollection of the observations made; and
4. capacity to truly translate into words the memory of such observations (Stafford, 1962:313-14).

It was not widely acknowledged until the late 19th century that to disqualify children from testifying on the basis that they did not understand the nature of an oath thwarted the protections the criminal law sought to afford them (Badgley Committee Report, 1984). Thus, in 1885, the British Parliament passed a statute¹⁸ which permitted a "child of tender years" to give evidence in court even if the child's testimony was not taken upon oath. This statute articulated the standard for the corroboration requirement for children's "**unsworn**" testimony. The statute provided that, on charges of

¹⁸ Criminal Law Amendment Act, 1885, 48 and 49 Vict., c. 69, s. 4 (U.K.). The formal title was "An act to make further provisions for the protection of women and girls, the Suppression of brothels, and other purposes".

"unlawfully and carnally knowing" a girl under the age of 13, or of attempting to do so, the evidence of a child complainant or other child witness of tender years could be received even though unsworn:

[P]rovided that no person shall be liable to be convicted of the offence unless the testimony admitted by virtue of this section and given on behalf of the prosecution shall be corroborated by some other material evidence in support thereof implicating the accused.¹⁹

Canada followed the British lead and, in 1890, enacted an analogous provision which applied to the specific offences of unlawful carnal knowledge of a girl under the age of 14, or an attempt to do so, and of indecent assault on a female.²⁰ A significantly similar provision was incorporated into Canada's new **Criminal Code** in 1892.²¹ In 1893, the original **Canada Evidence Act**²² enshrined the policy of allowing the unsworn evidence of children to be received and acted upon, provided such evidence was corroborated, and extended to all proceedings under federal law. A similar policy was adopted and enacted into most provincial evidence acts.

In the 1955 revision of the **Criminal Code**, the mandatory corroboration requirement enacted in 1890 (which applied to the unsworn testimony of children in trials

19 *Ibid.*

20 An Act further to amend the Criminal Law; S.C. 1890, c. 37, s. 13.

21 The **Criminal Code**, 1892, S.C. 1892, c. 29, s. 685.

22 The **Canada Evidence Act**, 1893, S.C. 1893, c. 31, s. 25.

for specific sexual offences) was made applicable to all Criminal Code offences, sexually related or not²³, as follows:

S. 586. No person shall be convicted of an offence upon the unsworn evidence of a child unless the evidence of the child is corroborated in a material particular by evidence that implicates the accused.

Pursuant to a subsequent revision of the Criminal Code in 1970, statutory provisions governing child witnesses were set out in s. 16 of the Canada Evidence Act²⁴, which provided:

S. 16(1) In any legal proceedings where a child of tender years is offered as a witness, and such child does not, in the opinion of the judge, justice or other presiding officer, understand the nature of an oath, the evidence of such child may be received, though not given upon oath, if, in the opinion of the judge, justice or other presiding officer, as the case may be, the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

(2) No case shall be decided upon such evidence alone, and it must be corroborated by some other material evidence.

²³ The Criminal Code, S.C. 1953-54, c. 51, s. 566. The following jurisdictions and statutes do not require corroboration of unsworn evidence of children: Yukon, Evidence Ordinance, R.O.Y.T. 1974 c. E-6 s. 23; Northwest Territories, Evidence Ordinance, R.O.N.W.T. 1974 c. E-4 s. 23 and Uniform Evidence Act, (as Revised 1945 and as am.) s. 23. Finally, the Nova Scotia and Prince Edward Island Evidence Acts do not provide for the unsworn evidence of children of tender years; there is no special provision in these Acts for children. In these jurisdictions, in civil actions and provincial prosecutions, children who do not understand the nature and consequences of an oath cannot testify (Report on Evidence, 1982).

²⁴ R.S.C. 1970, c. E-10. See also Ontario Evidence Act, s. 18, R.S.O. 1980 c. 145.

In proceedings under the **Juvenile Delinquent's Act**, the qualification of a "child" or a "young person" to testify was governed by ss. 60 and 61 of the **Act**.²⁵ The present **Young Offenders Act**²⁶ says this:

EVIDENCE OF A CHILD OR YOUNG PERSON.

60. In any proceedings under this Act where the evidence of a child or a young person is taken, it shall be taken only after the youth court judge or the justice, as the case may be, has

- (a) in all cases, if the witness is a child, and
- (b) where he deems it necessary, if the witness is a young person

instructed the child or young person as to the duty of the witness to speak the truth and the consequences of failing to do so.

Under s. 16 of the **Canada Evidence Act** and like provisions, when a "child of tender years" was offered as a witness, the trial judge was required to conduct a *voir dire* in open court²⁷ to determine whether the child was "**competent**" to testify²⁸. In the event of a jury trial, the jury remained in the courtroom during the competency hearing, and if the child was ruled "competent" to testify, whether upon oath or unsworn, the jury was permitted to consider the evidence on the *voir dire* in their assessment of the child's credibility²⁹. If the opposing side admitted competency, the *voir dire* was expressly

25 R.S.C. 1970, c. J-3, as amended.

26 R.S.C. 1985, c. Y-1.

27 Where the inquiry was held in the judge's chambers, the conviction was overturned: **R. v. Dunne** (1929), 21 Cr. App. R. 176.

28 **Sankey v. R.** (1927), S.C.R. 436, 48 C.C.C. 97; **R. v. Fitzpatrick** (1929), 40 B.C.R. 478, 51 C.C.C. 146 (B.C.C.A.); **R. v. Carson** (1954), 110 C.C.C. 61 (B.C.S.C.); **R. v. Hampton** (1966), 4 C.C.C. 1, 55 W.W.R. 432 (B.C.C.A.); **R. v. McKay** (1975), 31 C.R.N.S. 224, (1975), 4 W.W.R. 235 (B.C.C.A.).

29 **R. v. Reynolds** (1950), 1 K.B. 606, 34 Cr. App. R. 60, [1950] 1 All E.R. 335. Lord Goddard, C.J. stated:

...[A]lthough the duty of deciding whether the child may be sworn or not lies on the judge and is not a matter for the jury, it is most important that the jury should hear the child's answers and see its demeanour when questioned, because those matters will enable the jury to come to a conclusion as to the weight they should attach to its

waived. In the event the opposing party did not object to the child being sworn, that did not waive the requirement of a *voir dire*³⁰. If an objection was contemplated it had to be made when the witness was to be sworn. A failure to make a timely objection was fatal to raising the issue on appeal³¹.

A. "A CHILD OF TENDER YEARS" - THE COMMON LAW APPROACH

As previously discussed, the established common law practice was that there was no minimum age which excluded child witnesses³². As a common law rule, courts considered children under the age of 14 years to be of "**tender years**" and were presumed *prima facie* to be incompetent (above that age children were presumed *prima facie* to be competent witnesses).³³

The term "**child of tender years**", articulated in the legislation, was not statutorily defined (Bigelow, 1966-67). Rather, the statutory language, which originated from the English Criminal Law Amendment Act, 1885, was defined through common law or the ordinary meaning of the words. Canadian judges struggled with the meaning

evidence. (at 64)

30 Sankey v. R., *supra*.

31 R. v. Deol, Gill and Randev (1981), 58 C.C.C. (2d) 524 (Alta.C.A.), 23 C.R. (3d) 324 (Alta.C.A.).

32 Rex v. Brasier, *supra*.

33 R. v. Antrobus (1946), 8 C.C.C. 118, (1946), 3 C.R. 357, (1947), 2 D.L.R. 55, (1947), 1 W.W.R. 157 (B.C.C.A.); R. v. Nicholson (1950), 98 C.C.C. 291, (1950), 2 W.W.R. 308 (B.C.S.C.); R. v. Armstrong (1959), 125 C.C.C. 56, 31 C.R. 27 (B.C.C.A.); R. v. Deol, Gill and Randev, *supra*; R. v. Fletcher (1982), 1 C.C.C. (3d) 370 (Ont.C.A.). In R. v. Armstrong, *supra*, DesBrisay, C.J.B.C., referred to the presumption that children of 14 years understand the nature of an oath, but it is apparent that the presumption may be rebutted by circumstances to the contrary as in R. v. Dawson, [1968] 4 C.C.C. 33 (B.C.C.A.) 3, 4 C.R.N.S. 263, 64 W.W.R. 108. See also the Report of the Federal-Provincial Task Force on the Rules of Evidence (1982).

of this term. In the Ontario Court of Appeal case, R. v. Horsburgh³⁴, Evans, J.A. approached the issue as follows:

There is no definition of the words "tender years" and the competency of a child witness to give sworn or unsworn evidence depends not upon the precise age of the child but rather upon the actual degree of intelligence possessed by the witness and his appreciation of his duty to be truthful. The determination of the degree of intelligence and understanding of the child and his obligation to tell the truth, in my opinion, depends not only upon the inquiry conducted by the trial Judge as to the capacity and intelligence of the child, his appreciation between truth and falsehood and his duty to tell the former, but also upon the conclusions which the presiding Judge draws from observing the appearance, demeanour, manner of speaking and deportment of the witness. (at 248 C.C.C.)

His Lordship went on to make the proposition that:

A child of 14 is presumed subject to conviction and punishment under the Criminal Code and, in my opinion, a similar presumption must apply to the competency of such child to give sworn evidence. (at 249 C.C.C.)

34

(1966), 3 C.C.C. 240 (Ont.C.A.); 47 C.R. 151, 56 D.L.R. (2d) 289 (Ont.C.A.) revd [1968] 2 C.C.C. 288, 2 C.R.N.S. 228, 63 D.L.R. (2d) 699 (S.C.C.).

**B. "UNDERSTAND THE NATURE OF AN OATH" -
THE COMMON LAW APPROACH**

Pursuant to s. 16 of the Canada Evidence Act, the trial judge was first required to determine whether the child understood the nature of an oath. Canadian courts held that counsel had an obligation to prepare child witnesses in this respect before the commencement of the trial.³⁵ In appropriate cases, the trial would be adjourned in order to provide counsel an opportunity to do so.³⁶

The "nature and consequences" test formulated in Brasier, *supra*, was first affirmed in Canada by the British Columbia Court of Appeal. In R. v. Antrobus³⁷, Mr. Justice Robertson opined:

A child without any religious knowledge or belief, might understand the nature of an oath, but not the consequences. It seems to me therefore that before a child of tender years may be sworn the two requirements set out in Brasier's case must be fulfilled, namely that the child understands the nature and consequences of an oath. (at C.C.C. p.124)

His Lordship spoke approvingly of the Brasier standard and declared that, in order to be sworn, a child must believe in the existence of God and must believe that he or she would be punished by God if he or she did not speak the truth.³⁸ His Lordship

35 R. v. Bannerman (1966), 48 C.R. 110, 55 W.W.R. 257 (Man.C.A.); R. v. Brown (1951), 99 C.C.C. 305 (N.B.C.A.); R. v. Armstrong, *supra*. R. v. Bannerman, "Those calling a child have a duty to inform and instruct and failing the performance of their duty, the Court should do it".

36 R. v. Cox (1898), 62 J.P. 89; R. v. Baylis (1849), 13 L.T. (O.S.) 509; R. v. Nicholas (1846), 175 E.R. 102.

37 (1946), 8 C.C.C. 118, (1946), 3 C.R. 357, (1947), 2 D.L.R. 55, (1947), 1 W.W.R. 157 (B.C.C.A.).

38 *Ibid.*, at pp. 119-120, 124 C.C.C.

went on to discuss the significance of the oath as a prerequisite to the admissibility of testimony by pronouncing that the oath is "a special test for security" against the fabrication of evidence. The court also underscored the differential treatment between adult and child witnesses in court by reasoning that, in common law, there is a presumption that adults are competent witnesses because they possess the requisite degree of religious understanding required for the swearing of an oath, and a presumption that children under the age of 14 years specifically lacked such a capacity.³⁹

The strict test of Brasier and Antrobus was followed by other Canadian appellate courts⁴⁰ without any formidable challenge concerning its appropriateness as a statement of the law in Canada.⁴¹ The acceptance of such a formulation, specifically by the British Columbia Court of Appeal, was called into question by Bigelow (1966-67). In a scathing commentary on the subject, he remarked:

...no matter what *Brasier's* case said, there is nothing in the statute that says anything about "**the consequences of an oath**". ... It was here the judges of the British Columbia Court of Appeal went off the rails, to the confusion of judges and lawyers who have accepted it as unquestionable authority. (at 302) [emphasis added]

39 *Ibid.*, at p. 122 C.C.C.

40 Cited with approval in R. v. Lebrun (1951), 100 C.C.C. 16, 12 C.R. 31, [1951] O.R. 387 (C.A.); R. v. Dawson, *supra*; R. v. Kowalski (1962), 132 C.C.C. 324, 37 C.R. 248, 37 W.W.R. 529 (Man.C.A.); R. v. Hampton, *supra*; R. v. Horsburgh, *supra*; and R. v. Pawlyna (1948), 91 C.C.C. 50 (at p. 52), 5 C.R. 148 (at p. 162), [1948] 2 D.L.R. 327 (Ont.C.A.).

41 It has been argued that this common law rule, historically, was responsible for countless unsuccessful prosecution of sexual offences and violent crimes against children (McEwan, 1981). The test acted as a *de facto* barrier to the admissibility of many child witnesses. If, in the opinion of the judge, a child did not believe that he or she would suffer spiritual consequences (punishment) if falsehoods were told, the child could not be sworn and thus was excluded from testifying.

The two-branch "**nature and consequences**" test promulgated in Brasier and enshrined in Canadian common law by Antrobus is, according to one legal analyst (Pepper, 1984), flawed on two grounds:

1. that it imports a test not set out in the statute; and
2. that it requires that the child give a definite answer to an imponderable question.

In 1966, the Manitoba Court of Appeal, in R. v. Bannerman, *supra*⁴², rejected in unequivocal fashion the Antrobus test. Mr. Justice Dickson categorically reasoned that the term "**consequences**" did not appear in the s. 16 provision:

There is, as I have indicated, a series of Canadian cases beginning with *Rex v. Antrobus*, ... which say that before a child of tender years may be sworn he must be shown to understand not only the nature of an oath but also the consequences of an oath ... the word is not present in s. 16 of the Canada Evidence Act. That section speaks only of the "nature" of an oath. I should have thought the necessary implication of the section to be that if a child exhibits an understanding of the nature of an oath he is to be sworn. By the unnecessary introduction of the concept of "consequences" the result would seem to be, if the submission of counsel for the accused be accepted, that a child who shows an understanding of the 'nature' of an oath but not the 'consequences' of an oath, cannot give *unsworn* evidence under s. 16 because he *does* understand the *nature* of an oath; on the other hand he cannot give *sworn* evidence because he does not understand the 'consequences' of an oath; therefore he cannot give evidence at all. This would be a strange result indeed. With the greatest respect, it appears to me that the Canadian Courts, in *Rex v. Antrobus*, ... and in cases following that decision, have fallen into error, ... in adopting the word 'consequences' from *Rex v. Brasier*, ... and giving insufficient recognition to the absence of that word in s. 16 of the Canada Evidence Act. (at 138 C.R.; 284-5 W.W.R.)

42

See also for a comprehensive review of the authorities and the procedure to determine the reception and mode of a child's evidence.

His Lordship forcefully argued that no adult can identify with certainty the spiritual consequences of lying under oath in these terms:

What are the spiritual consequences of telling a lie under oath? No human being can say. When Frankie was asked what would happen to him if he didn't tell the truth and said that he did not know, he was simply giving the answer which any person asked this question must give, however learned and devout he may be. The more learned and devout the more probable that the answer would be the same as that given by this child. (at C.R. p.135; W.W.R. p.282)

In separate reasons, Schultz, J.A. made this compelling assertion:

I doubt whether the greatest present day theologians or moralists have answered the question put to this 13-year-old boy with any degree of certainty or unanimity. (at C.R. p.120; W.W.R. p.267)

Mr. Justice Dickson went on to formulate a "**nature alone**" test as follows:

...all that is required when one speaks of an understanding of the 'consequences' of an oath is that the child appreciates it is assuming a moral obligation... The object of the law in requiring an oath is to get at the truth relative to the matters in dispute by getting a hold on the conscience of the witness. (at C.R. p.138; W.W.R. p.284) [emphasis added]

According to this delineation, "**understanding the nature of an oath**" meant that a child witness need only appreciate that he/she is assuming a "**moral obligation to tell the truth**". If this criterion was satisfied, the child must be sworn as a witness. There no longer remained the necessity to demonstrate that the child understood the

consequences of lying under oath. Mr. Justice Dickson suggested this definition of the word "moral" (as found in the shorter Oxford dictionary):

...of or pertaining to the distinction between right and wrong, or good and evil, in relation to actions, volitions, or character. (at C.R. p.122)

Upon subsequent review by the Supreme Court of Canada, the **Bannerman** decision, rendered by the Manitoba Court of Appeal, was affirmed without reasons.⁴³

In **Reference re R. v. Truscott**⁴⁴, and **R. v. Horsburgh**, *supra*, the Supreme Court of Canada applied the modern formulation enunciated in **Bannerman** that "understanding the nature of an oath" simply means that a child witness need only understand the moral obligation of telling the truth. Furthermore, it does not require the trial judge to continue on to inquire as to whether the child understands the religious consequences of breaking the oath in order for the child's sworn testimony to be admissible.⁴⁵

In his dissent, in **Horsburgh**, Mr. Justice Laskin reiterated the view of Dickson J.A., in **Bannerman**, on the issue of "spiritual consequences" and the necessity for more desirable consequences:

I remark that at a distance of some 200 years from *Omychund v. Barker* (1744), 1 Atk. 22, 26 E.R. 15, and *R. v. White* (1786), 1 Leach 430, 168 E.R. 317, the contention that competency of a witness depends on demonstration that he or she is fearful of divine retribution (as an exclusive test) rather than earthly justice as the consequences of false

43 [1966] S.C.R. v. 57 W.W.R. 736n (S.C.C.).

44 [1967] 2 C.C.C. 285, [1967] S.C.R. 309 (S.C.C.).

45 As stated in **Reference re R. v. Truscott**, *supra*, and applied by Spence, J. in **R. v. Horsburgh**, *supra*.

testimony, is highly talismanic. The common law deserves better than that at the hands of the judiciary of the 20th century.⁴⁶

In 1981, upon further consideration of the issue of the religious content of an oath, the Ontario Court of Appeal affirmed the Bannerman decision, in R. v. Budin⁴⁷. Jessup J.A. categorically rejected the Brasier and Antrobus principle that a child witness must understand the spiritual consequences of an oath. He stated:

Learned theologians of various Christian and other faiths will differ as to the consequences of lying under oath except that it is clearly an affront to the deity. Section 16 has no reference to consequences and I therefore agree with Dickson J. (*ad hoc*), as he then was, in *R. v. Bannerman*, ... that to be competent to take an oath a child witness need not understand the spiritual consequences of an oath. *Bannerman* was affirmed by the Supreme Court of Canada without reasons [[1966] S.C.R. v, 57 W.W.R. 736n, 50 C.R. 76n] and in this day and age I prefer Dickson J.'s view on this point to that found in *R. v. Brasier* (1799), 1 Leach 199, 168 E.R. 202; *R. v. Antrobus* (1946), 87 C.C.C. 118, [1947] 2 D.L.R. 55, [1947] 1 W.W.R. 157, and *R. v. Kowalski*... (at 355-356)

Despite this apparent abandonment of the requirement of belief in the spiritual consequences of an oath, His Lordship preserved the requirement that a child witness must hold religious beliefs, such as a belief in a deity who is cognizant of what is being said and of its truth or falsity.⁴⁸ Speaking for the majority of the court, Jessup, J.A. enunciated a "**religious**" standard as follows:

46 At C.C.C. p. 258, C.R. pp. 166-7.

47 (1981), 58 C.C.C. (2d) 352, 20 C.R. (3d) 86, 120 D.L.R. (3d) 536 (Ont.C.A.), leave to appeal to Supreme Court of Canada refused C.C.C., D.L.R., loc. cit. See McEwan (1981) for a full analysis of this case.

48 *Ibid.*, at p.356. The British Columbia Court of Appeal in R. v. McKay, *supra*, already endorsed this formulation.

The essential things are that the trial Judge's questioning should establish whether or not the child believes in God or another Almighty and whether he appreciates that, in giving the oath (which can be read to the witness), he is telling such Almighty that what he will say will be the truth. A moral obligation to tell the truth is implicit in such belief and appreciation. (at 356)

In his dissenting opinion, Brooke J.A. relied on the English case of R. v. Hayes⁴⁹ and reasoned that, given the secular nature of contemporary society, many adults who swear the oath do not believe in the divine sanction of the oath.⁵⁰ His Lordship cited (with approval) R. v. Taylor⁵¹, R. v. Horsburgh, *supra*, and Reference re R. v. Truscott, *supra*, as support for the proposition that a child is morally required to tell the truth in order to take the oath.⁵² It was his contention that:

While inquiry into the child's belief and religious education would no doubt be helpful in determining the question of whether or not he understands the nature of the oath, nevertheless such inquiry is not necessary, and no finding need be made that he does in fact believe or disbelieve in God or a supreme being. (at C.R. p.94)

One year later, the Budin principle that a child must believe in God in order to be competent to take an oath was overruled in a decisive manner by the same court in R. v. Fletcher, *supra*. Adopting a more flexible approach, McKinnon A.C.J.O. opined:

I do not think that the understanding of the nature of an oath in any legal proceeding now requires a belief or an expressed belief by the child in God (or another almighty). Nor does it require that the child understand,

49 [1977] 2 All E.R. 288 (C.A.).

50 R. v. Budin, *supra*, at C.C.C. p. 358, C.R. p. 94.

51 (1970), 1 C.C.C. (2d) 321, 75 W.W.R. 45 (Man.C.A.).

52 R. v. Budin, *supra*, at pp. 359-60.

in giving the oath, that he is telling such almighty that what he will say will be true ... It is recognized that as society has changed over the years the oath for many has lost its spiritual and religious significance. Those adults to whom the sanctity of the oath has lost its religious meaning, nonetheless have a sense of moral obligation to tell the truth on taking the oath and feel their conscience bound by it. That is the nature of the oath for many adult witnesses today. Nor do they object on grounds of conscientious scruples to taking the oath. In my view a child of tender years is in the same position as an adult witness when the determination is being made whether the child witness understands the nature of an oath. (at C.C.C. pp. 376-377)

Affirming **Bannerman**, His Lordship went on to articulate a "secular" test for determining whether a child can give sworn testimony as follows:

...is whether the child has a sufficient appreciation of the solemnity of the occasion, and the added responsibility to tell the truth, which is involved in taking an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct. (at 380) [emphasis added]

In reaching this determination, the Ontario Court of Appeal embraced the view of Bridge L.J. in **R. v. Hayes**, *supra*⁵³, to the effect that s. 16 of the **Canada Evidence Act** does not require a religious belief in God in order for testimony to be given under oath. The witness in this English case, at trial, was found to be "wholly ignorant of the existence of God", but was permitted by the trial judge to be sworn. In upholding the lower decision on appeal, the Court of Criminal Appeal resolved the issue by these words:

53 At p. 237 All E.R.

It is unrealistic not to recognize that in the present state of society, amongst the adult population, the divine sanction of an oath is probably not generally recognized. The important consideration, we think, when a judge has to decide whether a child should properly be sworn, is whether the child has a sufficient *appreciation of the solemnity of the occasion, and the added responsibility to tell the truth*, which is involved in taking an oath over and above the duty to tell the truth which is an ordinary duty of normal social conduct. (at 237)

The **Fletcher** court also concurred with the proposition of Brooke J.A. in **Budin** that, while it may be helpful for the court to make an inquiry into a child's beliefs and religious education, actual belief in God or a supreme being is not a precondition under s. 16 to swearing an oath.⁵⁴

The common law test promulgated in **Fletcher**, albeit a desired liberal interpretation, was soundly criticized for its departure from the statutory language of s. 16 (Pepper, 1984). One legal analyst wrote in unequivocal terms:

In my view, the court has not given adequate attention to the statutory language in s. 16(1) and, in so doing, has rendered that section virtually meaningless. Section 16(1) clearly distinguishes between a child who understands the 'nature of an oath' (who may give sworn testimony) and a child who merely 'understands the duty of speaking the truth' (who may only offer unsworn testimony). By holding that a child need only feel a moral obligation to tell the truth in order to swear an oath, the court is virtually erasing the distinction between understanding the nature of an oath and understanding the duty of speaking the truth ... In its attempt to achieve equal treatment for child and adult witnesses, and to avoid the corroboration requirement in s. 16(2) for unsworn child testimony, the Ontario Court of Appeal in *R. v. Fletcher* has paid scant attention to the intention of Parliament in promulgating s. 16, and has given to the section a meaning which even a very liberal reading cannot sustain. (Bessner, 1991:491)

⁵⁴ **R. v. Fletcher**, *supra*, at p. 383.

Another critic of the Fletcher decision made this observation:

...the distinction between the tests for sworn and unsworn evidence has become so fine that the most that can reliably be said is that the question will be a function of the particular child witness and the particular trial judge's views on children. (Wilson and Tomlinson, 1986:318)

Conversely, a judge (Nasmith, 1990) applauded the Ontario Court of Appeal for "reaching the crossroads of practicalities" by abandoning religious beliefs and sanctions as essential components of the oath inquiry.

As a result of Fletcher and current authorities⁵⁵, the usual procedure on the *voir dire* is for the judge to question the child briefly concerning his or her age, education, and family; about the difference between truth and falsehood; whether it is wrong to lie; and the secular consequences of a lie. Because the test of oath capacity is "understanding the moral obligation to tell the truth", a judge does not have to inquire into such matters as the child's attendance at church or Sunday school, familiarity with the Bible and religious beliefs, to be satisfied that the child is morally qualified to take the oath.

While the Fletcher test, *supra*, unequivocally represents the law of Ontario, it is, however, questionable whether it reflects the law of Canada. Notwithstanding the adoption of this approach by the courts of appeal of Alberta and Manitoba⁵⁶, other provinces may follow their own established authorities. Since the Fletcher court did not deal specifically with the actual words of an oath, namely, "**so help me God**", Mr.

55 R. v. Fletcher, *supra*, was followed by R. v. Connors [1986] 5 W.W.R. 94 (Alta. C.A.), 46 Alta. L.R. (2d) 65 (Alta. C.A.); R. v. Green (1986), 42 Man. R. (2d) 81 (C.A.); and R. v. Pootoogook [1984] N.W.T.R. 165.

56 R. v. Connors, *supra*; R. v. Green, *supra*.

Justice Bouck (1988), of the Supreme Court of British Columbia, is of the opinion that the proper test to be applied in British Columbia is the one set out in **Budin**, *supra*.⁵⁷

III. PROCEDURAL ISSUES OF S. 16.(1) CANADA EVIDENCE ACT

16. (1) Where a proposed witness is a person under fourteen years of age or a person whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine
- (a) whether the person understands the nature of an oath or a solemn affirmation; and
 - (b) whether the person is able to communicate the evidence.
- (2) A person referred to in subsection (1) who understands the nature of an oath or a solemn affirmation and is able to communicate the evidence shall testify under oath or solemn affirmation.
- (3) A person referred to in subsection (1) who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may testify on promising to tell the truth.
- (4) A person referred to in subsection (1) who neither understands the nature of an oath or a solemn affirmation nor is able to communicate the evidence shall not testify. (See **Appendix B.**)

57

See **R. v. K.(G.B.)** (1993), 79 C.C.C. (3d) 257 (S.C.C.) at 288. The oath, drained of its divine tones, is on par with solemn declarations and affirmations.

A. IS THE INQUIRY MANDATORY?

The Saskatchewan Court of Appeal was the first appellate court called upon to give an interpretation as to the procedural issue of whether s. 16(1) is a mandatory inquiry. In R. v. D.(R.R.)⁵⁸, the first reported judgment of judicial non-compliance with this legislation, the accused successfully appealed his conviction for sexually assaulting his 6-year-old daughter.

The trial judge asked the child a series of general questions concerning her age, family and school in an attempt to establish her ability to communicate the evidence. The trial judge focused on the child's ability to communicate and did not give s. 16 a rigorous, formal interpretation. The full inquiry was as follows:

The Court: Before we call the Complainant, I will just discuss this with Counsel dealing with the new amendments. I want to question her, and of course I'm not going to — you're not suggesting that I should swear her in?

Ms. Hansen: She was not sworn at the Preliminary Inquiry, My Lord.

The Court: It's a question of whether she's got the ability to communicate, is really the task.

Ms. Hansen: Yes.

The Court: Do you agree with that, Mr. Allbright?

Mr. Allbright: Yes, My Lord. Thank you.

The Court: Go ahead, bring her in.

Ms. Hansen: Yes. C.D.

The Court: C, what is your full name?

A: C.A.D.

The Court: And how old are you?

A: Six.

The Court: You're six. Do you know what a judge is?

58 (1989), 47 C.C.C. (3d) 97 (Sask.C.A.); 69 C.R. (3d) 269.

A: Yes.

The Court: What does he do?

A: He works with children in court.

The Court: Sometimes he does, he works with children. Whereabouts do you live?

A: Saskatoon.

The Court: In Saskatoon. Can you speak into the microphone? And do you have any brothers?

A: One.

The Court: You have one. And what's your brother's name?

A: R.

The Court: R. And any sisters?

A: Mhmm.

The Court: How many sisters?

A: One.

The Court: One. And what's your sister's name?

A: K.

The Court: K. And do you go to school?

A: Yes.

The Court: And what grade are you in?

A: One.

The Court: Grade One. And what school do you go to? Do you know the name of your school?

A: Yeah.

The Court: What's the name of your school?

A: H.K.

The Court: H.K. And do you live near the school?

A: A bit.

The Court: And what's the name of your teacher?

A: Madame F.

The Court: Do you know what is meant by telling the truth?

A: Yes.

The Court: And what happens if you don't tell the truth?

A: God will get upset.

The Court: God will get upset. That's a good answer. And do you like school?

A: Yes.

The Court: What's your favourite subject? What do you like best about school?

A: At recess.

The Court: Consistent with my own views when I was your age. Do you know what lawyers do?

A: No.

The Court: You don't know what lawyers do. Do either of you have any questions arising out of the questions I asked?

Ms. Hansen: I have no questions, My Lord.

Mr. Allbright: No.

The Court: I have no hesitation in ruling that, within the new amendments to the *Evidence Act*, that she is quite able to communicate. I am, therefore, going to permit her to testify. (at 270-271)

As a result of this brief inquiry, the trial judge ruled that she was able to communicate the evidence and was allowed to testify. On appeal, the defence argued:

- a. the trial judge failed to comply with the **s. 16(1)(a)** requirement that he conduct an inquiry to determine whether the child understood the nature of an oath or solemn affirmation; and
- b. that the trial judge erred by failing to comply with the prerequisite **s. 16(3)** of eliciting from the child a promise to tell the truth.

The Saskatchewan Court of Appeal ordered a new trial and held that the procedure set out in **s. 16** of the Canada Evidence Act is mandatory. Bayda C.J.S. delivered the judgment of the court as follows:

In the present case I am of the respectful view that the judge erred in taking the evidence of the child without first carrying out the statutory duty of conducting an inquiry to determine whether she understood the nature of an oath or solemn affirmation and for that reason the conviction cannot stand. I might add that before us Crown counsel candidly conceded that had the judge conducted the inquiry he might well have reached the conclusion — in view of the mature quality of some of the answers given to the questions put to her by the judge — that the child, despite her age, understood the nature of an oath.

There is another reason why the conviction cannot stand. Even if the child had been properly found not to understand the nature of an oath or a solemn affirmation (but was able to communicate the evidence) the judge could not permit the child to testify without first having the child promise to tell the truth. Section 16(3) clearly imposes this prerequisite. The force of this prerequisite is no less than the force of the prerequisite to conduct an inquiry under s. 16(1)(a) and (b). (at C.R. p.274)

The court went on to say that a statutory duty exists which requires the trial judge first to determine whether the child understands the nature of an oath or solemn affirmation. The court specifically held that only after that procedure is satisfied does the trial judge proceed to ascertain whether the child has the ability to communicate. In the case at bar, the trial judge directed no questions to the child to ascertain whether she understood the nature of an oath or solemn affirmation. The trial judge appeared to have made the assumption that the child did not understand the nature of an oath or solemn affirmation and, as a result, failed to elicit a "promise to tell the truth" from her.

The court concluded that the trial judge's failure to conduct the inquiry, as prescribed, was fatal to the decision to allow the child to give evidence. Furthermore, even if the child was properly found not to understand the nature of an oath or solemn affirmation, but was, in fact, able to communicate the evidence, the trial judge was precluded from allowing her to testify in the absence of eliciting from her a specific promise to tell the truth.⁵⁹

The Court of Appeal further held that the curative provisions of s. 686(1)(b)(iii) of the **Criminal Code** could not be invoked in this case since that section was enacted

⁵⁹ For a critique of the court's narrow approach to the interpretation of s. 16, see Bala's Annotation to **D.(R.R.)** (1989) at C.R. (3d) 276.

to permit the court to remedy errors of substantive law, and not to remedy breaches of fundamental rules of evidence. The Chief Justice went on to conclude:

What s. 16 does, in effect, is create three classes of persons under 14 years of age who may testify: (i) those who understand the nature of an oath and are able to communicate the evidence; (ii) those who understand the nature of a solemn affirmation and are able to communicate the evidence; (iii) those who do not understand the nature of an oath or a solemn affirmation but are able to communicate the evidence. Before he may testify, however, a person in the first class must take an oath; a person in the second class must make a solemn affirmation; and a person in the third class must make a promise. The purposes of an oath, a solemn affirmation and a promise are the same: to put an additional impact on the person's conscience and to give further motivation for the person to tell the truth ...

The child in the present case fell into the third class of witness outlined above. The excerpt from the evidence quoted above discloses that no promise to tell the truth was elicited from the child. The prerequisite imposed by s. 16(3) was not fulfilled. For that reason as well the conviction cannot stand. (at C.R. pp.274-275)

In light of this ruling, the precise procedure for s. 16 inquiries should be strictly followed.⁶⁰

⁶⁰ See also: R. v. G.(C.W.), [1994] B.C.D. Crim. Conv. 5382-01 (B.C.C.A.), where the Court of Appeal ordered a new trial because the trial judge failed to get a promise from the child witness to tell the truth. The court held that this was a fundamental omission and could not be regarded as a procedural irregularity capable of being remedied under the provisions of s. 686(1)(b)(iv).

B. IMPROPER INQUIRY

In R. v. Leonard⁶¹, the Ontario Court of Appeal quashed the conviction and entered an acquittal of an accused of sexually assaulting an 8-year-old complainant on the basis that the trial judge erred in allowing her to testify under oath without specifically asking her whether she understood the concept of an oath. Despite the trial judge's comprehensive inquiry into whether she understood the importance of telling the truth, he failed to question her about the moral significance of telling the truth in court. Speaking on behalf of the court, Galligan, J.A. remarked:

It should be noted that there is no reference in that inquiry to the word oath. Perhaps a sufficient inquiry into a child's understanding of the nature of an oath could be made without specifically referring to an oath. However, with great respect to the trial judge, it is our opinion that his inquiry did not show that the child appreciated the solemnity of the occasion. It did not show that she understood the added responsibility to tell the truth over and above the duty to tell the truth as part of the ordinary duty of normal social conduct. It did not show that she had an understanding of what it means to tell the truth in court. Nor did it show that she had an appreciation of what happens in both a practical and moral sense when a lie is told in court. Thus we are of the opinion that the inquiry did not establish her understanding of the nature of an oath. It follows that her evidence should not have been accepted under oath. (at 231)

This ruling by the Ontario Court of Appeal is remarkably similar to the strict approach adopted by the Saskatchewan Court of Appeal in R. v. D.(R.R.), *supra*.

⁶¹ (1990), 54 C.C.C. (3d) 225. See also R. v. Ross (6 July 1989), (N.S.C.A.) [unreported]; (1989), 90 N.S.R. (2d) 439 (N.S.C.A.), where the Court of Appeal upheld a conviction based on the evidence of a 10-year-old witness who was allowed to give sworn testimony after a scant and less than probing inquiry regarding her understanding of an oath. Rather, the appellate court emphasized that the trial judge determined that the child could give sworn evidence and did not interfere with the trial judge's decision.

In an unreported case, **R. v. Khurana**⁶², it was necessary for the Crown to apprise the trial judge and defence counsel that a s. 16 inquiry was mandatory when a child is proffered as a witness. The Crown read aloud to the court s. 16 of the **Canada Evidence Act**. After a perfunctory questioning of the 12-year-old boy about his age, school and activities, the judge simply stated that he was satisfied that the child could testify. The judge neglected to ask any questions about the nature of an oath or solemn affirmation. He then invited counsel to ask questions, both of whom declined. Upon which, the judge had the boy sworn.

As an illustration of what might be termed "judicial non-compliance" with s. 16, at the preliminary hearing of **R. v. Sock**⁶³, the judge directed a series of questions at a 7-year-old complainant but failed to ask any questions concerning the child's understanding of an oath. The transcript of the examination is as follows:

Ms. Wrigley: I'm going to call [the child] to the stand, Your Honour.
The Court: Yes, all right.
Ms. Wrigley: You may want to ask some questions under Section --
The Court: That's right. How old are you, [child's name]?
A: Seven.
The Court: When did you get to be seven?
A: September.
The Court: September what, do you remember?
A: 27th.
The Court: 27th, okay. Do you go to school?
A: Yup.
The Court: What school? Do you remember the name of it? No.
Whereabouts is your school?
A: Four blocks.

62 (21 November 1989), Vancouver (B.C.C.C.) [unreported].

63 (19 March 1990), Vancouver 11663 (B.C.P.C.) [unreported].

The Court: Four blocks from your house? Where do you live?
A: In a little house.
The Court: In a little house. What's the name of the city that you live in? Do you remember that? No. You don't live in Vancouver? No. Calgary? Not sure? Okay. Have you got any brothers or sisters?
A: Yeah. Terry and Tommy.
The Court: Are they older or younger than you?
A: Younger.
The Court: Younger? Or are they older? How old's Terry?
A: I don't know.
The Court: Okay, what about Tommy? Is he bigger than you?
A: Yeah.
The Court: Lots bigger? Yes? Do you know how old Tommy is? Nope? Okay.
Ms. Wrigley: Your Honour, this might be of assistance. It's some pictures that [the child] drew in my office this morning of her family and that might be of assistance to you.
The Court: Ah.
Ms. Wrigley: Their names and their ages are there.
The Court: Did you draw this thing?
A: Yup.
The Court: Yes? Show it to [the child], please. What's that tell me? What does that tell me? What does it say on there? Is your name there?
A: Yup.
The Court: And what does it say beside your name? Does it say how old you are?
A: Seven.
The Court: Is Tommy's name there?
A: Yup.
The Court: And does it say how old he is? Can't -- you can't read that, eh? No, okay. Did you write it?
A: Yup.
The Court: Did somebody help you write it?
A: Yup. My mom.
The Court: Your mom did. How did she help you?
A: Saying the letters.
The Court: She help you write -- she told you what letters to put? Did she tell you what numbers to put too?
A: Yeah.
The Court: Do you ever go to Sunday School? You don't go to school on Sunday. Do you ever go to church?
A: Sometimes with my friends.

The Court: With your friends. How often is sometimes? Do you remember when you last went there?

A: No.

The Court: Have you been more than once?

A: I was there four.

The Court: Four times? What did you do when you were there?

A: Just sit there and the guy --

The Court: The guy talked?

A: The guy talks.

The Court: Did you get to sing any songs?

A: Yup.

The Court: Yes. Do you always tell the truth? Yes? How come?

A: Cause.

The Court: Cause why?

A: I always knows --

The Court: Pardon?

A: I always know --

The Court: What do you always know? What do you think is supposed to happen if you don't tell the truth?

A: I don't know.

The Court: You don't know. Do you know what a fib is? No. Do you know what a lie is? No. You don't know what it means to be dishonest? You never heard of that word, have you? No.

Ms. Wrigley: Your Honour --

The Court: Do you ever --

Ms. Wrigley: Sorry, Your Honour might try an example of something. That's what's worked before.

The Court: You ever play make believe? Ever pretend that things happen that don't happen?

A: No.

The Court: If I asked you where you lived and you said Vancouver, would that be right or would that be wrong?

A: Wrong.

The Court: Do you ever say things that are wrong? Never? Why don't you ever say things that are wrong? Did your mom tell you not to do that?

A: No.

The Court: She doesn't. Anybody tell you that you should always tell the truth, you should always say what's right? Nobody told you that? No. Okay. Well, Miss Wrigley, if you want to ask some questions you go right ahead.

The trial judge was satisfied that the child understood the difference between telling the truth and telling a lie, after providing examples, and without pressing the child on either the obligation to tell the truth, or the religious nature of the oath.

In a similar situation, **R. v. Bernard**⁶⁴, after an in-depth questioning by the judge of a 6-year-old girl on peripheral matters and in the absence of any requisite questions about an oath, this terse exchange took place:

The Court: Okay. I am satisfied that you can tell me the truth.
That she knows the difference.

Ms. Harvey: Your Honour, it's my understanding that there's some recent case law that suggests that Your Honour must ask questions concerning the oath, as well. Because it's set out in Section 16, even though the child won't necessarily be --

The Court: Do you know what an oath is?

A: No.

The Court: You got your answer, Ma'am.

In **R. v. Morris**⁶⁵, the presiding judge at a preliminary inquiry allowed a 10-year-old complainant to be sworn without exploring the child's ability to understand the nature of an oath. The transcript of the inquiry captured these confusing events:

- (a) first, the judge declared that the child could not be sworn;
- (b) Crown counsel read to the court s. 16;
- (c) the judge made a terse statement that she did not ask the witness what swearing on the Bible would mean; and
- (d) the judge concluded that the witness understood the nature of an oath.

⁶⁴ (8 April 1991), Vernon 21980 (B.C.P.C.) [unreported].

⁶⁵ (8 March 1988), Vancouver 24309 (B.C.P.C.) [unreported]; (29 June 1988), Burnaby 33904C (B.C.P.C.) [unreported].

The Court: All right then. I am just going to ask you some questions. First of all, do you go to church or Sunday school?

Child: Yes, I do.

The Court: How long have you been going to school, I mean to Sunday school?

Child: Let's see now, I think two years.

The Court: Two years. Do you -- how often do you go?

Child: Every Sunday.

The Court: You go every Sunday. Do you believe in God or any other almighty being?

Child: Just Jesus.

The Court: All right. do you understand that -- this child can't be sworn in any event, it's just a question, isn't it?

Ms. Gordon: I beg your pardon?

The Court: The child can't be sworn.

Ms. Gordon: It's --

The Court: It's just an inquiry.

Ms. Gordon: -- it's an inquiry, yes.

The Court: Yes. What grade at school are you in?

Child: I'm -- I'm in Rosser School and I'm going in grade five.

The Court: Grade five. Do you do well in school?

Child: Yes.

The Court: Have you ever been in a courtroom before?

Child: No.

The Court: Do you know what this is all about?

Child: My dad sexual abused me.

The Court: Do you know the difference between telling a lie and telling the truth?

Child: Yes.

The Court: Do you always try and tell the truth?

Child: Yes.

The Court: Have you ever told a lie?

Child: Yes.

The Court: Do you realize that this is a court of law and if you tell what you know about this matter, you must be very careful to tell the truth and not to tell a lie?

Child: Yes.

The Court: Do you understand that both lawyers in this matter are going to be asking you questions about the matters that you saw or heard and you will have to answer these questions truthfully and to the best of your ability?

Child: Yes.

The Court: Do you understand that I am here to make sure that no unfair questions are asked of you?

Child: Yes.

The Court: When you are asked questions, do you think you can listen to them carefully and reply to them honestly?

Child: Yes, I do.

The Court: Do you think you can say you don't remember if that's the case, or you don't know if that isn't the case?

Child: Yes.

The Court: Mr. Chamberlain, anything?

Mr. Chamberlain: No, Your Honour.

Ms. Gordon: Your Honour, it's number -- it's Section 16 of the Canada Evidence Act where: [section read]

Mr. Chamberlain: Which section are you reading from?

Ms. Gordon: Sub -- section 16, subsection --

Mr. Chamberlain: Of what?

Ms. Gordon: -- of the --

The Court: Of this amendment, Mr. Chamberlain.

Ms. Gordon: -- Canada Evidence Act.

Mr. Chamberlain: Oh, of the amendment.

Ms. Gordon: Yes. Subsection (3) reads that "A person referred to in subsection (a) who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence, may testify on promising to tell the truth."

So, Your Honour, I missed -- Your Honour I think asked that question and I missed the answer of this witness, whether she understood what swearing on the Bible meant.

The Court: Well, I didn't ask her what swearing on the Bible was. There is no age limit in that, Mr. Chamberlain.

Mr. Chamberlain: No, there is not.

The Court: All right, the child can be sworn. I'm satisfied that she understands the nature of an oath and can communicate the evidence.

So, despite the fact that the trial judge initially said the child could not be sworn, upon further examination, and without ever examining the child on the religious aspects of the oath, the trial judge allowed the child to be sworn.

At the preliminary hearing of R. v. Sutherland⁶⁶, the judge, after directing a line of questioning to an 8-year-old child on the issue of his understanding of the nature of an oath, declared him unable to take an oath. However, the judge allowed the child to testify unsworn without eliciting a requisite "promise to tell the truth".

C. FAILURE TO CONDUCT INQUIRY

In a subsequent Ontario Court of Appeal case, which dealt with this issue, R. v. Krack⁶⁷, the accused appealed his conviction of sexual assault on the basis that the trial judge failed to conduct the s. 16 inquiry of a 13-year-old complainant before he was sworn to testify. The defence relied on R. v. D.(R.R.), *supra*, to support its claim that s. 16 is a mandatory procedural provision. The court ruled that the curative provisions of s. 686(1)(b)(iv) of the Code could be properly invoked in this case to correct such a procedural error, since the boy was sworn at the preliminary hearing, experienced no difficulty in communicating his evidence, and defence counsel, when invited by the trial judge to do so, had no questions for the child witness. The irregularity was of a minor nature and did not result in the loss of the trial court's jurisdiction. The court went on to caution that its judgment was not to be construed as holding that the curative provisions can be used as a remedy in every case of failure to conduct the mandatory

⁶⁶ (21 October 1988), Penticton 14742 (B.C.C.C.) [unreported].

⁶⁷ (1990), 56 C.C.C. (3d) 555 (Ont.C.A.).

inquiry. Rather, courts will have to decide on a case-by-case basis whether it is appropriate to invoke the provision. The threshold test is that an accused's fundamental right to a fair trial will not be compromised.

In **R. v. Fabre**⁶⁸, the Quebec Court of Appeal ruled that the trial judge's failure, to conduct an inquiry of an 11-year-old child witness, constituted a "procedural irregularity" to which the curative provisions of the **Code** could be successfully applied since no prejudice to the accused occurred. The appeal court was convinced that the trial judge, had he conducted an inquiry, would have at least arrived at the conclusion that the child was able to communicate the evidence and thus be allowed to testify on promising to tell the truth. Mr. Justice Proulx then directed his attention to the inflexible approach adopted by the Saskatchewan Court of Appeal on this issue, as follows:

I cannot fail to comment on the decision of the Saskatchewan Court of Appeal in *R. v. D.(R.R.)* (1989), 47 C.C.C. (3d) 97, 69 C.R. (3d) 267, 20 R.F.L. (3d) 1, where it held that an error of law committed in the inquiry held pursuant to the same s. 16 could not be 'saved' by the effect of s. 686 (1)(b)(iii). With great deference, I would note that the court did not consider it appropriate to apply subpara. (iv) which I would apply here to remedy the error of law. (at 569)

The British Columbia Court of Appeal, in **R. v. Slusarenko**⁶⁹, also applied the curative provisions of **s. 686(1)(b)(iv)** as a remedy for the trial judge's failure to conduct the requisite inquiry of a child witness. Defence counsel relied upon the authority of **R. v. D.(R.R.)**, *supra*, where the same mistake was made at trial. McEachern, C.J.B.C.

⁶⁸ (1990), 62 C.C.C. (3d) 565 (Que.C.A.).

⁶⁹ (6 December 1989), Vancouver CA010814 (B.C.C.A.) [unreported].

held that it was distinguishable because, in that case, the evidence of the child was vital to the Crown's case and without it there could be no conviction, which was not the case here.

In an unreported case, **R. v. Allard**⁷⁰, no inquiry was conducted by the trial judge of a 12-year-old girl complainant. Prior to her being sworn, this brief exchange between the judge and the child witness took place:

The Court: You speak right up so that we can all hear, in particular, this accused.
A: Yes.
The Court: All right, take the Bible in your right hand --
Mr. Jones: Excuse me just a minute. J., do you have gum?
The Court: Thanks. Take that Bible in your right hand. What is your full name?
A: J.L.H.
The Court: How do you spell your last name?
A: [Spells name].
The Court: Is it Miss?
A: Yes.
The Court: All right, just set the Bible down and answer the questions please.

Similarly, in a B.C. case, **R. v. Conrad**⁷¹, neither the judge or counsel appeared to have been aware of the necessity of a s. 16 inquiry of a child witness as prescribed by the **Canada Evidence Act**. The 13-year-old female complainant was called to the stand, sworn by the court clerk, followed by this questioning:

Court Clerk: Please state your full name and address?
A: N.V., [states address].

⁷⁰ (26 May 1989), Drumheller CO160124331A01 (Alta.C.A.) [unreported].

⁷¹ (12 October 1988), Squamish 5627 (B.C.P.C.) [unreported].

The Court: How old are you?
A: Thirteen.
The Court: What grade are you in school?
A: Eight.
The Court: Thank you, you may sit down.

So the actual implementation of s. 16 has not been uniform. Courts have had difficulty with its interpretation, have applied it rigorously, have acknowledged and ignored it, and/or seemed unaware of it.

D. WHO CONDUCTS THE INQUIRY?

1. Pre-Bill C-15 - Ancient and Common Law Traditions

The common law procedure to determine the testimonial competency of a child witness was first established in the 17th-century English case of Rex. v. Braddon and Speke, *supra*. A 13-year-old boy's competence was determined after the judge conducted an inquiry into his understanding of the nature and consequences of an oath.

Almost a century later, the court, consisting of a panel of twelve common law judges, in Rex. v. Brasier, *supra*, articulated the standard that the admissibility of children's evidence

...depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the Court. (at 202)

In other common law jurisdictions, the Australian High Court in R. v. Lyons⁷² ruled that it was the exclusive jurisdiction of the judge to conduct the inquiry as to a child's competency to testify, although he may request the assistance of counsel in the questioning.

In 1895, the Supreme Court of the United States adopted the English approach on "competence" examinations of child witnesses. The court, in Wheeler v. United States, *supra*, held as follows:

The decision of this question rests primarily with the trial judge, who sees the proposed witness, notices his manner, his apparent possession or lack of intelligence, and may resort to any examination which will tend to disclose his capacity and intelligence, as well as his understanding of the obligations of an oath. (at 523)

In Canada, under the former s. 16 of the Canada Evidence Act, when a "child of tender years" was offered as a witness, it was an implied prerequisite that an inquiry be conducted by the court, notwithstanding the fact that the legislation was silent on the issue. It became an established common law practice that the trial judge conduct the inquiry in the manner of a *voir dire* to determine whether a child is competent to give testimony⁷³.

72 (1889), 15 V.L.R. 15 (Aust.H.C.).

73 R. v. Harris (1919), 34 C.C.C. 129 (Sask.K.B.); Sankey v. R., *supra*; R. v. Fitzpatrick, *supra*; R. v. Carson, *supra*; R. v. Armstrong, *supra*; R. v. Hampton, *supra*; R. v. McKay, *supra*. In R. v. Salmon (1972), 10 C.C.C. (2d) 184 (Ont.C.A.), the trial judge conducted the inquiry and opposing counsel was not entitled to examine or cross-examine the witness.

There is, however, a reported case which underscores the ambiguity of the language of s. 16. In **R. v. Jing Foo**⁷⁴, the British Columbia County Court held that there is no statutory requirement in the impugned section that the judge personally conduct the inquiry. Rather, in this case, which involved an accused charged with having carnal knowledge with a female under 14 years, the Crown counsel conducted the inquiry as to the child's understanding of an oath. The trial judge, upon entertaining a defence objection to the procedure, opined as follows:

Counsel for the accused seemed to be of the opinion that I should personally have examined this girl as to whether she understood the nature of an oath, or not. This was done for me, by the Crown counsel, and I think I was entitled to act on information elicited by him. The objection is overruled. (at 105)

Furthermore, it is noteworthy that, at the trial in **R. v. Bannerman**, *supra*, the judge, the Crown, and defence counsel all participated in the questioning of the child witness as to s. 16 requirements. Upon review by the Manitoba Court of Appeal, Mr. Justice Schultz, delivering for the majority, expressed the view that

...the practice that appears to be invariably followed in England, of having such inquiry conducted by the trial judge, is eminently desirable, for he is required to exercise his discretion based on the inquiry as a whole, inducing personal observation of the child's manner and conduct while under examination, and whether or not the child has had religious training and understands his solemn obligation to tell the truth. (at C.R. p.120)

⁷⁴ (1939), 73 C.C.C. 103, 54 B.C.R. 202 (B.C.C.C.).

In the subsequent appeal to the Supreme Court of Canada, Dickson, J.A. (as he then was), however, made no adverse remarks concerning the inquiry procedure followed at trial.

While Canadian legal commentators have postulated that the common law governing the old legislation is equivocal on the issue as to who should conduct the inquiry, there is general consensus that the judge, not counsel, should question the child (Pepper, 1984; Bessner, 1991; Cartwright, 1963-64; Phipson, 1970; Popple, 1954).

2. Bill C-15 - 1988

With the passage of Bill C-15, the Canada Evidence Act was re-enacted.

Subsection 16(1) now reads:

Where a proposed witness is a person under 14 years of age...the **Court shall**, before permitting the person to give evidence...**conduct an inquiry**... [emphasis added]

The new language of this section appears to require that a judge conduct an inquiry whenever a child under 14 years is proffered as a witness. One legal analyst argues that the intent of the statute is now unequivocal. Bessner (1991) states:

Section 16(1) makes it clear that it is the court and not defence or Crown counsel, which is to conduct the inquiry as to whether the child has the capacity to testify. Under the new legislation, the judge must personally examine the child. Thus, the kinds of questions posed by counsel in **R. v. Bannerman** and in **R. v. Jing Foo** are prohibited under the new legislation. (at 496)

In **R. v. D.(R.R.)**, *supra*, the first reported case, which has been discussed earlier, the Saskatchewan Court of Appeal discussed the language chosen in the new s.

16. Delivering the judgment of the court, Bayda, C.J.S. reasoned, as follows:

In my respectful view the need for an inquiry to determine whether the child understands the nature of an oath or solemn declaration is no less a prerequisite and no less indispensable under the current s. 16 than was under the former s. 16. In point of fact, because of the inclusion of the word "shall" in the current s. 16, the tone of the language of the current s. 16 is more imperative than the tone of the language in the former s. 16. (at 273)

In a critique of this decision for its narrow interpretation, Professor Bala (1991) submitted that "...in the context of the new legislation the term 'shall' should be interpreted in a directory rather than a mandatory fashion" (at 277). In addition, the same legal observer argued that, while the court only considered the issue that an inquiry must take place, it did not specifically address the issue of "how" the inquiry under s. 16 should be conducted. He states:

Some judges are apparently of the view that since the statute specifies that the "court shall...conduct an inquiry:, there is a duty on the presiding judge to actually direct the questioning of the child, perhaps affording counsel the opportunity to ask questions after the judge is finished, as occurred in **R. v. D.(R.R.)**. It is, however, submitted that the term "conduct an inquiry" refers to the judge presiding over an inquiry rather than necessarily asking the questions. (at 279)

If one accepts the arguments of Bessner (1991), the controversy over who conducts the inquiry is now settled by the explicit language of the new legislation. If, however, one accepts Bala's (1991) arguments, the law remains unsettled on this issue.

3. Findings and Discussion

Analyses of **146** transcripts of **s. 16** inquiries of unreported British Columbia cases were made. The judge personally conducted the inquiry by questioning the child witness in **143** of the cases. Crown counsel conducted the inquiry in **3** cases. There was very limited judicial commentary concerning the intent of the legislation and no reference to any common law was made on the specific issue in the unreported British Columbia cases.

a. Judge Conducts

In **R. v. Rohde**⁷⁵, upon perusing **s. 16** in the **Criminal Code**, the trial judge simply commented:

Now although the provisions say "the Court shall inquire", it's a Judge's inquiry. (at 10)

This terse interpretation was given by the trial Judge in **R. v. O'Bray**⁷⁶:

Normally, the way the new section is worded, it's up to me to make any inquiries. (at 19)

⁷⁵ (21 May 1991), Coquitlam 38557C (B.C.P.C.) [unreported].

⁷⁶ (19 December 1988), Coquitlam 34295GC (B.C.P.C.) [unreported].

At the preliminary hearing of **R. v. Satiacum**⁷⁷, the judge, making no reference to the intent of the section, simply informed counsel in this fashion:

I feel that I should be the one that's asking the question. (at 3)

In the preliminary inquiry of **R. v. N. et al**⁷⁸, the judge made the following pronouncement:

...it's my function to solely, as I understand the law, to ask questions and conduct the inquiry, and if there's any exception to that, I'll stand down and let you make submissions...I'll proceed on the basis that it's my function only. (at 7)

Neither counsel made any arguments or submissions regarding the position held by the judge.

Following a ruling, in **R. v. Massaoutis**⁷⁹, that the 11-year-old girl was competent to swear an oath, this exchange took place between the judge and defence counsel:

The Court: Do you have a concern, Mr. Angelomatis?

Mr. Angelomatis: Yes, Your Honour, my experience has been that the defence counsel and the prosecutor both enter into this inquiry and that it takes the nature of a *voir dire*.

The Court: I don't allow counsel to...

Mr. Angelomatis: Fine.

The Court: ...examine witnesses with respect to this. If you have any specific questions or concerns that you might want me to raise with her, I will.

77 (7 October 1988), Richmond 23076 (B.C.P.C.) [unreported]; (6 November 1989), Vancouver CC881770 (B.C.C.C.) [unreported].

78 (31 May 1991), Chilliwack 23781C (B.C.P.C.) [unreported].

79 (12 May 1987), Vancouver (B.C.P.C.) [unreported].

Mr. Angelomatis: It's not so much whether Your Honour raises them or whether I do. If you feel that the position is that you enter into that inquiry and that the questions don't emanate from defence then I'll accept your ruling.

The Court: I'm satisfied she's competent. (at 4-5)

In **R. v. Dodds**⁸⁰, following a cursory inquiry by the trial judge, Crown counsel requested permission to question the child. The court refused to allow the Crown to examine the child witness. This short dialogue was recorded:

Crown: May we ask the questions?

Defence: The section says the Court conducts. (at 2)

The court refused to allow the Crown to examine the witness.

A county court judge in **R. v. Ramsay**⁸¹, simply stated:

I don't propose to invite counsel to ask questions because I don't think that's proper. I think things should be done by myself. But if either of you have any specific question or a line of questioning that you would like to be put to him, I'm prepared to listen. (at 2-3)

b. Crown Conducts

Crown counsel conducted the inquiry in 3/146 proceedings. In the preliminary hearing of **R. v. Epp**⁸², s. 16 was reviewed as follows:

80 (10 February 1992), Surrey 53478-C (B.C.P.C.) [unreported].

81 (5 January 1989), Vancouver CC881357 (B.C.C.C.) [unreported].

82 (1 March 1989), Richmond 22837 (B.C.P.C.) [unreported].

Defence: And there's a corresponding section in the Code but I can't remember the number in the Code.

The Court: Yes, 16 I think covers it. It's a person under fourteen years of age. Yes, do you want to ask the ---I think the inquiry is relatively, I believe, informal so do you wish to ask some questions? Perhaps you could lead, Miss Cici.

Crown: Thank you. (at 3)

At the trial of **R. v. Epp**⁸³, the county court judge directed the Crown to lead the inquiry by this instruction:

As you are both aware, there are really two procedures that we can follow; one is that I do the inquiry and the other is that counsel can ask questions and, in addition, I can ask questions. The procedure that I would like to follow is I would like counsel to ask questions, and then I will ask any additional questions, and I will make my ruling. What I would like to do is have the questions first and then hear submissions of counsel. (at 63)

In **R. v. Wright(M.)**⁸⁴, without any consideration of the relevant evidentiary section, the court simply acquiesced to Crown counsel's request that he conduct the inquiry of a 5-year-old witness. This exchange was recorded:

The Court: I understand that you wish to call the child next?

Mr. Lang: Yes, I wish to call the child for the question of capacity.

Mr. Lang: Does your Honour wish me to ask the questions of the witness?

The Court: If you would, please.

Mr. Lang: I think it might help. (at 45)

83 (4 December 1989), Vancouver CC890784 (B.C.C.C.) [unreported].

84 (18 October 1988), Victoria 48500 (B.C.P.C.) [unreported].

4. Conclusions

The above findings suggest:

- a. that judges interpret s. 16(1) literally, to mean, that it is the **judge** who conducts the inquiry;
- b. that the inquiry is mandatory;
- c. that judges did not seem to do much legal analysis of the provision and seemed to respond out of previous experience; and
- d. that upon the completion of the inquiry by the judge, it is in the judge's discretion whether counsel may be allowed to question or cross-examine - nothing in the legislation precludes counsel's involvement.

Thus, there is no compelling evidence to support Bessner's (1991) assertion that the types of questioning allowed in **Jing Foo** and **Bannerman** would be prohibited by the legislation. Rather, it is argued that individual judges are exercising their discretion on a case-by-case basis.

E. CAN COUNSEL QUESTION OR CROSS-EXAMINE?

1. Pre-Bill C-15

The Ontario Court of Appeal, in **R. v. Salmon**⁸⁵, addressed the issue of the right of counsel to cross-examine in this manner:

⁸⁵ (1972), 10 C.C.C. (2d) 184 (Ont.C.A.).

Suffice it to say that, in our view, there is no absolute right in defence counsel or in Crown Counsel, to cross-examine such a prospective witness as to his or her competency to be sworn, as was argued both at the trial and here,...In this case, it is not necessary to decide whether a trial Judge may have a discretion to allow counsel--and that, of course, would be counsel both for the prosecution and for the accused--to participate in the determination of such competency; but we are all of the view that it would require a quite extraordinary set of circumstances before such an exercise of discretion could even be considered by a trial Judge. There was nothing extraordinary in this case. (at 186)

While this decision was followed in **R. v. Budin**, *supra*, when the issue was dealt with by the same court, it may have been an overstatement:

It is argued that in this case defence counsel should have been permitted to question the witness by way of cross-examination prior to her being sworn, but the unanimous judgment of this Court in *R. v. Salmon*..., is to the contrary as was also the view of Shultz J.A. in *Bannerman*. (at 356)

As discussed in the previous section, in the unique case of **R. v. Jing Foo**, *supra*, Crown counsel led the inquiry by questioning the child witness. In **R. v. Bannerman**, *supra*, the Crown, as well as the court and defence counsel questioned the child witness.

2. **Bill C-15 - 1988**

In **R. v. D.(R.R.)**, *supra*, the first reported case of this genre, upon completion of a s. 16 examination of the child, the trial judge extended this invitation to counsel:

The Court:	Do either of you have any questions arising out of the questions I asked?
Mr. Hansen:	I have no questions, My Lord.
Mr. Allbright:	No.

Of the **146** transcripts examined, judges allowed Crown counsel to ask questions in **16** cases and defence counsel to cross-examine in **26** cases (see **Appendix B**).

F. LEADING QUESTIONS AND/OR INSTRUCTIONS BY THE JUDGE

Mr. Justice Dickson articulated, in **R. v. Bannerman**, *supra*, the principle with respect to leading questions:

Those calling a child have a duty to inform and instruct, and failing the performance of their duty, the Court should do it. A child who does not know what an oath is may at once understand the import of the simple words of the common oath if someone has the kindness to let the child know what they are before starting an inquiry into his theological opinions. And so with the nature of an oath. The child who responds with the wrong answers to the customary thoughtless questions may show an intelligent response to thoughtful and instructive questions. The oath having been explained to him, he may quickly show an understanding of the solemnity of the oath;...

I use the word "instructive" advisedly because, in his factum, counsel for the accused took objection to "leading questions" put to young Spence by the trial judge. Leading questions are entirely proper in this area...the judge may instruct the child what this belief is, and the child may accept it on this authority and be as well prepared to take the oath on the spot as it would have been after receiving the same dictation from parental authority...the judge may then and there impart theological instruction and produce the necessary belief;...": Wigmore on Evidence, 3rd ed., vol. VI, p.306. In my opinion counsel have the same duty to the child. (at 136-7 C.R.; 283 W.W.R.)

This formulation remains unchallenged in any decisions relating to the issue. In **R. v. Budin**, *supra*, for example, Jessup J.A., delivering for the majority, acknowledged that

[T]he trial judge, of course, can always give such instruction [as to the nature of the oath] before questioning the prospective witness. (at 356)

The issue was reconsidered by the Ontario Court of Appeal in **R. v. Fletcher**, *supra*, and the rule established in **Bannerman** and **Budin** remains the law in Canada.

1. **Findings and Discussion**

In the 146 unreported transcripts studied, no common law was discussed or referred to in relation to the propriety of judges asking leading questions of the child witness. Notwithstanding the absence of citations to such authority, judges simply led the child in 27/146 cases concerning the nature of an oath.

The following are several examples of judges leading in this area:

R. v. M.(T.)⁸⁶:

- Q: What's your date of birth, A.?
A: September 24th.
Q: Just push that microphone away, please. Anywhere, yes. And how old are you now?
A: Eleven.
Q: And what grade are you in?
A: Six.
Q: What school do you go to?
A: General Brock.
Q: And how are you making out there?

86 (20 October 1987), Vancouver CC870623 (B.C.C.C.) [unreported].

A: Good.

Q: And you go to school regularly? Have you ever been in a courtroom before? Have you -- I take it you must watch T.V. every once in a while? Have you seen courtroom scenes on T.V.? Have you ever seen a person get into a witness stand such as you're in now and take up the Bible and swear to tell the truth, take an oath? Do you know what an oath is? Do you know what a promise to tell the truth is? That's what an oath is. Do you understand that? Yes?

A: Yes.

Q: So do you know that a promise to tell the truth is an oath and do you know that when you promise to do something that it's expected that you will do it? So if you promise to tell the truth you will tell the truth?

A: Yes.

Q: If I ask you to take the Bible in you hand and if you told me that you were going to tell me the truth, would you in fact tell me the truth?

A: Yes.

Q: Do you understand that there are consequences, something might happen if you don't tell the truth?

A: Yes.

Q: You might be punished?

A: Yes.

Q: And if I ask you now to take up that Bible, take it in your hand, and you take the oath to tell the truth you're going to do that?

A: Yes.

The Court: Okay. Swear the witness. I'm satisfied that she's competent to swear an oath.

Of course, when a judge leads the child through the inquiry, little understanding of the child's comprehension is gained.

In **R. v. Ball**⁸⁷, where the child was 13 years of age, the following terse exchange took place:

87 (3 January 1989), Matsqui 18119F (B.C.P.C.) [unreported].

Q: Do you understand what it means to swear on the Bible to tell the truth?
A: Yes.
Q: Do you understand that that is a promise to God that you will tell the truth?
A: Yes.

In **R. v. Martin**⁸⁸, the judge quickly led the 12-year-old witness through the inquiry:

The Court: Now, if you take the oath that I recited to you, do you understand that you will be telling God or promising God that you will speak the truth?
A: Yes.

In neither **Ball** nor **Martin** is there any particular explanation given for the haste with which the inquiry is conducted. One could, however, speculate that the judge felt the inquiry rather pointless due to the witnesses' evident maturity (which is not revealed in the transcripts).

In **R. v. Morris**, *supra*, for instance, the trial judge indulged in a mature joke about "any other Almighty":

The Court: Okay. Do you believe in God or any other almighty being.
A: Yeah.
The Court: Okay. If you take the oath that I just read to you, do you understand that you will be telling God that what you're saying is the truth?
A: Yes.

88 (19 October 1988), Penticton 14680 (B.C.C.C.) [unreported].

The child was 13 years old.

In **R. v. Satiacum**, *supra*, the judge led a 10-year-old as follows:

- Q: All right. Do you believe in God?
A: In my own way.
Q: Do you. If you take that oath that I just read to you, do you understand that you would be telling God that what you're saying is the truth?
A: Yes.
Q: All right. Now, do you know that if you're talking with your friends or your family that you have to tell the truth?
A: Yes.
Q: And do you know that if you take an oath in court that it's even more important to tell the truth because you've sworn that you would?
A: Yes.

One could point to the child's answer, "In my own way" as demonstrating maturity and, in fact, the child was exceptionally bright, and her intelligence was acknowledged by the trial judge.

In **R. v. Kinnie**⁸⁹, the judge offered some religious instruction concerning the Bible as follows:

- The Court: And do you know what a Bible is?
A: Yep.
The Court: When we talk about a Bible, what is the Bible--
A: It's--
The Court: --as far as you know what it is.
A: Teaches about some things. Experience and stuff.
The Court: Teaches about experiences in life, does it?
A: Yep.

89 (16 October 1989), Vancouver CC890510 (B.C.C.C.) [unreported].

The Court: About religion, about Christianity, about Jesus Christ, that sort of thing?
A: Yep.
The Court: Do you understand that?
A: Yep.
The Court: Do you know what happens to you if you don't tell the truth?
A.: Not really, no.
The Court: Might you get punished if you don't tell the truth?
A.: Yep.
The Court: What about in your foster home? If you told a lie and got caught at it, did anything happen to you?
A.: I'd get a privilege taken away.
The Court: A privilege taken away. Do you understand that it's necessary if you say that you're going to tell the truth that you will tell the truth?
A.: Yes.
The Court: What's that called? Is it called an oath?
A.: Yep.

The child was 11 years old.

In **R. v. McFarlane**⁹⁰, the judge led the witness on the subject of the moral responsibility of telling the truth in court and the solemnity of the occasion as well:

Q: All right. Now, you understand that you have a duty to tell the truth? That means that it's your responsibility to tell the truth in the courtroom?
A: Yes.
Q: Every citizen that comes into this courtroom has a duty when they become witnesses to tell the truth. Is that not so?
A: Yes.
Q: Because that's the basis upon which we determine guilt or innocence, isn't it?
A: Yeah.

90 (13 December 1990), New Westminster 26351 (B.C.P.C.) [unreported].

Q: And it has very serious consequences. If people come and lie, innocent people could be very seriously harmed. Do you understand that?

A: Mm-hm.

Q: If you were asked by the Court Clerk to say you swear to tell the truth and nothing but the truth so help you God, What would that be called. Do you know what that's called?

A: The oath.

Q: Yes. And you're swearing to tell the truth if you say yes, is that not so?

A: Yes.

Q: And you're swearing before this court that what you say is the truth, is that not so?

A: Yeah.

Q: Do you have-- you told me about your responsibility to tell the truth in terms of what could happen to you if you do not tell the truth. You could be punished, but do you have any other understanding of why you should tell the truth? In other words -- let me put it another way. People leave their belongings out in the open from time to time, at school and in people's homes and we understand, don't we that we're not to help ourselves to those belongings?

A: Yeah.

Q: Unless we're invited to do so or we're given a gift. Do you know why we don't take things that don't belong to us?

A: Because they're not ours.

Q: It would be wrong morally, wouldn't it? Just as to not tell the truth would be wrong morally, wouldn't it? So, there are two reasons. The moral consequences and also the legal consequences. Do you understand that?

A: Mm-hm.

Q: You understand, do you not, in a court of law that every man or woman that is brought before the court is presumed or believed to be innocent. Do you understand that?

A: Mm-hm.

Q: Unless the Crown is able to produce evidence that shows you have a reasonable doubt that that is not so?

A: Yeah.

- Q: So, you understand, therefore, the great responsibility that you would have to tell the truth if I were to have you sworn as a witness? Do you understand that?
- A: Mm-hm.

This witness was 12 years of age.

In all these cases, the children perhaps conveyed to the judge, through their behaviour, a maturity which rendered the inquiry redundant. This is not articulated by the judges, but I would point out that all of the children were between the ages of 10 and 13.

2. Conclusions

The dissertation research demonstrates that in the majority of the cases (116/146) judges do not lead the child witness with respect to the substantive issue of "understanding the nature of an oath". Rather, judges routinely asked leading questions on peripheral issues in an attempt to establish a child's general intelligence and ability to communicate the evidence.

There was virtually no reference to legal authority pertaining to the right of the judge to lead and/or instruct a child and no objection was made by counsel to the judicial practice.

It can be concluded that the principle laid down in R. v. Bannerman, *supra*, has not been challenged even in light of the re-enactment of s. 16(1) of the Canada Evidence Act. It is submitted, therefore, that the decision to ask leading questions remains within the discretion of individual trial judges in keeping with common law tradition in Canada.

G. THE "VOIR DIRE"- PRESENCE OF JURY?

In the event of a jury trial, the legislation provides no guidance on whether the s. 16 inquiry is to be conducted in the presence of a jury. However, the established common law practice for s. 16, referred to as a *voir dire*, is that the inquiry takes place while the jury is present (a procedure analogous to the qualification of an expert witness) so that the jury may assess the weight to be given to the evidence in the event of the child being deemed competent to testify⁹¹. There is no controversy over the inquiry being conducted in an open court⁹² with the accused being present⁹³.

1. Findings and Discussion

In the 146 transcripts studied, 9 were jury trials. In all 9 cases, the s. 16 inquiries were held in the absence of the jury. In 8 of the cases, the judge merely excused the jury without any consideration of or reference to legal precedent or common law practice. In the remaining case, **R. v. Epp**, *supra*, the Crown made submissions that the inquiry should take place in the presence of the jury. However, the defence successfully argued that the procedure(which warrants an exclusion of the jury) was a question of law to be determined by the judge. The following exchange took place:

91 **R. v. Reynolds**, *supra*.

92 **R. v. Dunne** (1929), 21 Cr. App.R. 176.

93 **R. v. Grimba** (1980), 56 C.C.C. (2d) 570.

Crown: Your Honour, it is the Crown's position that this is the kind of inquiry that should be conducted in front of the jury. If at the end of your inquiry of the witness it is decided that she is either unable to communicate her evidence or she doesn't understand the meaning of the oath, then Your Honour finds that she should give unsworn evidence, that that is a decision that should be made in front of the jury and it goes to weight.

My understanding of the usual cases of this kind is that that is presently how it is done. It is not done in the absence of the jury but they are entitled to watch you question this witness. My friend obviously has had more experience than I have but that's how I understand it is normally done.

Defence: Well, from my point of view it is a question of law at this stage. And if, as a question of law, Your Honour, is satisfied that the child can be sworn, then that is indicated, that ruling is made, and then what my friend has suggested is done before the jury, that is, asking whatever questions one wants to ask to establish that the child is possessed of sufficient intelligence to understand the duty of telling the truth, but at this stage it is a question of law. Certainly we couldn't argue it.

The Court: Pardon?

Defence: We couldn't argue the matter with the jury sitting there.

The Court: No, we couldn't. It is my view that it is a ruling of law, so what I am going to do is have the inquiry in the absence of the jury. Then, whichever way that I decide, I think it is appropriate that, in fact, much of the evidence be re-led in front of the jury so that, in fact, they know the weight to put on this witness's evidence.

It is clear from the research presented that the current practice of excluding the jury in s. 16 inquiries is inconsistent with Canadian case law. It is submitted, however, that in the absence of further judicial elucidation or explicit legislation on the issue, the definitive procedure will remain amorphous and subject to individual judicial discretion.

IV. EVIDENTIARY ISSUES OF S. 16 OF THE CANADA EVIDENCE ACT

(See **Appendix C** for the competency rulings and **Appendix D** for the types of questions judges asked.)

A. "UNDERSTAND THE NATURE OF AN OATH"

S. 16(2) A person referred to in subsection (1) who understands the nature of an oath or a solemn affirmation and is able to communicate the evidence shall testify under oath or solemn affirmation.

The new legislation⁹⁴ is silent as to what threshold test a judge should use to make a legal determination whether a child has the capacity to "**understand the nature of an oath**". As previously discussed, common law governs the qualification of children to give sworn testimony. The historical approach would be to adopt the Brasier/Antrobus standards which focused on a belief in God and punishment by God for lying. Having satisfied some form of a threshold test, traditionally and automatically the witness will be asked to take the Bible in his or her right hand and answer the question:

⁹⁴ This section was re-enacted by S.C. 1987, c.24 [now R.S.C. 1985, c.19 (3rd Suppl.)], s. 18, and came into force on January 1, 1988 under **Bill C-15**.

"Do you swear to tell the truth, the whole truth and nothing but the truth so help you God?"

Presumably, the witness's response will be in the affirmative or words like "I do". The modern common law approach, in Canada, allows for a "religious" (**Budin**) or "secular" (**Bannerman**; **Fletcher**) test to be applied. (See **Appendix E** for Mr. Justice Bouck's (of the British Columbia Supreme Court) list of questions.)

The **Budin** court promulgated a "religious" standard which required as a precondition:

The essential things are that the trial judge's questioning should establish whether or not the child believes in God or another Almighty and whether he appreciates that, in giving the oath (which can be read to the witness), he is telling such almighty that what he will say will be the truth. A moral obligation to tell the truth is implicit in such belief and appreciation. (at 356) [emphasis added]

The **Bannerman** test, which interpreted the predecessor legislation, is that in determining whether a child understands the nature of an oath, the trial judge has a duty to explore the witness' understanding of his or her moral obligation to tell the truth. The classic formulation of the test is:

The object of the law in requiring an oath is to get at the truth relative to the matters in dispute by *getting a hold on the conscience of the witness*. (at C.R. p.138; W.W.R. p.284) [emphasis added]

The child's understanding of the moral obligation must include:

1. an appreciation of the solemnity of the occasion;

2. an understanding of the added responsibility to tell the truth *over and above* the duty to tell the truth as part of the ordinary duty of normal social conduct;
3. an understanding of what it means to tell the truth *in court*; and
4. an appreciation of what happens, in both a practical and moral sense, when a lie is told *in court*.

The **Fletcher** court, overruling the **Budin** principle, articulated the "secular" test in a succinct manner, the test:

...is whether the child has a sufficient appreciation of the solemnity of the occasion, and the added responsibility to tell the truth, which is involved in taking an oath, over and above the duty to tell the truth which is an ordinary duty of normal social conduct. (at 380)

This court endorsed the proposition that, while it may be useful for the court to conduct an inquiry into a proposed child witness' beliefs and religious education, an actual belief in God or a Supreme Being is not necessary, nor is it a prerequisite that the child understands that in giving an oath, he/she is telling God or the Supreme Being that what he/she will say will be true. The standard, analogous to the criterion for adult witnesses, is that it is sufficient that the child witness understands that the oath involves a moral obligation to tell the truth.

The issue on appeal of whether the trial judge erred in ruling that a 10-year-old complainant understood the nature of an oath was entertained by the Nova Scotia Court

of Appeal in a reported case, R. v. R.(M.E.)⁹⁵. Upon completion of this inquiry, the child was allowed to give sworn testimony:

- The Court: Now, do you, ah, have you ever gone to church or Sunday school, K.?
- A: Yup.
- The Court: How often do you go?
- A: Almost every Sunday, if we don't sleep in.
- The Court: Now, if you were asked to put your hand on, ah, on a Bible and say that you were going to tell the truth, do you know what that would mean?
- A: Yeah, you're supposed to tell the truth and nothing but the truth.
- The Court: And, ah, if you were asked to tell the truth in that way, and if you put your hand on the Bible, what would you do?
- A: I'd tell the truth.
- The Court: Great. Well, K., I think you understand what, ah [inaudible], and, ah, that's what we're going to ask the lady to come in and, uhm, and, ah, she's going to put you on oath so that everything that you say after that will have to be the truth. All right? You understand that.
- A: Yup. (at C.R. pp.118-119)

Upon subsequent cross-examination by defence counsel, it was elicited from the child that she did not know what would happen if she did not tell the truth:

- Q: K., tell me, you said before that you, ah, knew what it meant to tell the truth, is that right? Do you know what happens if you don't tell the truth?
- A: No.
- Q: You don't know what happens if you don't tell the truth? No. Do you know what happens if you lie?
- A: Not really, no.

95 (1989), 71 C.R. (3d) 113 (N.S.S.C.); (1989), 49 C.C.C. (3d) 475.

- Q: You don't. Okay. Well, tell me, have you ever told your mother that something happened when it didn't happen?
- A: I don't think so.
- Q: Did you ever lie to your mother?
- A: I don't think so.
- Q: Did she ever tell you not to do something and you did it, and then told her you hadn't done it?
- A: No.
- Q: You don't remember doing it?
- A: [inaudible]. (at C.R. pp.119-120)

The accused, who was appealing his conviction for sexually assaulting his granddaughter, argued that the inability of the child to articulate the consequences of not telling the truth constituted grounds for overturning the trial judge's decision. In his judgment, MacDonald J.A. noted that, although it would have been desirable if a more in-depth examination of the child had been conducted, the trial judge had the distinct advantage of observing the child and her demeanour. The justice was not persuaded that Judge Freeman erred in the conclusion he arrived at and cited as authority this passage from **R. v. Bannerman**, *supra*, where Mr. Justice Dickson said:

This judge had the very great advantage of observing and talking to the child. That this was of special importance is apparent from the judge's comments. Where a trial judge with these advantages examines a child as to its understanding of the nature of an oath and determines that the child is competent to testify, his discretion, unless manifestly abused should not be interfered with. We must avoid appearing to be laying down what and how many questions must be asked. Each case will depend on its own facts, and the impression that the child makes upon the judge will be of great importance. (at C.R. p.135)

In **R. v. Leonard**, *supra*⁹⁶, a conviction for sexual assault of an 8-year-old child was quashed by the Ontario Court of Appeal. An acquittal was directed on one ground - that the trial judge erred in permitting the complainant to give sworn testimony because the s. 16 inquiry did not contain a specific reference to the word "oath". A portion of the inquiry conducted was: (See **Appendix Transcript #1** for the complete inquiry.)

The Court: Well it's awfully important that I hear people like you and other people who come to court to tell me things, it's awfully important that they do what?

A: Tell the truth.

The Court: Why is that important?

A: Because if you tell a lie you could get other people in trouble.

The Court: What people would get in trouble if you tell a lie?

A: The people that are telling the truth.

The Court: If you tell lies the people that are telling the truth will get into trouble, is that what you mean?

A: Yes.

The Court: Do you ever tell lies?

A: Sometimes.

The Court: Like about what kind of things?

A: Like I say my brother hit me.

The Court: You say your brother hit you?

A: Yes.

The Court: And that wasn't the truth. Did he get in trouble?

A: Sometimes.

The Court: Any other times that you don't tell the truth?

A: No.

The Court: What if you don't tell the truth and people get into trouble, what else? Anything else?

A: I don't think so.

The Court: Well maybe if I don't hear the truth maybe I'll do something wrong. Could that be possible?

A: Maybe.

The Court: Judges aren't supposed to do things wrong, are they?

A: No.

96 Previously discussed in the section "Improper Inquiry".

The Court: They could hurt a lot of people. Do you understand that?

A: Yes.

The Court: You go to Sunday School, don't you?

A: Yes.

The Court: Where do you go there?

A: The Temple Baptist Church.

The Court: How long have you been doing that?

A: The last two years.

The Court: An do you go every Sunday?

A: Every Sunday.

The Court: What do you learn there?

A: David killed Goliath and the giant came and he told lies and how King Saul and all these other people killed Kings. And about creating earth, having the stories about Adam and Eve.

The Court: You learn all about God, do you?

A: Yes.

The Court: So you know what it is to tell the truth?

A: Yes.

The Court: What do you think the truth is?

A: Doing the right thing.

The Court: Doing the right thing?

A: Yes. (at 228-231)

Adopting the **Bannerman** test as authority, the appeal court ruled that the inquiry was sufficient to justify the opinion that the child understood the duty of speaking the truth but failed to show that the child appreciated the solemnity of the occasion or the added responsibility to tell the truth over and above the ordinary duty of normal social conduct.

Mr. Justice Galligan ruled:

It should be noted that there is no reference in that inquiry to the word oath. Perhaps a sufficient inquiry into a child's understanding of the nature of an oath could be made without specifically referring to an oath. However, with great respect to the trial judge, it is our opinion that his inquiry did not show that the child appreciated the solemnity of the occasion. It did not show that she understood the added responsibility to tell the truth over and above the duty to tell the truth as part of the

ordinary duty of normal social conduct. It did not show that she had an understanding of what it means to tell the truth in court. Nor did it show that she had an appreciation of what happens in both a practical and moral sense when a lie is told in court. Thus we are of the opinion that the inquiry did not establish her understanding of the nature of an oath. It follows that her evidence should not have been accepted under oath. (at 231)

1. Brasier/Antrobus Test - Belief in God and Spiritual Consequences

Out of the 146 s. 16 inquiries analyzed, judges applied the Brasier/Antrobus "religious" test for oath competency in 77 of the cases (see **Appendix C**). It is evident from the dissertation research that the majority of British Columbia judges require that child witnesses, before they are allowed to give sworn testimony, must:

1. believe in God;
2. believe that they are promising God to tell the truth; and
3. believe that they will be punished by God for lying in court.

In anticipation of this traditional judicial approach, prosecutors systematically prepare children for court to satisfy such oath competency criteria (Harvey and Dauns, 1992). Following are some examples of judicial inquiries aimed at satisfying the religious (Brasier/Antrobus) prerequisites:

At the preliminary hearing of R. v. Zaharik⁹⁷, after introductory questions, a 13-year-old complainant was questioned by the judge as follows:

97 (12 October 1988), Surrey 4230FC (B.C.P.C.) [unreported].

Q: Go to Sunday School?
A: No.
Q: Have you ever gone?
A: Once.
Q: **Do you believe in God?**
A: **Yes.**
Q: And what does that mean to you?
A: What does God mean to me?
Q: Yes.
A: Probably that it just reminds me of life, and how it works, and he's by our side.
Q: What -- have you ever been to Court before?
A: No.
Q: **Do you know what it is to swear an oath on the Bible?**
A: **Yes.**
Q: **And what does that mean to you?**
A: **It's to promise God and the Court that you will not lie and you will tell the truth all the way.**
Q: **And what would happen if you did lie?**
A: **Then the Court has the right to send you to jail or God will punish you in his own ways.**
Q: And do you think that would occur?
A: Pardon me?
Q: Would that be the consequence if you did lie?
A: Yes.
The Court: I'm prepared to have the witness sworn. Take the Bible in your hand, please. Please stand up. [emphasis added]

In the County Court of Westminster case, R. v. Z.(P.R.)⁹⁸, the trial judge conducted this inquiry of a 13-year-old witness:

The Court: Do you go to Sunday school?
A: Sometimes.
The Court: You are aware then of what an oath is?
A: Yes, I am.
The Court: What is an oath?

98 (21 March 1989), New Westminster X019612 (B.C.C.C.) [unreported].

A: It is a promise to God that you will not lie to the courts.

The Court: And do you appreciate that if you make that promise and if you do lie what's the result to yourself, if any?

A: The Lord can punish you in his own ways by making you feel bad for the rest of your life and the courts can punish you in their ways by putting you in jail.

The Court: You appreciate that, do you?

A: Yes, I do.

The Court: Do you believe that?

A: Yes, I do.

The Court: All right. I'll have this person sworn. I'm quite satisfied that she's capable of giving evidence and also that she's aware of what the nature of an oath is. Yes, swear the witness, please. I'll ask you to stand up for a minute, Miss V. [emphasis added]

In **R. v. D.(T.L.) and H.(D.W.)**⁹⁹, the trial judge underscored the necessity for the child (12 years old) to understand the spiritual consequences of lying to God as one of the criteria for being sworn. Relevant portions of the inquiry are as follows:

Q: Miss P., do you attend church?

A: No.

Q: Do you believe in God?

A: Yes.

Q: Do you understand what it means to swear an oath on the Bible to tell the truth?

A: Yes.

Q: Can you tell me what that means, as far as you're concerned?

A: To tell the truth and nothing but the truth.

Q: And when you swear on the Bible and say so help you God, or so help me God, what does that mean to you?

A: That I've got to tell the truth.

⁹⁹ (26 February 1990), Burnaby 2908 (B.C.Y.C.) [unreported].

Q: And if you don't tell the truth, what happens?
A: Then you get in trouble by the law.
Q: Do you also understand that to mean that God will punish you?
A: Yes.
Q: And how would he do that?
A: Well, would be when you get older, you'll regret it.
Q: Do you know what it means to have the oath binding on your conscience, do you understand what that means?
A: No.
Q: Now, you said that you'd get in trouble with the law -
-
A: Mm-hmm.
Q: -- can you tell me what you understand that to be?
A: Well, you could get charged.
Q: You mean charged criminally?
A: Yes.
Q: And do you promise to tell the truth in this proceeding?
A: Yes.

The trial judge concluded:

In this case, I have conducted an inquiry, as I'm required to do, with regard to Miss P. giving testimony and whether she can give testimony after being sworn on the Bible, or whether she can, when promising to tell the truth, give her evidence. I'm satisfied in this case that although she wasn't able to tell me in words that perhaps I or counsel might have thought appropriate with regard to her understanding of an oath binding on her conscience, **I'm satisfied that she has an understanding of the role of God in these proceedings and that she would be punished by God if she -- in addition to the law, if she does not tell the truth and that she can give her evidence in this case, upon swearing an oath on the Bible.** Madam Clerk, you can go ahead and swear the witness at this time. [emphasis added]

In R. v. Zult¹⁰⁰, the court conducted this inquiry of an 11-year-old female complainant:

The Court: Do you go to church or Sunday School?
A: Church.
The Court: **Do you believe in God?**
A: **Yes I do.**
The Court: **What does it mean to you to swear on the Bible?**
A: **It means that I'm promising to God to tell the truth.**
The Court: **And anybody else?**
A: **Yes, the Court.**
The Court: **What happens if you lie?**
A: **I'll be punished by God and the Court.**
The Court: Do you believe that?
A: Yes I do.
The Court: What kind of punishment do you think you would get if you were lying?
A: The Court could put me in jail if I was old enough, or tell my parents to punish me and **God could punish me by making me feel bad for a long time.**
The Court: This young lady understands the nature of an oath and is certainly able to describe with some considerable ability, communication as to what occurred and not occurred, and I am prepared to have her sworn. [emphasis added]

The same court questioned a 13-year-old as follows:

The Court: **Do you believe in God?**
A: **Yes I do.**
The Court: **Do you know what it means to swear an oath on the Bible?**
A: **Yes, that means it's, well it's a promise to God and the Court to tell the truth.**
The Court: What would happen if you did not tell the truth?
A: You would have to pay the penalty, and you would get in even more trouble, like if you're not in trouble then

100 (9 May 1991), Surrey 51402-C2 (B.C.P.C.) [unreported].

you'll get in trouble. If you're in trouble, you'll get in even more trouble than you already are.

The Court: **Who do you get in trouble with?**

A: **The Court and with God.**

The Court: Do you believe that? You are nodding yes, your answer is yes?

A: Yes, sorry.

The Court: All right, I am prepared to have the witness sworn. [emphasis added]

At a preliminary inquiry, **R. v. Cote**¹⁰¹, the judge allowed a 9-year-old girl to give sworn testimony because she was able to answer definitively who would punish her if she did not tell the truth. This terse exchange occurred:

Q: So you've been going to Sunday school up until recently? And what does -- do they tell you anything at Sunday school about how -- whether you should tell the truth or not?

A: Yes, it does.

Q: Pardon?

A: Yes, it does.

Q: And did they tell you what would happen if you didn't?

A: You'll get punished.

Q: Who by?

A: Jesus.

In all these excerpts the witnesses demonstrated beliefs in God and in the actual consequences of lying under oath.

101 (28 July 1988), Vancouver 95912F (B.C.P.C.) [unreported].

2. Budin Test - Belief in God and Promise to God to Tell the Truth

The **Budin** "religious" test was the second most commonly applied threshold test for oath competency. There were **24/146** instances whereby the prerequisites, namely:

1. the child's belief in God; and
2. the child's promise to God to tell the truth in court

were satisfied. The judicial inquiry in **R. v. Zaharik**, *supra*, is an exemplification of the classic formulation of the **Budin** test which judges require to be satisfied by child witnesses:

The Court: It may be that you are going to be asked to take an oath and it says "**do you swear that the evidence you shall give will be the truth, the whole truth and nothing but the truth so help you God**". Do you understand what an oath is?

A: Yes.

The Court: What is an oath?

A: A promise to the Court and to God to tell the truth.

The Court: Do you believe that there is a God?

A: Yes.

The Court: Do you go to church?

A: No.

The Court: Have you ever gone to church or Sunday School?

A: Yes.

The Court: You do believe that there is a God that is almighty?

A: Yes.

The Court: I am satisfied that this witness is capable of communicating the evidence which she has to give and I am also satisfied that she is capable of taking an oath. [emphasis added]

In **R. v. Ball**, *supra*, the judge instructed the child as follows:

Q: Do you understand what it means to swear on the Bible to tell the truth?
A: Yes.
Q: Do you understand that that is a promise to God that you will tell the truth?
A: Yes.
Q: Do you go to church or take any religious instruction?
A: I have.
The Court: I'll have her sworn.

In both Zaharik and Ball the judge conducted brief Budin inquiries.

In R. v. Rohde, *supra*, a judge had a 9-year-old witness sworn after this interchange concerning religion and the nature of an oath:

Q: Are you prepared to tell the truth when you answer those questions?
A: Uh huh.
Q: You won't tell any kind of lies?
A: No.
Q: Do you go to church?
A: Yup.
Q: And do you know what a Bible is?
A: Uh huh.
Q: What is it?
A: It's a book and it tells about Jesus and his disciples and it tells about God.
Q: What's that book in front of you?
A: A Bible.
Q: Have you seen one of those before?
A: Yup.
Q: Do you know what it means to swear on the Bible?
A: It means that you're going to tell the truth — you swear to God that you're going to tell the truth.
Q: And do you know why we use the Bible rather than any other book such as a book like I have on my bench here?
A: Because the Bible is the word of God.
Q: If I were to give you that Bible and ask you to put your hand on it and swear to tell the truth, what would it mean to you?

A: It would mean that if I told a lie then God would know and it would be a lot worse than if I just told a lie without swearing on the Bible.

Q: How would you feel if you were to be asked a question after you had sworn on the Bible and you told a lie?

A: I'd feel quite bad.

The Court: Well, it's a bit unusual in this case, but this young fellow is a pretty bright young man, and in my view he understands the nature of an oath, and he is able also to communicate. Accordingly, I'm going to have him sworn. [emphasis added]

This, too is a **Budin** inquiry, where the judge focuses on God and the truth, and not punishment.

In **R. v. Morris**, *supra*, the preliminary hearing judge led the 13-year-old witness concerning the religious requirement for oath competency. In addition, the court counseled the child as to the higher standard of telling the truth in court than in ordinary social life. The relevant portions of the inquiry are as follows:

The Court: First of all, do you go to church or Sunday School?

A: Yeah.

The Court: How often?

A: Every Sunday.

The Court: Okay. How many years have you been going to church?

A: About three years.

The Court: Okay. Do you believe in God or any other almighty being?

A: Yeah.

The Court: Okay. If you do take the oath that I just read to you, do you understand that you will be telling God that what you're saying is the truth?

A: Yes.

The Court: Okay. Do you know the difference between telling a lie and telling the truth?

A: Yes.

The Court: Do you always try and tell the truth?
A: I try to.
The Court: Have you ever told a lie?
A: Yes.
The Court: Do you realize that this is a court of law and if you tell what you know about this matter you have to be careful to tell the truth and not to tell a lie?
A: Yes.
The Court: Do you understand that both lawyers in this case will be asking you questions about what you saw and what you heard or had done, and that you have to answer these questions truthfully and to the best of your ability?
A: Yes.
The Court: Do you understand that I am here to make certain that there are no unfair questions and -- are asked and to protect you from them?
A: Yes.
The Court: When you're asked the questions do you think you can listen to them carefully and answer them honestly?
A: Yes.
The Court: Do you think you can say you don't remember if that's the case or you don't know if that's so?
A: Yes.
The Court: I am satisfied that the child understands the nature of an oath and can communicate the evidence and be sworn. [emphasis added]

This inquiry is a variation on the **Budin** test, with extra emphasis on the "in court" aspect of it.

At the preliminary hearing in **R. v. Satiacum**, *supra*, a 10-year-old female complainant was asked this series of questions prior to being sworn:

Q: And have you ever seen a person when they come to testify in court or to tell what happened, that they -- they take an oath on a Bible, have you ever seen that happen?
A: Yes I do.
Q: **And do you know what that oath is?**

A: **Yes I do.**
Q: **What is it?**
A: **An oath is a promise to God to tell the truth and nothing but the truth.**
Q: And is that what you will do here today?
A: Yes I will.
Q: Now, you seem like an intelligent little girl, but I have to ask these questions. Do you know the difference between a truth and a lie?
A: Yes I do.
Q: For instance, if I were to tell you that this pen that I am holding is red, would that be telling the truth or telling a lie?
A: Telling the truth -- telling a lie, sorry.
Q: Okay. And if I said it was a black pen, would that be telling the truth or telling a lie?
A: Telling the truth.
The Court: All right. Now, I went into a little extra conversation, and I am saying this for the benefit of counsel, because I am dealing, as both counsel are aware, with section 16, and I was dealing with -- by way of asking extra questions, with the -- with subsection (b), being whether this is a -- the person is able to communicate the evidence, that's the reason I asked some peripheral questions, just to -- just to talk to the -- to the witness -- but based on what I have heard, I am satisfied that this witness understands the nature of the oath and, from my conversation with her, she strikes me as being an intelligent, bright young lady and is able to communicate the evidence and I intend to take her evidence under oath. So would you stand up for a moment, please, and just take the Bible in your hand, L. [emphasis added]

This is a **Budin** inquiry as well.

In **R. v. Garcia**¹⁰², the court emphasized the significance of a belief in God and that the 10-year-old child witness is swearing to God that she is telling the truth. The following is a portion of the inquiry:

- Q: But in this courtroom do you understand that you must tell the truth?
- A: Yeah.
- Q: And why must you tell the truth in this courtroom.
- A: So the -- so the judge will like get every word and that if you're not telling the truth, that he just might not believe you and if you're making a joke out of it, if you're laughing and giggling.
- Q: And if you don't tell the truth what will happen to you?
- A: You get in some kind of trouble or the judge won't believe things you say.
- Q: Can you tell me what sort of trouble you would get into?
- A: Well, if my parents knew I was lying in court they -- I would get in serious trouble.
- Q: From your parents?
- A: Pardon?
- Q: You'd get in serious trouble from your parents --
- A: Yes.
- Q: -- would you? Can you tell me why else that it's important to tell the truth?
- A: The reason why it's good to tell the truth is because then your parents know what's going on and -- and **you're telling the truth to God too.**
- Q: Have you ever watched courtroom scenes on television?
- A: Yeah.
- Q: And do you know that -- watch the court clerk or the registrar when a witness is brought before the Court and they sit in the witness box just as you're sitting and one of the things that is done before any questions are asked is the court clerk has the witness stand and a Bible is handed to the witness. **You're a witness,**

102 (18 November 1991), New Westminster X029583 (B.C.S.C.) [unreported].

so a Bible would be handed to you, and if you were asked do you swear to tell the truth and nothing but the truth so help you God, do you know what that's called?

A: Mm, hmm.

Q: What do you think it's called?

A: An oath.

Q: All right, and if you swore to tell the truth who are you swearing to tell the truth to?

A: God.

Q: To God and to the Court, is that --

A: Yeah.

The Court: I am satisfied that this witness, this young person, has the ability to communicate her evidence and I am satisfied that she understands the nature of an oath and I am going to have her sworn. [emphasis added]

The focus of the examination is on belief in God and a promise to God to tell the truth.

In an attempt to satisfy the religious criterion of the **Budin** formulation, the preliminary inquiry judge, in **R. v. Sutherland**, *supra*, led the 8-year-old witness concerning the possible consequences of making a promise to God and Crown counsel subsequently intervened by arguing that a belief in God is not a prerequisite. The child was subsequently permitted to give unsworn testimony. The relevant portions of the inquiry are as follows:

Q: Do you ever go to Sunday School?

A: Sometimes. Not that often though.

Q: When is the last time that you went to Sunday School?

A: I'm not sure. A long time ago.

Q: A long time ago. Okay. What did -- do you remember what you were taught in Sunday School?

A: No.

Q: Do you believe in God?

A: Yes.

Q: You do? Can you tell me what you understand God to be.

A: U'mmm, somebody that has created us and a spirit.

Q: Pardon me?

A: I think he is a spirit.

Q: You think he's a spirit. Okay. Where did you find out about God?

A: I think my mother. I'm not sure.

Q: Do you recall whether God was mentioned in Sunday School that you went to?

A: Pardon me?

Q: Was God mentioned in the Sunday School that you went to?

A: No. I mean, yes. Yes, he was.

Q: He was. **What do you think might happen to you if you promised God that you would do something and then you didn't do it?**

A: **I'm not sure.**

The Court: Mr. McSheffrey, I do not believe that, based on the answers that I have heard from this child and his mother, that the child should be sworn. I am, however, prepared to continue the Inquiry.

Mr. McSheffrey: I would -- I'm sorry, you are prepared to continue the inquiry?

The Court: To continue the inquiry.

Mr. McSheffrey: Your Honour, I would ask -- it's my understanding, and I didn't research the cases for this hearing this afternoon, but it's my understanding that there is a line of authority that suggests that a belief in God is not critical to the determination of the capacity to swear an oath. Rather, the determination ought to be directed as to whether or not the young person understands the nature of an oath and the duty to tell the truth to the Court.

I would ask Your Honour to consider, if you are prepared to, to continue the inquiry along the lines of whether the boy understands the nature of an oath and whether or not he would understand his duty to tell the truth to the Court if he were to take an oath.

The Court: Well, I am prepared to ask one more question.

Q: Do you understand -- do you know what it would mean for you to take an oath on the Bible?

A: No. [emphasis added]

So the child was not sworn.

The judge, at the preliminary hearing of R. v. K.(M.O.)¹⁰³, ruled that a 10-year-old child be sworn based on the child's understanding of an oath to mean "that you won't lie to the judge or God". Upon further questioning by the judge and defence counsel, the child was unable to articulate what a consequence of not telling the truth in court would mean. Under cross-examination, defence counsel was able to elicit from the child an admission that he did not really understand what an oath meant as explained to him by Crown counsel in preparation for a s. 16 inquiry. In light of such a revelation, defence counsel specifically argued that the child not be sworn as a witness. The judge, however, was satisfied that the criteria for oath competency were met in this instance. The standard the judge applied would be consistent with the threshold test enunciated in Budin. The partial s. 16 inquiry is as follows (see **Appendix Transcript #2** for the full inquiry, which includes cross-examination of the child by defence counsel):

- Q: Do you go to church, S.?
A: I used to, yeah.
Q: Until when? When did you stop going to church?
A: Um --
Q: Just roughly, I don't need to know exactly.
A: A couple of months ago.
Q: Oh really. That recently. **Do you know what it means to take an oath to tell the truth? Just in your own words, you don't have to know exactly what it means, the way I'd explain it, but do you have an idea of what it means to take an oath to tell the truth?**
A: **Not to lie?**
Q: **Do you have any idea what it means to swear that you won't lie? Do you know what that means? Using the Bible there?**

103 (28 March 1989), North Vancouver 19699 (B.C.P.C.) [unreported].

A: **That you won't lie to the judge or -- or God.**

Q: And do you -- what do you think would happen to you if you swore an oath on that Bible and you did either tell a lie, or not tell the whole truth?

A: I don't know.

Q: Can you think of anything that would happen to you? No?

A: No.

Q: I think those are all the questions that I'd ask of this potential witness, Mr. Weber. Any submissions, Mr. Kincaid? Any submissions, Mr. Weber?

The Court: These proceedings are being conducted under section 16 of the *Canada Evidence Act*. It's a fairly new enactment and requires certain stages of inquiry of the proposed youthful witness. We've concentrated here on the oath, because it seems clear to me that this young man would understand the need to tell the truth, and therefore would be in a position to make a solemn affirmation, I don't have any difficulty with that. However it's my view, although the law is still undeveloped, that the purpose of that subsection is to indicate the difference between a young person under the age of 14 years of age who understands the moral obligation to tell the truth, and for other reasons, has objections to taking an oath, just as an adult would, and therefore should be affirmed. I don't believe it's a choice in degree between if someone does not understand the oath, he should then be affirmed, if he does not understand the affirmation, then he should not testify, or rather, he should promise to tell the truth, which is the next step. **In this case, I'm satisfied, because of his previous religious upbringing, to some extent, and because of his explanation about his obligation, both to me and to God to tell the truth on the stand**, that this young man has no moral or other objection to making an affirmation, and he is, in fact, in my view, sufficiently apprised of the requirements of the oath to take it before he testifies. Would you please stand and take the Bible in your hand? [emphasis added]

Again, the judge applied the **Budin** criteria, and was satisfied.

3. Bannerman/Fletcher Test - Moral Obligation and Solemnity of Occasion

Judges adopted the Bannerman/Fletcher criteria in making their legal determinations as to oath competency in only **12/146** transcripts analyzed as part of the dissertation research. (See **Appendix C.**) Below is a selection of such inquiries.

Without reference to any specific authority, the trial judge in R. v. McFarlane, *supra*, applied the Bannerman test as the standard for understanding the nature of an oath. This was done, notwithstanding the 9-year-old witness' explication to the court of telling the truth to God and the subsequent consequence of punishment by God for telling a lie. This dialogue between the court and child transpired:

- Q: Do you know what my job is?
A: Yeah. Like to see if I'm telling the truth or not.
Q: Tell me about the truth. What do you understand about telling the truth?
A: Well, if -- when you tell the truth, that means -- I'm not really sure about it right now.
Q: Well, tell me what you understand. Just take your time and think about it for a few minutes. **Do you know what a lie is?**
A: **Yeah. Like if I lie in court then I get grounded or I could go to jail for just a day or so, or get punished by God.**
Q: **Now, you said a number of things here. You get grounded or you might go to jail and then you said something about God?**
A: **Like you get punished by the Lord. He could make something bad happen to you.**
Q: **So, you think that if you didn't tell the truth that God would punish you?**
A: **Yeah.**
Q: Do you go to church, Sunday School?

A: Well, I go to church sometimes.
Q: Do you?
A: Yeah.
Q: And do you also then when you go to church attend Sunday School? No? You just go to church?
A: Yeah.
Q: Where did you go to church?
A: Well, I didn't go out here. I used to go in French River.
Q: **Aside from the idea of God punishing you and the court punishing you, why is it important to tell the truth? Can you think of any other reason?**
A: **No.**
Q: Can't think of any other reason at the moment? Do you always tell the truth?
A: Not all the time.
Q: Sometimes you tell -- you say things that are not the truth, don't you? But here, this is a very important time to tell the truth, isn't it?
A: Yeah.
Q: **Do you know that when a man or a woman is charged with an offence -- do you know what I mean by that? They're alleged to have done something that is not right. That they come in before a judge and the rule of law or the law is that they're believed to be innocent until otherwise proven. Isn't that so? And that courts rely on evidence or testimony from witnesses, such as yourself.**
A: **Yes.**
Q: **Do you understand that?**
A: **Yeah.**
Q: **So, I rely on you. It's very important to tell the truth, is it?**
A: **True.**
Q: **Can you do that?**
A: **Yeah.**
Q: **You're certain that you can tell the truth?**
A: **Yes.**
Q: **And if I were to have the lady that's sitting in front of me, she's called the Court Clerk, her name is Kelly and if I were to have her pick up the Bible and say do you swear to tell the truth and nothing but the**

truth so help you God, do you know what that would mean?

A: Yes.

Q: What do you think that would mean?

A: Well, like you tell the truth to God and the judge and to tell the truth.

Q: When you're speaking with your friends -- you have lots of friends, I guess, school friends and out of school, you try and tell the truth, do you?

A: Yes.

Q: Most of the time?

A: Yes.

Q: But this is not the same thing, is it?

A: No.

Q: It's far more important. There is no comparison. It is absolutely imperative that you tell the truth and if you're not certain, you must say I don't know. Do you understand that?

A: Yes, I do.

The Court: I am satisfied that this young man understands the nature of an oath. He certainly is able to communicate his evidence. He has the intelligence to do that. **I am satisfied also that he appreciates the importance of this occasion. That he understands the added responsibility of appearing in court and speaking the truth over and above his -- the normal day to day requirement of speaking the truth. He understands what it means to tell the truth in court and he has an appreciation of both in the practical and in the moral sense of what happens when a lie is told in court and I am therefore, satisfied that he may be sworn.** All right. Could you stand, please and the Court Clerk will -- [emphasis added]

Without naming the **Bannerman** test, the judge followed it.

Following a similar line of questioning of another child witness (12-year-old) in the same case, the judge (who, in fact, led the child with respect to a moral obligation to tell the truth), adopted the **Bannerman/Fletcher** test. This exchange occurred:

Q: And do you know what it means to tell the truth?
What do you think it means to tell the truth?

A: To tell the truth. Like you don't lie. You tell -- say I -- I went to the store, which I really didn't, that's telling a lie and then if you did that's telling the truth.

Q: Do you always tell the truth?

A: No. Not always.

Q: Why is it important to tell the truth here?

A: Because if you don't, then you can get in big trouble.

Q: Who would you get into trouble with?

A: The judge. You.

Q: Yes? Can you think of any other reason why you should tell the truth?

A: So you can --

Q: Just take your time. It's not easy to come here and sit up in front of all these people and talk to me. You're doing pretty well. I know that when I was your age I wouldn't have been very good. I had trouble talking to people even when I was older, with a lot of people standing around. I found it hard. So, I can see that you might have difficulties. It's not easy. Do you remember what I asked you? I said, can you think of any other reason why you should tell the truth?

A: So that what happened to D. wouldn't happen again.

Q: **All right. Now, you understand that you have a duty to tell the truth? That means that it's your responsibility to tell the truth in the courtroom?**

A: **Yes.**

Q: **Every citizen that comes into this courtroom has a duty when they become witnesses to tell the truth. Is that not so?**

A: Yes.

Q: Because that's the basis upon which we determine guilt or innocence, isn't it?

A: Yeah.

Q: And it has very serious consequences. If people come and lie, innocent people could be very seriously harmed. Do you understand that?

A: Mm-hm.

Q: **If you were asked by the Court Clerk to say you swear to tell the truth and nothing but the truth so help you God, what would that be called? Do you know what that's called?**

A: **The oath.**

Q: Yes. And you're swearing to tell the truth if you say yes, is that not so?

A: Yes.

Q: And you're swearing before this court that what you say is the truth, is not that so?

A: Yes.

Q: Do you have -- you told me about your responsibility to tell the truth in terms of what could happen to you if you do not tell the truth. You could be punished, but do you have any other understanding of why you should tell the truth? In other words, -- let me put it another way. People leave their belongings out in the open from time to time, at school and in people's homes and we understand, don't we, that we're not to help ourselves to those belongings?

A: Yeah.

Q: Unless we're invited to do so or we're given a gift. Do you know why we don't take things that don't belong to us?

A: Because they're not ours.

Q: **It would be wrong morally, wouldn't it? Just as to not tell the truth would be wrong morally, wouldn't it? So there are two reasons. The moral consequence and also the legal consequence. Do you understand that?**

A: **Mm-hm.**

Q: You understand, do you not, in a court of law that every man or woman that is brought before the court is presumed or believed to be innocent. Do you understand that?

A: Mm-hm.

Q: Unless the Crown is able to provide evidence that shows you have a reasonable doubt that this is not so?

A: Yeah.

Q: **So, you understand, therefore, the great responsibility that you would have to tell the truth if I were to have you sworn as a witness? Do you understand that?**

A: **Mm-hm.**

The Court: I'm satisfied that this young person is a person who's intelligent, that is an intelligent young man. He understands the nature of an oath and he has the ability to communicate his evidence. **He also has an appreciation of this solemn occasion. He has an**

understanding of the added responsibility to tell the truth over and above the day to day responsibility to tell the truth. He understands what it means to tell the truth in court and an appreciation of what happens both in the practical and the moral sense if he were to not tell the truth and having satisfied myself on all those aspects, I'm prepared to have him sworn. [emphasis added]

Again the judge followed **Bannerman**.

In **R. v. Malcolm**¹⁰⁴, prior to making a legal determination concerning an 11-year-old child's ability to understand the nature of an oath, the court instructed the female complainant of the added responsibility of telling the truth in court. The inquiry was as follows:

- Q:** I see. All right. **Do you know what -- if I were to ask you, "Do you swear to tell the truth and nothing but the truth, so help you God?" If I were to ask you that, what is that called, do you know?**
- A:** **It's swearing in so you -- you won't lie to the Court 'cause if you lie to Court you might get in trouble, you might get put in jail and charged.**
- Q:** **I see. So that phrase is called an oath, isn't it?**
- A:** Yes.
- Q:** And do you know why you're here?
- A:** Yes.
- Q:** This is a court of law and you know that, don't you?
- A:** Yes.
- Q:** And when you come in to court, you are going to be asked some questions perhaps --
- A:** Yes.
- Q:** Why is it important to tell the truth?
- A:** Well, for me to win the -- for me to win the case.
- Q:** Why is it important for you to win the case?

104 (8 February 1991), New Westminster 26256 (B.C.P.C.) [unreported].

A: So this incident -- what happened to me -- will not happen to any other kids again.

Q: I see. When you are -- you have a number of friends, do you not?

A: Yes.

Q: And when you're speaking to your friends, do you always tell the truth?

A: Mm, yes, most of the time, yes.

Q: But sometimes you don't?

A: Well, it depends what they ask me. If it's about my personal life, yes, I do tell them some things, but some things I don't want to say.

Q: Such as what?

A: Such as having a boyfriend.

Q: I see. Would you lie to them on that occasion?

A: No.

Q: You just wouldn't tell them?

A: Right. I'd say, "It's none of your business."

Q: I see. What is the difference between telling the truth here in court and telling the truth when you're speaking to your friends?

A: Well, friendship is a really strong thing and you have to keep it 'cause sometimes in case of your friends -- friends help you out sometimes and the law helps you too, so it's better if you don't lie to court or your friends because you might lose and then you'll get in trouble.

Q: **Do you see any difference in telling the truth in court and telling the truth in your day to day dealings with your friends?**

A: **No, not really.**

Q: **You don't see any difference at all?**

A: **No, except that you can get charged if you lie --**

Q: **Charged with?**

A: **-- in court.**

Q: **I'm sorry, I didn't mean to interrupt you. If you don't tell in court, you said you'd -- you'd -- if you don't tell the truth in court, you said you can get charged, charged with what?**

A: **I forget what it's called.**

Q: **Perjury?**

A: **That's it.**

Q: **Well, I think that -- you -- you've hit it on the head right there, it certainly is perjury if you don't tell**

the truth. And what happens if you commit perjury?

A: You'll get charged and you will get thrown in jail.

Q: So it's very important to tell the truth, isn't it?

A: Yes.

Q: I'm a bit troubled about what you said about winning this case and how that -- how you feel that that fits in with telling the truth?

A: Yes.

Q: Do you believe that you should stretch your -- the truth a little bit just to win the case?

A: No --

Q: If you did --

A: -- I'm going to tell --

Q: -- if you did stretch the truth, what -- what would you -- what -- what would you be doing?

A: I'd be lying.

Q: That's right, you would be lying, and you have a responsibility to everybody in this room, **you have a responsibility to me, to your country when you're in court to speak the truth, don't you?**

A: Yes.

Q: To uphold the law is that not so?

A: Yes.

Q: That is your responsibility when you come in here as a witness as you are speaking the truth so that the law can be upheld is that not so?

A: Yes.

Q: Isn't that the difference between telling the truth in court and telling the truth when you're just dealing with your friends?

A: Yeah, it's cause --

Q: Do you understand the difference there now?

A: Yeah, a bit, yeah.

Q: There's a much greater responsibility, isn't there?

A: Yeah.

Q: Because the law is dependent upon witnesses telling the truth --

A: Yes.

Q: -- is that not so?

A: Yes. Yes.

Q: If you are asked any questions of which you are not certain of the answer, you know that it is your duty to

tell me, the judge, that "I don't know the answer" or "I am uncertain", you understand that, do you not?
 A: Yes.
 The Court: All right. I'm satisfied that -- that this young lady is certainly -- has the intelligence to communicate. Do you wish to make some comment, Ms. Dawson?
 Ms. Dawson: No, Your Honour. I'm -- I'm inviting you to have the witness sworn.
 The Court: Mr. Walters, do you wish to make any comment?
 Mr. Walters: No. Thank you, Your Honour.
 The Court: I am satisfied, therefore, that this young lady has the ability to communicate -- has the intelligence and the ability to communicate. **I am satisfied that she understands the meaning of an oath within the case law -- within the meaning of the case law and I direct that she be sworn.**
 The Clerk: Yes, Your Honour. [emphasis added]

It is interesting to note that, while the trial judge alluded to satisfying some criteria in the common law for oath capacity, no actual authority was cited. It can be concluded, however, that a form of the **Bannerman/Fletcher** standard was being applied.

The judge in **R. v. Stevens**¹⁰⁵ made a brief reference to **Fletcher** as the appropriate common law test to be used for qualifying a child witness:

The test is now, according to the changes in the Code and Mr. Justice Boughton, his paper said it's maybe **the Fletcher test, where the judge must be satisfied that the child has the moral obligation to tell the truth in taking an oath and the child feels he is conscience bound by it.** [emphasis added]

In **R. v. Ramsay**, *supra*, during a s. 16 inquiry, a discussion took place between the trial judge and Crown counsel with respect to what constituted "an understanding of

105 (9 February 1990), Matsqui 20205 (B.C.P.C.) [unreported].

an oath". Notwithstanding the nature of questions put to the 13-year-old child concerning religion and God, the judge delineated the threshold test as a "**moral obligation to tell the truth**". Crown counsel concurred with the judge's interpretation and provided further elucidation by citing a case which dealt specifically with the issue. The relevant portion of the inquiry is as follows:

- Q: I didn't know you went to church, P. Do you go to church or Sunday School?
- A: I don't. Sometimes I used to go.
- Q: Used to go to Sunday School sometimes?
- A: No, I used to go to church sometimes.
- Q: Oh, did you? What church was that?
- A: I don't know.
- Q: You don't know the name?
- A: No.
- Q: Can you tell me where it was?
- A: No, and I don't know the street.
- Q: Ah. Do you know anything about God?
- A: Yeah.
- Q: What do you know about God?
- A: That he made us. He helps us.
- Q: Yes.
- A: That's it.
- Q: Does God care whether you tell the truth or not?
- A: Yeah, he cares.
- Q: He cares?
- A: [Nodding]
- Q: What does he want you to do?
- A: Tell the truth.
- The Court: It's my understanding, gentlemen, that the language in the new version of Section 16 and particularly Section 16 2 -- all through 16, the issue as to whether or not the person **understands the nature of an oath focuses much more on the moral obligation to tell the truth than on anything else**. Do any of you want to make any submissions in that regard?
- Mr. Guthrie: No. I have no comment. I -- actually I do agree with Your Honour's comment.
- The Court: All right.

Mr. Bernard: I do have this decision of His Honour Judge McKinnon in the County Court of Westminster as it then was, that discusses this issue with respect to understanding an oath.

This is a case decided in 1986 in June, and this has to do with a 10-year-old child and making an inquiry with respect to her understanding of the consequences of an oath. And he says at the bottom of the first page:

'I have concluded that the aspect of the Antrobus decision relied upon by defence counsel has, at least by implications, been overruled in British Columbia and accordingly there is no obligation upon me in conducting the inquiries of A.L. to ascertain whether she believes in a Supreme Being and need only to be satisfied that she appreciates she has a moral obligation to tell the truth. That being so, we need to proceed to an inquiry of the witness A.L. to ascertain whether she does understand the nature of an oath --'

The Court: Well, I can advise counsel that I think that he understands that he has a moral obligation to tell the truth on the basis of the questions and answers that I've had, subject to, and I'm still prepared to hear your submissions on that.

Mr. Bernard: Yes. If Your Honour is satisfied that he has -- understands the moral -- has a moral obligation to tell the truth, then he can take the oath and that should end the matter as far as his ability to give evidence. [emphasis added]

The court continued on with this brief dialogue and concluded with a ruling:

The Court: All right, P., I think you understand that you have to tell the truth?

A: Yes.

The Court: And therefore, **I'm going to ask that you be sworn, which is a solemn procedure in which you promise God --**

A: Yes.

The Court: -- and all of us that you will tell just the truth?

A: Um-hum.

The Court: Okay. So I'm going to ask you stand and take the Bible, which is in front of you there, in your hand, and I'll ask the clerk to swear you. [emphasis added]

It is strikingly odd that the judge would, after articulating the standard of oath competency as satisfying a "moral obligation to tell the truth", ultimately impose upon the child a "promise to God" to tell the truth.

Quare: Why should the words "so help you God" (which arguably imports a religious dimension to the phrase) be put to witnesses: "**Do you swear to tell the truth, the whole truth, and nothing but the truth?**" if the test is to merely satisfy a "**moral obligation** to tell the truth"? Moreover, why is it necessary for a witness to swear on a Bible if, in effect, through common law interpretation of the legislation, the religious aspect of oath-taking has been removed?

4. Wrong Test: Predecessor Legislation

The dissertation research identified 4/146 cases where judges applied the wrong test for the s. 16 inquiry. At the preliminary inquiry of R. v. Ball, *supra*, the judge was satisfied that the 12-year-old witness understood the nature of an oath under Budin. However, that legal determination was premised on his interpretation of the s. 16 predecessor legislation, *inter alia* (the section of the legislation which deals with "unsworn" testimony):

...the child is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.
[emphasis added]

The relevant excerpt from the transcript is as follows:

Q: Do you know the difference between telling a lie and telling the truth?
A: Yes.
Q: Do you always try to tell the truth?
A: Yes.
Q: Have you ever told a lie?
A: Yes.
Q: And you realize that this is a Court of Law and if you tell what you know about the matter you must be very careful to tell the truth and not tell a lie?
A: Yes.
Q: Do you understand that both lawyers in this case will be asking you questions --
A: Yeah.
Q: -- about what you saw and heard and you will have to answer these questions truthfully to the best that your memory will allow you. And do you understand that I am here to make certain that no unfair questions are asked and to protect you from being asked unfair questions?
A: Yes.
Q: When you are asked a question do you think you can listen to them carefully --
A: Yes.
Q: -- and reply to them honestly? If you -- do you think you can say you don't remember if that's the case?
A: Yes.
Q: All right. If you don't know, just say so. Can you do that?
A: Yes.
The Court: Do you, Counsel, wish to ask any questions?
Mr. Petrie: No, Your Honour.
Mr. Coleman: No, thank you, Your Honour.
The Court: **I'm satisfied that she's able to communicate and sufficiently intelligent to justify the reception of the**

evidence and she understands the duty of speaking the truth.

- Q: Do you understand what it means to swear on the Bible to tell the truth?
- A: Yes.
- Q: Do you understand that that is a promise to God that you will tell the truth?
- A: Yes.
- Q: Do you go to church or take any religious instruction?
- A: I have.
- The Court: I'll have her sworn.
- Mr. Petrie: Thank you, Your Honour. [emphasis added]

Neither counsel commented on this interpretation of s. 16.

Another case where the judge erroneously applied the "sufficient intelligence" test was in R. v. S.(W.D.)¹⁰⁶:

- The Court: I'm prepared to hear the evidence of this witness but I don't believe it should be taken under oath.
- Mr. McSheffrey: Do I understand Your Honour to say that you are prepared to hear his unsworn evidence?
- The Court: Yes.
- The Court: Well, as I said, I am prepared to have the child give unsworn evidence on the basis that I believe that he is of **sufficient intelligence to give unsworn evidence**. That is my determination based on the questions - questioning I have conducted here. [emphasis added]

In a similar situation, the county court judge, in R. v. Satiacum, *supra*, allowed a child witness to be sworn after conducting an inquiry based on the requirements of the old legislation. Her Honour concluded:

106 (5 January 1988), Penticton 14742 (B.C.P.C.) [unreported].

All right. I'm satisfied then, having listened to the answers of L.P. and observing her in the witness stand, that she is **sufficiently intelligent to justify the reception of the evidence** and that she **understands the duty of speaking the truth**. I'm also satisfied that she has a belief in God, as she says, in her own way and that in giving evidence under oath that she's telling God that what she says is the truth, and in my view then she may be sworn. [emphasis added]

There were no objections or submissions made by Crown or defence counsel in response to this ruling. If counsel were aware of the new **s. 16** provisions, neither apprised the judge of it.

In subsequent reasons for judgment, Her Honour Judge Ryan spoke briefly of the common law she relied upon in reaching her decision:

Before L.P. testified I conducted an inquiry pursuant to section 16 of the Canada Evidence Act. At its conclusion I was satisfied that she understood the nature of an oath in accordance not only with Bannerman v The Queen (1966) SCR 5, but also Regina v Budin (1981) 58 CCC 2 @ 352. I was also satisfied that she was able to communicate the evidence.

This unreported case was the only instance (1/146) where a judge made specific reference to common law authority in an attempt to interpret **s. 16**. The judge, however, provided no elaboration of her understanding of the fundamental principles enunciated in Bannerman and Budin. It is submitted that the trial judge did not make any analytical distinction between these two tests, which arguably are not compatible. Because the child satisfied both the Budin and Bannerman standards, the learned justice did not have to choose between them. However, the Bannerman decision, affirmed without reasons by the Supreme Court of Canada from the Manitoba Court of Appeal

(and written by Mr. Justice Dickson), is arguably of greater authority than **Budin** (a decision of the Ontario Court of Appeal from which the Supreme Court of Canada refused to grant leave). In addition, both counsel did not demonstrate a comprehension of the legislation and the case law.¹⁰⁷

5. Improper Inquiry

In R. v. C.(K.C.)¹⁰⁸, the Alberta Court of Appeal held that the trial judge erred by refusing to permit a 5-year-old victim to testify because she was too young. The Crown had appealed the accused's acquittal on a charge of sexual assault on this ground (among several others). After this brief inquiry, the trial judge refused to carry on:

Q: Do you know how old you are?
A: 5.
Q: Do you know when your birthday is?
A: No.
Q: And tell me, E., your sister was just inside here. Is that correct?
A: Yes.
Q: And you were waiting for her outside?
A: Mm hm.
Q: And where do you live, E.?
A: Sundre.
Q: How big is Sundre?
A: Not too big.
Q: How many elevators does it have?

107 See also: R. v. Epp, *supra*, where defence counsel erroneously referred the court to the predecessor legislation.

108 (1992), 73 C.C.C. (3d) 343 (Alta.C.A.).

A: None.
Q: None?
A: Only —
Q: Only what?
A: Well, I don't think it's got any.
Q: You don't think so. Well, you live in Sundre. Who do you live with?
A: My mom and my sister.
Q: And you don't go to school yet?
A: Yeah, I do.
Q: You do. What grade are you in?
A: I don't know.
Q: Are you in kindergarten?
A: Yeah.
Q: Where do you go to kindergarten? Where is it at?
A: By the [indiscernible].
Q: By where?
A: By a big white building.
Q: By a great big white building. And who is your teacher at kindergarten?
A: Mrs. Bailey.
Q: Mrs. Bailey?
A: Yeah.
Q: Is she a friend of yours?
A: She my teacher.
Q: Do you have any friends at kindergarten?
A: Yeah.
Q: Who are your friends?
A: Kafrina and Hayley and Valerie.
Q: Helene and Valeria and Kafrina, did you say?
A: Katrina.
Q: Kafrina?
A: No, Katrina.
Q: Kathleena. Did I get it right that time? Not quite? Pretty close. What did you do last summer?
A: I was in school.
Q: You were where?
A: I was still in school then, still in school.
The Court: It's pretty apparent to me that even at this early stage, I have to make a determination as to whether she has the capacity to give evidence. Even with this early communication, I'm satisfied we're going to have considerable difficulty. She is of very tender years. This is a five year old. I'm — that decision — there

is a decision to be based on her intelligence and be able to communicate. The matter of communication in itself leaves much to be desired only because of her age, and I don't even think it's necessary for me to get to the second phase, and that's to determine whether she has the capacity, which is a moral duty to tell the truth. And I think we've reached — I've reached the conclusion here, without even submissions, unless you have some strong submissions, and particularly invite you to make them from the Crown, the evidence she might give would have just no weight.

Mr. Willms: Your Honour, I take the position that it's an inquiry to be made by the court.

The Court: That's correct.

Mr. Willms: In your capacity. And if you find that she does not have the capacity, that ends the matter.

The Court: The communication that we have conducted is, I am satisfied, most simplistic, and she's a growing young girl. And at the age of approximately 7 or 8, two years makes a big difference and —

Mr. Willms: I think part of the problem is compounded by the fact that there is somewhat of a speech impediment and that, of course, is a difficulty.

The Court: Yes. I've noticed that.

Mr. Willms: I just put it on the record. I believe it's obvious from the questions.

The Court: There are very very few cases that I am aware of where the evidence of a five year old is even brought before the court.

Mr. Willms: I take the position, simply this, that age is not the determinative factor, just simply whether she has the ability, and if you find that she does not have the ability, then, My Lord, I stand by your decision.

The Court: Well, I'm going to excuse this witness. I don't think it would serve any purpose in having her testify.

Mr. Willms: Thank you, My Lord.

The Court: Much of that evidence, as relates to her and the involvement of the accused as alleged, has already been heard, in any event.

Mr. Willms: That's correct, My Lord. There is still the avenue that the Crown can, in circumstances, permit an application under the Khan decision, but that, My Lord, you will have to deal with as we get along with this.

The Court: Yes, I take it, E., you didn't understand anything we had to say, did you? No? You shook your head. That means no, I guess. Would you like to leave here? Would you feel better if you just got out of this room?

The Witness: Beats me. (at 345-347)

As a result of the truncated inquiry, the trial judge did not allow her to testify either to promise to tell the truth or take an oath or an affirmation. The Court of Appeal held that a witness should not be precluded from testifying simply on the basis of his or her age. Mr. Justice Kerans, in delivering the judgment of the court, stated:

We understand his ruling effectively was that, because she was only five years old, she was not a useful witness. With respect, that is not the law. The law is that a witness of any age is to be heard if the judge is satisfied as a matter of fact that she was able to comprehend what is asked of her, which is to tell the court the truth about what happened: see *R. v. D. (R.R.)* (1989), 47 C.C.C. (3d) 97, 69 C.R. (3d) 267, 20 R.F.L. (3d) 1 (Sask.C.A.). We say again that the nub of the ruling here was that no inquiry need be made because the child was merely five. The judge should not have decided the issue in that summary way, but should have conducted a fuller investigation. (at 347)

The court ordered a new trial.

In *R. v. Massaoutis*¹⁰⁹, the preliminary hearing judge allowed an 11-year-old complainant to give sworn testimony after a very unusual inquiry. The judge directed a series of 8 questions, framed as one question, to the child. The child responded only after a voice (her mother) instructed her to answer in the affirmative. Following the

109 (12 May 1987), Vancouver (B.C.P.C.) [unreported].

child's answer of "yes", the judge led the witness on the substantive issues and subsequently elicited from the child 5 more "yes" responses. The full inquiry reads:

- Q: What's your date of birth, A.?
A: September 24th.
Q: Just push that microphone away, please. Anywhere, yes. And how old are you now?
A: Eleven.
Q: And what grade are you in?
A: Six.
Q: What school do you go to?
A: General Brock.
Q: And how are you making out there?
A: Good.
Q: **And you go to school regularly? Have you ever been in a courtroom before? Have you -- I take it you must watch T.V. every once in a while? Have you seen courtroom scenes on T.V.? Have you ever seen a person get into a witness stand such as you're in now and take up the Bible and swear to tell the truth, take an oath? Do you know what an oath is? Do you know what a promise to tell the truth is? That's what an oath is. Do you understand that? Yes?**

A Voice

[child's mother]: Say yes.

- A: **Yes.**
Q: So do you know that a promise to tell the truth is an oath and do you know that when you promise to do something that it's expected that you will do it? So if you promise to tell the truth you will tell the truth?
A: **Yes.**
Q: If I ask you to take the Bible in your hand and if you told me that you were going to tell me the truth, would you in fact tell me the truth?
A: **Yes.**
Q: Do you understand that there are consequences, something might happen if you don't tell the truth?
A: **Yes.**
Q: You might be punished?
A: **Yes.**

Q: And if I ask you now to take up that Bible, take it in your hand, and you take the oath to tell the truth you're going to do that?
A: Yes.
The Court: Okay. Swear the witness. I'm satisfied that she's competent to swear an oath.

Of course, the voice interfered with the inquiry.

In R. v. Dinescu¹¹⁰, the judge allowed a 10-year-old child witness to be sworn in the absence of the witness's understanding of what happens (in both a practical and moral sense) when a lie is told in court. The transcript reads as follows:

A: Good morning.
Q: How are you feeling today?
A: Okay.
Q: Have you ever given evidence in court before?
A: No.
Q: Okay. You've had an interview with Ms. Brown today, have you?
A: No.
Q: On a previous day --
A: [Indiscernible]
Q: -- the prosecutor? Mm-hm. Did she tell you something about the fact that I'd ask you some questions about telling the truth and swearing to tell the truth? Okay. Have you ever sworn on a Bible before to tell the truth?
A: No.
Q: Have you ever seen that on T.V. when witnesses do that --
A: No.
Q: -- in a courtroom show? You haven't seen those sorts of things. Okay. Do you know what it means to tell the truth? Are you pretty good at telling --
A: Yeah.

110 (6 May 1991), Coquitlam 38683C2 (B.C.P.C.) [unreported].

Q: -- the truth? Good. Okay. You have to say yes or no in answer to my questions 'cause it's being recorded.

A: Okay.

Q: Okay. When you swear on the Bible to tell the truth, that's an oath, okay?

A: Okay.

Q: What do you think it means to take an oath to tell the truth, what are you promising to do?

A: To tell -- like, to tell the truth, like --

Q: Mm-hm.

A: -- and not -- not making it up.

Q: Not make it up. Okay. do you know what would happen if -- in a courtroom if you swore to tell the truth and you told a lie?

A: No.

Q: You don't know. Okay. Is -- would that be a good or bad thing to do?

A: Bad.

Q: Mm-hm. And today, when you give your evidence and if I allowed you to swear on the Bible to tell the truth, would you tell the truth?

A: Yes.

Q: Okay. Yes, Mr. Darychuk, do you have any questions?

Mr. Darychuk: No, Your Honour.

The Court: All right, Ms. Brown.

Ms. Brown: No, Your Honour.

The Court: All right. Yes. D. will be sworn.

The witness was unable to demonstrate that she was assuming a "moral obligation to tell the truth" or an appreciation of the solemnity of the occasion. While it is clear from this inquiry that the criteria set out in **Bannerman** were not satisfied, defence counsel did not object to the ruling.

B. "SOLEMN AFFIRMATION" LEGISLATION

The intent of Parliament in enacting the new affirmation provision of s. 16(1)(a) is the elucidation and liberalization of the former legislation. The common law on this issue was set out in **R. v. Budin**, *supra*, where the Ontario Court of Appeal, considering the predecessor to s. 16, held that a child is precluded from making an affirmation:

It is clear that the right to affirm does not extend to a child of tender years. (at 355)

With the passing of **Bill C-15**, enshrining s. 16 **Canada Evidence Act**, legislators have adopted the liberal approach expressed in **R. v. Fletcher**, *supra*, that a child could be affirmed pursuant to s. 15 **Canada Evidence Act**. The Alberta Court of Appeal, in **R. v. Connors**, *supra*¹¹¹, applying the *dicta* of MacKinnon, A.C.J.O. in **Fletcher**, allowed a child without a belief in God, to be affirmed on the basis that she considered herself morally obligated to tell the truth on taking the oath and felt conscience-bound by it.

Under the current mandated provision, the law permits a child, who holds no belief in God or religious convictions, but demonstrates an understanding of the nature of a moral obligation to tell the truth, to give sworn testimony.

If a child, upon taking the stand, indicates that he or she wishes to affirm, the judge conducts an inquiry into, first, whether the child possesses a "conscientious scruple" such as an honourable, religious, or upright misgiving, doubt or qualm about testifying under oath (Bouck, 1988, see **Appendix E**).

111 Similarly, see **R. v. Dawson**, *supra*.

In **R. v. Deakin**¹¹², the British Columbia Court of Appeal held that it is not sufficient for a witness to merely state an intention "to affirm", rather it is incumbent that he/she express that he/she has "**conscientious scruples**" or its equivalent. The court opined:¹¹³

A witness merely stating that he "wants to affirm" is not sufficient. His reason might be different from that permitted by the statute, and it should be expressly stated and not left to inference what that reason is, otherwise, in my opinion, he makes no affirmation under the Act. (at 274)

Secondly, the judge must be satisfied that the child understands the nature of the solemn affirmation to mean, in essence, that it is a promise to tell the truth. If both criteria are met, the child can be affirmed.

It has been postulated by a justice of the British Columbia Supreme Court (Bouck, 1988) that the occasions wherein a child might request an affirmation or use the words "I object on the grounds of conscientious scruples" would be exceedingly rare.

To date, there are no reported cases which deal specifically with the judicial application or interpretation of the term "**understands a solemn affirmation**". Furthermore, the dissertation research of unreported cases reveals no case where a child has articulated a wish to make an affirmation or made statements with respect to an

112 (1911), 16 B.C.R. 271 (B.C.C.A.).

113 It is an unusual practice in contemporary times for judges to inquire into the reason why an adult witness wishes to affirm where a witness simply states "I wish to affirm". Most judges allow affirmation upon a request without question. It is hypothesized that this judicial practice developed because judges did not want to embarrass a potential witness in public by compelling him/her to reveal his/her private religious beliefs or misgivings concerning such beliefs (Mr. Justice Bouck, 1988). Notwithstanding, failure to elicit from the witness a reason for wanting to affirm may justify an order for a new trial on appeal (**R. v. Deakin**, *supra*).

objection based on conscientious scruples. There were 4 cases where judges allowed child witnesses to be "affirmed".

The subject of a solemn affirmation was discussed in a limited manner in the unreported case of R. v. R.(W.N.)¹¹⁴. The county court judge, who appeared to be confused over s. 14 (now s. 15) and s. 16 Canada Evidence Act even after Crown counsel advised him of s. 16(1)(a), allowed the 13-year-old child to give sworn testimony. The following inquiry took place:

- Q: I didn't know you went to church, P. Do you go to church or to Sunday School?
- A: I don't. Sometimes I used to go.
- Q: Used to go to Sunday School sometimes?
- A: No, I used to go to church sometimes.
- Q: Oh, did you? What church was that?
- A: I don't know.
- Q: You don't know the name?
- A: No.
- Q: Can you tell me where it was?
- A: No, and I don't know the street.
- Q: Ah. Do you know anything about God?
- A: Yeah.
- Q: What do you know about God?
- A: That he made us. He helps us.
- Q: Yes.
- A: That's it.
- Q: Does God care whether you tell the truth or not?
- A: Yeah, he cares.
- Q: He cares?
- A: [Nodding]
- Q: What does he want you to do?
- A: Tell the truth.
- The Court: It's my understanding, gentlemen, that the language in the new version of Section 16 and particularly Section 16 2 -- all through 16, the issue as to whether or not

114 (5 January 1989), Vancouver CC881357 (B.C.C.C.) [unreported].

the person understands the nature of an oath focuses much more on the moral obligation to tell the truth than on anything else. Do any of you want to make any submissions in that regard?

Mr. Guthrie: No. I have no comment. I -- actually I do agree with Your Honour's comment.

The Court: All right.

Mr. Bernard: Yes, I agree, Your Honour, as well. The wording of Section 16 simply provides that someone who understands an oath or solemn affirmation is able to communicate the evidence. So obviously it's a question left to Your Honour to decide whether or not there is that understanding and there is case law that has sort of broadened what used to be the necessity to understand in some religious way the consequences of taking an oath.

The Court: Is the Crown asking that I swear P.?

Mr. Bernard: I would think that in the circumstances, given his very limited religious knowledge, I think it might be more appropriate that he be affirmed indicating that he has some sort of moral obligation to tell the truth.

The Court: Yes.

Mr. Bernard: It would be my submission, if it's appropriate to make submissions, that he is of sufficient intelligence to communicate the evidence and that he does have a concept of what truth is and could have taken an oath to tell the truth by affirming.

The Court: I haven't looked at the section with respect to affirming. Is that done without a request from the witness, ever? Is there a power to do that on the Court's own volition?

Mr. Bernard: Well, I'm going from section 16 sub 2 which says:

A person referred to in subsection 1 who understands the nature of an oath or a solemn affirmation and is able to communicate the evidence shall testify under oath or solemn affirmation.

The Court: Yes.

Mr. Bernard: So it seems to provide for that as an option. It certainly would seem unlikely that it would be available to an adult and not to a young person.

The Court: See, a solemn affirmation comes pursuant to Section 14 of the Act, I think, which is on the very same page

of Martins and that speaks about a person who is objected to as incompetent as if incompetent to take an oath. Now, does P. fall into that definition?

Mr. Bernard: Well, that's difficult for me to say, Your Honour. I also see that there is a case that seems to suggest that the right to affirm does not extend to a child of tender years.

The Court: I suspect that that was before the amendment --

Mr. Bernard: That was before the amendment, yes.

The Court: -- of section 16.

The Court: Well, I can advise counsel that I think that he understands that he has a moral obligation to tell the truth on the basis of the questions and answers that I've had, subject to, and I'm still prepared to hear your submissions on that.

Mr. Bernard: Yes.

The Court: The issue then is do I swear him or, as counsel has suggested, affirm him? If I affirm him, I have to bring it within Section 14, I believe.

Mr. Bernard: I think given that decision and the question that appears as to whether or not a youth can affirm, there's no need to go that far and I retract that suggestion that he be affirmed. If Your Honour is satisfied that he has -- understands the moral -- has a moral obligation to tell the truth, then he can take the oath and that should end the matter as far as his ability to give evidence.

The Court: All right. Mr. Guthrie, have you anything you want to add?

Mr. Guthrie: Nothing.

At common law, the solemn affirmation should not be used in the absence of a "conscientious scruple" to oath-taking on the part of the witness. It is simply not possible for a child to have such a scruple without an understanding of the oath, so it should not be used in this manner. But sometimes it is, as the following cases show.

The trial judge, in **R. v. Ennig**¹¹⁵, without explication, concluded that a 7-year-old child be affirmed after conducting this inquiry:

- Q: Do you ever go to church?
A: Yes.
Q: Which church do you go to? Did you know -- have you ever heard about Sunday School?
A: Yes.
Q: Is that what you go to, Sunday School?
A: Yes.
Q: What do you learn about in Sunday School?
A: Sunday, School, God.
Q: God. And do you believe in -- that there's a God?
A: Yes.
Q: And do you talk to your mommy and daddy about God? Hm? Do you know what it means to take an oath?
A: What?
Q: If you were asked to tell the truth, the whole truth and nothing but the truth, what would that mean to you?
A: Not telling a fib.
Q: Not telling a fib. And if you told a fib to your mommy what would she do to you?
A: Spank me.
Q: And what would you -- what would happen if you told a fib in Court?
A: Get in trouble.
Q: Yeah, you might get into trouble. And are you sure you know the difference between telling the truth and not -- and lying?
A: um-hm.
Q: And what's -- what does it mean to lie?
A: Tell a fib.
Q: Can you remember the things you're going to tell me?
A: Yes.
Q: And are you going to tell me the truth?
A: Yes.
Q: Now you wouldn't want me to be angry with you if you -- would you?

115 (8 November 1989), Burnaby 15674FC (B.C.P.C.) [unreported].

A: Mm-mm.
Q: No. And I'd be angry if you -- if what happened?
A: What?
Q: What would make me angry?
A: Not -- telling a fib.
The Court: **Yes, all right, I'm satisfied that she understands the significance of telling the truth. That's she's capable of providing evidence and that she should be affirmed.** [emphasis added]

The child probably could have been sworn.

In **R. v. Garcia**, *supra*, the provincial court judge made a peculiar ruling that, because the 9-year-old child **did not understand the importance of the occasion**, he was prepared to have him "**affirmed but not sworn**". It is arguable, however, that the child would have satisfied the **Budin** test. This inquiry took place:

Q: The reason I'm asking you all these questions is this, that I have to determine whether or not you can be sworn. Do you understand what I mean when I say that?

A: No.

Q: For instance, let me give you an illustration. I don't know whether you have ever sat in a courtroom and listened to people giving testimony or giving evidence in the witness box. Where you're sitting now is called the witness box and if you've ever sat in court and listened to people coming into court to give evidence as witnesses you heard the court clerk stand up or you've seen the court clerk stand up and she or he usually has a Bible. And they hand that Bible to the witness and they then say, '**Do you swear to tell the truth, the whole truth, and nothing but the truth, so help you God?**' Do you know what that phrase is called?

A: **An oath.**

Q: **That's an oath, that's correct. And when you swear to tell the truth what does that mean?**

A: **That you promise God to tell the truth.**

Q: Yes, and can you tell me why it is that it's important to tell the truth?

A: Because something wrong can happen.

Q: Let's go over that again. The question I asked you was this, why do you think it's important to tell the truth?

A: Because something wrong can happen.

Q: Yes, and why is it particularly important in court? Can you think of a reason?

A: No.

Q: All right. Do you always tell the truth?

A: Most of the time.

Q: Most of the time. Sometimes you don't tell the truth. If you were asked a question in court here today by either Counsel, Ms. Antifaev for the Crown and Defence Counsel and say you didn't know the answer. They asked you a question and you didn't know the answer to that question. How would you handle that? What would you say?

A: I'd just say I don't know.

Q: You'd say I don't know? That's what I thought you said. If you weren't sure what the answer was, what would you do then?

A: I'd say I'm not sure about it.

Q: If you were to be while you were in court here today asked a question and it wasn't the truth, the answer that you gave was not the truth, what do you think could happen to you?

A: I don't know.

Q: Do you know why you're here? Do you know why you've come to court today?

A: Yeah.

Q: It's very important that you be very certain of what you say, isn't it?

A: Yeah.

Q: And if you said something that was not true, do you understand what could happen to you if you say something that is not true?

A: Yeah.

Q: What do you think could happen?

A: I could get in big trouble or something.

Q: You could get in big trouble? Is that what you said?

A: Yeah.

- Q: And who would punish you or who would put you in big trouble?
- A: My dad or my mom.
- Q: Your dad or your mom. Do you understand or do you have any religious schooling? Do you go to church at all?
- A: Yes, I do.
- Q: And how frequently do you attend church?
- A: I go every Sunday.
- Q: Do you go with your parents?
- A: Mm-hmm.
- Q: And when you go with your parents do they go to the regular church and you go to Sunday School or do you just attend church with them?
- A: No, it's -- I go down to Sunday School and my dad's a teacher there, a Sunday School teacher, and my mom doesn't usually get to come 'cause she usually works so [inaudible].
- Q: I see. So your dad is the Sunday School teacher.
- A: Yeah.
- Q: And during your various lessons that your dad gives you during Sunday School does he talk to you and the rest of the class about the importance of telling the truth?
- A: No, he just talks about -- like he tells us stories of in the Bible and stuff.
- The Court: **Well, as a result of my questioning I am satisfied that this witness is capable of communicating, has the intelligence to communicate his evidence, but I am not satisfied that he understands the importance of the occasion and for that reason I am prepared to have him affirmed but not sworn. [emphasis added]**

It is respectfully submitted that such a legal determination is not permissible in Canadian law. A solemn affirmation is equivalent to the oath, if understood by the witness, both resulting in the giving of "sworn" testimony. The trial judge may have confused affirmation with "promising to tell the truth", which is the "unsworn" condition for the

reception of the evidence of a child. It is interesting that neither counsel took notice of such an unusual finding.

In **R. v. Epp**, *supra*, Crown counsel conducted the inquiry, followed by a brief cross-examination by defence counsel. As a result of the 12-year-old's admission that she did not believe in God and upon her undertaking to tell the truth, the presiding judge was satisfied that the child can make an affirmation. The transcript reads:

EXAMINATION IN CHIEF BY CROWN COUNSEL:

- Q: A., you're twelve years old?
- A: Yes.
- Q: Now you told me earlier that you watch a lot of court shows on T.V.?
- A: Yes.
- Q: You understand what happens in court?
- A: Yeah, a little bit.
- Q: Okay. Do you think these are pretty serious proceedings?
- A: Yes, very serious.
- Q: Now tell His Honour, do you believe in God?
- A: No, not really.
- Q: Now what does it mean to you to tell the truth in court?
- A: Well if you tell the truth then it -- well if -- if I'd lied in court I'd feel like the person I was getting in trouble I wasn't -- like it wouldn't make me feel any better if I got that person in trouble dishonestly and if I did lie in court, 'cause I've never been here before, then it would stay in my head and I wouldn't feel very well about it.
- Q: Do you think that you might get in trouble if you didn't tell the truth in court?
- A: Yeah.
- Q: What do you think would happen to you?
- A: You get -- I guess you get in trouble with perjury.
- Q: Do you know what perjury means?
- A: Mm-hm.
- Q: What?

A: If you lie in court you can get charged with perjury which is if you lie and if they find out about it like you can get charged with it.

Q: Do you think the judge might get mad at you?

A: I'm not sure about that.

Q: Do you think your mom and dad might get mad at you?

A: I'm not sure about that either really.

Q: How would you feel yourself if you came to court and didn't tell the truth?

A: I'd feel quite guilty after I was out of the courtroom.

Q: Now you realize as a result of what you're going to tell His Honour that Ron Epp is facing serious consequences. Right?

A: Yes.

Q: So tell His Honour whether you think it's important or not to tell the truth today?

A: You mean why I think it's important?

Q: Well first of all do you think it's important?

A: Yes, I think it's important.

Q: Why?

A: To tell the truth I think it's important because it's not right -- it's not really right to lie on any -- anyone who would feel -- anybody who would usually tell the truth wouldn't lie and I'm sure that anybody would feel bad if they lied and didn't tell the truth.

Q: **So since you don't believe in God would you just be able to promise to His Honour that you'd tell the truth?**

A: Yes, I would be able to.

Q: Now what would you mean if you took that promise?

A: I'm make the promise to the judge or Your Honour that I'd tell the truth in the court and then I'd feel better about telling the truth. And I'd tell the truth anyways well -- even if I didn't have to swear under the oath.

CROSS EXAMINATION BY DEFENCE COUNSEL:

Q: Do you know what the -- what the word 'oath' means?

A: Yes. You mean explain it, how it works?

Q: Well what would you think the word means then?

A: Not sure what it means but I know like where you use it in this case like. I don't understand.

Q: Well if you promise to tell the truth in this court and you don't, A., what do you think is going to happen to you?

A: Get in trouble with perjury that I just explained.

Q: Yeah, well you get in trouble with perjury but that doesn't explain what that --

A: Well --

Q: -- what kind of trouble that would lead you to. What kind of trouble do you think you'd get into?

A: Maybe I'd get in trouble from the judge and other people I guess.

Q: I beg your pardon?

A: Maybe I'd get in trouble from the judge and the subject would come back up again and I'd get in trouble for it.

Q: Thank you.

The Court: **I think on the question inquiry I'm satisfied that she can take an affirmation, so perhaps you could read that to her now. [emphasis added]**

While this unreported case comes closest to being an exemplification of an appropriate instance where a solemn affirmation may occur, it is far from consistent with the common law where a specific inquiry must be made into whether a child possesses a "**conscientious scruple**". (See **Appendix F** for Mr. Justice Bouck's list of questions.)

C. "ABILITY TO COMMUNICATE THE EVIDENCE"

Until very recently (October 1993), the second prerequisite of **s. 16(1)**, that the child be able to communicate the evidence, had not been authoritatively interpreted by the courts. Proponents of the provision have argued that the policy background, legislative history, and the plain language of the legislation all favour a "broad" interpretation - namely, the bare ability to communicate (Thompson, 1989). An

argument can also be made that the term is inclusive language which includes non-verbal forms of communication such as the use of writings, drawings, anatomically detailed dolls, physical gestures, or sign language. On the basis of this wider interpretation of the concept, it is open for counsel to argue on the basis of **s. 14** of the **Charter** that:

A...witness...who does not understand the language in which the proceedings are conducted...has the right to the assistance of an interpreter

or make a submission pursuant to **s. 6** of the **Canada Evidence Act** that:

A witness who is unable to speak may give his evidence in any manner in which he can make it intelligible.

A narrower approach would be that "**able to communicate**" implies not only the mechanical ability to convey information, but also the intellectual capacity to comprehend questions and articulate comprehensible and sensible answers. (See **Appendix G** for Mr. Justice Bouck's list of questions.)

Presumably, "**ability to communicate the evidence**" must be evaluated in the context of a child being able to communicate in a legal milieu. It may be argued that children as young as one year of age may possess the ability to communicate; however, to communicate the evidence in court necessitates a degree of cognitive skill to comprehend the event, memory skills to recount past events, and verbal skills to respond to questions at trial (Bala, 1990).

The threshold test has been under attack by academics. One author argues:

While necessary, adherence to truth is not sufficient to establish competency. There is also a necessity that the child has cognizant skills adequate to comprehend the event he or she witnessed and to communicate memories of the event in response to questions at trial. Competency to testify implies some measures of competency at the time of the event witnessed as well as at the time of trial. The child must be able to organize the experience cognitively and to differentiate it from his or her other thoughts or fantasies. (Melton, 1981:75)

The Ontario Court of Appeal addressed the issue in **R. v. Donovan**¹¹⁶. The court was of the opinion that, while this provision mandated the trial judge to inquire into whether or not the child is able to communicate the evidence, no statutory duty exists to conduct an inquiry into the child's competence at the time of the events, even where the child was quite young at the time. The court did underscore that the age of the child at the time of the offence and the length of the interval to the trial are significant factors to be considered in determining the weight to be given to the child's testimony.

In **R. v. Khan**¹¹⁷, commenting on the distinction between "sworn" and "unsworn" evidence based on the predecessor legislation, the Ontario Court of Appeal favoured a broad approach:

The test is whether the child's intellectual attainments are such that he or she is capable of understanding the simple form of questions that it can be anticipated will be asked, and is able to communicate the answer in an understandable manner. (at 206-207) [emphasis added]

116 (1991), 13 W.C.B. (2d) 319 (Ont.C.A.).

117 (1988), 42 C.C.C. (3d) 197 (Ont.C.A.).

Upon further appeal to the Supreme Court of Canada¹¹⁸, the decision of the Ontario appellate court was upheld.

In **R. v. D.(R.R.)**, *supra*, the trial judge was of the view that the prerequisite for oath competency under the new amendments was "**the ability to communicate**". In an attempt to satisfy that requirement, he conducted the inquiry as follows:

- The Court: Before we call the Complainant, I will just discuss this with counsel dealing with the new amendments. I want to question her, and of course I'm not going to -
- you're not suggesting that I should swear her in?
- Ms. Hansen: She was not sworn at the Preliminary Inquiry, My Lord.
- The Court: **It's a question of whether she's got the ability to communicate, is really the task.**
- Ms. Hansen: Yes.
- The Court: C., do you know what a judge is?
- A: Yes.
- The Court: What does he do?
- A: He works with children in court.
- The Court: Sometimes he does, he works with children. Whereabouts do you live?
- A: Saskatoon.
- The Court: Do you know what is meant by telling the truth?
- A: Yes.
- The Court: And what happens if you don't tell the truth?
- A: God will get upset.
- The Court: God will get upset. That's a good answer. And do you like school?
- A: Yes.
- The Court: What's your favourite subject? What do you like best about school?
- A: At recess.
- The Court: Consistent with my own views when I was your age. Do you know what lawyers do?
- A: No.

The Court: You don't know what lawyers do. Do either of you have any questions arising out of the questions I asked?

Ms. Hansen: I have no questions, My Lord.

Mr. Allbright: No.

The Court: **I have no hesitation in ruling that, within the new amendments to the *Evidence Act*, that she is quite able to communicate. I am, therefore, going to permit her to testify. (270-271) [emphasis added]**

The Saskatchewan Court of Appeal held that a statutory duty exists which requires the trial judge first to determine whether the child understood the nature of an oath or solemn affirmation. The appellate court went on to say that only after that procedure is satisfied, can the trial judge proceed on to ascertain whether the child has the ability to communicate. Notwithstanding the procedural error, the line of questioning, directed by the trial judge at the child and the elicited simplistic responses, would appear to satisfy the standard test enunciated in ***R. v. Khan***, *supra*.

The Manitoba Court of Appeal, in ***R. v. McGovern***¹¹⁹, considered the phrase "ability to communicate". The court held the view that:

An ability to communicate evidence is not defined. The word "evidence", however, denotes a statement made by a witness under a legal sanction, whether that be an oath, a solemn declaration or a promise to tell the truth. It is thus quite clear that to be able to communicate evidence a witness must understand what it means to tell the truth. There would be no purpose in requiring a witness to promise to do so if an understanding of what truth is was not a requisite.

It is equally clear, in my view, that, in permitting a witness to give evidence "on promising to tell the truth", the statute implicitly requires an understanding on the witness's part of what a promise is and the

119 (1993), 22 C.R. (4th) 359 (Man.C.A.).

importance of keeping it. Otherwise, the promise would be an empty gesture. (at 363)

In a very recent case, the Supreme Court of Canada, in **R. v. Marquard**¹²⁰, interpreted the phrase "communicate the evidence" as "**more than mere verbal ability**". The defence had argued that the judge, in order to make a determination as to whether a child witness is able "to communicate the evidence", must test the witness' ability to perceive and interpret the events in question and to recollect the same, as well as his or her ability to communicate, in the sense that the witness possessed the verbal ability to understand questions and be responsive in his or her answers. The Crown took the position that the impugned legislation only required the last prerequisite to be satisfied. In resolving the issue, the **Marquard** court adopted what is described as a "middleground". The Supreme Court of Canada held that a trial judge must be satisfied that a child witness has the "**capacity**" to perceive, interpret and recollect events together with the ability to communicate. Madam Justice McLachlin, with Lamer C.J.C., Sopinka, Cory, Iacobucci, and Major J.J. concurring, held:

The judge must satisfy him- or herself that the witness possesses these capacities. Is the witness capable of observing what was happening? Is he or she capable of remembering what he or she observes? Can he or she communicate what he or she remembers? The goal is not to ensure that the evidence is credible, but only to assure that it meets the minimum threshold of being receivable. The enquiry is into *capacity* to perceive, recollect and communicate, not whether the witness *actually* perceived, recollects and can communicate about the events in question. Generally speaking, the best gauge of capacity is the witness' performance at the time of trial. The procedure at common law has generally been to allow

120 (1993), 25 C.R. (4th) 1 (S.C.C.).

a witness who demonstrates capacity to testify at trial to testify. Defects in ability to perceive or recollect the particular events at issue are left to be explored in the course of giving the evidence, notably by cross-examination.

I see no indication in the wording of s. 16 that Parliament intended to revise this time-honoured process. **The phrase "communicate the evidence" indicates more than mere verbal ability. The reference to "the evidence" indicates the ability to testify about the matters before the court. It is necessary to explore in a general way whether the witness is capable of perceiving events, remembering events and communicating events to the court.** If satisfied that this is the case, the judge may then receive the child's evidence, upon the child's promising to tell the truth under s. 16(3). It is not necessary to determine in advance that the child perceived and recollects the very events at issue in the trial as a condition of ruling that her evidence be received. That is not required of adult witnesses, and should not be required for children. (at 10) [emphasis added]

Madam Justice L'Heureux-Dubé, writing in dissent, took the view that the standard, articulated by Justice McLachlin, was inconsistent with the intent of the legislation. She stated:

In her view, there is nothing in s. 16 of the Act which indicates an intention to vary the common law rule. I disagree. Such a result would, in my opinion, run counter to the clear words of s. 16 of the Act as well as the trend to do away with presumptions of unreliability and to expand the admissibility of children's evidence and may, in fact, subvert the purpose of legislative reform in this area. (at 24)

Rather, Justice L'Heureux-Dubé provided an analysis as follows:

Given that legislative reform was designed in part to facilitate the reception of children's evidence, it is unlikely that Parliament intended to make the new provisions even more stringent. The more likely scenario is that Parliament intended the test to be just what the words indicate: the ability to communicate. This interpretation does reflect the basic

recommendation of the Badgley report as well as the more general evidentiary trend to remove barriers to the reception and use of evidence.

The common law rules rest on the presumption that the evidence of certain classes of witnesses is inherently unreliable. To require, as my colleague does, an inquiry into perception and recollection under s. 16 of the Act is to implicitly import the presumption of unreliability back into children's evidence, the very notion which this Court has previously stated that Parliament revoked in its reforms to s. 16 (*R. v. W.(R.)*, supra).

Under s. 16, once the child's ability to communicate, understood as the ability to respond to questions, has been established, any limitations because of deficiencies in recollection or perception go to weight rather than admissibility.

However, the adequacy of a child's powers of perception and recollection, even if set at a low threshold, may be assessed differently by different judges. Limiting the inquiry to the ability to understand and respond to questions, as s. 16 of the Act prescribes, has the virtues of simplicity and ease of determination. This, in turn, will ensure consistency and predictability with regard to the admission of children's evidence. The rest may be left to the trier of fact. (at 28)

Justice McLachlin responded to the dissenting justice's contentions as follows:

I disagree. The test I have expounded is not based on presumptions about the incompetency of children to be witnesses nor is it intended as a test which would make it difficult for children to testify. Rather, the test outlines the basic abilities that individuals need to possess if they are to testify. The threshold is not a high one. What is required is the basic ability to perceive, remember and communicate. This established, deficiencies of perception, recollection of the events at issue may be dealt with as matters going to the weight of the evidence. (at 10)

Notwithstanding the definitive resolution of the issue by the Supreme Court of Canada, it is submitted that the interpretation of the term given by Justice L'Heureux-Dubé is the more desirable one (per *R. v. Khan*, supra). The legislation was enacted to facilitate more, and younger, children to testify (*viz.*, tell their story) in court by creating the

lower threshold tests of "able to communicate" and "promise to tell the truth". The statutory language of s. 16 makes no reference to the necessity of conducting an inquiry into a child's capacity to perceive, interpret and recollect events. It is submitted that to expand the threshold test, in the manner as suggested by Madam Justice McLachlin, would revitalize the Wigmorean approach of Kendall-type¹²¹ warnings that children's evidence is "inherently unreliable". Furthermore, it is argued that such an approach would be inconsistent with the spirit of the legislation and the Parliamentary intent to facilitate successful prosecution of child sexual abuse. What ultimately constitutes as "evidence" for the trier, it is submitted, should be an issue which goes to weight, not admissibility.

An examination of the 146 s. 16 transcripts revealed no definitive judicial interpretation of the term "**able to communicate the evidence**". More specifically, there was a clear absence of reference to case law. Rather, judges routinely asked a series of questions aimed at establishing whether a child "**understands the nature of an oath**" and as result of that amorphous procedure arrived at the concomitant conclusion that the child is "**able to communicate the evidence**".

In R. v. S.(R.)¹²², the trial judge gave this explanation following a lengthy oath competency inquiry:

All right. Now, I went into a little extra conversation, and I am saying this for the benefit of counsel, because I am dealing, as both counsel are aware, with section 16, and I was dealing with -- by way of asking extra

121 To be discussed in Chapter 2.

122 (7 October 1988), Richmond 23076 (B.C.P.C.) [unreported].

questions, with the -- with subsection (b), being whether this a -- **the person is able to communicate the evidence, that's the reason I asked some peripheral questions, just to -- just to talk to the -- to the witness.** [emphasis added]

At the preliminary hearing of **R. v. Zaharik**, *supra*, the judge embarked on a set of questions for the purpose of satisfying the first prerequisite of s. 16(1) as follows:

The Court: Again because there are serious consequences coming out of this as in other trials. You understand I am here to make certain that the questions that are asked of you are proper questions, to ensure there will be no abuse of yourself by any of the lawyers who may be questioning you?

A: Yes.

The Court: What grade are you in?

A: Eight.

The Court: How are your grades?

A: Good.

The Court: It may be that you are going to be asked to take an oath and it says 'do you swear that the evidence you shall give will be the truth, the whole truth and nothing but the truth so help you god'. Do you understand what an oath is?

A: Yes.

The Court: What is an oath?

A: A promise to the Court and to God to tell the truth.

The Court: Do you believe that there is a God?

A: Yes.

The Court: Do you go to church?

A: No.

The Court: Have you ever gone to church or Sunday School?

A: Yes.

The Court: You do believe that there is a God that is almighty?

A: Yes.

The Court: **I am satisfied that this witness is capable of communicating the evidence** which she has to give and I am also satisfied that she is capable of taking an oath. [emphasis added]

The following are case examples of the approach taken by British Columbia judges in an attempt to make a legal determination of whether a child is "**able to communicate the evidence**":

R. v. Young¹²³:

- Q: Do you know what it means to swear on the Bible?
A: It means that you're going to tell the truth -- you swear to God that you're going to tell the truth.
Q: And do you know why we use the Bible rather than any other book such as a book like I have on my bench here?
A: Because the Bible is the word of God.
Q: If I were to give you that Bible and ask you to put your hand on it and swear to tell the truth, what would it mean to you?
A: It would mean that if I told a lie then God would know and it would be a lot worse than if I just told a lie without swearing on the Bible.
Q: How would you feel if you were to be asked a question after you had sworn on the Bible and you told a lie?
A: I'd feel quite bad.
The Court: Do you have any questions to ask of this young man, Miss Porteous?
Ms. Porteous: No, Your Honour.
Mr. Geselbracht: No, Your Honour.
The Court: Well, it's a bit unusual in this case, but this young fellow is a pretty bright young man, and in my view he **understands the nature of an oath, and he is able also to communicate**. Accordingly, I'm going to have him sworn. [emphasis added]

R. v. Satiacum, *supra*:

- The Court: I am satisfied that this witness understands the nature of the oath and, from my conversation with her, she strikes me as being an intelligent, bright young lady and **is able to communicate the evidence** and I intend to take her evidence under oath. So would you stand

123 (3 July 1990), Duncan 12672 (B.C.P.C.) [unreported].

up for a moment, please, and just take the Bible in your hand.

The Court: Before L.P. testified I conducted an inquiry pursuant to section 16 of the Canada Evidence Act. At its conclusion I was satisfied that she understood the nature of an oath in accordance not only with Bannerman v. The Queen (1966) SCR 5, but also Regina v Budin (1981) 58 CCC 2 @ 352. I was also satisfied that **she was able to communicate the evidence.** [emphasis added]

R. v. Morris, *supra*:

The Court: Yes. I am satisfied that the child understands the nature of an oath and **can communicate the evidence and be sworn.** [emphasis added]

R. v. Malcolm, *supra*:

The Court: I am satisfied, therefore, that this young lady has the **ability to communicate** -- has the intelligence and the ability to communicate. I am satisfied that she understands the meaning of an oath within the case law -- within the meaning of the case law and I direct that she be sworn.

The Clerk: Yes, Your Honour. [emphasis added]

R. v. McFarlane, *supra*:

The Court: I am satisfied that this young man understands the nature of an oath. He certainly is **able to communicate his evidence.** He has the intelligence to do that. I am satisfied also that he appreciates the importance of this occasion. That he understands the added responsibility of appearing in court and speaking the truth over and above his -- the normal day to day requirement of speaking the truth. He understands what it means to tell the truth in court and he has an appreciation of both in the practical and in the moral sense of what happens when a lie is told in court and I am therefore, satisfied that he may be sworn. [emphasis added]

R. v. S.(W.D.), *supra*:

Mr. McSheffrey: Your Honour may recall that the last time this matter was before you on January fifth, you made the inquiry as to his capacity to be sworn and you informed

counsel that it is your belief that he didn't have the capacity to give sworn evidence. I am prepared to proceed. It would seem that section 16 of the Evidence Act may require Your Honour to make a further inquiry as to his ability to communicate.

The Court: Well, I am fully satisfied in respect of his ability to communicate from my previous questioning of him. What is the position of counsel? Are you -- is it your position that there should be further inquiries made?

Mr. McSheffrey: I don't -- if your Honour feels that the boy can communicate, certainly the Crown supports that conclusion. I would contend **that he is able to communicate** and that he does know the difference between telling the truth and telling a lie. He could give reliable evidence.

Mr. Marshall: I submit that the inquiry the Court did the last day is sufficient to make the same finding under the amended legislation. [emphasis added]

In all these cases, the court satisfied itself as to the child's ability to communicate conversationally.

As previously examined, the Saskatchewan Appeal Court in R. v. D.(R.R.), *supra*, prescribed a precise and sequential procedure for s. 16 inquiries as follows:

1. The judge must first determine whether the child understands the nature of an oath or solemn affirmation, then, if that procedure is satisfied.
2. The judge will proceed to ascertain whether the child has the ability to communicate.

The dissertation research, it is submitted, does not support a judicial adherence to such a strict approach. Rather, the judicial exercise consists of a form of questioning designed to arrive at a simultaneous legal determination of both prerequisites.

D. "PROMISE TO TELL THE TRUTH"

- s. 16(3) A person referred to in subsection (1) who does not understand the nature of an oath or solemn affirmation but is able to communicate the evidence may testify on promising to tell the truth.

This is the area of the legislation which promised to have the greatest impact. In light of the changing legal climate reflected in the new section, more, and younger, children will be able to testify in court. If a child is unable to satisfy the oath or affirmation requirements, as long as he or she meets the original test of "**ability to communicate**", the child **may** testify simply on "promising to tell the truth".¹²⁴

The substantive issue to be addressed judicially is whether there is a legal requirement that the child possess intellectually a simple or concrete understanding of the abstract concepts of "**promising**" and "**telling the truth**" and to demonstrate in a simple or precise manner an ability to make a distinction between a "truth" and a "lie".

In R. v. Meddoui¹²⁵, the Alberta Court of Appeal adopted a liberal approach to the interpretation of this section by refusing to impose any legal requirement upon a trial judge to make children verbally articulate a definition for the abstract concepts of

124 Bessner (1991) points out the ambiguity of the legislation:

[T]here is an inconsistency between s. 16(2) and s. 16(3). Section 16(2) provides that if a child understands the nature of an affirmation, and is able to communicate the evidence, the child *shall* testify. Section 16(3) provides that in circumstances in which the child promises to tell the truth and is able to communicate the evidence, the court *may* permit the child to testify. Section 16(2) is a mandatory provision, while s. 16(3) is permissive. Obviously the legislators intended s. 16(2) and (3) to address different circumstances. It is difficult, however, to identify any meaningful differences between the two provisions. (at 499)

125 (1990), 61 C.C.C. (3d) 345, [1991] 2 W.W.R. 289, 2 C.R. (4th) 316 (Alta.C.A.).

"promise" or "truth".¹²⁶ The defence argued on appeal that the trial judge failed to question two children about the meaning of "**promise**" and "**truth**" before permitting them to give unsworn testimony upon "**promising to tell the truth**". In dismissing the appeal, the court held that it is not necessary for a "**ritualistic**" inquiry nor a "**formula**" to be applied in such cases:

Mr. Engel objects that the judge failed to ask these children about the meaning of "promise" and "truth". The judge was, of course, in a position to assess the kind of understanding these children had and we decline to impose any legal requirement that a proposed child witness be required to define the terms. We also disagree with the argument that the judge must ritualistically inquire whether the child knows the consequences of a failure to tell the truth.

While we might have posed different questions, we do not think that any formula should be routinely applied. The judge must assess the understanding of the witness and must weight the nature and maturity of the responses. The questioning was not perfunctory, but clearly intended to expose the quality of the understanding. This was a careful questioning and the assessment of the children's capacities and abilities was a matter eminently suited for the judge's determination. This experienced judge had a very great advantage in being able to tailor his questions towards those children, and we are unable to say he forfeited the advantage. (at 2-3)

On further appeal to the Supreme Court of Canada¹²⁷, Mr. Justice Sopinka, delivering the unanimous decision of the court, affirmed the reasoning of the Alberta Court of Appeal on this issue.

126 In a U.S. case, **People v. District Court**, 791 P. 2d 682 (Colo. 1990), a 4-year-old girl was found to be competent to testify in a sexual assault case even though she could not "understand" (in essence, could not verbalize) the difference between telling the truth and telling a lie.

127 [1991] S.C.J. 81 (S.C.C.).

In a recent case, **R. v. Khan**, *supra*, the Ontario Court of Appeal, upon an analysis of the law based on the predecessor legislation, addressed the issue of the "unsworn" evidence of a young child. This case involved a little girl, who was 3½ years old when she was sexually assaulted by her doctor, and 4½ at the time of the trial. The lower court disqualified the child from giving unsworn evidence and acquitted the accused. The appellate court quashed the decision and ordered a new trial.

The court found that the trial judge applied the wrong test in determining the competency of a child to give unsworn testimony. At trial, the Crown sought to have the child complainant, a 4½-year-old, give unsworn testimony. The trial judge questioned the child who responded appropriately as to the distinction between the truth and a lie, but was unable to answer questions concerning the Bible or the consequences of not telling the truth in court. In an effort to make a determination on the substantive issue, the judge asked these questions:

- Q: -- and do you know what it is to tell the truth? You're sort of shrugging your shoulders there and smiling. Do you know what it is to tell a lie?
- A: U-hmm.
- Q: What's a lie?
- A: If you say you cleaned up the room and you didn't, and your mother and your father went to see it and it's messy, that's a lie.
- Q: I see. What happens when you tell a lie?
- A: The parent spank their bum.
- Q: That's right. Is that what happens to you?
- A: Yeah.
- Q: Not often?
- A: No.
- Q: Do you ever tell a lie? Just a little one?
- A: Some big and some little.
- Q: Is that right? What's a big lie?

A: A big lie is if you have a big mess in your room, and you said 'I cleaned up my room, Mom', and you went in the bedroom and the Grandma and the mother and daddy were to see it's all a big mess. They would yell at them and spank the bum.

Q: What's a little lie?

A: If you have a little room.

Q: A little room?

A: Like a mouse's house --

Q: I see. You're doing just fine. Tell me, what else happens to you if you tell a lie?

A: I get spanked and I get sent in my room and I get cleaned up and I cry and I come back out and I not cry, and that's okay.

Q: And then everything is fine, is it?

A: [Nod]

Q: Now, you see that book [the Bible] just behind you there?

A: U-hmm.

Q: You know what that is?

A: What?

Q: Can you pull it over for me? That's the girl. Do you know what that book is?

A: Yeah.

Q: What is it? You're sort of looking at your Mom, are you? Is that your Mom over there?

A: U-huh.

Q: Sitting down there by the box. Why don't you look at me, T.? Do you know what that book is?

A: [Shake of head]

Q: Do you know what it means to --

A: What?

Q: Do you know where you are now?

A: Yeah.

Q: Where?

A: In court.

Q: You're in court. How do you feel about being in court?

A: I feel like I want to go home.

Q: You do? Well, you'll go home soon.

A: I know.

Q: In addition to wanting to go home, how else do you feel about court?

A: I -- I --

Q: You don't know? You don't know what this book [the Bible] is? You sort of shrugged your shoulders again. You don't know what that book is or do you? You're shaking your head. You don't know. Do you know what it is to tell the truth in court? You are shrugging your shoulders again. All right, thank you. I don't have any other questions for you. Thank you T.

After hearing submissions of counsel, T. was asked a further set of questions which included the following:

Q: T., is telling the truth good or bad?
A: Good.
Q: Is telling a lie good or bad?
A: A lie is good or bad?
Q: Yeah.
A: Bad.
Q: Bad, and what happens when you tell a lie in the courtroom?
A: I don't know.
Q: You don't know. You shrugged your shoulders. (at 285-86).

The trial judge refused to accept the child's unsworn testimony on the ground that, while she possessed sufficient intelligence to justify the reception of the evidence, he was not satisfied that she understood the duty of speaking the truth. The Court of Appeal concluded that the trial judge erred in applying the test articulated in **R. v. Bannerman**, *supra*, a case where the issue under consideration was the reception of evidence under oath, and in particular in applying Mr. Justice Dickson's statement that:

the object of the law in requiring oath is to get at the truth relative to the matters in dispute by getting a hold on the conscience of a witness.
(at 138) [emphasis added]

The appellate court found that the trial judge erred in law by applying inappropriately high standards to his determination of the issue. Mr. Justice Robbins was of the view that the trial judge applied the more strenuous test for admission of "sworn" testimony when he ought to have applied the less strenuous test applicable to "unsworn" testimony. He explained:

An appreciation of the assumption of "a moral obligation" or a "getting a hold on the conscience of the witness" or (to refer to the factors stressed in *Fletcher, supra*) an "appreciation of the solemnity of the occasion" or an awareness of an added duty to tell the truth over and above the ordinary duty to do so are all matters involving abstract concepts which are not material to a determination of whether a child's unsworn evidence may be received. A child need not comprehend "what it is to tell the truth in court" or to appreciate "what happens when you tell a lie in the courtroom" before he or she can give unsworn evidence. Questions of this nature, which were put to T. and relied on by the trial judge in his ruling excluding her testimony, are not appropriate to the issue of the admissibility of a child's unsworn testimony. (at 205)

The justice went on to frame this liberal test for the reception of "unsworn" evidence of a child:

To satisfy the less stringent standards applicable to unsworn evidence, the child need only understand the duty to speak the truth in terms of ordinary everyday social conduct. This can be demonstrated through a simple line of questioning directed to whether the child understands the difference between the truth and a lie, knows that it is wrong to lie, understands the necessity to tell the truth, and promises to do so...Any frailties that may be inherent in the child's testimony go to the weight to be given the testimony rather than its admissibility...

The test is whether the child's intellectual attainments are such that he or she is capable of understanding the simple form of questions that it can be anticipated will be asked, and is able to communicate the answer in an understandable manner. Again, the weight to be accorded the evidence is for the trier of fact. (at 206) [emphasis added]

The primary objective of this reformulation was the court's desire to abolish the traditional bias against the admission of evidence from young children.

While the Ontario Court of Appeal was, in actuality, giving an interpretation of the statutory requirements for "**unsworn**" evidence under the predecessor legislation, the court explicitly stated that this test applied to the new **s. 16(3)** as well:

In the final analysis, it seems to me that the standards applicable to the admission of a child's unsworn testimony under s. 16(1) are in reality no different than those now set by the new provision dealing with unsworn evidence (s. 16(3)) which came into effect on January 1, 1988. The new provision uses plainer language to permit a child who does not understand the nature of an oath "but is able to communicate the evidence [to] testify on promising to tell the truth". (at 206)

Upon further appeal by the accused, the Ontario Court of Appeal decision in **R. v. Khan**, *supra*, was subsequently affirmed by the Supreme Court of Canada. Madam Justice McLachlin quoted with approval the less stringent test formulated by Robbins J.A. and agreed that errors of law were made:

I agree with the Court of Appeal that the trial judge made the two errors to which it referred. He erred first in applying the *Bannerman* test to s. 16 of the *Evidence Act* and emphasizing that T. did not understand what it meant to lie 'to the court'. While the distinction between the ability to testify under oath and the ability to give unsworn evidence under s. 16 has been narrowed by rejection in cases such as *Bannerman* of the need for a religious understanding of the oath, it has not been eliminated. Before a person can give evidence under oath, it must be established that the oath in some way gets a hold on his conscience, that there is an appreciation of the significance of testifying in court under oath. It was wrong to apply this test, which T. clearly did not meet, to s. 16, where the only two requirements for reception of the evidence are sufficient intelligence and an understanding of the duty to tell the truth. (at 98)

Secondly, since the s. 16 Canada Evidence Act makes no distinction between children of different ages, she elaborated that:

The trial judge also erred in placing critical weight on the child's young age. The Act makes no distinction between children of different ages. The trial judge in effect found that T. met the two requirements for permitting a child to testify under s. 16, but, emphasizing her immaturity, rejected her evidence. He found that T. had sufficient intelligence, and conceded that she "seemed to be aware at least of the consequences of telling a lie". This is clear from T.'s evidence, as revealed by the following portions of the transcript:

Q: Yes, and do you know what it is to tell the truth? You're sort of shrugging your shoulders there and smiling. Do you know what it is to tell a lie?

A: U-hmm.

Q: What's a lie?

A: If you say you cleaned up the room and you didn't, and your mother and your father went to see it and it's messy, that's a lie.

Q: I see. What happens when you tell a lie?

A: The parent spank their bum.

• • • • •

Q: I see. You're doing just fine. Tell me, what else happens to you if you tell a lie?

A: I get spanked and I get sent in my room and I get cleaned up and I cry and I come back out and I not cry, and that's okay.

Q: And then everything is fine, is it?

A: [Nod]

Having found that the two requirements for reception of the evidence under s. 16 had been fulfilled, the trial judge erred in letting himself be swayed by the young age of the child. **Were that a determinative consideration, there would be danger that offences against very young children could never be prosecuted.** (at 98-99)¹²⁸ [emphasis added]

Madam Justice McLachlin concluded that, by refusing to allow the 4½-year-old child to give unsworn evidence, the trial judge erred by putting too much weight on the

¹²⁸ In an American case, State v. Hussey, 521 A. 2d 278 (Me 1987), the conviction of a father for sexual abuse of his daughter was upheld. The court ruled that the 3-year-old child was competent to testify.

fact that the child was very young, in effect, drawing a distinction between children of tender years and older children.¹²⁹ The Supreme Court of Canada dismissed the accused's appeal and ordered a new trial. In light of the latter ruling, courts must be made aware of the fact that the age of a child cannot be the sole consideration in deciding whether or not he or she has the capacity to testify.

UNREPORTED CASES

Upon analysis of s. 16 transcripts, it can be argued that courts have adopted a broad and flexible approach in the application of this section of the legislation. From the research, judges are exercising wide discretion on a case-by-case basis in the determination of the reception of the unsworn evidence of a child. No consideration or reference was made to the common law promulgated in earlier cases and/or, more recently, **Meddoui** and **Khan**. Furthermore, judges provided no commentary concerning the intent of Parliament in enacting s. 16(3). Judges allowed children to give "unsworn" testimony on a "promise to tell the truth" in 25/146 cases.

In **R. v. N. et al**, *supra*, a 5-year-old complainant was permitted to testify on simply promising to tell the truth. The judge neglected to ask any questions to establish whether the child understood the notions of "promise" or "truth". A portion of the proceeding is as follows:

¹²⁹ According to Bessner (1990), this latter statement of Madam Justice McLachlin is of profound significance. The **Khan** court, in effect, has clearly accepted the conclusion of contemporary psychological studies that the evidence of young children may have significant probative value.

THE COURT QUESTIONS THE WITNESS:

- Q: Now, how old are you, D.?
- A: Huh?
- Q: What's your name, D. D?
- A: D.
- Q: All right. How old are you now?
- A: Five.
- Q: Do you know your birthday? What day is that?
- A: March 3rd.
- Q: Do you go to school, D.?
- A: Nope.
- Q: Okay. Do you go to playschool?
- A: After September. September.
- Q: Okay. What's the name of your friend?
- A: My friend?
- Q: The little doll you've got there.
- A: His name is Bear Face and Bear Head.
- Q: Okay. How long have you had him?
- A: Once.
- Q: Once. Okay. Do you know -- have you talked to this gentleman over here, this Mr. Brodie?
- A: Yup.
- Q: Yeah? And have you talked to him as to why you're here and what it's about?
- A: Well --
- Q: Hey?
- A: -- yeah.
- Q: Can you tell me what -- why you think you're here?
- A: I don't know.
- Q: All right. Did something happen between your mother and your dad and you?
- A: Yup.
- Q: Do you remember about that?
- A: They were doing dopey stuff.
- Q: All right. Do you think you can tell me what they did?
- A: Yup.
- The Court: Just listen to what I say to you for a little moment, now.
- A: Okay.
- The Court: Will you promise to tell me the truth about what happened between you and your mom and your dad?
- A: Yeah.
- The Court: All right.

Arguably, this inquiry would fall short of the standards set forth in Meddoui and/or Khan.

The judge, in R. v. Sutherland, *supra*, allowed a child to give unsworn testimony based on his "sufficient intelligence" and his "ability to communicate". More specifically, the judge failed to question the 8-year-old child about telling the truth and failed to elicit a specific promise to tell the truth. The inquiry is recorded as follows:

THE COURT QUESTIONS THE CHILD:

Q: Now, the clerk may -- I'm not sure yet, but the clerk may ask you to put your hand on the Bible and swear to tell the truth. You would be taking an oath and I have to ask you a few questions about whether you know what taking an oath means. Do you ever go to church?

A: No.

Q: Do you ever go to Sunday School?

A: Sometimes. Not that often though.

Q: When is the last time that you went to Sunday School?

A: I'm not sure. A long time ago.

Q: A long time ago. Okay. What did -- do you remember what you were taught in Sunday School?

A: No.

Q: Do you believe in God?

A: Yes.

Q: You do? Can you tell me what you understand God to be.

A: U'mmm, somebody that has created us and a spirit.

Q: Pardon me?

A: I think he is a spirit.

Q: You think he's a spirit. Okay. Where did you find out about God?

A: I think my mother. I'm not sure.

Q: Do you recall whether God was mentioned in Sunday School that you went to?

A: Pardon me?

Q: Was God mentioned in the Sunday School that you went to?

A: No. I mean, yes. Yes, he was.

Q: He was. What do you think might happen to you if you promised God that you would do something and then you didn't do it?

A: I'm not sure.

The Court: Mr. McSheffrey, I do not believe that, based on the answers that I have heard from this child and his mother, that the child should be sworn. I am, however, prepared to continue the Inquiry.

Q: Do you understand -- do you know what it would mean for you to take an oath on the Bible?

A: No.

The Court: I'm prepared to hear the evidence of this witness but I don't believe it should be taken under oath.

Mr. McSheffrey: Do I understand Your Honour to say that you are prepared to hear his unsworn evidence?

The Court: Yes. Well, as I said, **I am prepared to have the child give unsworn evidence on the basis that I believe that he is of sufficient intelligence to give unsworn evidence.** That is my determination based on the questions -- questioning I have conducted here. [emphasis added]

The judicial inquiry conducted in **R. v. Ghini**¹³⁰, generated minimal responses from a 10-year-old witness to questions concerning the consequences associated with lying and failure to keep a promise. Furthermore, in response to the judge's direct question, the child failed to explain the difference between telling the truth and telling a lie. The judge, nevertheless, was satisfied that the child understood the duty of speaking the truth and accepted his unsworn testimony upon an understanding of promising to tell the truth:

Q: All right. Just have a seat if you would, please. What's your name, please?

A: M.

130 (17 May 1989), Burnaby 36801 (B.C.P.C.) [unreported].

Q: And what grade are you in?
A: Five.
Q: Grade five. And how old are you?
A: Ten.
Q: How are you doing in school?
A: Fine.
Q: Your grades, A's, B's, C's?
A: Probably C+'s.
Q: C+'s, that's pretty good. Do you believe in God, M.?
A: Sort of.
Q: Sort of. Do you go to church?
A: No.
Q: Do you go to Sunday School?
A: No.
Q: No. Do you talk to your mom and dad about God or someone like God?
A: Not really.
Q: All right. What do you think this means: Do you swear that the evidence you shall give shall be the truth, the whole truth, and nothing but the truth so help you God?
A: Yes.
Q: Do you know what that means? What does it mean?
A: Don't lie.
Q: All right. What would happen if you don't tell the truth after you agreed to do so?
A: You could be in big trouble.
Q: What kind of big trouble?
A: I don't know, trouble.
The Court: After conducting this inquiry, I'm satisfied that this child doesn't understand any definite oath.
Q: Now do you know that in court you're supposed to tell the truth?
A: Yes.
Q: Do you know what a promise is?
A: Yes.
Q: What is it?
A: It's when you -- it's hard to describe, sir, but it's when you tell someone, like, if you promise to --
Q: What will happen to you if you do not keep your promises, do you know?
A: No.
Q: Do you promise things to your friends?

A: Sometimes, I guess.
Q: And what happens -- what does that mean when you promise to give your friend something or what have you?
A: I couldn't -- well, if you promise to give them a toy or something and if you don't, you don't keep your promise.
Q: All right, and can you tell me the difference between telling the truth and telling a lie?
A: Telling the truth -- I don't know how to describe it, telling the truth.
Q: Anyhow, do you promise to tell the truth here today?
A: Yes.
The Court: **I'm satisfied that this witness can't be sworn but I'm satisfied that he understands the duty of telling the truth and he's promised to tell the truth. I'll accept his evidence without oath. Go ahead, please?**
[emphasis added]

In the same case, a 7-year-old child satisfied the judge that he understood the duty of telling the truth in court following this short inquiry:

Q: Do you believe in God, C.?
A: Yes.
Q: Do you go to church on Sunday?
A: No.
Q: Go to Sunday School?
A: No.
Q: Do you talk to your mom and dad about God or someone like God?
A: No.
Q: Do you know what it means to swear to tell the truth in court?
A: Yes.
Q: What does it mean?
A: If you lie you -- you -- you'll be called a liar and no one will every believe you again and the whole thing, the whole story will get mixed up.
Q: Oh, I see. Do you know what a promise is?
A: Yes.

Q: What do you think would happen if you don't keep a promise?
A: Then you -- you lie.
Q: Oh, I see. Do you promise things to your friends?
A: Yes, sometimes.
Q: And do you promise to tell the truth here today?
A: Yes.
Q: And what will happen if you don't tell the truth in court?
A: If you don't tell the truth everything will get mixed up and you won't get -- no one will believe you anymore.
The Court: **I'm not satisfied that this child should be sworn. I'm satisfied, however, that the child understands the duty of telling the truth in court. He's promised to tell the truth and I accept his testimony on that basis.**
Q: You promise to tell the truth, do you?
A: Yes.
The Court: All right, go ahead, please. [emphasis added]

It is submitted that the above inquiry would marginally satisfy the threshold test enunciated in **Khan** for "unsworn" testimony.

The next two cases underscore the court's willingness to eschew rigid imposition of the need for children to express in definitive abstract fashion terms such as "**promise**", "**truth**", or "**lie**". Such an approach, it is argued, would be consistent with the ruling in **Meddoui**.

In **R. v. Sock**, *supra*, the Crown assisted the judge in the conducting of the inquiry of a 7-year-old complainant. In order to establish whether the child understood the difference between a truth and a lie, the Crown formulated questions containing **concrete** examples of such concepts. The relevant segments of the inquiry are as follows:

Q: Do you ever go to Sunday School? You don't go to school on Sunday. Do you ever go to church?

A: Sometimes with my friends.

Q: With your friends. How often is sometimes? Do you remember when you last went there?

A: No.

Q: Have you been more than once?

A: I was there four.

Q: Four times? What did you do when you were there?

A: Just sit there and the guy --

Q: The guy talked?

A: The guy talks.

Q: Did you get to sing any songs?

A: Yup.

Q: Yes. Do you always tell the truth? Yes? How come?

A: Cause.

Q: Cause why?

A: I always knows --

Q: Pardon?

A: I always know --

Q: What do you always know? What do you think is supposed to happen if you don't tell the truth?

A: I don't know.

Q: You don't know. Do you know what a fib is? No. Do you know what a lie is? No. You don't know what it means to be dishonest? You never heard of that word, have you? No.

Ms. Wrigley: Your Honour --

Q: Do you ever --

Ms. Wrigley: Sorry, Your Honour might try an example of something. That's what's worked before.

Q: You ever play make believe? Ever pretend that things happen that don't happen?

A: No.

Q: If I asked you where you lived and you said Vancouver, would that be right or would that be wrong?

A: Wrong.

Q: Do you ever say things that are wrong? Never? Why don't you ever say things that are wrong? Did your mom tell you not to do that?

A: No.

Q: She doesn't. Anybody tell you that you should always tell the truth, you should always say what's right?

Nobody told you that? No. Okay. Well, Miss Wrigley, if you want to ask some questions you go right ahead.

Ms. Wrigley: Now, if I ask you some questions today K., will you tell the Judge the truth about what happened to you? Will you promise to tell the truth? You won't make anything up? All right. Can you tell the Judge what grade you're in?

A: Grade one.

Ms. Wrigley: Now, if you told the Judge that you were really in grade ten, would that be the truth?

A: No.

Ms. Wrigley: Would it be a lie? Would it -- is that right that you're in grade ten?

A: No.

Ms. Wrigley: What grade are you really in?

A: Grade one.

Ms. Wrigley: Now, if I took -- if I took your paper here and I put it behind your back, I want you to ask me where it is. Ask me where the paper is.

A: Where is my paper?

Ms. Wrigley: Well, I don't know. I think I -- I think I -- I don't know where it is. Am I telling you the truth? I'm lying, aren't I? Now, ask me again where the paper is.

A: Where is my paper?

Ms. Wrigley: It's here, I've got it behind my back. Is that the truth?

The Court: Nodding in the affirmative.

Ms. Wrigley: Well, I submit that she's capable of giving evidence, Your Honour. Perhaps not sworn, but certainly --

The Court: Well, hang tight. Do you want to ask any questions on this matter, Mr. Fung?

Mr. Fung: No. I don't think she's capable of giving sworn evidence though.

The Court: No. Well, I -- thank you. **I want you to promise to tell me the truth.** I am satisfied that this girl is certainly capable of communicating, Miss Wrigley, but not by way of oath or affirmation. [emphasis added]

In **R. v. Dodds**, *supra*, a 6-year-old girl when questioned was unable to tell the judge the difference between the truth and a lie. The relevant portions of the transcript read:

Q: Do you know what it means to tell the truth?
A: No.
Q: Do you know what it means to tell a lie?
A: No.
Q: Do you know what is the difference between a lie and the truth?
A: No.
Q: Do you know what a promise is?
A: No.

At this point in the inquiry, Crown counsel made a submission that the judge should frame a question which contained a concrete example of a truth versus a lie. The judge further questioned the child as follows:

Q: If I said that you were a boy, is that the truth or is that a lie?
A: A lie.
Q: Will you promise to tell me the truth?
A: Yes.
Q: Will you tell me any lies?
A: No.

Upon eliciting those responses, the judge ruled that the child could give unsworn evidence on "**promising to tell the truth**". This ruling was made notwithstanding strong objections from defence counsel that the child did not demonstrate a comprehensive understanding of what is meant by "**promise to tell the truth**".

In the following series of cases, the judicial inquiries placed emphasis on whether children understood what is meant by "**telling the truth in court**" and/or "**consequences of not telling the truth in court**".

The 12-year-old witness, in **R. v. Lamarre**¹³¹, demonstrated an implicit appreciation for the necessity to tell the truth in response to a succession of questions put to her by the judge. She was not, however, able to tell the court what consequences might flow from not telling the truth. The judge appeared to have placed little weight on that issue and allowed her to testify on promising to tell the truth:

THE COURT QUESTIONS THE WITNESS:

- Q: Now I'm going to read something to you and I'll ask you some questions. If I were to say to you, "Do you swear that the evidence to be given by you to this court would be the whole truth and nothing but the truth, so help you God," if I were to say that to you, do you understand what that would mean?
- A: Yes.
- Q: What would your interpretation of that be? Just give it a few moments.
- A: That I would promise to tell the whole truth and not lie, I guess.
- Q: And why do you think it would be important to tell the truth? That's a hard one, isn't it? Do you understand why you're here?
- A: Yes.
- Q: It's very important to tell the truth, isn't it?
- A: Yes.
- Q: **Do you understand what would happen to you if you did not tell the truth?**
- A: **No.**
- Q: **Why do you think it's important to tell the truth?**
- A: **I can't put it into words.**
- Q: **Well, do the best you can. Perhaps we --**

131 (15 December 1989), Port Coquitlam 35893C (B.C.P.C.) [unreported].

A: **Because you're not suppose to lie, I know.**
Q: All right. Do you know the difference between telling a lie and telling the truth?
A: Yes.
Q: Do you always tell the truth?
A: No.
Q: You realize that this is a court of law?
A: Yes.
Q: And that you must tell the truth?
A: Yes.
Q: And if one of the lawyers were to ask you a question that you were not certain of the answer, what would you say?
A: I would that I'm -- that I'm not certain of the answer.
Q: And do you understand what my role is, that is to say, that I'm here to protect you to make certain that you're not asked any unfair questions?
A: Yes.
Q: And do you feel that you can listen to the question, make certain that you understand that question, and answer it honestly?
A: Yes.
Q: Do you understand that Mr. Lamarre is charged with a very serious charge?
A: Yes.
Q: And does that in your mind, have any bearing as to why you must be careful as to what you say?
A: Pardon me?
Q: I'll put it another way. You realize that Mr. Lamarre is charged with a very serious charge. You understand that, don't you?
A: Yes.
Q: That if he were to be found guilty that it could have some unpleasant consequences for him.
A: Yes.
Q: So you understand how important it is to tell the truth?
A: Yes.
Q: **Do you understand what would happen to you if you did not tell the truth?**
A: **No.**
Q: You have no understanding at all? Do you understand what the word "perjury" means?
A: No.

Q: Have you heard of people that have been charged with perjury?
A: No.
Q: You don't know what that means.
The Court: All right. I am not satisfied that this witness understands the nature of an oath but I am certainly **satisfied that she is able to communicate the evidence and she may testify by promising to tell the truth.**
Ms. Strike: Does Your Honour wish to put a formal promise to her or --
The Court: Yes. [emphasis added]

Similarly, in **R. v. Garcia**, *supra*, the trial judge permitted an 8-year-old to be unsworn without eliciting an answer regarding the kind of consequences he might be faced with if he did not tell the truth. In addition, this child witness could not delineate for the judge why it was important to tell the truth in court:

Q: What is my job?
A: To listen to the other people.
Q: All right, and what do you call me?
A: A judge.
Q: Do you understand that this is a courtroom?
A: Yes.
Q: Have you ever been in a courtroom before?
A: No.
Q: Pardon?
A: No.
Q: This is an important occasion, isn't it?
A: Yes.
Q: A lot of people are listening to what you have to say. Do you understand that?
A: Yes.
Q: Tell me something, when you're talking to your friends and talking to your parents, do you always tell the truth?
A: Yes.
Q: You always tell the truth?
A: Sometimes, yes.

Q: Sometimes you don't tell the truth? Why is it important to tell the truth here? Do you want to think about that for a minute? **Let's go back to my other question, why is it important to tell the truth here in court?**

A: **I can't really remember.**

Q: I'm sorry. I can't hear you.

A: I can't really remember the answer.

Q: You can't remember the answer. **All right. Can you tell me what would happen to you if you didn't tell the truth?**

A: **You'd have to face some consequences.**

Q: **And what kind of consequences would you have to face?**

A: **Umm.**

Q: You don't know the answer at the moment? All right.

The Court: **I am satisfied that this witness can promise to tell the truth but I am not satisfied that he understands the nature of an oath and I am not prepared to have him sworn. [emphasis added]**

In **R. v. Bruneau**¹³², the 12-year-old child recognized the significance of telling the truth in court but lacked comprehension of the possible consequences of lying in court. The judge ruled that her testimony be accepted unsworn on the basis of her intention to tell the truth and her ability to communicate the evidence:

QUESTIONS BY THE COURT:

Q: Do you attend church or Sunday School at all?

A: No.

Q: If you were asked in this courtroom to take the Bible and to swear to tell the truth, the whole truth and nothing but the truth so help you God, what would that mean to you?

A: To tell the truth.

Q: And would you be saying anything to God as far as telling the truth?

132 (30 November 1989), Terrace 12339 (B.C.P.C.) [unreported].

A: I don't know.

Q: Would you be saying anything to yourself or to others as far as what it would mean to -- to say that when you're holding the Bible?

A: Well, I guess that would mean to swear to God that you'd tell the truth. But --

Q: **What do you feel the significance of that is if you weren't to tell the truth; for example, what would happen to you or to others?**

A: **I don't know.**

Q: What do you think would happen to you generally if you -- what's expected of you today as far as any questions that might be put to you?

A: To tell the truth about what happened.

Q: And is it -- is that your intention to tell the truth?

The Court: Counsel have any questions as far as understanding the nature of an oath is concerned?

Mr. Arndt: Not at this time, Your Honour, no.

The Court: Miss Langford?

Miss Langford: No, Your Honour.

The Court: Well, I'm not satisfied that this witness understands the nature of an oath. However, **I am satisfied that she's able to communicate the evidence and may testify on promising to tell the truth.** F., do you promise to tell the truth with respect to any of the questions that may be asked of you in the courtroom this morning by counsel or the Court?

A: Yup. [emphasis added]

In **R. v. D.(T.L.) and H.(D.W.)**, *supra*, the judge conducted a perfunctory inquiry wherein the 12-year-old witness possessed an understanding that he could get into trouble if he did not tell the truth in court. However, he failed to define for the judge what kind of trouble one might encounter in that situation. Irrespective of the lack of clarification on that point, the judge allowed his unsworn testimony on the basis of a promise to tell the truth:

THE COURT QUESTIONS THE WITNESS:

Q: D., how old are you?
A: Twelve.
Q: Do you understand what it means to swear an oath on the Bible to tell the truth in this court?
A: Yeah.
Q: Can you tell me what it means to you?
A: It means free to tell the truth and don't lie.
Q: Do you attend church?
A: No.
Q: Do you believe in God?
A: Yeah.
Q: If you swear an oath on the Bible does that bind your conscience? Do you understand what that means?
A: No.
Q: **Do you know if anything happens to you if you don't tell the truth in court?**
A: **You get in trouble.**
Q: **Can you tell me something about that, what kind of trouble you could be in.**
A: **I don't really know what trouble.**
Q: I'm sorry. I didn't hear that.
A: I don't really know.
Q: **You know you could be in trouble, but you don't know what kind of trouble.**
A: **Mm-hm.**
Q: All right. **Are you prepared to tell the truth in this court?**
A: **Yes.**
Q: **Will you promise me that you will?**
A: **Yes.**
The Court: Any questions from the Crown.
Ms. Foster: No, thank you.
The Court: Any questions from either counsel.
Mr. Golden: No, Your Honour.
Mr. Waddington: No, thank you, Your Honour.
The Court: **I'm satisfied that D. can give evidence on promising to tell the truth. I'm not satisfied that he could be sworn. [emphasis added]**

After a cursory inquiry of another 12-year-old in the same case, the judge allowed the unsworn evidence after the child gave a succinct statement concerning the importance of telling the truth in court and the consequence of a failure to do so:

THE COURT QUESTIONS THE WITNESS:

- Q: S., do you understand what it means to swear an oath on the Bible to tell the truth in a court proceeding?
- A: Not really.
- Q: All right. Do you go to church?
- A: No. I used to.
- Q: **Do you understand the importance of telling the truth in court?**
- A: **Yes.**
- Q: **Why is it important to tell the truth in court?**
- A: **Because I can get in a lot of trouble if you lie.**
- Q: **Do you know what kind of trouble you can get into?**
- A: **Yeah. You can go to jail if you lie.**
- Q: All right. Will you promise to tell the truth in court?
- A: Yes.
- The Court: Any questions from the Crown.
- Ms. Foster: No, thank you, Your Honour.
- The Court: Do either counsel have any questions?
- Mr. Golden: I don't, Your Honour.
- Mr. Waddington: No, Your Honour, thank you.
- The Court: **I'm satisfied that Miss T. can give her evidence, on promising to tell the truth to this Court. I'm not satisfied that she can take an oath to swear on the Bible. [emphasis added]**

In **R. v. Young**, *supra*, the judge focused the inquiries in an attempt to establish the competency of two children to take an oath, pursuant to **Bannerman** or **Budin**. In the judge's view, neither test was satisfied¹³³. Both children were unable to give a clear articulation of the consequences of failing to tell the truth in court. Thus, only unsworn

133 Quare: Given the children's somewhat substantive responses to the questions, would another judge rule differently (i.e. allow sworn testimony)?

evidence was proffered in this case. (See **Appendix Transcript #3** for the complete inquiries.)

Based on the research presented, it is submitted that judges are applying this section in a liberal manner, to allow more, and younger children to give evidence in court, as was intended by Parliament.

DISQUALIFICATION

There were **3/146** cases of disqualification under the "**promise to tell the truth**" requirement. In **R. v. Stevens**, *supra*, the Crown entered a stay of proceedings after an 8-year-old female complainant was disqualified from testifying. An expert witness called by the Crown had earlier testified that the child was somewhat mentally retarded and that her mental development was delayed by several years from her actual chronological age. He further testified that she suffered from deficits in her memory and lacked a highly developed concept of guilt. Upon receiving this evidence, and upon subsequent conversation with the child, the trial judge concluded that she did not have the ability to understand a promise to tell the truth.

After conducting an inquiry in **R. v. Brown**¹³⁴, it was revealed that a 7-year-old complainant did not understand the concept of promising to tell the truth. The Crown made a submission that the child be allowed to testify since the understanding of the nature of a promise was a matter only going to weight. Defence counsel countered by

134 (5 November 1988), New Westminster X018880 (B.C.C.C.) [unreported].

arguing that the evidence should be rendered inadmissible. The county court judge ruled that the evidence could not be received since the child did not understand the nature of a promise.

At the preliminary hearing in **R. v. Bernard**, *supra*, the judge did not allow a 4-year-old complainant to give evidence because he was not convinced that the child understood what "to tell the truth" meant.

E. DISTINCTION BETWEEN "SWORN" AND UNSWORN" EVIDENCE

While s. 16 is notably reticent on the weight to be given to "unsworn" evidence vis-a-vis "sworn" evidence, a cogent argument may be marshalled that, in law, they are equivalent. As a result of the abolition of any legal distinction between a child's testimony under "oath" or under a "promise to tell the truth", together with the repeal of s. 586 and s. 274 of the Criminal Code¹³⁵, it is strikingly apparent that the drafters of the amendment intended that the "sworn" and "unsworn" evidence of children be afforded the same status (The Minutes and Evidence of the Legislative Committee on Bill C-15, First Meeting:24). Thus, the new requirement of "a **promise to tell the truth**" can have the same binding effect as an "oath" or "affirmation" on an "unsworn" child. One leading legal observer (Bala, 1989) commented:

135 These provisions dealt specifically with the requirement of corroboration of a child's unsworn testimony for a conviction.

The new s. 16 appears to abolish any legal distinction between a child giving evidence given under oath or under a promise to tell the truth. The legal doctrine of requiring corroboration for unsworn evidence has clearly been abolished, and children under 12 cannot be prosecuted for perjury, whether giving sworn or unsworn evidence. It is thus apparent that Parliament intended sworn and unsworn evidence of children to have the same legal status. In each case where a child is testifying, the trier of fact is to assess the witness's credibility, which includes an assessment of the witness's ability and willingness to tell the truth, but does not rest on a technical inquiry into whether the witness understands the nature of an oath. (at 278)

There remains, of course, a concern shared by many practitioners that even with the new modification, "**unsworn**" testimony will be given far less weight by fact-finders. It is open to the defence to argue that varying degrees of weight should be attached to evidence dependent on whether it is "**sworn**" or "**unsworn**", and "**corroborated**" or "**uncorroborated**". The practical implication of this is that prosecutors should prepare their child witnesses to give "**sworn**" evidence if at all possible.

Two reported cases have underscored the existence of a legal distinction between "**sworn**" and "**unsworn**" evidence irrespective of the intent of the legislation. The Supreme Court of Canada had an opportunity in **R. v. Khan**, *supra*, to resolve the dilemma, between "**sworn**" and "**unsworn**" testimony, which has persisted since **Bannerman** and **Fletcher**. The court held out the proposition that the distinction between the ability to testify under oath and the ability to give unsworn evidence appears to have been narrowed but not eliminated. With respect to "**sworn**" evidence, the court was of the view that "it must be established that the oath in some way gets a hold on [the child's] conscience" and that the child appreciates "the significance of testifying in court". In order to give "**unsworn**" evidence, the court held that "the child need only

understand the duty to speak the truth in terms of everyday social conduct". While Madam Justice McLachlin acknowledged that the standards for "sworn" and "unsworn" evidence are strikingly similar, she steadfastly maintained that a difference exists between the two competency tests. Speaking for a unanimous court of five, McLachlin, J. reasoned:

I agree with the Court of Appeal that the trial judge made the two errors to which it referred. He erred first in applying the *Bannerman* test to s. 16 of the *Evidence Act* and emphasizing that T. did not understand what it meant to lie "to the court". While the distinction between the ability to testify under oath and the ability to give unsworn evidence under s. 16 has been narrowed by rejection in cases such as *Bannerman* of the need for a religious understanding of the oath, it has not been eliminated. Before a person can give evidence under oath, it must be established that the oath in some way gets a hold on his conscience, that there is an appreciation of the significance of testifying in court under oath. It was wrong to apply this test, which T. clearly did not meet, to s. 16 where the only two requirements for reception of the evidence are sufficient intelligence and an understanding of the duty to tell the truth. (at 98)

The New Brunswick Court of Appeal, in **R. v. Demerchant**¹³⁶, was asked to decide the very issue of whether a distinction exists between "sworn" and "unsworn" evidence. In this case, the appellate court found that the trial judge erred in allowing a 7-year-old complainant to testify under oath and a new trial was ordered. While the inquiry established the child's ability to communicate the evidence and his understanding of the necessity of telling the truth, the inquiry failed to demonstrate that the child understood the moral obligation of telling the truth.

Delivering the judgment of the court, Ryan J.A. stated:

136 (1991), 66 C.C.C. (3d) 49 (N.B.C.A.).

When the trial judge conducted his inquiry he made several attempts to satisfy himself that the child knew what was meant by the moral obligation of telling the truth. The responses were weak:

The Court: Now [M.] do you know the difference between a story and the truth?

A: Yeh.

The Court: What's the difference?

A: Well, if you told on somebody else that's a lie, and if you tell on the right person, that's the truth.

The Court: Can you explain that to me, what do you mean by that?

• • • • •

The Court: ... tell me what's the difference again between the truth and a story?

A: Well you have to tell -- if you explain something on somebody else then that's a lie but if you explain it on the right person, then that's the truth.

The Court: What do you mean by the right person?

A: Well if they hit you and and if you blamed it on somebody else, that's a lie but if you told on the right person, then that's the truth.

When it came to understanding the nature of an oath, the inquiry fell well short of its mark but the child's understanding of the necessity of telling the truth became more apparent:

The Court: Now the -- we have a procedure in court where we ask all people who are going to give evidence to put their right hand on the Bible and to swear to tell the truth, the whole truth and nothing but the truth, so help you God, what will that mean to you, [M.]?

A: I don't know what it --

The Court: Did you see when your mother came up here to the front of the courtroom and first this man held that book for her and she put her hand on it and then this other man said something to her, what did that mean?

A: It means she is going to tell the truth.

On January 1, 1988, the requirement of corroboration of the unsworn testimony of a child was removed. A question therefore raised in this case is: Given the fact that the questions and answers do not show an

understanding of the nature of an oath but do show a capacity to communicate the evidence on the youth promising to tell the truth, does it make any difference whether the child was sworn to testify under oath? In the circumstances of this case, I think it does. (at 55)

The justice continued on to argue that, although the trier of fact is entitled to accept unsworn evidence without corroboration, there remains a distinction between the weight given to "sworn" and "unsworn" testimony, particularly in the case of a jury trial:

This procedural error might have less impact upon a judge sitting without a jury. There, it might not change anything in the trial judge's appreciation of the child's credibility. But the jury must take its instructions in law from the judge. **By swearing the child it may leave an impression with the jury that the child's evidence should be given greater weight.** The judge has ruled, in effect, that this child understood the nature of an oath. The jury was required to accept this ruling when in fact there was no evidence to support it. (at 55-56) [emphasis added]

A line of cases, emanating from other appellate courts, reveal a very different judicial perspective on the substantive issue. It is submitted that, these cases taken collectively, support the proposition that "sworn" and "unsworn" evidence of child witnesses are now legally equivalent. In **R. v. D.(R.R.)**, *supra*, the Saskatchewan Court of Appeal, adopted this approach:

The purposes of an oath, a solemn affirmation and a promise are the same: to put an additional impact on the person's conscience and to give further motivation for the person to tell the truth. ... There is no reason in logic to treat one class of witness as belonging to a higher level than another class. Nor is there any reason in logic to treat differently, from the standpoints of need and importance, the three prerequisites: an oath, a solemn affirmation and a promise. (at 274-275) [emphasis added]

This view was shared by the Manitoba Court of Appeal, in R. v. McGovern, *supra*. Citing, with approval, in R. v. D.(R.R.), *supra*, Twaddle J.A. held:

...[T]he weight which should be given to a young witness's evidence is not affected by the form of the witness's commitment to tell the truth. ...With great respect to the learned author [commenting on the D.(R.R.) passage, where McWilliams of Canadian Criminal Evidence (3rd ed.) at 34 said: "I agree as to the oath and an affirmation but remain unconvinced as to a mere promise], I am not persuaded by his comment that evidence given under a mere promise to tell the truth should, by reason of that fact alone, be afforded less weight than evidence given under oath or affirmation. The essential question for the trier of fact, regardless of the form of the witness's commitment to tell the truth, is the witness's appreciation of the moral responsibility of doing so.

In the case at bar, the learned trial judge was well aware of the extent to which the witness appreciated her moral responsibility to tell the truth. This is apparent from the record of the voir dire enquiry. There is no reason to believe that he did not take the extent of her appreciation into account. He would have been in error to give less weight to the witness's evidence merely because it was unsworn. (at 365-366)

Similarly, Mr. Justice Dielschneider, in R. v. Meacham¹³⁷, commented in no uncertain terms:

[T]here is no substantive difference between an oath, an affirmation and a promise [to tell the truth]. **Each one of the three imposes upon the conscience of the person giving the evidence a moral obligation to tell the truth.** (at 86) [emphasis added]

The Ontario Court of Appeal case, R. v. Field¹³⁸, would further buttress the argument for the removal of the legal distinction between the two types of evidence. In

137 (29 September 1989), Kerrobert 503 (Sask.Q.B.) [unreported]; (1989), 82 Sask. R.84 (Q.B.).

138 (1990), 9 W.C.B. (2d) 736 (Ont.C.A.).

this instance, it was ruled that the trial judge "erred in bolstering the weight of the evidence of [child] complainants by reason of their having taken an oath".

The Alberta Court of Appeal, in R. v. Meddoui, *supra*, upon considering the significance of a child "**testifying**" unsworn, made a profound statement:

The verb is commonly used to describe both sworn and unsworn testimony, and I can see no reason not to accept this interpretation **in the light of the recent changes in the law virtually extinguishing the legal significance between the two.** (at 345) [emphasis added]

It is argued that, in light of this pronouncement, there should be no difference in weight between "**sworn**" and "**unsworn**" testimony. On further appeal to the Supreme Court of Canada, Mr. Justice Sopinka, speaking for the unanimous court, affirmed the reasoning of the Alberta Court of Appeal on this aspect of children's testimony.

In 1991, the Ontario Law Reform Commission¹³⁹, recommended that the distinction between sworn and unsworn testimony for child witnesses be abolished. The justification for this reform is premised on three principal reasons:

1. that judicial interpretation of sworn and unsworn testimony have rendered the two tests indistinguishable;
2. that since the corroboration requirement for unsworn evidence of a child has been repealed "[t]here seems little point in requiring the court to decide whether to put a child on oath or not if in the end the child's evidence is entitled to the same amount of weight, whether sworn or unsworn" (Spencer and Flin, 1990:309); and

139 Report on Child Witnesses, O.L.R.C., Ottawa.

3. to eliminate the possibility that the fact-finder will draw an adverse inference about the value of the evidence from whether it was sworn or unsworn.

F. DISQUALIFICATION

- s. 16(4) A person referred to in subsection (1) who neither understands the nature of an oath or a solemn affirmation nor is able to communicate the evidence shall not testify.

The only instance where this section of the legislation was invoked occurred in a very unusual proceeding. In R. v. McEwan¹⁴⁰, before calling the evidence, Crown counsel applied for an adjournment of the trial for at least 5 months because, as a result of pre-trial interviews with the 4-year-old alleged victim, he had "grave concerns about her ability to give her evidence in an intelligible way". After hearing submissions from both counsel, the trial judge denied the application and ordered the trial to proceed. The Crown proceeded to call the child witness. Following an inquiry under s. 16, the trial judge ruled that the requirements were not met, in that he could not be satisfied that the child was able to communicate the evidence. At this juncture in the trial, the Crown renewed its application for an adjournment for the same reasons as earlier denied. Over the objections of defence counsel, the trial judge granted the adjournment. The defence subsequently petitioned the Supreme Court of British Columbia for an Order of Prohibition to prevent the judge from hearing and the Crown from calling the child's

140 (8 February 1990), Vernon 20576 (B.C.P.C.) [unreported]; (13 June 1990), Vernon 21184 (B.C.S.C.) [unreported].

evidence. In dismissing the petition, the higher court ruled that the granting of an adjournment, by the provincial court judge, did not result in the loss of jurisdiction, nor was the trial judge prevented from considering and receiving the evidence of the child complainant upon resumption of the trial.

G. CHARTER CHALLENGE

Since the proclamation of the legislation, there have been no serious Charter challenges to s. 16. In the unreported case of R. v. Meacham, *supra*¹⁴¹, the accused, who was on trial for two counts of sexual assault involving young children, made an application that s. 16(3) of the Canada Evidence Act be ruled unconstitutional on the basis that it offended ss. 7, 11(c), and 11(d) of the Charter. These sections read as follows:

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 ...

(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;

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

141 See Pepper's (1984) discussion of Charter arguments as to the unconstitutionality of the predecessor s. 16.

In this case, the trial judge allowed an 8½-year-old complainant, who did not understand the nature of an oath but understood the nature of a promise, to give unsworn testimony. On appeal, the defence argued that the reception of the unsworn evidence as provided for in s. 16(3) of the Canada Evidence Act, and the lack of procedural safeguards, such as the requirement of corroboration, violated those sections of the Charter. It was further argued that the provision of s. 16(3) by which evidence can be admitted on a promise to tell the truth, denied an accused person of a trial conducted in accordance with the principles of fundamental justice.

Justice Dielschneider noted that the trial judge cited a passage from the judgment of R. v. D.(R.R.), *supra*, to the effect that there is no reason in logic to treat one class of witness as belonging to a higher level than another class. The chief justice in that case ruled that there is no substantive difference between an oath, an affirmation, and a promise. Rather, each one of the three imposes upon the conscience of the witness giving testimony a moral obligation to tell the truth. In agreement, the Saskatchewan Court of Appeal ruled that it is not contrary to the rules of fundamental justice to receive at trial evidence based on a promise.

VI. CONCLUSION

 Historically, the competency requirement has been widely acknowledged as "the No. 1 legal rule preventing successful prosecution of child molestation cases"

(Whitcomb, 1992; Galante, 1984). The wisdom of competency examinations has been widely criticized in Canada, the United States, and other jurisdictions. Wigmore (1940a), a leading American authority on evidence, specifically argued that such a practice could easily result in a form of judicial arbitrariness in a situation wherein the same child would be deemed competent by one judge but incompetent by another.



There has been a definite trend away from competency criteria, in particular, the common law rule which establishes a presumption of competence only for children over the age of 14 years. In recent years, several Canadian law reform bodies have advocated the abolition of the common law and statutory presumption that children under 14 years are incompetent witnesses. In 1975, the Law Reform Commission of Canada proposed a new **Criminal Code** which would abolish the oath, replace it with an affirmation, abolish unsworn evidence, and codify the judge's power to instruct witnesses¹⁴². The Commission described its progressive **Evidence Code** as follows:

There are no special rules of competency in the Code with respect to children. The frailties inherent in the testimony of immature witnesses should affect the weight of the evidence rather than its admissibility. (at 87)

In 1984, the Badgley Commission¹⁴³ was mandated "to enquire into the incidence and prevalence in Canada of sexual offences against children and youths and to recommend improvements in laws for the protection of young persons from sexual abuse

142 Law Reform Commission of Canada, Report on Evidence (1975), Evidence Code ss. 50-51.

143 (1984) Report on Sexual Offences Against Children, Ottawa.

and exploitation". The Commission advocated an abolition of competency tests for child witnesses by recommending the following:

1. Every child is competent to testify in court and the child's evidence is admissible. The cogency of the child's testimony would be a matter of weight to be determined by the trier of fact, not a matter of admissibility.
2. A child who does not have the verbal capacity to reply to simply framed questions could be precluded from testifying.

This reform would give children's testimony the same treatment and status as evidence by adults. It is submitted that the cogency and veracity of a given child's testimony would be a matter of weight to be determined by a fact-finder, not a matter of admissibility or an *a priori* presumption of unreliability, as is currently the Canadian practice. This approach, it is argued, would satisfy the general common law principle that all relevant evidence should be admissible in court.

The Committee concluded that to presume that a child's testimonial competency is contingent upon or influenced by the child's age fails to take into account the cognitive and developmental differences among children of the same age and is inherently wrong in principle. Furthermore, it is the position of this dissertation that implementation of such a reform would be consistent with a contemporary movement towards enlightened jurisprudence and the spirit of our **Charter**.

The Ontario Law Reform Commission¹⁴⁴, in 1991, underscored the need for fundamental change in the legal rules pertaining to child witnesses¹⁴⁵. The Commission acknowledged that the competency requirements of s. 18 of the Ontario Evidence Act made it extremely difficult for children to be qualified as witnesses and, as a result, highly probative evidence would not be available to the trier of fact. The Commission espoused the view that many common law principles and statutory rules applicable to child witnesses were premised on erroneous and archaic concepts about the reliability of children's evidence.

The report reiterated that psychological studies, which traditionally portrayed children as unreliable witnesses, were without empirical foundation. The Commission accepted the findings of contemporary research which clearly demonstrates that children possess adequate cognitive skills to comprehend or to describe witnessed events; children are able to make distinctions between fact and fantasy; and children have a moral sense and are no more likely to fabricate evidence than are adults. The Commission made these recommendations as a major reform proposal that children be presumed competent witnesses:

1. The oath should be abolished as a test of competency for child witnesses. A simple promise to tell the truth should be the qualification requirement for child witnesses in Ontario civil proceedings.

144 (1991) Report on Child Witnesses, Ottawa. These recommendations only have direct relevance for evidentiary issues in civil proceedings such as child protection cases, parental custody and access disputes, monetary damage claims, and employment.

145 Currently only two provinces, Saskatchewan and British Columbia, have reformed their competency rules for child witnesses. British Columbia introduced new legislation in 1988, and Saskatchewan amended its Evidence Act in 1989 by incorporating the competency rules in Bill C-15.

2. Where in the opinion of the court, a child does not understand the promise to tell the truth, the judge shall nevertheless hear the evidence and may act on it if, at the end of the case, the judge is satisfied that the evidence is reliable.
3. The presumption that a child under 14 years is an incompetent witness should be abolished. The Ontario **Evidence Act** should be amended to provide that all individuals, including children, are presumed competent witnesses.
4. The distinction between sworn and unsworn testimony for child witnesses should be abolished. (at 96)

In the United States, liberal **Federal Rules of Evidence** and **State Uniform Rules of Evidence** have been enacted to allow children to testify and permit the trier of fact to determine the weight and credibility of the testimony. Generally, states fall into one of the following four categories (see **Appendix H**):

1. states presuming incapacity below a specified age (a minority);
2. states requiring an understanding of the oath;
3. states following the **Federal Rules of Evidence** (a growing number); and
4. states providing that all children are competent in sex offense cases (all 50).

The adoption of **Rule 601** of the **Federal Rules of Evidence**, in 1975, reflects the modern movement to eliminate rules that preclude witnesses from giving evidence solely because they belong to a particular group such as children. The sanguine approach articulated by Wigmore (1940a; 1940b; 1979) is implicit in **Rule 601**:

A rational view of the peculiarities of child-nature, and of the daily course of justice in our courts, must lead to the conclusion that the effort to measure 'a priori' the degrees of trustworthiness in children's statements, and to distinguish the point at which they cease to be totally incredible and acquire suddenly some degree of credibility, is futile and unprofitable. The desirability of abandoning this attempt and abolishing all grounds of mental or moral incapacity has already been noted...The reasons apply with equal or greater force to the testimony of children. Recognizing on the one hand the childish disposition to weave romances and to treat imagination for verity, and on the other the rooted ingenuousness of children and their tendency to speak straightforwardly what is on their minds, **it must be concluded that the sensible way is to put the child upon the stand and let it tell its story for what it may seem to be worth.** To this result legislation must come. (1940a:600-601) [emphasis added]

This rule accords the same rebuttable presumption of competency granted to all other witnesses and in particular abolishes all specific grounds of testimonial incompetency:

Every person is competent to be a witness except as otherwise provided by these rules.

It is designed to curtail the necessity for a preliminary inquiry into a witness' competence, leaving the fact-finder to determine the weight that should be accorded a child's testimony and generally to assess the child's credibility, without qualifying the witness beforehand.

There is a high degree of congruence among prestigious American organizations and national panels toward a recommendation for the widespread adoption of such rules¹⁴⁶. The American Bar Association (1982), a strong proponent of abolishing arbitrary age limitations for competency determinations, recently concluded that:

Child victims of sexual abuse should be considered competent witnesses and should be allowed to testify without prior qualification in any judicial proceeding. The trier of fact should be permitted to determine the weight and credibility to be given to the testimony.

The Attorney General's **Task Force on Family Violence** recommended:

Because the victim is often the only witness to the crime, a child's testimony may be critical to the prosecution of the case. Children, regardless of their age, should be presumed to be competent to testify in court. A child's testimony should be allowed into evidence with credibility being determined by the jury. (at 38-39)

Various other law reform panels and commissions in other common law jurisdictions have concluded that the traditional competency test serves no useful function and should be abandoned¹⁴⁷. The Law Reform Commission of Tasmania (1989) argued that the oath competency requirement is a test of religious understanding rather than a test of the ability of a child witness to accurately recount past events in response to questions. The Commissioner was of the view that:

146 National Legal Resource Center for Child Advocacy and Protection (1982); President's Child Safety Partnership (1987).

147 New Zealand Law Reform Commission (1988); Pigot Report (1990); Law Reform Commission of Western Australia (1990); Law Reform Commission of Ireland (1990); Law Reform Commission of Tasmania (1989). See Birch (1992) and the Ontario Law Reform Commission's report (1991) for an analysis of the findings of these reform-minded bodies.

...[a] strict interpretation of an oath connotes an understanding of religious ideas. Webster's Dictionary defines oath as: a solemn formal calling upon God or a god to witness to the truth of what one says... (at 35)

The Law Reform Commission of Western Australia (1990) remarked that the oath:

...is not a test which a very young child, however intelligent and truthful, may be expected to pass." (at 8)

According to the Law Reform Commission of Ireland (1990):

The real objection to the oath, however, is that it presents an irrational and irrelevant obstacle to the giving of evidence by children in cases where they have valuable and relevant evidence to provide. (at 55)

In England, the Pigot Committee concluded that a preliminary assessment to qualify a child witness is not necessary. The Committee was of the opinion that a child witness should testify - the intellectual development, age, and maturity of the witness should solely be a matter of weight. In some European countries, France, West Germany, and Scandinavia, there is no requirement of a competency examination for child witnesses. Such factors as age and maturity may affect the weight given to the evidence but courts do not preclude children who are below a certain age or children with different levels of understanding from testifying¹⁴⁸.

The academic community has also spoken out on the issue of the inequality in treatment to which children have been exposed by reason of the oath requirement. Many

148 See Spencer and Flin (1990) for a discussion of the legislation of these individual countries.

have argued that the oath requirement be abolished as a test for competency (Wilson, 1989; Lilles, 1986; Spencer and Flin, 1990; Melton *et al.*, 1983; Dominic, 1985-86). While the purported purpose of oath competency is to enhance the likelihood that a witness will tell the truth in court, social scientists have concluded that competency assessments are poor indicators of the reliability of the evidence offered by child witnesses and that understanding the nature of an oath is "irrelevant" to whether a child will tell the truth in court proceedings (Yuille, King and MacDougall, 1988)¹⁴⁹.

Research has demonstrated that there may be little reason to differentiate children from adults *vis-a-vis* their propensity to lie on the witness stand. Experimental studies have revealed that moral behaviour or telling the truth does not necessarily follow from an understanding of the difference between truth and falsehood. In children as well as adults, comprehending the oath and the ramifications of telling a lie does not guarantee honesty (Goodman, 1984a and 1984b).

In addition, it is argued that, although young children appreciate the difference between truth and lying, they experience difficulty (as do most adults) in articulating a definition for the concept of "truth" (Spencer and Flin, 1990)¹⁵⁰. Furthermore, children are routinely found incompetent to testify because they are unable to define to our adult standards the meaning of the word "oath" (Walker, 1993).

149 See Whitcombe *et al.* (1985) at 38: "In an experiment conducted by psychologists on three to six-year-old subjects, the children were asked a number of questions typically asked by judges in a competency examination. It was found that the children's performance on those questions were poor indicators of their ability to provide accurate information about the event they had experienced."

150 This argument would be supported by the unreported cases presented earlier in this chapter on this very issue.

Another argument for dispensing with competency assessments is that moral knowledge is not useful in the prediction of a child's truthfulness (Whitcombe *et al.*, 1992). The fundamental purpose of a competency assessment is for the court to determine whether a child witness is likely to give honest testimony. Some academicians have argued that it is discriminatory to subject children to such scrutiny when no such rules exist to assess the morality of adult witnesses prior to admitting their testimony (Spencer and Flin, 1990).

In a recent Ontario study which examined the extent of a child's understanding of telling the truth in court, it was revealed that children do not distinguish between swearing to tell the truth and promising to tell the truth (Ruck, 1989).

The law has long established the special status of children's testimony and has implicitly assumed it to be less reliable than that of adult witnesses. Considerable psychological research has been conducted on the reliability of child witnesses in the past decade. The contemporary research on children's memory suggest that children are not uniformly less accurate or less competent than their adult counterparts (Davis *et al.*, 1986; Misener, 1991; Loftus & Davies, 1984; Goodman, 1984b; Johnson and Foley, 1984; Ceci *et al.*, 1987; Marin, Holmes, Guth and Kovac, 1979; Goodman and Reed, 1986; Melton, 1981; Penrod *et al.*, 1989; Yuille *et al.*, 1988; Hudson, 1990).

Early empirical studies which stigmatized children as the most dangerous of witnesses are no longer supportable. Modern researchers, some of whom have conducted parallel studies with adult subjects conclude that the issue of children's competence must be viewed against a background of adult incompetence (Flin and Bull, 1989). Children

can be as accurate as adults in answering objective questions about events they have witnessed (Goodman and Reed, 1986; Goodman and Helgeson, 1988; Marin *et al.*, 1979)¹⁵¹.

Furthermore, they do not have a greater propensity than adults to lie when testifying — there is no clear relationship between age and honesty (Melton, 1981; Goodman, 1984b; Wilson, 1989). Most obviously, they point out that witnesses of all ages may be prone to lying and deliberate self-delusion.

In simulated trial studies, there are circumstances under which child witnesses are perceived as more credible than adults: when the scenario involved a trial for sexual assault (Goodman *et al.*, 1989), and when the victims were perceived to be confident in their testimony (Goodman *et al.*, 1989; Wells, Turtle and Luus, 1989; Nigro *et al.*, 1989; and Leippe and Romanczyk, 1987)¹⁵².

At the turn of the century in America, the courts began to interpret oath requirements practically. The focus shifted from "spiritual" to more "secular" concerns.

In **Clinton v. The State**¹⁵³, the court stated:

The purpose of the oath is not to call the attention of God to the witness but the attention of the witness to God; not to call upon Him to punish the false swearer but on the witness to remember that He will assuredly do so.

151 Researchers have found that children even as young as three can be questioned so as to demonstrate their competence using the present competence criteria. *A fortiori* such children should have no difficulty understanding an admonition, if properly expressed (Berliner and Barbieri, 1984). See also David Jones' account The Evidence of a Three-year old Child (1987), containing the detailed account by "Susie" who was abducted, assaulted and left to die in the most distressing circumstances. This showed that there are some occasions on which even a child of this age could give intelligible and accurate testimony.

152 Though it appears that, as a rule, there is still a tendency among jurors (in simulated studies) to perceive children as less credible witnesses than adults (Goodman *et al.*, 1987).

153 (1905), 33 Ohio St. 27.

By thus laying hold of the conscience of the witness and appealing to his sense of accountability, the law best ensures the utterance of truth. (at 33)

The court, in this case, emphasized the witness' "conscience" and "accountability" and the obvious interconnectedness of those essential concepts.

The form of oath competency other than the Judaeo-Christian test has been encapsulated in early Canadian common law. In **R. v. Ah Wooly**¹⁵⁴, the Supreme Court of British Columbia held that:

For taking the evidence of a Canton Chinaman not a believer in Christianity, the oath known as the "chicken oath" should be administered instead of the less solemn "paper oath", if the trial is for a capital offence. (at 25)

The court permitted the witness to sign and submit an oath in writing to the King of Heaven. This procedure followed:

The oath was then read aloud by the witness, after which he wrapped it in Joss-paper as used in religious ceremonies, then laid the cock on the block and chopped its head off, and then set fire to the oath from the candles and held it until it was consumed. (at 26-27)

In 1982, the Ontario Court of Appeal, in **R. v. Fletcher**, *supra*, formally acknowledged that a religious sanction was no longer an essential component of the oath ceremony:

I do not think that the understanding of the nature of an oath in any legal proceeding now requires a belief or an expressed belief by the child in

154 (1902), 9 B.C.R. 569, 8 C.C.C. 25 (B.C.S.C.).

God (or another almighty). Nor does it require that the child understand, in giving the oath, that he is telling such almighty that what he will say will be true.

It is recognized that as society has changed over the years the oath for many has lost its spiritual and religious significance. Those adults to whom the sanctity of the oath has lost its religious meaning, nonetheless have a sense of moral obligation to tell the truth on taking the oath and feel their conscience bound by it. That is the nature of the oath for many adult witnesses today. Nor do they object on grounds of conscientious scruples to taking the oath. In my view a child of tender years is in the same position as an adult witness when the determination is being made whether the child witness understands the nature of an oath. (at 376) [emphasis added]

The Fletcher court, in arriving at its decision to impart a secular test for oath competency, also adopted the reasoning from the English Court of Appeal in R. v.

Hayes, *supra*. Lord Justice Bridge expounded:

It is unrealistic not to recognize that in the present state of society, amongst the adult population, the divine sanction of an oath is probably not generally recognized. The important consideration, we think, when a judge has to decide whether a child should properly be sworn, is whether the child has a sufficient *appreciation of the solemnity of the occasion, and the added responsibility to tell the truth*, which is involved in taking an oath over and above the duty to tell the truth which is an ordinary duty of normal social conduct. (at 290)

In a very recent case, R. v. Kalevar¹⁵⁵, the court commented on the juxtaposition of contemporary Canadian society and the role of the traditional oath:

Clearly, Canada's emerging multi-cultural society requires an acknowledgement in the courts that the Judaic-Christian form of oath is not necessarily the only form of religious oath to be administered, and that

155 (1991), 4 C.R. (4th) 114 (Ont.G.D.).

persons of other religious persuasions should not automatically be given affirmation as the only alternative. (at 117)

An Ontario judge argued for the abrogation of the traditional Christian oath on the basis that it is "demographically archaic and preferential" and seemingly of "very limited utility" (Nasmith, 1990a:232). He went on to give this persuasive argument:

Today we are in a place far removed from the Ecclesiastical Courts. The church and state and court are separate. In my opinion, our courts should be entirely secular. We live in an increasingly multi-culture (multi-religion) society. Religious beliefs are diverse. Those people linked to the Judeo-Christian mainstream would find the traditional Anglican ceremony more or less familiar. Many others would not. We took this country from aboriginals who had other beliefs. We have invited and welcomed to the country very significant numbers of Muslims, Hindus, Buddhists, etc. to add to a list of agnostics, atheists, pantheists, and myriad others who have not been indoctrinated with Christian beliefs. The rights of these minorities (who, together, possibly constitute the majority) to be free from discrimination based on religion, are firmly entrenched in section 15 of our Charter of Rights. I think this means that our democratic society is sufficiently liberalized to free individuals from any tendency of the state to use its power to impose religious dogma on them...The traditional Anglican oath is not compulsory. Nonetheless, we have created the appearance that it is. This atmosphere of religious exclusivity is **not appropriate in our multi-cultural society nor in our secular court**. Obviously, both the legislators and the judiciary have been struggling with **the theological pretences in the traditional oath**. **In my opinion, it is high time the routine was changed so that a secular ceremony is used for every witness. A simple promise to tell the truth would probably suffice...There is probably some merit in having witnesses confirm their obligation to tell the truth. Whatever the ceremony, it should mean that the witness is being held accountable. The traditional oath, with its tenuous probe into the religious realm, does not have this effect. For those who are not believers, the religious factor is meaningless. For some with religious conviction, this pedestrian ceremony is trivializing and insulting, perhaps even blasphemous. for many the ceremony is just foreign to their religious beliefs. A responsible person will speak the truth without a religious oath and for the others it means nothing anyway.** (at 231-232) [emphasis added]

Spurred on by the Fletcher decision, Judge Nasmith formulated a two-branch oath test (for adult witnesses) designed to confirm the solemnity of the occasion and the significance of telling the truth in court and to bind a witness' conscience by underscoring the "rightness" of telling the truth or the "wrongness" of not telling the truth by reference to the criminal offence of perjury:

- a. Do you know that it is a criminal offence to intentionally give false evidence in a judicial proceeding?
- b. Do you solemnly promise to tell the truth in this proceeding?

There is further evidence of a judicial departure from traditional oath competency tests. In R. v. Belliveau¹⁵⁶, a Manitoba judge allowed a Native child to take an oath by swearing on a feather to tell the truth. In British Columbia, Judge Anthony Sarich, who conducted an inquiry into Natives and the justice system, permitted witnesses to take an oath in non-traditional ways. Native witnesses refused to make an oath on the Bible because the Bible, for them, had been soiled by years of abuse under religious orders at the hated residential schools. One witness was allowed to make an oath on her grandmother's spirit to speak straight from the heart. Chief Bev Sellars, of the Soda Creek Band, told the Sarich Commission:

The Bible means nothing for me to swear on...but the spirit of my grandmother is sacred.¹⁵⁷

156 (6 June 1989), Winnipeg (Man.Y.Div.) [unreported], as recounted by Crown Counsel, Elizabeth R. Sellik, to the writer.

157 The Vancouver Sun, January 23, 1993, "Isolated Natives Travel Far to Attend Hearings", p.B2.

Judge Sarich allowed another witness to swear on a sacred rock which, according to the witness, invokes the power of the earth and binds the witness's conscience to tell the truth.

Based on the research presented, this dissertation argues for the repeal of s. 16 of the Canada Evidence Act, which deals with child witnesses, on the following grounds:

1. In practice, some judges have ignored this mandatory provision by failing to conduct an inquiry. The appellate courts are at issue over whether breach of this statutory duty constitutes a "fundamental evidentiary breach" (R. v. D.(R.R.) (Sask.C.A.)) or a "procedural irregularity" (R. v. Krack (Ont. C.A.); R. v. Fabre (Quebec C.A.)). Furthermore, there is a lack of judicial consensus over whether the curative provisions of the Criminal Code can remedy such a breach.

2. The common law rule, established in Bannerman and Budin, is that it is proper for a judge to instruct a witness by posing leading questions. Judges were found to lead a child witness with respect to the substantive issue of the "**nature of an oath**" in 27/146 s. 16 inquiries. It is submitted that this judicial practice leads to arbitrariness in determining oath competency. This is particularly significant given that the impugned legislation creates the categories of "**sworn**" and "**unsworn**" testimony of child witnesses and the legal distinction between the two, vis-a-vis the preponderance of the evidence, has not been authoritatively resolved in Canadian law. Unless Parliament enacts specific

legislation to remove the legal distinction between the two types of evidence, it is argued that "**unsworn**" testimony will continue to be given far less weight by fact-finders¹⁵⁸.

3. The threshold test for determining a child's competency to take an oath has not been judicially decided in an authoritative manner. Three tests for oath competency (under the predecessor legislation) have been delineated in common law by Canadian appellate courts. Historically, the test (premised on Judaeo-Christian dogma) was the "**nature and consequences**" formulation first promulgated in the ancient English case, **Rex v. Brasier**, *supra*, and imported into Canada by the British Columbia Court of Appeal in **R. v. Antrobus**, *supra*. The test underwent further judicial refinement when the Supreme Court of Canada, affirming the Manitoba Court of Appeal's decision in **Bannerman**, articulated a modern "**secular**" test which eliminated the requirement of a religious belief in God in order for testimony to be given under oath. In 1981, the "**spiritual consequences**" branch of the test was subsequently abandoned by the Ontario Court of Appeal in **Budin**. However, the Ontario Court of Appeal held on to the principle that a child must believe in God in order to be competent to take an oath. The same court in **Fletcher** overruled **Budin** one year later. In the absence of statutory guidance and authoritative case law, it is submitted that the legislation has been subject to vague and inconsistent interpretation by the courts depending on differing judicial approaches. The dissertation research has demonstrated a clear lack of uniformity among the provinces whose appellate courts have been unable to reach an agreement on what

158 See **R. v. Field**, *supra*; **R. v. Demerchant**, *supra*.

constitutes the threshold test for understanding the "**nature of an oath**". Because it was affirmed by the Supreme Court of Canada, it is submitted that **Bannerman** should be the common law test for oath competency in Canada. Furthermore, there is unequivocal empirical evidence that the overwhelming majority of British Columbia judges apply a "**religious**" Judaeo-Christian test as a prerequisite for child oath competency (**101/146** cases). This dissertation argues that, in light of the diverse culture and secular nature of contemporary Canadian society, it is **untenable**, as well as **unconstitutional**, for courts to continue to require child witnesses to satisfy an archaic legal requirement fashioned by a panel of twelve common law justices in 1779.¹⁵⁹ The common law test for oath competency developed during a period of English history when most people were Christians. The historical justification behind the oath requirement was "to admonish witnesses to tell the truth under the pain of divine retribution". God was considered the avenger of broken oaths and there would be spiritual consequences for the bearer of falsehoods. **Section 16** legislation is based on a common law distinction between "sworn" and "unsworn" evidence which no longer exists. The common law has evolved beyond the religious notions of spiritual consequences to a more secular attempt to bind one's conscience. There is now very little justification for a hierarchy of evidence in light of today's secular society. It is further argued that **s. 2(a)** of the **Charter of Rights** guarantees that everyone has the fundamental "**freedoms of conscience and religion**", and the imposition of a religious oath requirement would be

159 **Rex v. Brasier**, *supra*.

unconstitutional. It is submitted that this issue of unconstitutionality may be raised by a child advocacy organization, or others, by seeking intervenor status in the courts.

Section 2(a) of the Charter has been held by the Supreme Court of Canada to encompass the right to refuse to participate in religious practice¹⁶⁰. To require an oath is to require, I submit, religious practice. Nor can such a requirement be deemed trivial¹⁶¹ when it would preclude someone from participating in the legal process.

Quite apart from the religious connotation of oath-taking, the historical justification for the policy distinction between "**sworn**" and "**unsworn**" testimony was that a witness who lied, while under oath, could be charged with the criminal offence of perjury. The Criminal Code defines the age of criminal responsibility at 12 years of age:

s. 13 No person shall be convicted of an offence in respect of an act or omission on his part while that person was under the age of twelve years.¹⁶²

Children under the age of 12 years, therefore, cannot be convicted of perjury.¹⁶³ Thus, the purported "safeguard" of an oath and judicial warnings as to legal sanctions and consequences are vacuous concepts. It is submitted that the structural framework of the legislation is inherently flawed and creates judicial deviance in the application of the legislation.

160 **R. v. Big M Drug Mart**, [1985] 1 S.C.R. 295.

161 See **Jones v. The Queen**, [1986] 2 S.C.R. 284.

162 R.S., c. C-34, s. 12; 1980-81-82-83, c. 110, s. 72.

163 Young persons between the ages of 12 and 17 years fall under the purview of the Young Offenders Act, R.S.C. 1985, c. Y-1.

4. There is clear evidence of failed judicial attempts at applying the legislation:
 - a. judges have conducted improper inquiries with respect to satisfying the requirement of "**understanding the nature of an oath**" for oath competency;
 - b. judges have conducted improper inquiries with respect to satisfying the common law requirement for "**solemn affirmation**"; and
 - c. judges have erroneously applied the provisions of the predecessor legislation as criteria for the legal determination of oath competency.

These problems may be attributed to: a) the lack of clarity in the legislation; b) the confusion over the change in the law upon which the legislation was based (*viz.* the common law has moved beyond the legislation); and/or c) the failure on the part of counsel and judges to avail themselves of the new legislation.

5. **Section 16** has not resulted in the definitive resolution of the inherent problems associated with the predecessor legislation. The common law has outgrown the statutory distinction between "sworn" and "unsworn" evidence upon which s. 16 is based. With the removal of the corroboration requirement for "unsworn" testimony, there is no substantive difference between the two types of testimony. In light of the liberal interpretation given by the appellate courts in **Bannerman**, **Fletcher**, and **Khan**, the differences between the threshold test for "sworn" (s. 16(2)) and "unsworn" (s. 16(3)) has become somewhat indistinguishable. If the criterion for testimonial competency is "**a moral obligation to tell the truth**", what is the discernible distinction between

"**understanding the nature of an oath**", giving a "**solemn affirmation**", or undertaking a "**promise to tell the truth**"?

6. Under **Bill C-15**, corroboration is no longer a statutory requirement for sexual offences when a child testifies unsworn (s. 274 - to be discussed in the next chapter). It is submitted that the repeal has diminished the distinction between "**sworn**" and "**unsworn**" evidence to a meaningless and artificial dichotomy. Since no legal consequences derive from whether a child gives "**sworn**" (oath/solemn affirmation) or "**unsworn**" (promise to tell the truth) testimony, what is the utility of requiring courts to conduct s. 16 inquiries?

7. It is argued that the legislation is based on anachronistic legal reasoning, negative cultural stereotypes, and largely unsubstantiated **a priori** assumptions of children's "incompetence" as witnesses. It is discriminatory, unfair, and serves no useful purpose in our society, particularly in view of current psychological knowledge of children's cognitive, perceptual, and memory capabilities.

8. It is further argued that our criminal justice system, which emphasizes procedural safeguards and due process for accused persons, is imbalanced and denies children equal access to the law as guaranteed by s. 15 of the Canadian Charter of Rights. The equality provision reads:

- s. 15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Age, it is submitted, is an arbitrary way to determine legal competency to testify in court. The issue of the unconstitutionality of s. 16 may be challenged under this Charter provision by interest groups. A new s. 16 Canada Evidence Act should allow children to testify and allow the trier of fact to determine the weight and credibility of the testimony.

It is the position of this dissertation that the current legislation be abolished and replaced with a new Canada Evidence Act which would allow every child to testify on a "**promise to tell the truth to the court**". The judge should conduct a simple line of questioning to determine whether there is adequate evidence of the child's understanding of "**truth**". The United States National Center for the Prosecution of Child Abuse recommends the following form¹⁶⁴:

1. Do you know the difference between right and wrong?
2. Do you know what it is to tell a lie?
3. If I said it was Christmas today, would that be the truth or would it be a lie?
4. Is it right or wrong to tell a lie?
5. If you were to tell these people a lie, or something that wasn't truth, what would happen to you?
6. Do you promise only to say things that are true today?
7. Do you promise not to tell any lies?

¹⁶⁴ Toth and Whalen, 1986:V-22. This manner of questioning is fairly common in the U.S. and generally accepted as giving adequate evidence of a child's understanding of truth (Gray, 1990).

In 1991, the Ontario Law Reform Commission went further by recommending that "where in the opinion of the court, a child does not understand the promise to tell the truth the judge shall nevertheless hear the evidence and may act on it if, at the end of the case, the judge is satisfied that the evidence is reliable" (at 96). This dissertation supports that position. It is the author's understanding that a Bill is currently being drafted to amend the Canada Evidence Act to allow children to testify on a simple "**promise to tell the truth**". If, in the opinion of the judge, there are "**indicia of reliability**", the child's evidence could be admissible even without an elicited promise.

CHAPTER 2: CRIMINAL CODE s. 274: CORROBORATION NOT REQUIRED

I know [the judge] did [believe me] — he said that in summation but he said that there was no hard, cold evidence [for conviction].

Well, [the judge] made it clear at the end that it was due to "reasonable doubt" and not that I was lying.

The judge said "I know someone in the court is telling lies. I hope one day the truth comes out".

Quotes from child victims
(London Family Court Clinic: Child Witness Project (Sas *et al*, 1993))

I. INTRODUCTION

s. 274. Where an accused is charged with an offence under **section 151, 152, 153, 155, 159, 160, 170, 171, 172, 173, 212, 271, 272 or 273**, no corroboration is required for a conviction and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration.¹⁶⁵

This section of **Bill C-15** reflects Parliament's commitment to seek justice for children by reforming the law to enhance successful prosecution of child sexual abuse cases (Rogers, 1990). It abolishes the old s. 16(2) **Canada Evidence Act**, which

165 The relevant **Criminal Code** offences (which includes the newly created sexual offences under Bill C-15) are:

- | | | | |
|--------|--|--------|--|
| s. 151 | - Sexual Interference | s. 172 | - Corrupting Children |
| s. 152 | - Invitation to Sexual Touching | s. 173 | - Indecent Acts |
| s. 153 | - Sexual Exploitation | s. 212 | - Procuring |
| s. 155 | - Incest | s. 271 | - Sexual Assault |
| s. 159 | - Anal Intercourse | s. 272 | - Sexual Assault With a Weapon
Threats to a Third Party or
Causing Bodily Harm |
| s. 160 | - Bestiality | s. 273 | - Aggravated Sexual Assault |
| s. 170 | - Parent or Guardian Procuring Sexual Activity | | |
| s. 171 | - Householder Permitting Sexual Activity | | |

provides that the evidence of an unsworn child be corroborated by some material evidence, and repeals s. 586 of the Criminal Code (a mandatory corroboration requirement applicable to all Criminal Code offences, sexually related or not):

- s. 586. No person shall be convicted of an offence upon the unsworn evidence of a child unless the evidence of a child is corroborated in a material particular by evidence that implicates the accused.

The enactment of this Criminal Code provision also makes apparent the objective of Parliament to recognize the credibility of the child victim/witness in sexual abuse cases. (The Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15, First Meeting:18; Rogers, 1990; Bala, 1990)

Under this new provision, corroboration is no longer a statutory requirement for sexual offences when a child testifies. The child's testimony may be given under oath (sworn) or on a promise to tell the truth (unsworn). A judge may convict an accused solely on the evidence of a child, provided that the burden of proof in criminal cases (beyond a reasonable doubt) is met. According to advocates of the legislation, this change formally acknowledges the contemporary dynamics of child sexual abuse, as there is rarely any direct evidence, either physical or eyewitness, to corroborate a child's testimony (Stewart and Bala, 1988).

S. 274 also prohibits the judge from giving any limiting instruction respecting corroboration in sexual offence cases. It is arguable whether the common law rule of dispensing corroboration warnings has been repealed by s. 274. There is some concern and uncertainty whether judges, who have enjoyed a long tradition of warning juries,

will, in fact, refrain from doing so. Defence lawyers have predicted that judges will continue to charge juries to look for confirming evidence to support the complaint.

In addition, while this section clearly removes any formal requirement for corroboration, it remains equivocal as to whether the legislation will eliminate the common law practice of judges warning juries of the "inherent frailties" of children's evidence, even if they are found competent to testify (Bala, 1990).

II. RESEARCH QUESTIONS

Section 274 statutorily prohibits judges from warning juries (or themselves) that it is unsafe to find an accused guilty without corroboration. While this new provision clearly removes any statutory requirement for corroboration, it remains unclear whether the legislation will, in effect, eliminate the common law practice of judges giving corroboration warnings and/or warnings with respect to the "**inherent frailties**" of children's testimony.

The dissertation research attempts to answer the following questions (see **Appendix I**):

- A. Do judges continue to warn that it is dangerous to convict an accused on the uncorroborated evidence of children?
- B. Do judges continue to require corroboration before convicting an accused on the evidence of children?

- C. Do judges continue to warn that there are "**inherent frailties**" in children's evidence and that their testimony is unreliable?
- D. What **Charter** (or other) challenges have been made with respect to the legislation?
- E. What comments have been made by judges with respect to the credibility of children's evidence in the context of the dynamics of child sexual abuse?
- F. What are the practical issues associated with the legislation?
- G. What are the research implications as a result of the judicial interpretation of the legislation?

III. CORROBORATION AND COMMON LAW WARNINGS

This chapter will commence with an overview of the evolution of corroboration law and the associated common law practice of judges administering warnings with respect to child witnesses. This will be followed by: a) an analysis of the case law and unreported decisions relevant to the research issues being examined; b) challenges to the legislation; c) judicial comments regarding the credibility of children's evidence; and d) a conclusion.

A. HISTORY - PRE-BILL C-15

Corroboration as a legal doctrine originated in the English common law and was subsequently adopted in Canadian common law and codified in Canadian legislation.¹⁶⁶ The classic common law definition of "**corroboration**" in criminal cases was articulated by Lord Reading, C.J., in 1916, in R. v. Baskerville¹⁶⁷. The issue facing the court concerned the scope of the rule of practice requiring corroboration of the evidence of an accomplice, but the court stated that the rule was the same for statutory requirements. Lord Reading made the point that it was clearly not necessary for the evidence of an accomplice to be confirmed in every manner but that a difference of opinion had arisen as to whether it was essential that the corroborative evidence connect the accused with the crime. Following a consideration of the authorities, the court concluded that the more appropriate opinion was that the evidence must be confirmed not only as to the fact of the commission of the offence, but also that the accused committed it. Delivering for the court, Lord Reading stated:

We hold that evidence in corroboration must be independent testimony which affects the accused by connecting or tending to connect him with the crime. In other words, **it must be evidence which implicates him, that is, which confirms in some material particular not only the evidence that the crime has been committed, but also that the prisoner committed it.** The test applicable to determine the nature and extent of the corroboration is thus the same whether the case falls within the rule of practice at common law or within that class of offences for which corroboration is required by statute. The language of the statute,

166 Section 586 Criminal Code; s. 16(2) Canada Evidence Act.

167 [1916] 2 K.B. 658, (1916-1917), All E.R. Rep. 38, 25 Cox C.C. 524, 12 Cr. App. Rep. 81 (K.B.).

"implicates the accused," compendiously incorporates the test applicable at common law in the rule of practice. The nature of the corroboration will necessarily vary according to the particular circumstances of the offence charged. It would be in high degree dangerous to attempt to formulate the kind of evidence which would be regarded as corroboration, except to say that **corroborative evidence is evidence which shows or tends to show that the story of the accomplice that the accused committed the crime is true**, not merely that the crime has been committed, but that it was committed by the accused. (at 667) [emphasis added]

The chief justice further elaborated that it would be highly dangerous to attempt to formulate the kind of evidence which would constitute "corroboration". He did make the clarification, however, that the corroboration need not be direct evidence that the accused committed the crime - circumstantial evidence of the accused's connection with the offence was sufficient. In addition to the direct evidence of another witness, it could include an admission by the accused, the finding of articles, the condition of the victim, medical reports, etc.

The narrow interpretation of the rule was approved in a 1927 Supreme Court of Canada decision, **Hubin v. The King**¹⁶⁸. Anglin C.J.C. for the court stated:

Since the decision of the Court of Criminal Appeal in *Rex v. Baskerville*, [1916] 2 K.B. 658, the requirements of the provision now found in s. 1002 admit of no doubt. The corroboration must be by evidence independent of the complainant; and it must tend (headnote) "to show that the accused committed the crime charged." (at 172-173 C.C.C.)

168 (1927), 48 C.C.C. 172, [1927] S.C.R. 442 (S.C.C.). One legal observer concluded that the Supreme Court of Canada acted upon the strict interpretation of the rule on at least 15 occasions spanning a period of 60 years (Schiffer, 1988).

The **Baskerville** principle was formally adopted in Canada in the Supreme Court of Canada case, **Paige v. The King**¹⁶⁹. The court accepted the view that, in order to constitute corroboration, there must not only be independent evidence on some material particular, but that such evidence must implicate the accused.¹⁷⁰

In **R. v. Spencer**¹⁷¹, Lord Ackner referred to three established categories of witnesses for whom there is justification for an obligatory corroboration warning:

In the three established categories where the 'full warning' is obligatory, the inherent unreliability of the witness may well not be apparent to the jury. Hence the phrase often used in a summing up -- it is the experience of the courts accumulated over many years etc. etc. **Complainants of sexual assaults** do on occasions give false evidence for a variety of reasons, some of which may not have occurred to a jury. **Accomplices** may have hidden reasons for lying, and this possibility may again not be apparent to a jury. **Children** who, although old enough to understand the nature of an oath and thus competent to give sworn evidence, may yet be so young that their comprehension of events and of questions put to them, or their own powers of expression, may be imperfect. All this needs properly to be spelt out to the jury. (at 141)¹⁷² [emphasis added]

It became a well-established practice in English common law that the warning must be given in the case of alleged victims of sexual assault and in the case of child

169 (1948), 92 C.C.C. 32, [1948] S.C.R. 349 (S.C.C.).

170 See **R. v. Scott** (1973), 15 C.C.C. (2d) 234 (N.S.C.A.) for an example of the strictness of this rule. The Nova Scotia Court of Appeal quashed the conviction of an accused father on an incest charge against his 15-year-old daughter. The appellate court ruled that proof of the fact that she was not a virgin did not constitute "corroboration" since it did not directly implicate the accused. Furthermore, the appellate court held that the daughter's complaints of the alleged sexual acts by her father to her mother and sister were not "corroborative" because they were not "independent".

171 [1987] A.C. 128.

172 See **Vetrovec v. The Queen**, (1982), 27 C.R. (3d) 304, 67 C.C.C. (2d) 1 (S.C.C.) where the Supreme Court of Canada examined, and rejected as no longer either relevant or desirable, the common law rule which required juries to be warned about the danger of convicting on the uncorroborated evidence of an accomplice.

witnesses.¹⁷³ The discriminatory attitude towards these two groups became enshrined in Canadian legislation.¹⁷⁴

At common law (pre-1988), when a "child of tender years" gave "sworn" testimony and it was the only evidence which implicated the accused, the trial judge warned the jury that it was dangerous to convict without some corroborative evidence, but that they could convict if they were satisfied that the uncorroborated evidence was true (McWilliams, 1984). Lord Goddard, C.J. reasoned in R. v. Campbell¹⁷⁵:

The sworn evidence of a child need not as a matter of law be corroborated, but a jury should be warned, not that they must find corroboration, but that there is a risk in acting on the uncorroborated evidence of young boys or girls . . . and this warning should also be given where a young boy or girl is called to corroborate the evidence of another child, sworn or unsworn, or of an adult. (at 438)

Under the predecessor legislation, where a "child of tender years" gave "unsworn" testimony and it was the only evidence implicating the accused, the evidence had to, as a matter of law, be corroborated. The justification for the requirement of

173 R. v. Brown (1910), 6 Cr. App. R. 24 (the Court of Criminal Appeal held that it was a time-honoured practice to caution juries in respect of the evidence of a female complainant on a charge of a sexual offence); R. v. Graham (1910), 4 Cr. App. R. 218; R. v. Cratchley (1913), 9 Cr. App. R. 232; R. v. Dossi (1918), 13 Cr. App. R. 158; R. v. Tatam (1921), 15 Cr. App. R. 132; R. v. Lovell (1923), 17 Cr. App. R. 163; R. v. Salman (1924), 18 Cr. App. R. 50; R. v. Hester [1973] A.C. 296.

174 Section 586 Criminal Code and s. 16(2) Canada Evidence Act. Canadian legal commentator, Andrews (1964) offered this perspective on the "unintended consequences" of the state of the corroboration law:

It must be admitted...that if the law sets itself firmly against convictions in any case where reliance has to be placed wholly or substantially on children's evidence, very many offences against children will go unpunished. In practice, these offences of interference with children are often among the most serious crimes and it is important to convict the offender before he takes advantage of further opportunities. (at 770)

175 [1956] 2 All E.R. 272, [1956] 2 Q.B. 432, 40 C.R. App. Rep. 95 (C.A.).

corroboration was the lack of an oath, general lack of intellectual maturity, and the tendency of children to indulge in fantasies (McWilliams, 1984).

The narrow interpretation of the rule in R. v. Baskerville, *supra*, that the evidence in corroboration must be independent testimony "implicating the accused", was subsequently rejected by the Supreme Court of Canada in Murphy and Butt v. The Queen¹⁷⁶ (a rape case), and in Warkentin v. The Queen¹⁷⁷. In the latter case, the Supreme Court of Canada ruled that the identity of each accused did not have to be corroborated separately in the case of a gang rape. Mr. Justice de Grandpré stated in his reasons for judgment:

I am satisfied that the corroborative evidence of which s. 142 speaks need not identify each accused separately when the evidence to be corroborated is that a gang rape has been committed. It is sufficient to establish that intercourse without consent has taken place and that the group was a party to it. In the same fashion, I cannot accept the submission that the corroborative evidence of s. 142 must be pigeon-holed in three different slots, namely intercourse, non-consent and identity. The wording of the section goes against that interpretation. On the text of the article, there is corroboration when the story of the complainant is "corroborated in a material particular by evidence that implicates the accused". It is the entire picture that must be looked at, not a portion thereof. (at 20 C.C.C.)

The Alberta Court of Appeal also laid the rule to rest. In R. v. Chayko¹⁷⁸, the majority of the Alberta Court of Appeal held that the test enunciated in Baskerville was too narrow. The Alberta Court of Appeal, in considering the nature of the corroboration

176 (1976), 29 C.C.C. (2d) 417, 70 D.L.R. (3d) 42, [1977] 2 S.C.R. 603 (S.C.C.). This case dealt with corroboration of the evidence of a complainant alleging sexual assault under s. 142 of the Criminal Code.

177 (1976), 30 C.C.C. (2d) 1, 70 D.L.R. (3d) 20, [1977] 2 S.C.R. 355 (S.C.C.).

178 (1984), 12 C.C.C. (3d) 157, 31 Alta. L.R. (2d) 113, 51 A.R. 382 (Alta.C.A.).

required in the case of an unsworn child witness under s. 586 of the Criminal Code, held that the corroborative evidence need only be such as "confirming the complainant's story implicating the accused". Justice Kerans, delivering for the majority, and with reference to the statement of Spence, J. in Murphy and Butt v. The Queen, *supra*¹⁷⁹, opined:

Mr. Justice Spence's approach was to look for evidence which confirmed the story of the complainant . . . Implicit in this approach, it seems to me, is a recognition of the inadequacy of the Baskerville definition of corroboration. Evidence implicating the accused is a possible but not a necessary element for a corroboration . . . (at 170)

In R. v. B.(G.)¹⁸⁰, one of a trilogy of cases heard together, the Supreme Court of Canada dealt with the issue of corroboration and its statutory interpretation **prior** to its repeal. In interpreting the pre-Bill C-15 law, Madam Justice Wilson held that it was only necessary for a child complainant's evidence to be corroborated in a "**material**" particular, with or without implicating the accused. Describing a more flexible and purposeful approach, she wrote as follows:

Given the interpretive problems in the language of the section, it is difficult to discern the intention of the legislature by looking at the wording alone. I think we have to apply a purpose approach. In my view, the purpose of s. 586 is to allow the evidence of a witness, otherwise feared to be untrustworthy, to be given weight. Another way of formulating the purpose is to state that the section is designed to ensure that no accused will be convicted on the basis of testimonial evidence that is by its very nature unreliable. In order to achieve the section's purpose, therefore, what is required is additional evidence that renders it probable

179 Unsworn testimony cannot corroborate other testimony which requires corroboration. See Hoskins (1983) on mutual corroboration.

180 (1990), 56 C.C.C. (3d) 161; 77 C.R. (3d) 347 (S.C.C.).

that the complainant's story is true and may be safely acted upon. **Provided that the complainant's evidence is corroborated in a material particular, with or without implicating the accused, the veracity of the witness will be strengthened.** A good example in this case would be the evidence of the doctor that the child had indeed been sexually assaulted. (at 180) [emphasis added]

In the result, the Supreme Court of Canada held that the trial judge erred in acquitting the accused for lack of corroboration, since s. 586 of the Criminal Code did not require the corroborative evidence to connect the accused to the commission of the offence. The court upheld the decision of the Saskatchewan Court of Appeal, ordering a new trial.

In addition, Madam Justice Wilson in *dicta* applied, as a general principle of statutory interpretation what might be considered a "presumption against impossibility":

Also in favour of the liberal interpretation are the presumptions that the law does not require the impossible and the legislator intends only what is just and reasonable. Since the only evidence implicating the accused in many sexual offences against children will be the evidence of the child, imposing too restrictive a standard on their testimony may permit serious offences to go unpunished and perhaps to continue. Moreover, it is reasonable to assume that the legislator did not intend an accused to benefit from the youthful age of his victim by placing unnecessary impediments in the way of prosecuting offences against small children. (at 180)

This type of judicial thinking, it is submitted, reflects a new sensitivity towards the assessment of the evidence of children.

Turn-of-the-century psychologists (Varendonck, 1911; Stern, 1903; Freud, 1909) were primarily responsible for propagating the belief that sexual and physical abuse of children are extremely rare and generally the product of children's imaginations

(Goodman, Rudy *et al*, 1989; Boat and Everson, 1990; Goodman, 1990).¹⁸¹ Contemporary research, conducted over the last decade, has shown that those stereotypical views lack empirical foundation (Goodman, 1984a; Goodman, Rudy *et al*, 1989). Since that time, proponents of the elimination of corroboration requirements for child witnesses/victims have argued that there is little evidence to support the claim underlying these laws that children's reports are "**unreliable**" and none at all to substantiate the popular mythology that children frequently fabricate tales of sexual assault or misunderstood innocent behaviour by adults (Berliner and Barbieri, 1984; Conte and Berliner, 1982; Burgess *et al*, 1978; Kroth, 1979; Schultz, 1973; Berliner and Stevens, 1979).¹⁸² Rather, the general veracity and cogency of children's reports are supported by relatively high rates of admission by the offender (Conte and Berliner, 1982). Children, unlike adults, lack the knowledge or cognitive ability to fabricate a "consistent believable false statement"; thus, it is strongly contended "that young children would be unlikely, therefore, to be able to make up a detailed account of a sexual incident unless it actually occurred" (Goodman, 1984a at 27).

The corroboration rule developed from prejudicial and faulty assumptions about the nature of sex-related offences and its complainants (Hoskins, 1983; Jackson, 1988;

181 As well, early psychological research on child witnesses was influential in generating negative views concerning their testimony. The majority of the empirical work portrayed children as particularly inaccurate, highly suggestible, and basically unreliable witnesses (Binet, 1900; Babinsky, 1910; Dupree, 1910; Marple, 1933; Mehl, 1912; Dauber, 1912; Limpmann, 1911; McCarty, 1929; Pear and Wyatt, 1914, Brown, 1926; Stern, 1939).

182 See Berliner and Barbieri (1984); Conte and Berliner (1982); Melton (1984; 1982) for a complete discussion of the psycho-legal issues of child sexual abuse. In addition, for an insightful and comprehensive review of recent strategies for procedural reforms to protect child victims in their role as witnesses see: Melton (1984); Pynoos and Eth (1984); Parker (1983); Berliner and Barbieri (1984); Finkelhor, 1987; Pipe and Goodman, 1991; Burgess *et al*, 1978; Avery, 1983; and Schultz (1973).

Goode, 1989; Lane, 1987; Sopinka and Lederman, 1974; Boat and Everson, 1990). Traditionally, perpetrators of sexual offences were male, and victims were invariably women and children.¹⁸³ Courts took the position that allegations of sexual assault against men were inherently subject to fabrication¹⁸⁴ and as a result "unreliable". Courts have been particularly circumspect in their approach to accepting the "**uncorroborated**" evidence of young girl complainants of cases involving sexual offences. In Mattouk v. Massad¹⁸⁵, Lord Atkin warned of the inherent danger of such testimony:

"It is now a commonplace that in judicial inquiries it is very dangerous to accept the uncorroborated story of girls of this age (15) in charging men with sexual intercourse. No doubt, there is no law against believing them, but in nearly all cases justice requires such caution in accepting their story that a practical precept has become almost a rule of law. (at 591)

Freud and John Wigmore, the leading American authority on evidence, played an integral role in shaping the law of corroboration. Their psychological theories led society to disbelieve children who made complaints of sexual abuse (Cozen, 1986). Both Freud and Wigmore firmly believed that charges of sexual abuse by young females were inherently unreliable. While Freud first accepted his adult female patients' allegations that they had been sexually abused as children, he later abandoned that

183 Historically, complainants of sexual abuse were invariably always female. The Badgley Commission (1984) reported that over 95% of sexual abusers are male, and that almost all of the victims are females under the age of 18. Approximately one-third of victims of child sexual abuse are boys. The common law corroboration requirement pertaining to male complainants was in doubt as recently as R. v. Cullen, [1975] 6 W.W.R. 153, 26 C.C.C. (2d) 79 (B.C.C.A.) although there was prior authority in England in R. v. Burgess (1956), 40 Cr. App. R. 144 and at the superior court level in Canada, R. v. F., [1968] 1 O.R. 658. [1969] 2 C.C.C. 4, 3 C.R.N.S. 117 (Ont.C.A.), that corroboration was required.

184 The example of the Salem (Witch Trial) "circle girls" in 1692 provided grounds for not permitting the uncorroborated evidence of children in court (Ceci, Toglia and Ross, 1987).

185 (1943) A.C. 588 (P.C.).

position because he could not believe that Viennese men were capable of committing such offences. Wigmore agreed with Freud's assumption that the accusations and testimony of young females were basically unreliable (Cerkovnik, 1985). Wigmore (1940b) was influential in fostering the view that young girls and females, because of mental defects and abnormalities, were predisposed to fabricating charges of sexual assault by males. He pontificated on the state of contemporary psychiatric knowledge on the issue, as follows:

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 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 offences by men. (at s.924a)

Wigmore contended that his views, accepted by the judiciary and lawyers of the period, were founded collectively on "modern" psychiatry, the experience of "any" criminal court judge, and "any" prosecuting attorney. By applying extraordinary rules of evidence only to female complaints of sexual abuse, he "openly concerned himself with protecting innocent men from false accusations" (Cerkovnik, 1985:695). In an American case, **State v. Looney**¹⁸⁶, the court reviewed, but rejected, Wigmore's submission that female complainants of sexual assault ought always to be examined with respect to their "social history and mental make-up". The court, however, accepted as authority Wigmore's proposition that:

186 240 S.E. 612 (N.C.1978).

Obviously, there are types of sex offences, notably incest, in which by the very nature of the charge, there is a grave danger of completely false accusations by young girls of innocent appearance, but unsound minds, susceptible to sexual fantasies and possessed of malicious, vengeful spirits. (at 618)

The discriminatory and vacuous assertions propagated by Wigmore have since been discredited. Upon close examination of his treatise on the subject, an observer (Bienen, 1983) arrived at the conclusion that the "scientific" sources Wigmore relied upon were lacking in empirical foundation. Rather, more contemporary psychological works have clearly demonstrated that he was wrong in his assumptions. Bienen concluded:

Wigmore's unequivocal assertion that young girls who complain of sexual assault are likely to be lying is not supported by recent clinical experience or by survey research data . . . In reality, false denials of incest are vastly more common than false complaints. (at 265)

The Supreme Court of Canada, in **R. v. Kendall**, *supra*, confirmed the common law practice, which required the trial judge, in every case in which a child testifies, to warn the jury of the danger of accepting the uncorroborated evidence of a child. As a matter of social policy and jurisprudence, the court took the view that there was a **"special risk in acting on the uncorroborated evidence of a young child, even when sworn"** (at 221). The legal rationale for this special judicial caution was premised on the "mental immaturity" of the child. Writing for the majority, and citing Wigmore (1940a) as authority, Mr. Justice Judson stated:

The basis for the rule of practice which requires the judge to warn the jury of the danger of convicting on the evidence of a child, even when sworn as a witness, is the mental immaturity of the child. The difficulty is fourfold: **1. His capacity of observation. 2. His capacity of recollection. 3. His capacity to understand questions put and frame intelligent answers. 4. His moral responsibility.** (Wigmore on Evidence, 3rd ed., para. 506) (at 220) [emphasis added]

This common law rule was subsequently cited with approval by the Supreme Court of Canada in **R. v. Horsburgh**, *supra*¹⁸⁷. Mr. Justice Spence, in *dicta*, commented that it was:

...a serious misdirection for the trial judge to direct the jury that once the Judge has decided, after making due inquiry, that a child witness may be sworn, that child's evidence may be received and treated as if it was the evidence of a competent adult witness. Instead the judge must warn the jury, or, if he is sitting alone, himself, about the special risk in acting on the uncorroborated evidence of a young child even when sworn. (at 320)

The **Kendall** rule, and its subsequent adoption by the **Horsburgh** court, perpetuated negative views about the reliability of children's evidence and substantively undermined the value of evidence given by children¹⁸⁸ (Leippe *et al*, 1989; Bessner, 1991; Delisle, 1989).¹⁸⁹ Appellate courts of the period, however, followed the **Kendall** approach with respect to giving mandatory warning of the "inherent frailties" of

187 This rule was also applied in **R. v. Chornenki** (1981), 14 Man. R. (2d) 46 (Man.C.A.).

188 The Ontario Law Reform Commission, in its Report (1991), submitted that as a result of the difficulties often encountered in securing corroboration of a child's testimony, the **Kendall** rule impeded successful prosecutions of many cases in Ontario. The rule was responsible for propagating and fostering the view that children's evidence is untrustworthy and inferior to the testimony of adults (Leippe *et al*, 1989).

189 In a civil case, involving custody of children, **Children's Aid Society of Kingston v. Mr. and Mrs. H.** (16 June 1977), Kingston (Ont.P.C.) (Fam.Div.) [unreported], the trial judge felt bound by the principle established in **Kendall** with respect to the "frailties" of children's evidence and directed himself that it was mandatory that their evidence (even though sworn) be seriously scrutinized. Thompson J. argued that a child's poor memory, undeveloped moral capacity, suggestibility, and inability to discern fact from fantasy, may affect the probative value of the evidence.

children's testimony. In the Ontario Court of Appeal decision of **R. v. Tennant and Naccarato**¹⁹⁰, three children, who were eyewitnesses to a murder, gave sworn evidence at trial. The appellate court ruled that the failure of the trial judge to warn the jury of the frailties of the children's evidence, as prescribed by the Supreme Court of Canada in **Kendall** and **Horsburgh**, constituted a serious error and a misdirection. The Ontario Court of Appeal specifically held that:

...where the evidence of children not only contradicts with the accused's testimony, but implicates and incriminates them the trial judge must in his charge warn the jury with respect to the frailties of their evidence.

Failure to caution the jury with respect to the matters referred to by both Judson, J., and Spence, J., was to leave them to deal with the evidence of these children as one would the evidence of adults and, in the circumstances, that was error. (at 87-88)

As a result of the judicial error, the convictions of the accused were overturned and a new trial was ordered.

Similarly, the **Kendall** rule was applied in **R. v. Quesnel and Quesnel**¹⁹¹, in a strict manner. In this case, four girls between 13 and 15 years of age testified at the sexual assault trial of two adult brothers. The trial judge directed the jury as follows:

I think you can accept the fact that children of thirteen or fourteen may not be as reliable witnesses as adults but they may be. Children of that age may fantasize and make up things, may bear grudges or something of that nature. But you have to, in essence, assess these witnesses from the witness box and make your own decision but you should bear these things in mind. (at 279)

190 (1975), 23 C.C.C. (2d) 80, 31 C.R.N.S. 1 (Ont.C.A.).

191 (1979), 51 C.C.C. (2d) 270 (Ont.C.A.).

Following such a charge, the accused were convicted by the jury. Upon subsequent review, the Ontario Court of Appeal ruled that the trial judge's charge was an "inadequate caution" because it failed to warn the jury of "the particular weaknesses in the child's evidence so that the real significance of the frailty of her evidence was clear"¹⁹² and directed that a new trial be conducted.

While some defence lawyers have argued that the **Kendall** and **Horsburgh** rule still applies, the Supreme Court of Canada, in **Vetrovec v. The Queen**¹⁹³, called into question the validity of mandatory corroboration warnings about the unreliability of testimony from particular classes of witnesses. Specifically, the **Vetrovec** court abolished the common law rule governing the corroboration of accomplice testimony, holding that general rules concerning the frailties of evidence of whole classes of witnesses were inappropriate. Rather, the court evinced a less restrictive, more situational approach towards corroboration and limiting instructions. Mr. Justice Dickson opined:

Rather than attempting to pigeon-hole a witness into a category and then recite a ritualistic incantation, the trial judge might better direct his mind to the facts of the case, and thoroughly examine all the factors which might impair the worth of a particular witness. If, in his judgment, the credit of the witness is such that the jury should be cautioned, then he may instruct accordingly. If, on the other hand, he believes the witness to be trustworthy, then, regardless of whether the witness is technically an 'accomplice' no warning is necessary. (at 11)

192 *Ibid.*, at 279.

193 (1982), 27 C.R. (3d) 304, 67 C.C.C. (2d) 1 (S.C.C.).

The Law Reform Commission of Canada (1975) argued that no empirical evidence existed to support the assumption that juries are more likely to be misled by the evidence of accomplices, victims of sexual offences, or children than by any other witnesses. Furthermore, the Commission maintained that there was no compelling reason why normal cross-examination and counsel's submissions to the jury could not expose any frailties of the evidence of such witnesses as effectively as it exposed the weaknesses in the testimony of any other kind of witness.

B. BILL C-15 - REPEAL OF CORROBORATION

1. Analysis of Reported Cases

By enacting s. 274 of the Criminal Code, the Federal Government clearly intended to eliminate discrimination against child witnesses by statutorily removing the corroboration requirement. While this section clearly removes any formal requirement for corroboration, it remains equivocal whether the legislation will eliminate the common law practice of judges giving Kendall-style warnings.¹⁹⁴

Since the proclamation of **Bill C-15**, the Supreme Court of Canada has had several opportunities to express in an unequivocal manner its rejection of the mandatory Kendall warning, but failed to do so. In R. v. B.(G.), *supra*, the accused were charged

¹⁹⁴ Since the legislation did not abrogate the common law warning, legal commentators have predicted that judges will continue to give the Kendall warning when children testify (Bala, 1990; Delisle, 1989).

with aggravated sexual assault of a 7-year-old child who, at the age of 8, gave sworn testimony at trial. The Supreme Court of Canada, in its description of the lower court's decision, noted that the trial judge acknowledged that he was governed by the admonition promulgated by **Kendall** and, in fact, did instruct himself on the frailties of children's evidence. Nevertheless, the Supreme Court failed to directly address the issue of whether such a common law practice should continue to be followed by the judiciary. Rather, Madam Justice Wilson, in delivering the judgment of the court, remarked on the proper approach that should be taken when assessing the credibility of child witnesses. Giving an interpretation of the *obiter dicta* comments of Mr. Justice Wakeling of the Saskatchewan Court of Appeal in **R. v. B.(G.)**, *supra*, where, in this passage, he recognized the need for more judicial sensitivity in assessing the credibility of children's evidence, Wilson J. remarked:

...I am of the opinion the trial judge erred in utilizing and applying strictly an adult standard for the assessment of credibility of the youths that appeared before him. Although the cross-examination was conducted quite reasonably in these trials. . .I find it unremarkable that the youthful witness would eventually find shelter in silence or simply agreement with counsel's suggestions. Nor do I find it difficult to understand that the trauma resulting from the incidents of assault would prevent a witness from having an accurate and detailed recall of the event, even if it were being recalled on the day it occurred. In the same way that adult standards would not be suitable to gauge the conduct of youths in physical, mental, social, or other aspects of human activity, it is equally unacceptable that such a standard be applied without modification when measuring the credibility of their testimony. (at 150)

...[I]t 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**. However this is not to say that the courts should not carefully assess the credibility of child witnesses and

I do not read his reasons as suggesting that the standard of proof must be lowered when dealing with children as the appellants submit. Rather, he was expressing concern that a flaw, such as a contradiction, in a child's testimony should not be given the same effect as a similar flaw in the testimony of an adult. I think his concern is well-founded and his comments entirely appropriate. While children may not be able to recount precise details and communicate the when and where of an event with exactitude, this does not mean that they have misconceived what happened to them and who did it. **In recent years we have adopted a much more benign attitude to children's evidence, lessening the strict standards of oath taking and corroboration, and I believe that this is a desirable development. The credibility of every witness who testifies before the courts must, of course, be carefully assessed but the standard of the 'reasonable adult' is not necessarily appropriate in assessing the credibility of young children.** (at 219-220) [emphasis added]

Having said this, the court chose not to debate the inappropriateness of the **Kendall** and **Horsburgh** decisions. Similarly, in **R. v. Khan**, *supra*¹⁹⁵, notwithstanding a salient discussion by Madam Justice McLachlin of the probative value of evidence offered by child witnesses, the Supreme Court of Canada did not explicitly overrule the 1962 **Kendall** decision.¹⁹⁶

While the Supreme Court of Canada, in **R. v. W.(R.)**¹⁹⁷, adopted and elaborated on the views expressed by Madam Justice Wilson, in **R. v. B.(G.)**, *supra*, namely, to eschew the acceptance of rigid stereotypes of children as unreliable witnesses, it, also, missed the opportunity to reject expressly the jurisprudence perpetuated by the **Kendall** and **Horsburgh** courts. The Supreme Court of Canada did not specifically make reference to either the **Kendall** or **Horsburgh** judgments.

195 This case dealt specifically with the issues of hearsay and unsworn evidence of a child.

196 See Bessner's annotation to this case, (1990), 79 C.R. (3d) 15.

197 (1992), 13 C.R. (4th) 257 (S.C.C.).

The Supreme Court of Canada did, however, formally acknowledge that the law of evidence affecting children had recently undergone two major developments. McLachlin J. described the changes as follows:

The first is removal of the notion, found at common law and codified in legislation, that the evidence of children was inherently unreliable and therefore to be treated with special caution. . . The second change in the attitude of the law toward the evidence of children in recent years is a new appreciation that it may be wrong to apply adult tests for credibility to the evidence of children. One finds emerging a new sensitivity to the peculiar perspectives of children. Since children may experience the world differently from adults, it is hardly surprising that details important to adults, like time and place, may be missing from their recollection. (at 266)

In light of the climate of heightened judicial sensitivity to children as witnesses, it would have been preferable if the W.(R.) court had abolished the **Kendall** warning. As a result, the law remains unsettled as to whether the **Kendall** warning constitutes a discretionary, as opposed to a mandatory, rule of practice. In the absence of an authoritative ruling by the Supreme Court of Canada which prohibits it, it is submitted that lower courts will be left to exercise their own discretion concerning the dispensing of such warnings.

In two recent decisions, courts have taken the opportunity to denounce common law rules which tended to treat an entire class of persons as unreliable witnesses. In his criticism of the blanket **Kendall** warning, Mr. Justice Power, of the Alberta Court of Queen's Bench, in R. v. B.(K.)¹⁹⁸, stated in unequivocal terms:

198 (1990), 76 Alta. L.R. (2d) 129 (Q.B.).

[T]he questioning of children and weighing of their evidence should be based upon an appreciation of their developmental stage and maturation level, not broad generalities. (at 134)

His Lordship was of the view that the broad policy statements underpinning the **Kendall** decision "lack any objective or scientific rationale"¹⁹⁹.

As well, the British Columbia Court of Appeal had occasion recently to address the issue of the common law warning with respect to child witnesses. In **R. v. K.(V.)**²⁰⁰, after consideration of the Supreme Court of Canada decisions in **Kendall** and **Horsburgh**, the British Columbia Court of Appeal ruled that a judge should not make any assumptions about the reliability of evidence solely because of a witness's age or the type of offence. In this case, the trial judge's failure to caution himself about the "frailties" of the evidence of a child witness did not constitute an error in law and no miscarriage of justice resulted. The court explicitly held that the caution was "a matter for the discretion of the trial judge, rather than as a rule of practice"²⁰¹, notwithstanding the existence of both English²⁰² and Canadian authority (as a result of **Kendall**). Mr. Justice Wood, in rejecting the need for a **Kendall**-type warning, concluded:

[I]n this province at least, there is no rule of practice that would have required the trial judge to have cautioned himself in the fashion suggested by counsel, simply because of the age of the complainant. (at 345)

199 *Ibid.*, at 134.

200 (1991), 4 C.R. (4th) 338 (B.C.C.A.).

201 *Ibid.*, at 345.

202 See **R. v. Campbell**, *supra*, at 102 (Cr. App. R.) per Lord Goddard C.J. and **Director of Public Prosecutions v. Kilbourne**, [1973] A.C. 729, [1973] 1 All E.R. 440, 57 Cr. App. Rep. 381 (H.L.) per Lord Hailsham at 740 (A.C.).

In **R. v. B.(E.R.)**²⁰³, the trial judge ruled that, when relying solely upon the evidence of child witnesses, it would be unsafe to convict in the absence of corroboration because of the recognized frailties of such testimony. The court commented further by issuing a caveat to the effect that the evidence of children suffers generally from a "diminished capacity". The provincial court judge formulated the warning as follows:

The only caveat that should be added, in accepting and relying upon the evidence of child witnesses, is that their age, and what we generally accept as being a **diminished capacity by reason of their youthfulness**, requires that a greater care be taken that the evidence received from them is reliable before proceeding to record a conviction against an accused based upon it, particularly where that evidence conflicts with the evidence of the accused. (at 15) [emphasis added]

In an unreported British Columbia case, **R. v. C.(G.A.)**²⁰⁴, the trial judge, in charging the jury, formulated a **Kendall**-like warning in this manner:

When you decide whether or not to accept the testimony of a child witness, in this case G., I would suggest you consider the following things: first, consider the questions I asked her initially when she was in the witness box, in terms of her intelligence and in terms of her capacity to understand questions and answer questions. Second, you should consider how her mental immaturity might affect her ability to give an accurate account of what she witnessed. You should ask yourselves whether G.'s mental immaturity could have affected the following things: one, her ability to observe what happened and to make rational sense of it; her ability to remember what she saw; her ability to understand the questions that Crown and Defence counsel asked her; her ability to frame intelligent answers to those questions and her ability to accurately communicate what she saw and her moral responsibility, her ability or desire to tell the truth. (at 2-3)

203 (1990), 9 W.C.B. (2d) 88 (Nfld.P.C.).

204 (9 May 1989), Vancouver CC881393 (B.C.C.C.) [unreported].

In the absence of legislation and/or authoritative case law, which explicitly abrogates the common law **Kendall** warning respecting children's evidence, it is submitted that judges will continue to give the ubiquitous warning about the frailties of children's testimony as a matter of discretion. It has been argued by the Ontario Law Reform Commission (1991), and this dissertation supports that position, that the **Kendall** rule should be statutorily abolished. The Commission has taken the position that children should be treated as individuals and not as a class of witnesses.²⁰⁵ The report stated:

The Commission subscribes to the view that the quality of a child's evidence ought to be judged on an individual basis, as is the situation with adult witnesses. A child's testimony should not be automatically labelled as untrustworthy and unreliable solely because the person that is offering the evidence is a child. (at 48)

It is irrational to have strict rules which attempt to assess a witness's evidence premised on whether a witness falls within a particular category. The **Vetrovec** court has explicitly rejected that rule of practice. The assessment of credibility should be based on an individual evaluation of a child witness in a particular case.

The Law Reform Commissions of Ireland (1990) and Western Australia (1990) have also recommended that common law warnings similar to those formulated in **Kendall** ought to be legislatively abolished.²⁰⁶

205 This view has been endorsed by both the Department of Justice (Yuille *et al.*, 1988) and the Law Reform Commission of Canada (1977). See, also, Robb and Korczyk (1989) for a discussion of the arbitrariness of the common law practice.

206 In New Zealand, a Bill passed in 1989 prohibits a judge from giving warnings respecting a child's testimony solely because the witness is a child. Such a direction may only be dispensed when, as is the case with adult witnesses, a real danger exists in the particular case that the evidence is unreliable and untrustworthy (Law Reform (Miscellaneous Provisions) Bill 1989).

Various judges, lawyers and academics have expressed serious reservations about a legal rule which promoted the treatment of an entire class of persons as unreliable witnesses (Leippe *et al*, 1989; Bala, 1992; Bessner, 1991; Spencer, 1987; Fote, 1985-86; Rozell, 1985; Goodman and Helgeson, 1988; Goodman and Reed, 1986). Mr. Justice Kerans, in **R. v. Meddoui**, *supra*, after a careful consideration of the social science research which has established that children are not inherently unreliable witnesses, stated:

...the Supreme Court of Canada as recently as 1962 in *R. v. Kendall* (1962), 132 C.C.C. 216, [1962] S.C.R. 469, 37 C.R. 179, had proclaimed that very young children were inherently suspect witnesses, a view expressed in the law since the last century. It was then thought, and 'scientific' authority supported the idea, that children did not distinguish fact from fantasy, were forgetful, and had no sense of truth... [T]he insight into child psychology planted in the law long ago and accepted in *Kendall* and other authorities was doubtful science. Parliament, in another provision in Bill C-15, repealed the rule about corroboration of child witnesses. I observe that, also very recently, the U.K. Parliament repealed a similar rule. I agree with Lord Lane when he says, in *R. v. B.* (February 27, 1990, unreported, except *Times* March 1, 1990), that repeal represents acceptance by Parliament of the idea that at least some children will offer reliable evidence, and the evidence of each child, as that of each adult, should be assessed individually. (at 357-358)

Similarly, it is argued that contemporary psychological research has revealed that the generalizations about children's testimonial capabilities enunciated in **Kendall** and **Horsburgh** are "overbroad, if not simply incorrect" (Thompson, 1989). Following a comprehensive analysis of the scientific research on the reliability of child witnesses, a legal observer (Bessner, 1991) concluded:

...psychological studies reveal that to date children have been greatly undervalued as witnesses. The testimony of a child who is asked simply and direct questions is generally as accurate and trustworthy as that of an adult eyewitness. (at 506)²⁰⁷

Professor Delisle (1989) followed a similar line of argument:

No one should assume that all children are inherently suspect. The child witness should be treated like other witnesses, as an individual with whatever individual shortcomings or individual attributes that are there to be observed. (at 317)

It is further submitted that, the four concerns formulated by the **Kendall** court about the unreliability of child witnesses, unequivocally can, and do, apply to all witnesses. Professor Bala (1992) advanced this argument:

As a matter of policy and empirical fact, a general rule about the need to warn of the unreliability of child witnesses is most dubious. It is true that evidence of a child *may* suffer from frailties of observation, memory, capacity to communicate, and moral responsibility. But the evidence of *any* witness may suffer from these frailties. Arguably, on a statistical basis, the evidence of accused persons is much less reliable than that of children, yet we do not require judges to give special warnings about the lack of reliability of the testimony of accused persons in general. Surely the very purpose of a trial is to assess the evidence of the witnesses in this particular case; general warnings about the lack of reliability of a category of witness are not appropriate. (at 17)

207 The Ontario Law Reform Commission (1991) did an extensive review of the empirical literature in Chapter 1 of its report and found that there was no validity to the **Kendall** proposition.

In **R. v. Saulnier**²⁰⁸, the Nova Scotia Court of Appeal ruled that, although the legal requirement of corroboration for sexual offences involving children has been removed by s. 274, the trial judge still has

...a discretion when reviewing the facts with a jury to discuss with them the weight they might see fit to give to the unsupported evidence of a complainant. (at 308)

In support of this proposition, Mr. Justice MacDonald relied on the judgment of Dubin, J.A. of the Ontario Court of Appeal, in **R. v. Camp**²⁰⁹, where he stated:

In short, therefore, I am of the opinion that it is no longer a rule of law that it is dangerous to convict on the uncorroborated evidence of the complainant with respect to those offences which had been enumerated in the former s. 142, and an instruction to the jury in the language therein prescribed is no longer appropriate. On the other hand the effect of the repeal does not limit the discretion of a trial Judge, nor relieve him of the duty in appropriate cases, while commenting on the weight to be given to the evidence of a complainant, to caution the jury in simple language as to the risk of relying solely on the evidence of a single witness, and to explain to them the reasons for the necessity of such caution. In doing so, the trial Judge ought not to resort to the term 'corroboration', but is free to point out to the jury any evidence which, in his opinion, supports the trustworthiness of the testimony of a complainant, even if such evidence does not meet the test set forth in *R. v. Baskerville*, [1916] 2 K.B. 658. (at 521)

The Nova Scotia Court of Appeal was of the view that the trial judge did not err in law in making comments with respect to corroboration. No instruction to the jury was required. MacDonald J.A. in *dicta* commented:

208 (1989), 48 C.C.C. (3d) 301 (N.S.C.A.).

209 (1977), 36 C.C.C. (2d) 511 (Ont.C.A.).

I feel bound however to say that since there was absolutely no evidence supporting the testimony of the girl, there was no need for the trial judge to make any comments with respect to supporting evidence. (at 308)

In **R. v. LeBlanc**²¹⁰, the Crown appealed an accused's acquittal on a charge of sexual assault on the ground that the trial judge erred in law by requiring corroboration of a complainant's testimony before he could convict. On the issue of corroboration, the trial judge had said:

I have a total absence of corroboration here. It's dangerous to convict any person without corroboration especially if the accused takes the stand and is unchallenged on cross-examination and you cannot say beyond a reasonable doubt in the circumstances of this case that he's not telling the truth. (at 528)

The New Brunswick Court of Appeal found that no error of law was established as a result of the trial judge's comment. Mr. Justice Angers, in dismissing the appeal, held as follows:

It is true that the judge used the word "corroboration" which, as is pointed out in Peter K. McWilliams, Q.C., *Canadian Criminal Evidence*, 3rd ed. (Aurora, Ontario: Canada Law Book Inc., 1991) at p. 26-20, "is now a bogey and the word 'confirmation' is to be preferred"; but this wrong choice of words does not constitute an error in law.

In my opinion, the trial judge was not requiring that the evidence of the complainant be confirmed; he was only stating the fact that it was not. He was also of the view, based on his appreciation of the circumstances of the case, that he should be cautious before entering a conviction. That position is correct in law as was recognized in *R. v. Camp* (1977), 36 C.C.C. (2d) 511, 79 D.L.R. (3d) 462, 39 C.R.N.S. 164 (Ont.C.A.),

210 (1992), 71 C.C.C. (3d) 527 (N.B.C.A.).

approved by this court in *R. v. Daigle* (1977), 37 C.C.C. (2d) 386, 18 N.B.R. (2d) 658. (at 528)

The Supreme Court of Canada, in *R. v. W.(R.)*, *supra*, considered the issues of the repeal of the corroboration requirement and the credibility of children's testimony. The court categorically rejected the legislative and common law approach which perpetuated the view that the evidence of children was inherently unreliable and therefore to be treated with special caution.²¹¹ While the court eliminated the prerequisite warning in every case which involved a child witness, it acknowledged that in some cases caution may be merited. McLachlin J., delivering the judgment of the court, opined:

I pause to consider the general question of how courts should approach the evidence of young children. The law affecting the evidence of children has undergone two major changes in recent years. The first is removal of the notion, found at common law and codified in legislation, that the evidence of children was inherently unreliable and therefore to be treated with special caution . . . The repeal of provisions creating a legal requirement that children's evidence be corroborated does not prevent the judge or jury from treating a child's evidence with caution where such caution is merited in the circumstances of the case. But it does revoke the assumption formerly applied to all evidence of children, often unjustly, that children's evidence is always less reliable than the evidence of adults. So if a court proceeds to discount a child's evidence automatically, without regard to the circumstances of the particular case, it will have fallen into error.

The second change in the attitude of the law toward the evidence of children in recent years is a new appreciation that it may be wrong to apply adult tests for credibility to the evidence of children. One finds emerging a new sensitivity to the peculiar perspectives of children. Since children may experience the world differently from adults, it is hardly surprising that details important to adults, like time and place, may be missing from their recollection. (at 266)

211 See McWilliams (1988) at para. 26:50100 where he contends that "some instructions as to the need for caution should still be required" for children who testify on "promising to tell the truth".

Madam Justice McLachlin reiterated and elaborated on the views expressed by Madam Justice Wilson regarding the standard of credibility to be applied to child witnesses, in

R. v. B.(G.), *supra*:

As Wilson J. emphasized in *B.(G.)*, these changes in the way the courts look at the evidence of children do not mean that the evidence of children should not be subject to the same standard of proof as the evidence of adult witnesses in criminal cases. Protecting the liberty of the accused and guarding against the injustice of the conviction of an innocent person require a solid foundation for a verdict of guilt, whether the complainant be an adult or a child. What the changes do mean is that we approach the evidence of children not from the perspective of rigid stereotypes, but on what Wilson J. called a 'common sense' basis, taking into account the strengths and weaknesses which characterize the evidence offered in the particular case...

It is neither desirable nor possible to state hard and fast rules as to when a witness's evidence should be assessed by reference to 'adult' or 'child' standards -- to do so would be to create a new stereotype potentially as rigid and unjust as those which the recent developments in the law's approach to children's evidence have been designed to dispel. Every person giving testimony in court, of whatever age, is an individual, whose credibility and evidence must be assessed by reference to criteria appropriate to her mental development, understanding and ability to communicate. But I would add this. In general, where an adult is testifying as to events which occurred when she was a child, her credibility should be assessed according to criteria applicable to her as an adult witness. Yet with regard to her evidence pertaining to events which occurred in childhood, the presence of inconsistencies, particularly as to peripheral matters such as time and location, should be considered in the context of the age of the witness at the time of the events to which she is testifying. (at 267-268)

While this decision appeared to exemplify an enlightened judicial approach with respect to the law of evidence pertaining to children, the court was, nevertheless, criticized for not adequately dealing with, and, not specifically overruling, the Kendall and Horsburgh judgments. A legal observer (Bala, 1992) argued:

The Supreme Court of Canada decision in *R. v. W.(R.)* (1992), 13 C.R. (4th) 257, ante, fits within the broad pattern of displaying increased sensitivity to the capacities of children as witnesses, albeit a judgment that disappointingly fails to discuss or explicitly overrule some of the previous, outdated jurisprudence in this area. (at 270)

In *R. v. Meddoui*, *supra*, Mr. Justice Robins commented on the abolition of the requirement for a systematic warning for child witnesses as follows:

Although the child's testimony is no longer presumed unreliable and is placed in the same position as that of any other witness, the cogency of her testimony is a matter of weight to be determined by the trier of fact.

As Professor Mewett observed in (1988) 30 Crim.L.Q. at p.257, the amendments liberalising the reception of the testimony of young children in criminal cases:

"seem to be a sensible, but not an excessive step, towards ensuring that such evidence is fairly received without prejudicing the rights of the accused and the protections he is entitled to.

• • •

With the repeal of s. 586 and no mention being made in the new s. 16 of the Canada Evidence Act of the requirement of corroboration, we have almost completely got rid of any absolute requirement for corroboration in criminal cases, and a good thing too. A jury, properly instructed on the question of the burden of proof, and a fortiori a judge, not only do not need any rule but may be seriously hampered by one. There is no reason to suppose that any apprehended danger of the wrongful conviction of an innocent person will actually materialize or that a jury will not carefully scrutinize the evidence of young children. It may be that in appropriate cases, the trial judge will continue to instruct the jury to exercise special caution, but there is no need for any absolute rule". (at 190-191)

In a recent case, which may have profound implications for the credibility of child witnesses, the British Columbia Court of Appeal, in *R. v. K.(V.)*, *supra*, ruled that there

is no statutory requirement or rule of practice that a judge caution himself (or a jury) about the danger of convicting an accused on the unsupported evidence of a child witness. In this case, the accused was convicted of the sexual assault of an 11-year-old complainant. There was no "independent" or supportive evidence to confirm either the complainant's or the accused's testimony. On appeal, the accused raised three grounds of error by the trial judge, the first and only one relevant to this analysis being that the trial judge erred in not cautioning himself with respect to accepting the unsupported evidence of an 11-year-old child.

Mr. Justice Wood of the Court of Appeal described the traditional stereotypical thinking by the judiciary surrounding cases of sexual assaults in this way:

When one reviews this history, a discernible trend becomes obvious. The common law rule of practice, which prevailed in a wide range of sexual offences prior to 1955, was predicated on assumptions which, as described by Dubin J.A. in *Camp, supra*, arbitrarily cast doubt on the credibility of all complainants who were alleged victims in cases of certain sexual offences. A good example was that described by Lord Atkin in *Mattouk v. Massad*, [1943] A.C. 588, [1943] 2 All E.R. 517, [1944] 3 W.W.R. 169 (P.C.) at p.591 [A.C.]:

"It is now a commonplace that in judicial inquiries it is very dangerous to accept the uncorroborated story of girls of this age [15] in charging men with sexual intercourse. No doubt, there is no law against believing them, but in nearly all cases justice requires such caution in accepting their story that a practical precept has become almost a rule of law". (at 348)

Wood, J.A. further remarked that:

That assumption is no longer valid, and the statutory amendments prior to 1982 reflect its rejection by a society moving to rid itself of such gender-related stereotypical thinking. (at 348)

After an extensive review of the common law, Mr. Justice Wood ruled that the special caution was a '**discretionary**' one which required an "**evidentiary foundation**" and stated, in an uncompromising manner:

The focus of the new discretion, which has replaced the old common law rules of practice, is the potential for the witness' evidence to be unreliable. **No automatic assumptions of unreliability arise because of age, or the nature of the complaint. There must be an evidentiary basis upon which it would be reasonable to infer that the witness' evidence is, or may be, unreliable. Absent such evidentiary foundation, it could not possibly be argued that failure to exercise the discretion resulted in a miscarriage of justice. Were it otherwise, the purpose of Parliament in enacting s. 274 would be circumvented.** (at 351) [emphasis added]

In effect, the British Columbia Court of Appeal has made an authoritative statement that courts must avoid the stereotypical attitudes in their assessments of the credibility of child witnesses.

2. Analysis of Unreported Cases

The dissertation research includes the monitoring of **71** (35 court observation cases and **36** case studies) unreported British Columbia cases (see **Appendix J**) (**14** were

preliminary inquiries and 57 were trials). Out of the 57 cases which proceeded to trial there were:

- 27 Convictions (with corroboration)
- 1 Conviction (without corroboration)²¹²
- 23 Acquittals²¹³
- 3 Guilty Pleas
- 3 Bench Warrants

It is clear from an analysis of the unreported cases that, notwithstanding s. 274, British Columbia judges have shown a reluctance to convict an accused without corroboration²¹⁴ and continue to engage in the practice of giving the common law warning that it is unsafe to convict an accused in the absence of corroboration.²¹⁵

212 **R. v. Ramsay**, *supra*. The low conviction rate for cases where there is no corroboration may be explained by the fact that:

- a. police are not laying charges in cases where there is no corroboration; and/or
- b. Crown are only proceeding with cases which have corroboration and, as a result, have a likelihood for conviction.

213 It is difficult to discern whether judges acquitted only in cases where they did not find corroboration or acquitted in cases where there was corroborating evidence of a complainant's allegations but were still left with a "reasonable doubt". It is unlikely, however, that all 23 cases were proceeded with to trial without the Crown tendering some corroborative evidence.

214 These unreported British Columbia cases were monitored in court. In the absence of the finding of corroboration, the accused were acquitted. **R. v. Khurana**, *supra*; **R. v. Dempsey and Hartung** (18 December 1989), Burnaby 2908 (B.C.P.C.) [unreported]; **R. v. Conrad** (10 April 1989), Vancouver CC881393 (B.C.C.C.) [unreported]; **R. v. Ghini**, *supra*; **R. v. V.** (4 October 1990), New Westminster 25676 (B.C.P.C.) [unreported]; **R. v. Zult**, *supra*; **R. v. Martin**, *supra*; **R. v. Young**, *supra*; **R. v. Zaharik**, *supra*; **R. v. Thomas** (31 May 1990), Salmon Arm 8931 (B.C.C.C.) [unreported]; **R. v. Dick(S.)** (7 March 1989), Vancouver CC880097 (B.C.S.C.) [unreported] (this was a jury verdict).

The Department of Justice (Schmolka, 1992; Hornick and Bolitho, 1992) funded research in selected sites across Canada to monitor the implementation of Bill C-15. The Ontario Communities Study found that half of the judges, who participated in a consultation with researchers, articulated that they would require corroboration before they were prepared to convict an accused. The remaining half of the judges stated that, while they did not object to the repeal of the corroboration rule in principle, they would still have difficulty in assessing credibility without corroborating evidence. The only data that was directly applicable was obtained from the Saskatchewan preliminary review. Judges reported that, for those cases discharged at the preliminary inquiry stage, there was lack of corroboration in 11 of 13 cases.

215 **R. v. Mason** (7 May 1987), New Westminster X017628 (B.C.C.C.) [unreported] (acquittal); **R. v. D.(J.L.)** (7 April 1988), Terrace 9630 (B.C.C.C.) [unreported] (acquittal); **R. v. C.(E.W.)** (16 May 1989), (N.S.S.C.A.D.) [unreported] (acquittal); **R. v. Meacham**, *supra* (acquittal); **R. v. Campbell** (9 March

A further line of cases illustrates the conservative approach of the judiciary. The provincial court judge, in R. v. H.(C.)²¹⁶, made these comments with respect to the repeal of the necessity for corroboration:

It is accepted that there is now no need for corroboration, at law. Nevertheless, one has not only to exercise caution when assessing the evidence of a child, but must also be concerned about the danger of convicting anyone on the evidence of a child without any supporting or confirming evidence. (at 3)

In R. v. B.(E.R.), *supra*, an accused was convicted of sexual assault of an 8-year-old boy. The complainant gave unsworn evidence at trial and the court admitted similar fact evidence concerning contact between the accused and an 11-year-old boy to rebut the accused's defence of innocent association. With reference to the issue as to the probative value of the unsworn evidence of the child witnesses, the trial judge concluded that, despite the elimination of the statutory requirement of corroboration for the complainant's testimony, the court should remain cognizant of the recognized frailties of the testimony and should, in appropriate circumstances, direct itself to find corroborative evidence. The court gave its reasons as follows:

Section 274 of the Criminal Code eliminated the requirement for corroboration for a conviction of an accused for an offence under enumerated sections, one of which is Section 271. However, notwithstanding the elimination of the statutory requirement of corroboration, the cases support the contention of counsel for the accused that the court should be cognizant of the recognized frailties of the

1988), Nelson 220829 (B.C.S.C.) [unreported] (acquittal); R. v. P.(L.J.) (1989), 7 W.C.B. (2d) 282 (Ont.D.C.) (acquittal); R. v. H.(C.) (8 March 1990), Courtenay Y696FC (B.C.P.C.) [unreported] (conviction).

216 (6 March 1990), Courtenay Y696FC (B.C.P.C.) [unreported].

testimony of persons as young as the two boys who gave evidence, and should, in the appropriate circumstance, instruct itself as to finding confirmative, supportive, or, for want of a better term, corroborative evidence, before convicting on the testimony of such witnesses. This view of the law is supported by a decision of the Nova Scotia Court of Appeal in **R. v. Saulnier** (1989), 48 C.C.C. (3d) 301 and by the Ontario Court of Appeal in **R. v. Tennant and Naccarato** (1975), 23 C.C.C. (2d) ... In a broad sense, it is the view of this court that the obligation on the court as it relates to child witnesses does not vary measurably from the obligation that the court has in respect of all witnesses and all evidence presented before it. With the elimination of the statutory requirement of corroboration, where it appeared in subsection 2 of Section 16 of the Canada Evidence Act, as it formerly read, or by virtue of Section 274, as it now is, of the Criminal Code, it does not follow that the court does not have the same responsibility and task as it has in relation to all witnesses; i.e. to accept only such evidence that is relevant to the proceedings, and of probative value, and ultimately to assess and determine what weight should be given to such evidence. (at 13-15)

In **R. v. Sutherland**, *supra*, an accused was acquitted of sexual interference of an 8-year-old boy because the trial judge was concerned about the danger of convicting the accused on the uncorroborated evidence of the child complainant and emphasized the difficulty with satisfying the criminal standard of proof in such cases. The relevant excerpt from the reasons for judgment is:

In circumstances such as these when evidence is given by a child and there is nothing to support that evidence, that does not mean that that evidence cannot be accepted, but one has to warn oneself sharply that it **may be dangerous to accept such evidence in the absence of some other supporting evidence, and that is what I find here. In the case of a criminal offense, a very serious criminal allegation, it is just too dangerous to accept that evidence when proof beyond a reasonable doubt is required.** For that reason, on the basis of the lad's evidence, and I don't mean to criticize him or suggest that he has lied to me about anything or to his mother, I just find that it is unsafe to act upon it.

It seems to me that through his own doing or some other influence on him, he was reluctant to tell me anything more than the bare facts because he was reluctant to say something that he thought he should not say, and faced with that apparent reluctance in him, because he is a bright lad with a good memory, it is not safe to convict on his evidence. (at 3) [emphasis added]

Similarly, in **R. v. Ball**²¹⁷, the trial judge underscored the need for corroboration in circumstances where there is only evidence consisting of one oath (of a child) against another oath (of an accused). His Honour Judge Hogarth, in his reasons for judgment, directed himself as to the "common sense" approach to be taken in such situations, notwithstanding the repeal of the corroboration requirement. His oral reasons on the issue are as follows:

...[T]he evidence upon which the Crown relies is entirely that of the child. There is no other evidence that I can see upon which it can be relied by the Crown to show that the offence was committed, apart from the circumstantial evidence dictated by the mother, and, to some very vague extent, by the detective.

The evidence of Ball is straight denial, an absolute denial, that admitted participation in the family but an absolute denial that he ever did anything of this kind. **In that sense you have oath against oath, that there is the oath of the child against the oath of Mr. Ball.** And I think that it's certainly not a rule of law but it's a good rule of common sense that when you have oath against oath and not being able to decide with exactitude which oath to choose, I think it's wise to remind ourselves that one should search for independent evidence that also tends to show that the offence was committed.

217 (15 May 1989), New Westminster X019869 (B.C.C.C.) [unreported].

There's no such evidence here. That's the old rule of corroboration where the common law held that it was dangerous to convict upon the uncorroborated evidence of the complainant. That's now gone by the boards, and quite properly so. But that was a direction that the judges had to give to the jury and it's gone by the boards, and quite properly so. But I still think that in circumstances where you might look to oath against oath, **where you're faced with oath against oath, you might look to the evidence for that kind of evidence, not necessarily with the greatest of strength, but something to give support to the Crown's case, arising out of and that arises out of the concept of having to prove the case beyond a reasonable doubt. There's no such evidence here.** (at 9-10) [emphasis added]

In the absence of finding corroboration to support either story, the judge acquitted the accused on the basis of a "**reasonable doubt**".²¹⁸

In **R. v. Stevens**, *supra*, the trial judge made clear his reluctance to convict an accused by relying solely on the evidence of the child witness.²¹⁹ He stated in no uncertain terms:

Now, this is a serious matter and it is a trial and if I were to rely solely on the evidence of the child, that the child gives as to the incidents, I would necessarily have to have some doubts. I might not necessarily disbelieve her but given what I've heard thus far, in the absence of further evidence, strong evidence -- evidence of corroboration, I will leave the word 'strong' out, evidence of corroboration that would satisfy me, I would have great difficulty convicting anybody of a serious offence on that evidence. (at 22)

Following these remarks from the judge, the Crown entered a stay of proceedings.

218 See the reported Ontario Court of Appeal case, **R. v. M.(A.W.)** (1993), 21 C.R. (4th) 106, where the court held that where evidence is diametrically opposed, the trier-of-fact is entitled to find reasonable doubt. The majority of the court ruled that the trial judge had wrongly approached the sexual assault case as one of deciding whether the accused or complainant is to be believed.

219 The 9-year-old child complainant, in this case, was, according to an expert who testified, "mentally delayed" by two or three years and was unable to give sworn testimony.

In R. v. C.(G.A.), *supra*, a father was charged with one count of assault and one count of sexual assault of his 9-year-old daughter. There was no corroboration (the only evidence which might be corroborative was the testimony from a school teacher of some behavioral changes) to support the child's allegation of the sexual assault. In his charge to the jury, the trial judge elected to give a special warning about the danger of convicting on the uncorroborated evidence of the child witness, as well as a warning about the child's mental immaturity and the resulting "inherent frailties" of a child's evidence. The judge concluded his charge by commenting that it was his view that no evidence existed to support the child's claim of the sexual abuse. The trial judge directed the jury with clarity and purpose as follows:

Now, in this case you heard the evidence of a child and I am going to give you something of a special direction when it comes to that. You heard the testimony of G. She is now 10 years old. You will recall I examined her and I came to the conclusion that she could be sworn...

When you consider the evidence of G. you should remember that she is mentally immature and may be less able than an adult to give an accurate account of what she has witnessed. She may be more likely than an adult to be influenced by the suggestions of other people, or she may be more likely to let her imagination run away with her. On the other hand, a child may be less likely than an adult to have an ulterior or an improper motive that could consciously or unconsciously influence the accuracy of her testimony.

When you decide whether or not to accept the testimony of a child witness, in this case G., I would suggest you consider the following things: first, consider the questions I asked her initially when she was in the witness box, in terms of her intelligence and in terms of her capacity to understand questions and answer questions. Second, you should consider how her mental immaturity might affect her ability to give an accurate account of what she witnessed. You should ask yourselves whether G.'s mental immaturity could have affected the following things: one, her ability to observe what happened and to make rational sense of

it; her ability to remember what she saw; her ability to understand the questions that Crown and Defence counsel asked her; her ability to frame intelligent answers to those questions and her ability to accurately communicate what she saw and her moral responsibility, her ability or desire to tell the truth.

Of course, you should also consider the things I just told to you about the credibility of witnesses generally and I will remind you that you do not have to accept all of the child's testimony; you do not have to accept part of it. You can either accept part or all, or you can reject it all. That is entirely up to you, as it is with any witness, but in this case I am also going to give you a special caution about G.'s evidence.

In my opinion, you should be very, very careful and cautious before you convict the accused solely on the basis of G.'s testimony. For this reason I suggest you look for other evidence that may confirm or substantiate the testimony of G. What you should look for is evidence that makes you more confident that this child was truthful and accurate.

Now, you may find some evidence that substantiates her testimony. I can give you some examples. The bruising that was observed on her may persuade you that there was force used against her that was unreasonable and, of course, that relates to the second Count. You can consider the evidence of the child, her personality, the evidence that you have about what seemed to have been a change of attitude in this period of time before the complaint was made.

Again I am going to suggest to you to be very, very cautious, indeed, if you do not find evidence that confirms or substantiates the testimony of this child. I have to tell you that I cannot find any evidence with respect to Count One, the sexual assault, other than the evidence of the child.

Now, you are the judges of the facts and it is up to you to decide whether the Crown has proved its case beyond a reasonable doubt. Again I am going to urge you to be especially careful in considering the testimony of a child witness. (at 2-3)

Following a short deliberation, the jury returned a verdict of "guilty" to the count of assault and "not guilty" to the charge of sexual assault.

In R. v. M.(W.H.)²²⁰, the accused was acquitted of charges of indecent assault and sexual assault of his young stepdaughter. While it acknowledged that the corroboration of the complainant's evidence was no longer required by law, the court nonetheless, felt it was important, in this case, to determine whether there were facts to confirm the evidence of the complainant. The court was of the opinion that the apparent lack of medical evidence, which would indicate whether the complainant had been sexually abused in the manner she described, was a most significant deficiency in the Crown's case. The court further held that there was nothing in the complainant's behavioral conduct, which could be indicative of sexual abuse. These evidential problems were compounded by some contradictory points in the complainant's evidence. The court concluded that her uncorroborated testimony could not have much weight.

Likewise, in R. v. D.(J.L.), *supra*²²¹, the trial judge acquitted an accused of sexual assault of a 10-year-old child (age 12 at the time of trial) and his 5-year-old daughter (age 7 at the time of trial) on the basis of lack of medical evidence to support the children's uncorroborated evidence. The trial judge, in her reasons for judgment, stated that she had "**entirely rejected the accused's evidence from a credibility standpoint**" but concluded:

In short, the medical evidence is not conclusive but simply consistent with both the Crown and defence theory in this case. Therefore, after much

220 (12 April 1990), GSC-9093 (P.E.I.S.C.) [unreported].

221 There is a disturbing postscript to this case. One year later, the Crown counsel who prosecuted the case received "a witness statement from an individual who witnessed the accused performing cunnilingus on his daughter. This individual had previously left an anonymous note on the windshield of a police vehicle, but was too afraid to come forward until after the trial" (quoted from a letter to the Criminal Justice Branch, Special Prosecutions, dated July 30, 1990, and signed by Ms. Laurie Langford, Crown Counsel).

agonization and with great reluctance and **despite what I consider to be the strong viva voce evidence of C.**, I have found that the inconsistencies and some of the contradictions found in the evidence **at least raise a reasonable doubt as to Mr. D.'s guilt.** (at 18) [emphasis added]

In **R. v. Lang**²²², a case which involved an allegation of sexual assault on a female child, the Manitoba Court of Appeal commented on the new **Criminal Code** provision by stating that although supporting evidence is no longer required as a matter of law, it may, notwithstanding, be required as a matter of reason, depending on the circumstances of the case. Twaddle J. gave this account of the court's prudent approach:

Reason dictates that if there is in the circumstances of the case even a possibility, not itself fanciful, that the complainant's account of events may have been imagined, the trier of fact should not convict in the absence of some fact, independently established, which connects the complainant's account with reality. (at 139)

However, there is limited evidence that judges are willing to weigh the credibility of the evidence of a child witness without a corroboration warning and to convict an accused on the uncorroborated evidence of a child.²²³

In the summary conviction appeal for touching his daughter, who was under 14 years, for a sexual purpose, the accused in **R. v. L.(P.K.)**²²⁴ argued that the trial judge failed to caution himself with respect to the danger of convicting on the uncorroborated evidence of the complainant. The appellate court ruled that, in the absence of anything

222 (1987), 46 Man. R. (2d) 135 (Man.C.A.).

223 **R. v. Hughes** (1988), 7 W.C.B. (2d) 32 (Ont.D.C.); **R. v. P.(D.W.)** (1989), 49 C.C.C. (3d) 417 (S.C.C.); **R. v. Ramsay**, *supra*.

224 (8 June 1990), Vancouver CC890086 (B.C.C.C.) [unreported].

on the record to indicate otherwise, it should be presumed that the trial judge applied the proper principles in deciding that the complainant was credible and her evidence ought to be accepted. The county court judge summed up as follows:

In my judgment in deciding the complainant was credible and that her evidence ought to be accepted the learned trial Judge necessarily gave consideration to the weight to be attached to her evidence. I find no error on the part of the trial Judge, and accordingly the appeal is dismissed. (at 11)

In **R. v. B.(J.N.)**²²⁵, an accused appealed his conviction for sexually assaulting his stepdaughter on the grounds that the trial judge's verdict was unreasonable because it was based on the uncorroborated evidence of the complainant. After review of the new **Criminal Code** provisions, the Manitoba Court of Appeal ruled that the trial judge was entitled to convict the accused by relying on the complainant's testimony alone and that there was no legal requirement for corroboration. Mr. Justice O'Sullivan, in dissent, however, was of the opinion that whether corroboration is necessary or not will depend on the circumstances of individual cases. He remarked:

I agree that a trial judge may convict on the sole evidence of the complainant; there are cases where it is impossible to supply corroboration or other factual support for the complaint. (at 146-147)

225 (1989), 68 C.R. (3d) 145 (Man.C.A.).

IV. CHALLENGES TO LEGISLATION

A. CHARTER CHALLENGES TO REPEAL OF CORROBORATION

In light of current judicial resistance to mandatory corroboration warnings based on a class-approach, as illustrated in Vetrovec, and given the continued requirement of a high burden of proof "beyond a reasonable doubt", a successful Charter challenge to the repeal of the corroboration requirement for unsworn child witnesses is doubtful.

The constitutional validity of the legislation was challenged in a Saskatchewan case. In the unreported case of R. v. Meacham, *supra*, the defence argued that the repeal of the corroboration requirement offended s. 11(c) and (d) of the Charter. Dielschneider J., ruling that there had been no Charter breach, opined:

It is no longer a requirement in law that a child's evidence be corroborated. The dropping of this safeguard, so the Defence argues as well, offends those provisions of The Charter guaranteeing a fair and just trial, namely s. 11(c) and (d).

To the contrary, it is my understanding that the repeal of this requirement of the law does not prevent me from looking for corroboration where the frailties of the evidence leave me with the moral conviction that to convict in the absence of other evidence would be dangerous. What has changed is the requirement that made me find corroboration, even where I was satisfied beyond a reasonable doubt that what was said was true.

The situation a trial judge now finds himself in, given the abolition of the requirement for corroboration, does not, therefore, in my view, offend adversely the principles of fundamental justice, or the presumption of innocence and so on, as set out in the sections I have mentioned. (at 4-5)

In spite of this ruling, the justice emphatically distinguished this case as one which cried out for corroboration. In the oral judgment, she outlined the necessity for the court's circumspect approach:

In a criminal case, I must be satisfied beyond a reasonable doubt that the Accused is guilty of the act or acts alleged against him. In this case, I cannot say that I am morally sure of the guilt of the Accused. What tugs at my conscience is the fact that what T. says is uncorroborated. Corroboration is, of course, in law not necessary. Even so, to my mind, this is one of those cases which cries out for corroboration. It is a case where I say to myself it is better to let a guilty person go free, than to run the risk of convicting an innocent one. Because I am not sure, I find the Accused not guilty of either count in the Indictment. (at 9)

Given that the requirement for corroboration often remains a tactical burden on the Crown, and given that the Crown's burden remains to prove the case beyond a reasonable doubt, it is not a violation of fundamental justice merely to abolish a statutory requirement for corroboration of children's evidence in order to convict an accused. The abolition of the requirement does not compel the accused to testify, nor does it affect the presumption of innocence.

B. CHALLENGES RE: RETROSPECTIVITY OF AMENDMENTS

Bill C-15 amendments came into force on January 1, 1988. Because the legislation did not contain a transition provision, there have been challenges made based on the argument that the amendments apply only to offences which occurred after that

date. Since many of the cases before the courts involved charges which took place prior to the enactment of **Bill C-15**, the issue of retrospectivity has been considered by the courts.

At common law, there is an overall presumption against retrospectivity which applies only to substantive law. Procedural provisions are generally retrospective.²²⁶ The Saskatchewan Court of Queen's Bench, in **R. v. Inkster**²²⁷, was the first court to deal specifically with the issue of retrospectivity of the amendments. In that case, an 11-year-old complainant gave "unsworn" evidence at trial and the defence argued that **s. 586** of the **Criminal Code** should apply because it was substantive law. The appellate court ruled that the repeal of **s. 586** did not affect the substantive elements of the offences charged. Rather, it merely related to matters with respect to proof of the offence. Accordingly, the Saskatchewan Court of Appeal held that the abrogation of the corroboration prerequisite was evidentiary and procedural in nature, rather than substantive, so its repeal operates retrospectively to charges laid prior to its repeal.

In **The Queen v. Parisien**²²⁸, the court adopted the same view of **Inkster** when it was confronted with the defence's argument that the court must adjudicate the case on the basis of the former **s. 16(2)** of the **Canada Evidence Act** and **s. 586**, since the alleged offence was committed prior to the repeal. The 5-year-old girl gave her testimony on an unsworn basis, having promised to tell the truth. Both of these sections

226 **Howard Smith Paper Mills Ltd. v. The Queen**, [1957] S.C.R. 403 (S.C.C.); **Eddy Match Co. v. The Queen** (1953), 109 C.C.C. 1 (Que.C.A.). See Stuart (1982:22-28) for a further general discussion of the issue of retrospectivity.

227 (1988), 69 Sask. R. 1 (Q.B.).

228 (5 August 1988), Winnipeg 088232006 (Man.P.C.) [unreported]; (1988), 5 W.C.B. (2d) 173.

had provided that no conviction could be secured upon the unsworn evidence of a child unless there was corroboration. The court held that the repeal did not have the effect of removing a substantive right. The impugned amendments affected matters of evidence, which in turn formed part of the procedural process involved in the determination of substantive rights. As a result, the applicable law was that which existed at the time of the preliminary hearing and not at the date of the alleged offence.

Similarly, in **R. v. Bickford**²²⁹, the Ontario Court of Appeal ruled that the changes to the law regarding corroboration are procedural, not substantive, and the right of the accused, therefore, is to be tried:

...in...accordance with the evidentiary rules and procedural requirements in effect at the time of his trial. A change in the law regarding corroboration, whether effected by statute or by judicial decision, in my opinion, is applicable to trials taking place after the date of the change, notwithstanding that the events giving rise to the charge occurred before the change. In short, corroboration is a matter of evidence in which the accused can have no vested or accrued right that could not be affected retrospectively. (at 185-186)

In addition, the Ontario Court of Appeal dealt with the constitutionality of the repeal of the statutory requirement for corroboration. The Crown appealed the acquittal of an accused on a charge of sexual assault of a 4-year-old girl. The central issue was whether the trial judge erred in ruling that the child's unsworn evidence at trial required corroboration irrespective of the repeal of **s. 586** and the amendment to **s. 16(2)** of the **Canada Evidence Act**, which statutorily required corroboration. The trial judge ruled

229 (1989), 51 C.C.C. (3d) 181, 34 O.A.C. 34 (C.A.).

that the amendments did not apply to his trial, notwithstanding, that it had occurred after the legislation was proclaimed in force (January 1, 1988). Mr. Justice Robins held that the repeal of the corroboration rules did not constitute an infringement of the accused's rights to fundamental justice under s. 7 of the Charter. It was the court's opinion that the change in the evidentiary rules did not operate so as to deprive the accused of a fair trial, nor did it deprive him of any of the safeguards guaranteed by s. 7. Mr. Justice Robins, speaking for the court, said:

In sum, it is my view also that neither s. 586 of the Criminal Code nor s. 16(2) of the Canada Evidence Act granted the respondent any substantive right to require that a witness's evidence be corroborated. The repeal of these sections was applicable to his trial notwithstanding that he had been charged and arraigned prior to the date upon which the amendments were proclaimed in force. Contrary to the trial judge's ruling, at the time of trial there was no requirement that the unsworn evidence of the child-complainant be corroborated and it accordingly was then possible to found a conviction upon such evidence.

The contention that, in so far as this respondent is concerned, the change in the corroboration rules constitute an infringement of his rights under s. 7 of the Charter may be dealt with briefly. In my opinion, the change does not operate so as to deprive the respondent of a fair trial nor does it deprive him of any of the rights guaranteed by s. 7 or indeed by any other provision of the Charter. For the reasons already stated, he had no vested right in the evidentiary or procedural rule that required a child witness's testimony to be corroborated nor can he be said to have acquired such a right because the prosecution against him began before the rule was abolished. By the same token, he has no vested right to rely on a lack of corroboration defence that may have been open to him before the law was changed. **The elements of the offence with which he is charged remain the same; his right to make full answer and defence is unimpaired by the change; and the Crown continues to bear the strict burden of proving its case beyond a reasonable doubt. Although the child's testimony is no longer presumed unreliable and is placed in the same position as that of any other witness, the cogency of her testimony is a matter of weight to be determined by the trier of fact.** (at 190-191) [emphasis added]

The Crown's appeal was allowed and a new trial was ordered.

The Ontario Court of Appeal decision, in **R. v. Bickford**, *supra*, was subsequently followed, in **R. v. Bruneau**, *supra*, and in **R. v. Jack**²³⁰, where an accused appealed an Order dismissing an application for *certiorari* to quash a committal to stand trial. The preliminary hearing judge had relied on the reasoning in **Bickford** by ruling that s. 586 of the **Criminal Code** was procedural only and thus applied retrospectively. The Supreme Court of Nova Scotia upheld the lower court ruling to refuse the *certiorari* application with the result that the accused was committed to stand trial.

V. **JUDICIAL COMMENTS -
ASSESSMENT OF CHILDREN'S TESTIMONIAL CREDIBILITY
AND DYNAMICS OF CHILD SEXUAL ABUSE**

There is a discernible trend emerging of increased judicial sensitivity with respect to children's credibility as witnesses and the understanding of the dynamics of child sexual abuse. A number of Supreme Court of Canada decisions reflect a more flexible and liberal appreciation of some aspects of children's evidence, which historically and stereotypically were considered to be signs of unreliability.

In a Supreme Court of Canada case, **R. v. B.(C.R.)**²³¹, which dealt specifically with the admissibility of similar fact evidence, Madam Justice L'Heureaux-Dubé, in

230 (1989), 51 C.C.C. (3d) 255 (N.S.S.C.A.D.).

231 [1990] 1 S.C.R. 717, 76 C.R. (3d) 1, 55 C.C.C. (3d) 1 (S.C.C.).

dissent, showed an appreciation of the importance of the context in which charges of sexual abuse arise and are adjudicated.²³² In the dissenting opinion, she stated:

When children are sexually assaulted there are generally no witnesses. When such matters become the subject of criminal prosecution it is usually a case of the victim's word against the accused's. Under such circumstances, the credibility of the victim is of crucial importance to the determination of guilt or innocence. When, as in this case, the credibility of the victim is attacked by defence counsel, the victim should not be denied recourse to evidence which effectively rebuts the negative aspersions cast upon her testimony, her character or her motives... The fact that most child sexual assaults occur under circumstances where the problem is hard to detect and even harder to prosecute places an obligation upon the judiciary to ensure that the abuses suffered by the victims are not perpetuated by an inability of the legal system to respond to the particular nature of the crime. (at C.R. p.8)

The Supreme Court of Canada, in R. v. W.(R.), *supra*, and R. v. L.(W.K.)²³³, exhibited some understanding of the dynamics of delayed disclosure of sexual abuse by victims. McLachlin J., in R. v. W.(R.), *supra*, ruled that the lower appellate court erred in placing any reliance on the fact that the children may not have made an initial complaint about the sexual abuse. She explicitly rejected the suspect view "that any inference should be drawn from the absence of a complaint or disclosure from a child within a short time of abuse". In her judgment she criticized the

...stereotypical but suspect view that the victims of sexual aggression are likely to report the acts, a stereotype which found expression in the now discounted doctrine of recent complaint. In fact, the literature suggests the converse may be true; victims of abuse often in fact do not disclose

232 See Symons (1990) for an insightful analysis of the contrast between the majority and dissenting judgments.

233 [1991] 1 S.C.R. 1091, 6 C.R. (4th) 1, 64 C.C.C. (3d) 321 (S.C.C.). See R. v. D.(E.), 73 O.R. (2d) 758 for another example.

it, and if they do, it may not be until a substantial length of time has passed. (at 268-269)²³⁴

In R. v. L.(W.K.), *supra*, Mr. Justice Stevenson, citing Canadian (Badgley Report, 1984) and American literature, with respect to delayed disclosures of sexual abuse opined:

It is well documented that non-reporting, incomplete reporting, and delay in reporting are common in cases of sexual abuse... For victims of sexual abuse to complain would take courage and emotional strength in revealing those personal secrets, in opening old wounds. If proceedings were to be stayed based solely on the passage of time between the abuse and the charge, victims would be required to report incidents before they were psychologically prepared for the consequences of that reporting.

That delay in reporting sexual abuse is a common and expected consequence of that abuse has been recognized in other contexts. In the United States, many states have enacted legislation modifying or extending the limitation period for the prosecution of sexual abuse cases, in recognition of the fact that sexual abuse often goes unreported, and even undiscovered by the complainant, for years. This legislation has, to date, withstood constitutional challenges: see, for example, Durga M. Bharam, 'Statute of Limitations for Child Sexual Abuse Offenses: A Time for Reform Utilizing the Discovery Rule' (1989) 80 J. Crim. L. & Criminology 842. Establishing a judicial statute of limitations would mean that sexual abusers would be able to take advantage of the failure to report which they themselves, in many cases, caused. This is not a result which we should encourage. There is no place for an arbitrary rule. (at 10-11 C.R.)

There are several recent cases which illustrate the willingness of judges to accommodate the limited testimonial capabilities of children and to assume more flexibility in their treatment of the inaccuracies in children's evidence.

234 According to one legal commentator (Bala, 1992), the court should have made specific reference to the scientific literature in support of its assertions. For example, see, *Summit* (1983) and *Weissman* (1991) for a discussion of child sexual abuse syndromes.

In **R. v. B.(G.)**, *supra*, the court spoke of a more flexible and "benign" approach to be taken by the judiciary in the evaluation of the credibility of children's evidence. In response to the traditional defence argument that children's evidence suffers from a lack of detail, inconsistencies, and discrepancies, and, thus, provides an unsafe foundation for conviction, the Supreme Court of Canada quoted this passage from the judgment of Justice Wakeling of the Saskatchewan Court of Appeal:

While children may not be able to recount precise details and communicate the when and where of an event with exactitude, this does not mean that they have misconceived what happened to them and who did it. (at 219)

The Supreme Court of Canada, in **R. v. W.(R.)**, *supra*, entertained the question of the approach which should be taken when assessing the credibility of children's testimony. One of the issues raised on appeal was that the evidence of the children was fraught with inaccuracy.²³⁵ In this case, the accused was convicted at trial of indecent assault, gross indecency, and sexual assault against three young females. The evidence of the 9 and 12-year-old children revealed a number of inconsistencies and some aspects of their testimony were contradicted. Upon appeal to the Ontario Court of Appeal, the convictions were set aside. The Crown subsequently appealed the decision. The court held the view that an appellate court should show great deference to findings of credibility made at trial, since the trial judge had the advantage of seeing and hearing the

235 The other two grounds were: that the convictions were set aside on the basis that there was no confirmatory evidence; and that neither of the older children was aware or concerned that anything untoward happened.

evidence of the witnesses. Referring to the specific issue raised, with respect to the inconsistencies of the children's testimony, Madam Justice McLachlin opined:

The Court of Appeal next referred to the fact that the evidence of the younger children was fraught with inaccuracy. This is true, particularly with respect to B.W.'s evidence. Some of the inconsistencies are minor, for example, an error on the distance from a van to a ball game many years ago. Others are more significant, relating to the sleeping arrangements of the three children, the location of bedrooms in the house and possibly the respondent's night-time attire. While it was the proper task of the Court of Appeal to consider such inconsistencies, one finds no mention of the fact that the trial judge was alive to them and resolved them to his satisfaction in his reasons for judgment, nor of the fact that many of the inconsistencies may be explained by reference to the fact that a young child might not be paying particular attention to sleeping arrangements or clothing or that the children had lived in a variety of different arrangements, which might well have given rise to confusion on such details. (at 268-269)

The Supreme Court of Canada allowed the appeal and restored the convictions. Relying on Wilson, J's decision in R. v. B.(G.), *supra*, Madam Justice McLachlin reiterated that it would be "**wrong to apply adult tests for credibility to the evidence of children**" (p.266, *ante*), because their ability to measure or accurately describe "peripheral matters such as time and location" (p.268, *ante*) ought to be considered in the context of their age. In an annotation of this case, Bala (1992) suggested that the judgment could have been considerably buttressed by reference to the "non-legal" literature on the subject of children's memories. He argued:

There is a growing body of psychological literature on children's memories, especially in the context of recollecting abuse. This research supports the view that children are more likely to have accurate memories of 'core elements' that directly involved them, as opposed to details requiring observation or assessment, such as time, place, physical setting

or distance. Indeed, with younger children who have undeveloped concepts of time, distance or even counting, questions requiring understanding of these concepts may not be meaningful. (at 272)²³⁶

A similar pattern of judicial enlightenment has appeared in other Canadian courts. In **R. v. P.(L.J.)**, *supra*, the court was particularly sensitive and alive to the testimonial difficulties of child witnesses as victims in sexual assault cases. The trial judge offered this lucid perspective on the matter:

This type of case, of course, is disturbing to a court. You have a vulnerable person who alleges that he has been sexually abused, and the court cannot and should not dismiss his testimony out-of-hand because of his problems of communicating and his difficulties in remembering certain events and certain times. To do that would mean that every person with a difficulty of that kind would be prey to any predatory sexual aggressor. Sexual aggressors would operate on the basis that there would be no testimony available to convict them. Most of these acts occur in private where only the victim and the offender are present. Not everyone is able to come into a court of law and recite facts with clarity and with precision with respect to dates and details. Even police officers, with the benefit of notes taken at the time or immediately thereafter, have difficulties on occasions. The average citizen trying to recall events that occurred a year or more in the past will have difficulties. In the case of a person with communication problems and problems with respect to time frame the difficulty is even more pronounced. Those difficulties do not necessarily invalidate the evidence to be given by the witness. I believe that J.P. made an honest attempt to tell the court what he recalls of what took place. We have his evidence. (at 3)

In an unreported case, **R. v. Griffin**²³⁷, the trial judge found that the children's evidence "suffered from a lack of detail and from inconsistencies and discrepancies".

236 For a detailed review of the contemporary literature on child witnesses see: Mian *et al* (1992); Penrod *et al* (1989) and the Ontario Law Reform Commission Report (1991).

237 (19 November 1990), New Westminster X027574 (B.C.S.C.) [unreported]. The trial judge told the writer that he had never tried a case of this type before and that he was somewhat nervous about receiving the testimony of children.

Irrespective of making that concession, the Supreme Court of British Columbia, relying on R. v. B.(G.), *supra*, convicted the accused of sexually assaulting three children. In his reasons for judgment, Mr. Justice Donald explained that he had assessed the evidence in a "global sense" and concluded that if "I had to rely solely on the testimony of each child, I would have had a doubt about the guilt of the accused. Viewed in the aggregate their stories depict what really happened, namely, that the accused sexually abused the children on a regular basis; I have a moral certainty about that finding".

A similar conclusion was arrived at, in R. v. C.(A.)²³⁸, by the Quebec Court of Appeal when the issue of the probative value of the testimony of a 7-year-old child was considered. The conviction of an accused father for the sexual assault of his 6-year-old daughter was upheld by the appellate court. While there were no witnesses to the alleged offence, the lower court accepted, as a major element of corroboration, the hospital doctor's testimony that the child had difficulty urinating. The trial judge found the child's evidence to be credible even though, under vigorous cross-examination, some aspects of her testimony were inconsistent. The Quebec Court of Appeal concurred with the trial judge's finding that there were no major contradictions in the child's testimony. Tourigny, J.A. commented on the cross-examination the child was subjected to and its subsequent impact on her ability to make consistent responses:

I confess that in such circumstances I have difficulty understanding how one can speak of uncorroborated testimony. Obviously, there was no corroboration with respect to the child's claim that her father was the aggressor, if the meaning of this word is limited to eyewitnesses to the

238 (1992), 71 C.C.C. (3d) 529 (Que.C.A.).

assault. The child gave her story, said the various witnesses, she testified and the judge believed her. Was he right in believing her? The appellant invites us, on the basis of the child's testimony before the trial judge, to conclude that he was not. I do not share this point of view.

Subjected to the fire of cross-examination by counsel for the appellant, as if she was an adult, she at certain times manifested fatigue, impatience, the need to lie down, and hunger, and even sadness. Through repeated questioning, which often employed different words, she answered and the judge did not find major contradictions in her answers. At certain moments, the child did not understand the meaning of the question because the same words were not used and she gave a different answer. Should one be surprised? A reading of the child's testimony convinces me that one should not be. (at 534)

In another case, **R. v. Hughes**, *supra*, the Ontario District Court judge accepted the evidence of a 12-year-old complainant even though there were inconsistencies and contradictions in her testimony. The child gave a very detailed and lucid account of the alleged sexual acts and, in the opinion of the court, it was inconceivable that she fabricated the minute details from other sources.

Mr. Justice Wakeling, in **R. v. B.(G.)**, *supra*, recognized the need for the judiciary to be sensitive to the significance of the reticence or ambiguity of children's evidence during cross-examination. He stated, in these terms:

...I am of the opinion the trial judge erred in utilizing and applying strictly an adult standard for the assessment of credibility of the youths that appeared before him. Although the cross-examination was conducted quite reasonably in these trials (but sometimes by as many as three counsel), I find it unremarkable that the youthful witness would eventually find shelter in silence or simply agreement with counsel's suggestions. Nor do I find it difficult to understand that the trauma resulting from the incidents of assault would prevent a witness from having an accurate and detailed recall of the event, even if it were being recalled on the day it occurred. In the same way that adult standards would not be suitable to gauge the conduct of youths in physical, mental, social, or other aspects

of human activity, it is equally unacceptable that such a standard be applied without modification when measuring the credibility of their testimony. (at 150)

In **R. v. Campbell**, *supra*, the trial judge cautioned himself to be mindful "of the risk in convicting on the testimony of a child or children in the absence of corroborating or confirmatory evidence". In the reasons for judgment, Mr. Justice Lysyk demonstrated acute insightfulness in his assessment of the credibility of the child witnesses in the face of the defence's allegation of fabrication of sexual assault. In particular, the judge ruled that "inconsistencies" in the evidence of the children in these areas did not prove fatal to their overall credibility. The reasons he gave are as follows:

After anxious consideration of the evidence as a whole I am satisfied beyond a reasonable doubt that the incidents described by C. and E. did occur and I reject the contention of the Defence that the Complainants fabricated their evidence. It is the case that there are some inconsistencies to be found in the evidence given by the Complainants at trial and at the preliminary hearing. For example, E. gave conflicting answers as to whether or not she was crying at the time the Accused was forcing himself upon her. Also, C. gave slightly differing versions about the movements of the Accused immediately before and after the incident involving her in the bedroom. . . However, having regard to the lapse of time since these incidents occurred and the youth of the Complainants, this type of inconsistency is not surprising and certainly not fatal to their overall credibility.

...Further, if the Complainants had set about to fabricate evidence one might have expected, particularly in the case of C., that the testimony would have been more dramatic or lurid than the accounts that were given. Their evidence was not dramatized. It had the ring of truth. (at 14-16)

In R. v. H.(E.L.)²³⁹, the Nova Scotia Court of Appeal ruled that the mistakes made by the young female complainant in her testimony as to the frequency of the sexual assaults, did not culminate in the impeachment of her credibility.

In R. v. Khan, *supra*, the Ontario Court of Appeal dealt with the issue of false allegations of sexual abuse by children and would seem to be in agreement with the argument of social scientists, Spencer and Flin (1990), that the cognitive and imaginative capacities of young children simply do not enable them to fantasize about sexual episodes in explicit detail. Mr. Justice Robins, in his reasons for judgment, stated that young children "are generally not adept at reasoned reflection or of fabricating tales of sexual perversion. They manifestly are unlikely to use their reflection powers to concoct a deliberate untruth, and particularly one about a sexual act which in all probability is beyond their ken" (at 292).

In R. v. Thompson²⁴⁰, the Ontario District Court judge relied on Khan in making an assessment of the credibility of a 9-year-old female complainant.

As pointed out by the Ontario Court of Appeal in R. v. Khan (1988) 42 C.C.C. (3d) 197, at p. 210, young children of the age of the complainant are generally not adept at reasoned reflection or at fabricating tales of sexual perversion. I am satisfied that the complainant is telling the truth when she testifies concerning the sexual acts performed by the accused. (at 9)

239 (1991), 2 C.R. (4th) 187 (N.S.C.A.).

240 (24 May 1989), 89159003 (Ont. Dist. C.) [unreported].

On balance, while there is mounting evidence that the judiciary has become more enlightened generally concerning the dynamics of child sexual abuse, there is lingering evidence that some judges manifest considerable insensitivity surrounding some issues.

In **R. v. Leeson**²⁴¹, an accused was convicted of touching for a sexual purpose a 3-year-old child and received a suspended sentence. The county court judge made these remarks at the opening of his oral judgment:

You have been convicted on a charge of touching with a part of your body for sexual purposes the body of a three-year-old girl. The circumstances are unusual in part because it appears that this **three-year-old girl was sexually aggressive**. It seems to me that this is an aspect of this case that may well be deserving of investigation but that is not under my control. **It is, however, a factor that I think can and should be taken into consideration here on sentencing.**

Secondly, you were under the influence of alcohol to a fair extent at the time, and I am satisfied you were also suffering from fatigue. From my observation of you and from the information in the pre-sentence report, I believe that the situation would not have reached the point that it did if you had been sober. I think because of your condition at the time you did not fully appreciate just how far the situation was advancing. (at 18-19) [emphasis added]

The judge's comment that the "**three-year-old girl was sexually aggressive**" and the arguable interpretation that the trial judge considered it as a mitigating factor in sentencing, caused considerable public controversy. The British Columbia Court of Appeal²⁴², however, addressed the issue in the Crown's sentence appeal by stating:

241 (14 November 1989), Vancouver (B.C.C.C.) [unreported].

242 (12 January 1990), Vancouver CA011659 (B.C.C.A.) [unreported].

It is relatively easy to reach simplistic conclusions when one is not burdened by the factual details where legal truth is usually to be found... I have no hesitation in saying that the statement was an unfortunate one, capable as it is of being given an inappropriate interpretation. The statement would have been unobjectionable if the one word "sexual" had been omitted, because it would then have been accurately descriptive of the circumstances which the Crown put forward as the evidence in this case.

It seems to me, therefore, that this was a case of the use of a word, just one word, in an oral judgment that is capable of receiving, and has received, an unfortunate misinterpretation. It does not appear to me that the trial judge misdirected himself in any material way on that issue of the case. (at 21 and 23)

In a recent, highly publicized case, **R. v. Unknown**²⁴³, a Quebec judge caused a public outcry over her comments in sentencing an accused to a lesser sentence because he had "spared" the victim's virginity. The accused and the victim were both Muslims. The accused was convicted of having repeatedly sodomized and molested his step-daughter over a period of 2½ years. The offences of anal intercourse and sexual intercourse each carry a maximum penalty of 10 years imprisonment. The judge imposed a 23-month sentence. In her decision, Madam Justice Verreault stated:

They did not have normal and complete sexual relations...vaginal relations to be precise, so she retained her virginity, which seems to be a very important value in their religion.²⁴⁴

The sentence is currently under appeal by the Crown.

243 (January 1994), Montreal (Que. Municipal Court) [unreported].

244 Quoted in **The Vancouver Sun**, Saturday, January 15, 1994:A2.

The county court judge, in R. v. Zaharik, *supra*, also lacked an appreciation of the dynamics of child sexual abuse. The Crown counsel, in this case, found the trial judge's comments particularly disturbing. In the portion of the reasons for judgment concerning his evaluation of the credibility of the child complainant, he wrote as follows:

As to the bulk of the remaining evidence, I can only say that it leaves me with a serious concern as to the complainant's story. **For instance, her evidence of his groping of her in the car on the way to Cloverdale is not consistent with the rest of her evidence, the effect of which is that she was not a willing participant. If that was the case, why did she continue to ride with him time after time in the car? I would find it much more believable, and the evidence would seem to confirm it, that she out of a childish infatuation allowed him to do these things. The fear of admitting such a compliance could then explain her subsequent insistence that she was not a willing participant and I would find that perfectly understandable. This compliance with his wishes could explain her continued riding with him and perhaps the normality of his and her conduct after any intercourse in the apartment.** (at 3) [emphasis added]

The judge also commented that he gave little weight to the evidence of an expert and two 13-year-old girls who testified on behalf of the Crown. Following these remarks, the trial judge acquitted the accused.²⁴⁵

In R. v. C.(M.H.)²⁴⁶, a Supreme Court of Canada case, which dealt with the issue of the Crown's failure to disclose to the defence statements made by a school teacher about the child complainant's denial of sexual abuse, according to Professor Bala

245 Because of the disturbing nature of the judge's remarks, Crown counsel forwarded the transcript to the writer and a special prosecutor at the Ministry of the Attorney General - Criminal Appeals and Special Prosecutions Branch for review.

246 [1991] 1 S.C.R. 763, 4 C.R. (4th) 1, 63 C.C.C. (3d) 385 (S.C.C.). This case was subsequently appealed to the Supreme Court of Canada and will be discussed in a different context in a later chapter on hearsay evidence.

(1992), Madam Justice McLachlin exhibited a lack of sensitivity by her interpretation of the evidence. The learned justice concluded that the fact that the complainant denied that the sexual abuse occurred upon being questioned by the teacher, "...might well...support...the defence that the evidence of the complainant was a fabrication"²⁴⁷. The court characterized the statement as "crucial evidence" to the defence, which may have influenced the jury's assessment of the child's credibility. McLachlin J. viewed it from this narrow perspective:

Arguably the state of mind required for silence may well be different from that required for a direct denial. A jury may consider that it is one thing to be silent [i.e. not to disclose abuse], another to lie in response to a direct question. The former may be easy; the latter more difficult. (at C.R. p.11)

In response to this passage, Bala (1992), in a critical annotation of the judgment, and underscoring the need for general judicial education and through the use of expert witnesses in court, wrote:

Regrettably this passage displays considerable insensitivity to the dynamics of child sexual abuse.

Some mental health professionals have developed considerable expertise in interviewing children about allegations of sexual abuse. It is well known among experts in the field of child sexual abuse that children are often reluctant to disclose abuse, even in response to direct questioning, or may disclose abuse and subsequently falsely 'recant' their allegations (see e.g. P. Horsham, H. McCormack & J. Bradford, *Practical Guidelines to the Assessment of the Sexually Abused Child* (Ottawa: Dent & MacMillan, 1989) at p. 21.)

247 *Ibid.*, at C.R. p.11.

It is often very difficult for a child to reveal that abuse has occurred, especially if perpetrated by a family member or trusted friend. There may be feelings of fear, guilt, disloyalty, or concerns about abandonment, that make a child unwilling to disclose. Invariably perpetrators of child sexual abuse make threats or inducements to pressure the victim not to disclose the abuse.

Canadian and American courts have clearly indicated that expert witnesses may be called to explain a child's delayed disclosure, recantation, or denial. Even the most restrictive of the American judgments have permitted experts to testify to dispel 'popular myths and misconceptions', and 'rebut an inference that a complainant's post incident behaviour was inconsistent with that of an actual victim of sexual abuse, incest or rape' (*People v. Beckley*, 456 N.W. 2d 391 (1990); see also *People v. Bowker*, 203 Cal. App. 3d 385, 249 Cal. Rptr. 886 (Cal. App., 1988)). (at 15)

It is arguable whether McLachlin J. improperly instructed the jury. The passage called into question by Professor Bala, it is submitted, seems to illustrate the difficulty inherent in dealing with any witness' contradictory statements, especially when, as in criminal cases, there must be proof beyond a reasonable doubt. When any witness makes an inconsistent statement (even in the face of an expert's opinion that such self-contradiction may be explained by the theory of false recantation), it would remain difficult for the trier-of-fact to accept either statement as satisfying the burden of proof.

VI. CONCLUSION

It is submitted that the dissertation research would generate affirmative responses to the first three research questions. The majority of the cases analyzed would support the propositions, notwithstanding the enactment of s. 274, that judges continue to:

- a. warn that it is dangerous to convict an accused on the uncorroborated evidence of children;
- b. require corroboration before convicting an accused on the evidence of children; and
- c. warn that children's evidence is unreliable.

While the constitutionality of s. 274 legislation has been upheld, it remains questionable, from the cases presented, whether the goals of the legislation (namely to enhance successful prosecution of child sexual abuse cases and to eliminate discrimination against child witnesses with respect to their credibility) have been achieved to any significant extent. From the cases examined, however, there is mounting evidence that the judiciary is becoming more sensitive and receptive to the unique problems children face as complainants/witnesses in sexual abuse cases.

The dissertation argues that children should benefit from equality before and under the law as guaranteed by our Charter of Rights and Freedoms. Section 15(1) reads as follows:

- s. 15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on

race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

It is submitted that children not be the subject of "**discriminatory**" special warnings based on their class and age. It is further argued that there should be no presumption in law that a child under the age of 14 is an incompetent witness and no requirement that the evidence tendered by a child be automatically considered unreliable and untrustworthy. Rather, as in any criminal proceeding, it is the judge's prerogative to make comments regarding the credibility of individual witnesses, including children, in circumstances where it is warranted. With the statutory repeal of corroboration, there should be greater concentration on the assessment of the credibility of "individual" child witnesses, as opposed to focusing on extant legal presumptions concerning their general "unreliability" as witnesses.

The current common law in Canada, as a result of Vetrovec, does not allow blanket warnings and statements that children are "unreliable" witnesses. In light of the dissertation research, it is argued that a common law prohibition is inadequate. Rather, it is submitted that a statutory enactment is necessary, such as:

- s. **274.1** Where an accused is charged with an offence referred to in s. **274**, the judge shall not instruct the jury that the testimony of children, as a class, is inherently unreliable.

This suggested prohibition could be extended to all Criminal Code offences.

Parliament has recently enacted the following Criminal Code provision:

659. Any requirement whereby it is mandatory for a court to give the jury a warning about convicting an accused on the evidence of a child is abrogated.²⁴⁸

as confirmation "that judges should no longer give juries warnings about the inherent unreliability of children" (Bala, 1993:369). This enactment extends to any **Criminal Code** offence. However, it does not prohibit judges from giving **Kendall** warnings and does not go any further than s. 274 as presently enacted.

This is not a recommendation, but, if the primary objective of Parliament were specifically "to increase convictions in child sexual abuse cases", as opposed to the current goal of "enhancing the successful prosecution of child sexual abuse cases", it is submitted that, this may be achieved by lowering the criminal standard of proof "beyond a reasonable doubt" to a civil standard of "on a balance of probabilities". Such an exception may apply only to sexual assault offences against children. It is evident from the dissertation research that the problem is one of proof. Given the present criminal burden of proof which must be met, British Columbia judges are extremely reluctant to convict an accused on the uncorroborated evidence of a child complainant. This dissertation recognizes that as a matter of law, corroboration is no longer required for a conviction but, as a matter of proof, corroboration may be very necessary. In criminal proceedings, corroboration remains critical and it is legitimate for judges to look for it. It is also acknowledged that such an approach, which in essence tampers with a time-honoured evidential burden, because the criminal burden of proof

248 **Criminal Code** R.S.C. 1985, c. C-46. This section was enacted in June of 1993 and proclaimed into force on August 1, 1993.

is equated with due process, would not likely survive ss. 7 and 11(d) Charter challenges, particularly if the test in R. v. Oakes²⁴⁹ is rigorously applied. However, there is a possibility that any new legislation of this type may be saved by s. 1 of the Charter, particularly if the s. 1 requirements viz, "objective" and "means" test in R. v. Edwards Books and Art Ltd.²⁵⁰ is satisfied.

Two requirements must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the legislative objective which the limitation is designed to promote must be of sufficient importance to warrant overriding a constitutional right. It must bear on a "pressing and substantial concern". Secondly, the means chosen to attain those objectives must be proportional or appropriate to the ends. The proportionality requirement, in turn, normally has three aspects: the limiting measures must be carefully designed, or rationally connected, to the objective; they must impair the right as little as possible; and their effects must not so severely entrench on individual or group rights that the legislative objective, albeit important, is nevertheless outweighed by the abridgment of rights. (at 425 C.C.C.)

See also R. v. Chaulk, *supra*, which held that the presumption of sanity violated the presumption of innocence but was upheld under s. 1 because the presumption of sanity avoided placing a virtually impossible burden on the Crown, would help to convict the guilty and acquit those who lack criminal intent.

It should be stressed that altering the burden of proof does not necessarily admit the inferiority of children as witnesses, but attempts to recognize the particular

249 [1986] 1 S.C.R. 103.

250 (1986), 30 C.C.C. (3d) 385, 35 D.L.R. (4th) 1, [1986] 2 S.C.R. 713. See also R. v. Oakes (1986), 24 C.C.C. (3d) 321, 26 D.L.R. (4th) 200; [1986] 1 S.C.R. 103 (S.C.C.).

difficulties imposed on the Crown in child sexual offences. The private nature of the crime makes proof very difficult.

In the final analysis, it is up to legislators to balance the competing interests of child complainants and accused persons in sexual abuse cases and this dissertation invites policy-makers to create alternative ways to increase successful prosecutions. Or, perhaps, the remedy to this intractable social problem should be sought elsewhere - not in the criminal, but tort or mental health law.

The research implications for practitioners, it is submitted, are as follows:

1. For Crown Counsel:

- a. Crown should continue to search for other evidence to corroborate a child's complaint, even though corroboration is not required by law;
- b. Crown should continue to proceed with cases where there is no corroboration;
- c. Crown should be specially trained to prosecute child sexual abuse cases and be able to refer the court to case authorities and social science literature²⁵¹;
- d. Crown should be prepared to use expert witnesses to assist the court in understanding the dynamics of child sexual abuse and its relationship to a child's testimonial capabilities;
- e. Crown should be prepared to rehabilitate a child witness if impeached on cross-examination on matters of inconsistencies in the evidence, delayed disclosure, false recantation, and other dynamics of child sexual abuse. This could be accomplished through the use of expert witnesses; by referring the court to appellate decisions; and by reference to social science research; and

251 In March 1992, the Ministry of Attorney General published a comprehensive practitioners' manual to assist Provincial Crown counsel with child sexual abuse prosecutions (Harvey and Dauns, 1992).

- f. Crown should be prepared to appeal decisions when the judge fails to comply with the legislation (i.e. make s. 15(1) **Charter** arguments if judges persist in giving corroboration warnings or blanket warnings about children's unreliability as witnesses).

2. For Judges:

- a. Since the involvement of children in criminal proceedings is a relatively new phenomenon, judges should receive sensitivity training with respect to the capabilities of children vis-a-vis competency and credibility issues in the context of being complainants/witnesses in sexual abuse cases; and
- b. Judges should allow expert opinion evidence to assist in assessing the evidence of child witnesses (provided that the expert evidence meets the requirements set out in Chapter 5).

CHAPTER 3: CRIMINAL CODE S. 486(2.1)(2.2): SCREEN AND CLOSED-CIRCUIT TELEVISION

Knowing he [the accused] was right there — identifying him, looking him in the eye.

Having my dad [the accused] sitting in front of me. I could be responsible for a long jail term.

I wanted to see him [the accused] when he heard what he'd done to me.

Quotes from child victims
(London Family Court Clinic: Child Witness Project (Sas *et al*, 1993))

I. INTRODUCTION

One of the more controversial provisions of **Bill C-15**, this Criminal Code amendment reads:²⁵²

486. (2.1)Notwithstanding **section 650**, where an accused is charged with an offence under **section 151, 152, 153, 155 or 159, subsection 160(2) or (3), or section 170, 171, 172, 173, 271, 272 or 273**²⁵³ and the complainant is, at the time of the trial or

252 No analogous provision existed in the Criminal Code prior to the enactment of **Bill C-15**.

253 The enumerated sections are as follows:

- | | |
|---|---|
| s. 650 - Accused to be Present/Exceptions/to Make Defence | s. 172 - Corrupting Children |
| s. 151 - Sexual Interference | s. 173 - Indecent Acts |
| s. 152 - Invitation to Sexual Touching | s. 271 - Sexual Assault |
| s. 153 - Sexual Exploitation | s. 272 - Sexual Assault With a
Weapon, Threats to a
Third Party or Causing
Bodily Harm |
| s. 155 - Incest | s. 273 - Aggravated Sexual Assault |
| s. 159 - Anal Intercourse | |
| s. 160 - Bestiality | |
| s. 170 - Parent or Guardian Procuring Sexual Activity | |
| s. 171 - Householder Permitting Sexual Activity | |

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

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

According to the broad policy goals identified in the debates in the House of Commons, this **Criminal Code** section was enacted:

- a. to enhance the successful prosecution of child sexual abuse; and
- b. to improve the experience of the child victim/witness (by minimizing the problems of the child sexual abuse victim giving evidence).

This provision was enacted by Parliament in direct response to the concern that children suffered from secondary trauma when forced to testify in front of the accused.²⁵⁴ Prior to the enactment of the legislation, the Legislative Committee on Bill C-15 heard testimony from experts on the issue. The Ontario Medical Association (1987) described the traumatizing effect of the courtroom experience on children in this manner:

When in court, children are particularly vulnerable for reasons related to patterns of emotional development and to the extent to which they are dependent on significant others whom they cannot afford to alienate . . . **Children are easily intimidated** by adults and are extremely vulnerable

254 A major reason why children refuse to testify in court is their apprehension of face-to-face confrontation with the accused. (Ontario Medical Association, 1987)

to threatening influences which may be conveyed in subtle communication techniques such as tone of voice or body posture. Thus, they are easily influenced and disadvantaged by behaviours that are standard practice in court procedures involving adults. Furthermore, the judicial principle of allowing the accused to confront his accuser carries **enormous threat for the young child who finds himself looking across the courtroom into the eyes of the accused against whom he is to give evidence . . .** in some cases the child has been locked into a secretive, threatening relationship in which he was a helpless victim and the feelings of victimization have not been resolved by the time the child faces the perpetrator across the courtroom. In this situation, the fear and helplessness previously experienced are immediately recreated and not only **inhibit the child when giving evidence**, but create an emotional crisis which can be as damaging to the child as events leading to the court hearing. (at 94) [emphasis added]

Dr. J.D. Gossage, a Clinical Assistant Professor of Pediatrics at the University of British Columbia, provided personal accounts of cases where child witnesses were so intimidated by defence counsel during cross-examination that they were unable to continue with their testimony.²⁵⁵ Experienced Crown counsel informed the Legislative Committee on Bill C-15 that children have been known to freeze on the stand by the presence of the accused, with the result that stays of proceedings and acquittals have been entered (Harvey, 1990; 1991).²⁵⁶

255 Dr. Gossage testified before the Committee on December 17, 1986.

256 Ms. Wendy Harvey is a Crown counsel who specializes in the prosecution of child sexual abuse cases in British Columbia. She has prosecuted over 100 such cases in her career. She testified as an expert witness before the Bill C-15 Committee in Ottawa prior to the enactment of the legislation and provided anecdotal accounts of the emotional distress experienced by children who testify in these proceedings. Other examples cited include: children crying and becoming hysterical; children urinating in the witness stand; and children running away and hiding during court adjournments.

The objective of the legislation was to facilitate young complainants in providing the court with an accurate and full account of the alleged acts by reducing the trauma and mental stress associated with testifying in the presence of an accused in open court.²⁵⁷

At the discretion of the presiding judge, a complainant may be permitted to testify from behind a screen (or other device), in the courtroom or outside the courtroom, via closed-circuit television if the following prerequisites are satisfied:

1. The offence must be one of the sexual offences enumerated in s. 486(2.1).²⁵⁸
2. The application must be made on behalf of a complainant (does not apply to child witnesses who testify in other criminal proceedings).
3. The judge must be of the opinion that a screen (or other device) or closed-circuit television is necessary in order to obtain a full and candid account of the acts complained of from the complainant.
4. These procedures are allowed only if the accused is able to hear the testimony and communicate with counsel at all times.

257 The most common fears of children associated with testifying in court concerning allegations of sexual assault are:

- fear of the accused;
- fear of cross-examination;
- fear of being disbelieved;
- fear of breaking up the family;
- fear of having a parent put in jail;
- fear of being blamed; and
- fear of being accused of consenting, lying, fantasizing or fabricating.

(Libai, 1969; Blowers, 1987; Whitcomb, 1992; Ontario Medical Association, 1987)

The use of screens, which purports to have the impact of reducing secondary trauma to a complainant as well as creating an atmosphere in which a child witness can give an accurate and full account of the allegations to the court, developed from other jurisdictions. Screen devices have been used for a considerable length of time in England, Wales, and numerous American states. Various law reform commissions have advocated the use of screens for young witnesses. (For a discussion see: Law Reform Commission of Western Australia, 1990.)

258 Footnote 253.

Canadian defence lawyers have warned that the new legislation suffers from a multitude of procedural, technical and constitutional deficiencies, which will ultimately result in challenges under the Charter (Schmitz, 1989:10). The decision to allow the use of a screen or closed-circuit television is discretionary and the legislation provides no guidelines as to procedure. The ambiguous drafting of this section leaves open whether the Crown must meet the test of establishing that such procedures are necessary "to obtain a full and candid account" before a screen or closed-circuit television will be allowed. A number of concerns have been raised:

- Is a *voir dire* necessary?
- What evidence must the Crown adduce?
- Will psychological evidence and hearsay evidence be admissible, or must the child testify?
- What constitutes the standard of "judicial satisfaction"?
- Will an improper inquiry by the trial judge be grounds for an appeal or subject to a Charter challenge?

It was anticipated that the constitutional validity of the new provision would be challenged. It could be argued that s. 486(2.1) violates s. 7 of the Charter, which guarantees an accused the right to a fair trial on the basis that an accused has the fundamental right to see and confront all witnesses. This argument focuses on the fact that the common law principles demand an open court and "right to confrontation". However, even if the Charter is interpreted so as to encompass an accused's right to face his or her accuser, it is arguable that a clear and simultaneous audio-visual

transmission, together with the accused's unimpeded ability to communicate with counsel, will satisfy that right. A further defence claim would be that the right to be presumed innocent under s. 11(d) of the Charter is infringed by the legislation. The argument centres on the fact that the use of the screen or closed-circuit television is premised upon the child's perceived fear of the accused. In order to permit such a procedure, the judge would have to form an opinion that there is some basis to this fear. It may be argued that this represents a type of pre-judgment, which reflects unfairly on the accused before any evidence is given. The defence maintains that this form of pre-judgment, which may lead to an inference that the accused is guilty of the offence, ultimately breaches the right to be presumed innocent until proven guilty.

II. RESEARCH QUESTIONS

There is a developing body of case law addressing the legal, constitutional, and practical issues surrounding the new provisions. The dissertation will provide analyses of Crown applications and the judicial interpretation of the legislation from lower court rulings to appellate decisions (see **Appendices K and L**).

The dissertation research attempts to answer the following questions:

- A. Was a *voir dire* conducted?
- B. What kind of evidence did the Crown call to support its application?
- C. What is the judicial interpretation of "**is of the opinion**"?

- D. What is the judicial interpretation of "**necessary to obtain a full and candid account**"?
- E. Did the child complainant have to testify?
- F. What is the judicial interpretation of "**other device**"?
- G. What constitutional or **Charter** challenges have been made with respect to the legislation?
- H. Do judges "order" (allow) screens or closed-circuit television for child complainants?
- I. What are the practical issues associated with the legislation?
- J. What are the research implications as a result of the judicial interpretation of the legislation?

III. ANALYSIS OF SCREEN CASES

The dissertation research includes the monitoring of **50** screen application cases (see **Appendix M**). Judges allowed the use of the screen by child complainants in **42** cases and denied the procedure in **8** cases.

While the legislation provides no guidance as to the proper procedure for the court to follow in order to form the "**opinion**" referred to in s. **486(2.1)**, the majority of courts have chosen to proceed by way of *voir dire* (see **Appendix M**). Other procedures conducted by Canadian courts which have resulted in the granting of screens have been by a pre-trial motion²⁵⁹, by consent of both parties²⁶⁰, and by a chambers'

259 **R. v. M.(P.)** (21 June 1988), Toronto (Ont.D.C.) [unreported]; 8 W.C.B. (2d) 416; (1990), 11 W.C.B. (2d) 593 (Ont.C.A.); (1990), 1 O.R. (3d) 341 (Ont.C.A.); 42 O.A.C. 153 (C.A.).

application after a child complainant became reticent on the stand (in the absence of legislative stipulation the common law is flexible)²⁶¹.

In **R. v. M.(P.)**, *supra*, the Ontario Court of Appeal reviewed the lower court's decision to allow a 12-year-old complainant to testify behind a screen. The only evidence adduced at trial directed to the issue was that the complainant disliked the accused and did not want to testify in his presence. The relevant part of her evidence elicited by Crown counsel was:

- Q: . . . other than just generally not wanting to speak about it in front of people, is there any particular reason that you don't want to be able to see Paul (the accused) when you testify?
- A: I don't like him. I don't want to know that he's here.
(at 345)

The appellate court ruled that, while the trial judge should have substantial latitude in deciding whether or not to form the requisite opinion, the court is not empowered to

260 **R. v. Seeley** (5 July 1989), Toronto (Ont. D.C.) [unreported].

261 **R. v. Ghini**, *supra*.

form the requisite opinion unless an "evidentiary base" is established.²⁶² Mr. Justice

Morden stated:

Section 486(2.1) enabled the trial judge to make the order sought if he were "of the opinion that the exclusion (*i.e.*, the use of the screen) is necessary to obtain a full and candid account of the acts complained of from the complainant". It is clear, of course, that what counts is the trial judge's opinion and not that of a reviewing court and, I think, substantial latitude should be accorded to the trial judge in deciding whether or not to form the requisite opinion. He or she is the one who has had the advantage of hearing the evidence and seeing the witness give it. His or her decision on this particular issue is not, in my view, strictly speaking, one of discretion, but, rather, one of judgment. The trial judge is not, however, empowered to form the requisite opinion unless there is an **evidential base** relating to the standard of necessity referred to in the subsection which is capable of supporting the opinion. (at 346) [emphasis added]

The Court of Appeal found that there was an insufficient evidentiary basis for the trial judge to make the order pursuant to s. 486(2.1). The appeal was allowed on this issue and other grounds. The conviction was set aside and a new trial was ordered.

In an early attempt to interpret the new provision, the Ontario District judge, in R. v. B.(A.) (No.1)²⁶³, ruled that a two-stage process is required for the court to form

262 The Ontario Court of Appeal, in R. v. Levogiannis (No.2), (1990) 2 C.R. (4th) 355, 62 C.C.C. (3d) 59 (Ont.C.A.), also ruled that to meet the statutory standard, there must be an evidential basis to support the opinion. The court stated:

The statutory standard which must be met before an order can be made under s. 486 (2.1) is the necessity "to obtain a full and candid account of the acts complained of from the complainant". The judge is required to form the opinion that the required necessity exists. There must be an evidential basis to support the opinion. (at p. 87 C.C.C.)

In light of such rulings, a complainant's mere discomfort at testifying or dislike of an accused will not form a sufficient evidential base to support the trial judge's ruling. Crown would need to establish that the complainant had a specific fear of the accused which prevented the complainant from giving a full and candid account in open court.

263 (17 August 1988) (Ont.P.C.) [unreported]; (15 May 1989), Barrie DC988 (Ont.D.C.) [unreported]; [summarized 7 W.C.B. (2d) 406].

an "**opinion**" that the screen is necessary to obtain a full and candid account of the acts complained of from the complainant. The two-stage procedure was articulated in the judgment written by Logan J.:

After becoming apprised of the child's inhibiting sensitivities, the judge would decide if testifying behind a screen could be of assistance to obtain a full and candid account. [i.e. stage one] If it would not that is the end of the matter. If it could, a further enquiry [i.e. stage two] should be made on the protection of the accused from unfairness. (at 7)

In a *voir dire*, the court heard expert testimony that the 16-year-old complainant, who suffered from extreme mental stress associated with the prospect of testifying in court about the alleged sexual acts, had attempted suicide at least four times prior to the trial and once during the actual trial. In addition, the paediatrician provided the court with an explanation of the effects of the child's diabetes upon her ability to manage courtroom stress and how such stress might lead to memory loss. In the court's opinion, expert evidence on an individual child's "**inhibiting sensitivities**" was necessary to assist the court in making its determination. Logan J. further held:²⁶⁴

. . .[T]he judge can best make his or her decision only after the judge has heard **expert testimony** on the reason why the child might not be able to give "a full and candid account of the acts . . ." in that particular case. (at 4) [emphasis added]

. . .[T]he judge should avoid rigidity and should make himself aware of the **inhibiting sensitivities** of the child within that child's practical age

264 In **R. v. W.(A.)** (8 February 1990) St. Catherines (Ont.P.C.) [unreported], the court held that the most desirable method of assessing the applicability of this provision is to rely on professional opinion.

level and within that child's environmental and heredical influences.²⁶⁵ (at 6-7) [emphasis added]

The court then provided an elucidation of the wording of the legislation as it pertains to the court's discretion, viz. "the presiding judge or justice . . . **may order**":

I find in s. 442(2.1) the word "may" is directed to the **trial judge**. It confers on him or her a **discretion to allow a complainant to testify behind a screen**. The **discretion must not be exercised where** it would operate unfairly to the accused. **However**, as Wilson J. said: "the **discretion to prevent unfairness is not a blanket authority...**" I find it **should not undermine the object of s. 442(2.1) that is "to obtain a full and candid account of the acts complained of from the complainant."**

The judge has to exercise his discretion. When considering how the discretion should be exercised I refer again to the comments of Wilson J. [on p.308]:²⁶⁶

"In my view, therefore, s. 643(1) of the Code should be **construed as conferring a discretion on the trial judge broader than the traditional evidentiary principle that evidence should be excluded if its prejudicial effect exceeds its probative value.**"

On [pp. 308-9] she said:

"I would stress that in both situations the discretion should only be exercised after **weighing** what I have referred to as the **two competing and frequently conflicting concerns of fair treatment of the accused and society's interest in the admission of probative evidence in order to get at the truth of the matter in issue**". (at 7-8) [emphasis added]

265 Similarly, in a landmark U.S. case, **New Jersey v. Sheppard** (1984), 197 N.J. 411, the court ruled that evidence must be tendered relating to a child's state of mind either through expert testimony or testimony by the child in order to determine if exclusion is necessary.

266 **R. v. Potvin** (1989), 47 C.C.C. (3d) 289, 68 C.R. (3d) 193, 1 S.C.R. 525 (S.C.C.).

In exercising its discretion, the Ontario District Court judge was satisfied that the two-branch test had been met and allowed the complainant to testify behind a screen:

I have concluded the biological condition of [the child] creates a unique situation. If I understand the evidence of [the paediatrician] correctly, the use of a screen in this case would reduce stress for [the child]. Anything which reduces stress in the case of a juvenile diabetic **would** assist the court in obtaining a full and candid account of the acts complained of from the complainant [**i.e. stage one test is met**]. If stress were to become too great the complainant **could** "blank out". It could impair her evidence at a time which **might** be both unfair to the accused and society. **This possibility** outweighs, in my view, the other possible detrimental effect to the accused . . . [**i.e. stage two test is met**]. (at 8) [emphasis added]

Professionals who have been qualified as experts — child psychologists²⁶⁷, social workers²⁶⁸, child abuse workers²⁶⁹, play therapists²⁷⁰, sexual abuse therapists²⁷¹, and Crown counsel²⁷² -- have testified in court concerning the factors which affect the complainant's ability to provide a full and candid account of the alleged acts. Expert evidence admitted by courts has included testimony on the following variables²⁷³:

267 See generally **Appendix M. R. v. Dick(S.), supra; R. v. Levogiannis (No.1)** (19 October 1989) (Ont.D.C.) [unreported]; (1989), 53 C.C.C. (3d) 492 (Ont.D.C.); **R. v. R.(P.S.)** (7 November 1989), London 1598 (Ont.D.C.) [unreported]; (1990) 9 W.C.B. (2d) 399 (Ont.D.C.); **R. v. Shubert** (22 March 1991), New Westminster (B.C.P.C.) [unreported]; **R. v. Snow** (29 June 1988), Vancouver CC880704 (B.C.C.C.) [unreported]; (14 July 1989), Abbotsford (B.C.P.C.) [unreported].

268 See generally **Appendix M. R. v. B.(A.) (No.1), supra; R. v. Burghgraef** (11 July 1988), Hamilton (Ont.P.C.) [unreported] (In particular, the social worker testified *inter alia* that it would be extremely difficult for the child to testify because of her conflicting feelings of fear and love or loyalty in relation to the accused [her father].); **R. v. Carr** (9 September 1989), Winnipeg (Man.P.C.) [unreported]; **R. v. H.(D.)** (1990), 55 C.C.C. (3d) 343 (N.B.Q.B.); **R. v. W.(K.E.)** (8 June 1990), Calgary (Alta.Q.B.) [unreported].

269 **R. v. Carr**, supra.

270 **R. v. Dick(S.)**, supra.

271 **R. v. H.(D.)**, supra.

272 **R. v. B.(A.) (No.1)**, supra.

273 See generally **Appendix M**. See also: McAllister (1986); Abel *et al* (1984); Finkelhor (1979); Greenberg (1979).

- a. the effects of child sexual abuse accommodation syndrome;
- b. the effects of mental stress and trauma;
- c. the effects of court-related fears;
- d. the effects of specific fear of the accused; and
- e. the effects of extreme stress on physical condition.

Other factors that may substantially interfere with a child complainant's ability to testify which the courts have considered include:²⁷⁴

- a. the tender age of the complainant;
- b. the child was undergoing continuing psychiatric therapy;
- c. the child had used the screen at the preliminary hearing and thus would have an expectation of testifying behind a screen at trial;
- d. specific inability to discuss the alleged sexual activity; and
- e. fear of attack by the accused.

In **R. v. B.(A.) (No.1)**, *supra*, the Crown counsel, who was qualified as an expert in the prosecution of sexual offences, testified that the child had exhibited unusually anxious behaviour during the normal interview process and, in his opinion, would probably not be able to give a full and candid account of the alleged acts without the benefit of a screen. He further testified that the child's mother (the spouse of the accused) had made intimidating gestures towards the complainant at the courthouse. The court also heard testimony from a police officer concerning the same intimidating behaviour of the mother towards the child.

The hearsay testimony of parents²⁷⁵ and foster parents²⁷⁶ has also been admitted by courts in support of the Crown's application for a screen. In **R. v. Burghgraef**,

274 See generally **Appendix M**.

275 **R. v. Kiyawasew** (3 April 1990), Fort St. John (B.C.C.C.) [unreported].

276 **R. v. Carr**, *supra*; **R. v. Kiyawasew**, *supra*.

supra, the mother testified that both children became extremely upset in the presence of the accused and experienced nightmares as a result. In **R. v. Dick(S.)**, *supra*, the father of a 6-year-old complainant testified that his daughter feared the courtroom, feared to be in the presence of the accused, and would become withdrawn as a result of the stress. This same complainant, who was to testify in a trial of another accused²⁷⁷, completely broke down in the corridor of the courthouse upon seeing the accused, and refused to enter the courtroom.²⁷⁸

At the trial of **R. v. Levogiannis (No.1)**, *supra*²⁷⁹, the judge permitted a 12-year-old complainant to testify behind a screen even though the child testified at the preliminary inquiry without the use of the device. The court received psychological testimony that the child had a specific fear of testifying and that the fear had intensified to a significant degree since the preliminary hearing. The court ruled:

. . . [I]t's clear to me that in balancing the right of the accused to a fair trial, with the right of complainant to give evidence without fear, I must order that a screen be used while the infant complainant is testifying. I appreciate that this is a matter within my discretion and I am conscious of the fact that the accused has the right to make full answer and defence to these charges.

It seems to me, however, that the use of a screen does not prevent the accused from seeing his accuser throughout the course of the child's evidence and that, on balance, fairness dictates that the child be protected, given his emotional state. (at 3)

277 **R. v. Dick(B.)**, (18 August 1988) Prince Rupert 10344 (B.C.S.C.) [unreported]. The relationship between these two cases will be discussed later.

278 As a result, the Crown made a closed-circuit television application. This case will be discussed in a later section.

279 This case was subsequently appealed to the Ontario Court of Appeal and the Supreme Court of Canada on constitutional issues. The appeals will be discussed in a later section on **Charter** issues.

The defence counsel, in **R. v. Carr**, *supra*, opposed the Crown's application for a 10-year-old female complainant to testify behind a screen. In particular, the defence argued that the child must be called to testify on the *voir dire* to test her ability to give evidence in open court. That submission was explicitly rejected by the court. The court ruled that, prior to making an order, there is no requirement that the trial judge require a complainant to attempt to testify in the *voir dire* (without the use of a screen). To do this, the court concluded, would be inherently wrong and ultimately defeat the purpose of the legislation.²⁸⁰

A. SCREENS ALLOWED - JUDICIAL COMMENTS

In an early case, **R. v. M.(P.)**, *supra*, an Ontario District Court judge allowed the Crown's motion for a screen for a child witness who was allegedly sexually assaulted by her stepfather.²⁸¹ In ruling on the *voir dire*, Mr. Justice Fleury commented that, although it is an established principle in common law that an accused is entitled to face his accuser, the intention of Parliament in enacting the legislation must be considered. He ruled as follows:

There is no question that it is a fundamental principle of common law that an accused is entitled to face his accuser and that there is a certain amount of wisdom in that type of general rule because it is more difficult to accuse someone of having done something, especially something of a

280 The same conclusion on the issue was reached in **Levogiannis**.

281 The accused appealed his conviction of sexual assault. One issue raised on appeal was that the ruling of the trial judge was made in error. This was discussed earlier.

somewhat heinous nature, more difficult to sling accusations when one has to face one's accuser.

On the other hand, I cannot ignore the intention of Parliament when it enacted this particular section. There is no question that the 12- or 13-year-old young girl would have considerable reluctance to discuss any kind of sexual activity, let alone the kind of sexual activity that is alleged, at least in count number 2, and that this reluctance would, in many respects, substantially interfere with her ability to recount the events as fully and as candidly as might be expected.

In that respect, if there is some system that can be devised whereby the rights of the accused are not interfered with or are minimally interfered with and the feelings of the complainant are in some way protected, there is to be, in my opinion, ample room given to the Crown to place the complainant in the position that will ensure the most full and most candid account.

In these circumstances, having heard the complainant in the preliminary motion context, I am satisfied that the use of the screen in this particular case should be allowed and I will, therefore, allow the application by the Crown and order that there be a screen positioned in such a way as to effectively screen the complainant from the accused, providing that there is ample opportunity for the accused, the Crown and the defence counsel to see the complainant as she is testifying. (at 3-4)

In a subsequent Ontario case, **R. v. R.(P.S.)**, *supra*, the court allowed a 14-year-old complainant to testify against her father behind a screen. The court heard expert testimony from a child psychologist that the young girl had attempted suicide after being served with a subpoena to testify at the preliminary inquiry. In the ruling on the *voir dire*, the judge applauded the new provision and ruled that the Crown had satisfied the court "**on a balance of probabilities**" that the complainant would be considerably inhibited in giving a "full and candid account" of her evidence if she did not have the benefit of the screen. Judge Killeen stated:

The enactment of section 486(2.1) was, in my view, for the purpose of assisting child witnesses in giving their evidence and, indirectly, assisting the trier of fact in striking at the truth of what has transpired in a given sexual assault case. This kind of aid for the witness and the court is, in my view, a beneficial step forward for trial justice generally, and, subject to the constraints specified in the section itself, it seems to me that the courts should welcome this provision.

My jurisdiction to allow the application is grounded on the requirement that the Crown satisfy me that the screen will be necessary to obtain a full and candid account of the complainant's evidence. While the section is not entirely clear, I conclude that the Crown must satisfy me **on the balance of probabilities** on this voir dire issue.

On the evidence I have heard in this case, I am so satisfied on the balance of probabilities that the screen should be ordered in this case. This young lady has attempted suicide because of her fears in having to testify against her father. It is clear from the evidence of Dr. Sudermann that she has been in a high state of stress and fear about testifying, and I infer, to the exclusion of any other rational conclusion, that she would be greatly inhibited in giving a full and candid account of her evidence if she did not have the benefit of a screen. I therefore allow the application and order that the screen be used in this case. (at 20-21) [emphasis added]

In a 1990 Ontario case, **R. v. Cooper**²⁸², the court accepted the evidence of the mother and social worker that the 8-year-old complainant was particularly nervous and deeply afraid to testify against her step-uncle in court. In granting the screen application, the court was of the opinion that any prejudice to the accused would be negligible and that the screen is rationally connected to the objective of Parliament in obtaining a full and candid account from the complainant. Clarke D.C.J. opined:

While I agree that given a parallel situation, this intimidation would be almost universal, I make this finding on the particular evidence presented in this case involving this complainant. Moreover, the screen utilized in

282 (27 August 1990), Milton 3949/89 (Ont.D.C.) [unreported].

Halton allows the accused and his counsel to see the complainant, observe her demeanour and, of course, hear her testimony. The screen simply prevents the complainant from seeing the accused. Of course, all her testimony can be tested in cross-examination. Thus I find that the **accused's right to confront his accuser, face-to-face, is only minimally impaired**, and that the screen will not hinder a fair trial.

I agree with the Crown that the phrase "face-to-face" must be given a large interpretation based on the actual prejudice to the accused in conducting a full defence. I find in the instant case that such prejudice would be minuscule and in any event, **must be balanced against the rights of society**.

Section 486(2)1, enacted as an exception to the right of face-to-face confrontation, was designed to cover sexual offences involving young children. Parliament recognized that a young girl is naturally reluctant to discuss sexual offences, and that this reluctance can substantially interfere with her ability to narrate the events fully and candidly. Section 486(2)1 facilitates such full and candid disclosure.

Assuming (without finding) that the section is a violation of section 7 and 11(d) of the Charter, I agree with my Brother Judge Logan in Regina v. B, 7 W.C.B. (2d), p. 407 that it is saved by section 1. **In all these cases, the rights of the accused must be measured against the rights of society. Where as here the accused's Constitutional rights are only minimally affected, such interference is warranted. Further, I find, that the use of the screen is rationally connected to the objective of Parliament in obtaining a full and candid account from the complainant.**

In summary, I find not only will the screen assist the complainant in giving her evidence, but that it is necessary to obtain a full and candid account of the acts complained of from the complainant. (at 2-4) [emphasis added]

In R. v. H.(D.), *supra*, a 12-year-old complainant was unable to testify against her father at the preliminary inquiry due to extreme fear of the accused. The Crown then proceeded by way of direct indictment and made an application for a screen. The court admitted testimony from the complainant's mother, a social worker and a sexual abuse

therapist concerning the child's extreme shyness, nervousness and fear of testifying in front of her father. In support of the application, Crown counsel referred previous decisions on the issue to the court.²⁸³ Upon review of the jurisprudence, the court was of the opinion that the exclusion was necessary "to obtain a full and candid account of the acts complained of from the complainant". In making the *voir dire* ruling, the court directed that the screen be set up and removed in the absence of the jury so that an **adverse inference would not be drawn**. Riordon J. stated:

I therefore do allow the request of the Crown and I order that the screen be positioned in such a manner so as to screen the complainant so that she is not able to see the accused but that the accused, his counsel and the prosecutor must and should be able to see the complainant. So as to minimize the effect that this decision will have on the jury, the screen will be put in place and removed in the absence of the jury. After my opening address and Crown counsel's address, I will instruct the jury on the matter of the screen, and instruct them that they are not to draw any adverse inference from the use of the screen. I will explain that this is a procedure that is allowed in situations such as this. After that instruction, I will ask the jury to retire for a few minutes, for a short recess, and direct that the screen be set up and put in place. After the screen is set up and the child witness is in the witness box, behind the screen, I will ask the jury to return to the courtroom to hear her testimony, at which time I will again direct and instruct the jury not to draw any adverse inference from the use of the screen. (at 347)

In **R. v. Patterson**²⁸⁴, a case which involved charges of physical abuse of two children, the Crown's application for a screen was granted, notwithstanding that the offences were not included in the **Criminal Code** provision. The court demonstrated considerable flexibility by the invocation of common law authority to permit the

283 The Crown relied on **R. v. B.(A.) (No.1)**, *supra*, and **R. v. M.(P.)**, *supra*.

284 (12 December 1990), Brampton (Ont.C.G.D.) [unreported].

separation of the child witness from the accused by a screen. In his ruling, Moore J. cited with authority the common law position stated in **R. v. Smellie**²⁸⁵, which allows for the separation of the witness from the accused in intimidating situations:

If the judge considers that the presence of the prisoner will intimidate a witness there is nothing to prevent him from securing the ends of justice by removing the former from the presence of the latter. (at 130)

It was the rationale of the court that, since common law authority permitted the removal of the accused, there is nothing inherently wrong with separating the two parties with the use of a screen. The court further ruled that the Crown need only to establish "on a balance of probabilities that the ends of justice might not be secured and there might be intimidation of the witness"²⁸⁶.

B. SCREENS DENIED - JUDICIAL COMMENTS

At the trial of **R. v. W.(K.E.)**, *supra*, in which the accused was charged with sexual abuse of his 5-year-old daughter, the Crown made a screen application. The court heard testimony from the child's mother, a social worker and a pediatrician that the complainant was extremely reluctant to testify against her father. The pediatrician, who was also an expert in child abuse, was unable to state with certainty to the court whether

285 (1919), 14 Cr. App. R. 128. This decision was also cited in **R. v. R.(M.E.)**, *supra*, at p.485.

286 **R. v. Patterson**, *supra*, at p. 5.

the screen would or would not assist the child in giving her testimony. As a result, Mr. Justice Shannon denied the Crown's request, on the ground that the test set out in the provision was not met, without stating any reasons. The child, having been sworn, then testified without the screen and simply "blurted out all the information"²⁸⁷. The accused did not testify. The judge convicted the accused and commented on the fact that he drew a negative inference from the failure of the accused to answer the case.

In an unreported British Columbia case, **R. v. Morris**, *supra*, a provincial court judge denied the Crown's request for a screen for the child complainants in the face of strong opposition by defence counsel. As a compromise, the court ordered the accused to sit at the back of the courtroom. The Crown did not present the court with any evidence to support its application. Because the legislation was in its infancy (this case being heard only six months after its proclamation), there was some confusion (demonstrated by all parties) over the procedural issues surrounding the application.²⁸⁸

An excerpt of the proceedings is as follows:

The Court: Actually, Ms. Gordon, my first inclination is to agree with what Mr. Chamberlain says. I have to come to the opinion on some other -- in some concrete evidence, that there is no other way to obtain the full and candid account. I don't know how you're going to give that to me without the children telling me that. I can appreciate what you're saying and how to do it, but how do I form the opinion without having any evidence?

287 No transcript was available in this case. However, a summary of the case was filed by Crown counsel.

288 Contrast this with subsequent cases where more experienced Crown counsel made submissions and prepared case law in support of its application: **R. v. Snow**, *supra* - Crown counsel cited as authority 5 cases where screens were allowed; and **R. v. Griffin**, *supra* - Crown cited as authority 10 cases where screens were allowed.

Mr. Chamberlain: Well I have no objection if the accused person sits way over in the back -- in the body of the court if my friend wishes but I -- the screen --

The Court: Is there any problem with the accused sitting at the back row?

Ms. Gordon: Well, Your Honour, it's a compromise. My position is that a screen -- that Parliament has made provision -

The Court: Yes, I know --

Ms. Gordon: -- and that it is the best solution. Certainly if Your Honour is not going to grant the screen, that would be the second best option.

Mr. Chamberlain: Have him sit in the back row in the right corner. I don't object to that. To have the witness screened away from me and everybody else, is incredible.

The Court: Well actually I don't think she can be screened away from you, Mr. Chamberlain, but --

Ms. Gordon: Certainly she isn't, Your Honour. Perhaps Mr. Chamberlain isn't aware --

Mr. Chamberlain: Just a moment, don't do anything yet.

Ms. Gordon: -- perhaps Mr. Chamberlain isn't aware of how this works but certainly when the screen is erected, he comes here. He can see the child. Your Honour can see the child. There's no problem. The only person who is screened is the accused from the view of the children and certainly Defence Counsel, in terms of facing the accused, my submission is that facing one's accuser is not to be taken literally and that the Defence Counsel is in full view and can see everything as Your Honour can.

The Court: Ms. Gordon, you just said something that really -- facing the accuser is not to be taken literally?

Ms. Gordon: Well in terms of visual facing --

The Court: Well I thought that's exactly what it meant.

Ms. Gordon: In my submission, it would be hearing and the more general sense of the word.

The Court: Well aside from that, I think we're probably talking about -- how -- I want to know is, how I form the opinion one way or the other? When the Defence Counsel is objecting --

Ms. Gordon: Yes.

The Court: -- and --

Ms. Gordon: I think that Your Honour has a good point there. Perhaps the accused could exit the Courtroom, the

child could come in, Your Honour could then make an inquiry of the child or I could ask questions of the child and then Your Honour could make a decision based on that.

The Court: Well, Mr. Chamberlain?

Mr. Chamberlain: Well we can't have the accused exit, absent.

The Court: No.

Ms. Gordon: Well I mean exit the bar perhaps and go back to the back of the Courtroom while Your Honour asks the young persons --

The Court: I'm not asking any questions. It's your application --

Ms. Gordon: Yes, thank you, I'll ask the questions, Your Honour and in that way Your Honour would have an opportunity to listen --

The Court: If you're going to put the child through that, it seems to me that some of the evidence is coming out, why not just compromise in this particular -- make your point at the trial. Let Mr. M. sit at the back and see what happens. I don't feel I can make the opinion without some evidence or something other than what you're telling me, in view of Mr. Chamberlain's objections.

Ms. Gordon: Yes, Your Honour. My -- my position will then be that I will call both girls. I will ask them questions about how they -- about how they will answer questions, with or without a screen and Your Honour can make a decision based on that.

Mr. Chamberlain: Well I -- I -- I say let's start asking the questions and see how they get along. It seems to me my friend is making an issue of this. If the witnesses are having difficulty, that will become apparent to the Court.

The Court: Yes.

Mr. Chamberlain: If they're not having difficulties, why not just carry on in the ordinary course like every other trial we've ever conducted in our lives.

Ms. Gordon: I'm asking that the girls -- I'm pursuing my point, Your Honour, and I'm going to ask that the girls come in and Your Honour make a decision based on --

Mr. Chamberlain: Well I object to those questions being asked myself. It seems to me that we're here to hear their evidence. If they have difficulties, it will become apparent.

The Court: Well I think that that's the way it should go, if there's difficulties, then I'll grant the application.

Ms. Gordon: Thank you, Your Honour. (at 1-3)

The accused was seated in the last row in the courtroom. The two complainants, a 10-year-old and an 11-year-old, were able to give their testimony without the necessity of a screen. The Crown did not seek a new application.

IV. CLOSED-CIRCUIT TELEVISION CASES

A. ANALYSIS

The dissertation research includes the monitoring of **10** closed-circuit television application cases. Judges allowed the closed-circuit television procedure in **9** cases and denied it in **1** case (see **Appendix N**).

In **R. v. Dick(B.)**, *supra*, the Supreme Court of British Columbia gave a narrow interpretation to the new section. The Crown had called evidence from the child's stepfather and a family therapist concerning general intimidation and shyness of the complainant. The evidence of the parent was to the effect that the child would only talk about the alleged acts in "comfortable surroundings" and only with persons she was familiar with. The therapist testified that the child had a tendency to "clam up" if she did not wish to continue speaking. The court denied the Crown's application for the 6-year-old complainant to testify outside of the courtroom by closed-circuit television on the basis that the Crown failed to establish that the child had a specific fear of testifying

in the presence of the accused as opposed to having a mere apprehension of testifying in the courtroom. In the ruling on the *voir dire*, Madam Justice Rowles stated:

There was no evidence from either witness that the accused's presence would be likely to have any particular effect on the child's being able to give a full and candid account of the acts complained of. Instead, the evidence called suggests that the child would have difficulty giving evidence except, as I said, under certain controlled conditions, and even that is not entirely predictable. (at 2)

The court expressly rejected the Crown's submission that allowing the child to give evidence outside the courtroom would enhance her ability to communicate her evidence and that the intent of the new provision was to serve that purpose. Choosing a more restrictive approach, and without addressing the constitutionality of the section, Madam Justice J. Rowles ruled that the legislation cannot be broadly construed to enhance the ability of the child witness to communicate her evidence:

The question is whether that legislation should be broadly construed, as the Crown suggests, or whether it applies only in those circumstances where the complainant would have difficulty testifying if he or she saw the accused during the course of his or her testimony.

In my view, section 442(2.1) cannot be construed as giving a general discretion to the Court to permit complainants under 18 to testify outside the courtroom simply on the basis such a procedure would **enhance** the complainant's ability to communicate his or her evidence. Instead, that section gives the Court discretion to allow a complainant to give his or her evidence without seeing the accused if that step appears **necessary** to obtain a full and candid account of the acts complained of from the complainant. (at 3) [emphasis added]

Shortly after the ruling, the child inadvertently came upon the accused in the hallway of the courthouse and, as a result, became so distressed that she refused to enter the

courtroom to testify. In view of the child's emotional state, the Crown elected not to call the child as a witness or to attempt to make a new application.

It is interesting to note that the same 6-year-old complainant was required to testify in a related case, **R. v. Dick(S.)**, *supra*²⁸⁹, approximately six months later. Once again, the child refused to enter into the court to give her testimony and specifically stated her fear of seeing the accused in the courtroom. The Crown made an application for the child to testify either behind a screen or in an ante-room via closed-circuit television. In support of its application in a *voir dire*, the Crown adduced evidence from the child's parent, her play therapist, and an expert psychologist who treated and assessed child victims of sexual abuse. In making the ruling that either of the procedures would be acceptable, the trial judge took into consideration the tender age of the child, her manifested anxiety about testifying in the courtroom before a jury and the accused, as well as her negative experience of seeing the accused in the corridor of the court in Prince Rupert. Mr. Justice MacKinnon ruled that it would accept the defence's preference for whether the complainant testified with the aid of a screen or from another room by way of closed-circuit television. The defence opted for the latter procedure to avoid the negative inference which may be drawn by the jury if the child were physically separated from the accused by a screen. The defence took the position that the fact that the child testifies from another room is indicative only of the intimidating nature of the

289 Originally, there were two accused jointly charged with sexual offences against the same 6-year-old child: Brian Dick (the son) and Sandra Dick (the mother). In the Prince Rupert proceeding, the trial was severed. As a result, the trial of **R. v. Dick(B.)** took place in Prince Rupert in August 1988 and **R. v. Dick(S.)** was proceeded with in the Supreme Court at Vancouver, B.C. in February 1989. Brian Dick was convicted and Sandra Dick was acquitted on all counts.

courtroom environment itself and would not cause the jury to draw an inference of guilt premised on the child's specific fear of the accused. The child subsequently testified in an ante-room with simultaneous television link and audio transmission to the courtroom.²⁹⁰

Unlike the strict elucidation in the **R. v. Dick(B.)**, *supra*, decision by the British Columbia Supreme Court, a broader approach was taken by the Nova Scotia Court of Appeal in its interpretation of the section in **R. v. R.(M.E.)**, *supra*. One issue raised on the conviction appeal by the accused was that the trial judge had erred in allowing the Crown's application under s. 442(2.1) "so as to obtain a full and candid account of the acts complained of". The trial judge had allowed a 10-year-old child to testify by closed-circuit television without the necessity of the Crown establishing that the complainant had a specific fear of the accused. Rather, the Court of Appeal held that the lower court had properly exercised its discretion in making the order by considering the complainant's

290 The actual procedure followed in this case (to receive the testimony of the 6-year-old complainant) was:

1. The persons present in the room with the child included one counsel for the Crown (the other counsel staying in the courtroom); one counsel for the defence (the other counsel staying in the courtroom); the mother of the child (who remained neutral throughout); and the court reporter.
2. The camera showed every person in the room except the court reporter.
3. There was no need for telephone lines because there were two counsel for the Crown and defence and so the accused was able to give instructions to her counsel who remained in the courtroom.
4. There was a video camera and a monitor in the room with the child and on the monitor the child was able to see the face of the judge.
5. A videotape recording was not made of the proceeding.
6. There were two colour monitors situated in the courtroom — one for the benefit of the judge and the other for the benefit of the remainder of the courtroom (including the jury). The judge spoke to the child through the monitor and the child was allowed to swear on the Bible, at which point the court clerk came into the interview room and had the child swear an oath.

young age (10), her familial relationship to the accused (her grandfather), her inherent shyness, and the intimate nature and duration (over five years) of the alleged sexual acts.

Another issue raised by the defence, but not on Charter grounds, was that the accused's common law right to face his accuser was infringed by the order permitting the child to testify outside the courtroom. Finding no merit in the appellant's submission, the court, relying on the proposition of Lord Chief Justice of England, in R. v. Lee Kun²⁹¹, stated:

The right to face one's accusers is not in this day and age to be taken in the literal sense. In my opinion, it is simply the right of an accused person to be present in court, to hear the case against him and to make answer and defence to it. (at 122-123)

At the trial of R. v. J.(J.V.R.)²⁹², the court granted the Crown's application for a 7-year-old child complainant to testify by closed-circuit television after the child was unable to continue with her testimony in the witness stand. The child became silent during direct examination when questions surrounding the alleged sexual acts were put to her. The child simply dropped her head and refused to talk. In allowing the application, the trial judge was satisfied that "there were forces, either by way of

291 [1916] 1 K.B. 337, 11 Cr. App. R. 293. The Lord Chief Justice of England said:

The reason why the accused should be present at the trial is that he may hear the case made against him, and have the opportunity, having heard it, of answering it. The presence of the accused means not merely that he must be physically in attendance, but also that he must be capable of understanding the nature of the proceedings. (at 300)

292 (1990), 9 W.C.B. (2d) 186; (7 April 1989) Bracebridge (Ont.P.C.) [unreported].

coercion or otherwise, that are acting on the mind of this child and which induced her to refuse to answer".²⁹³

In another case, one appellate court ruled that a trial judge was in error by allowing the Crown to call witnesses who were not qualified as experts. In R. v. H.(B.C.)²⁹⁴, the accused appealed his conviction for sexual assault of an 8-year-old girl. At trial, the Crown brought an application pursuant to s. 486(2.1) for an order allowing the complainant to testify outside the courtroom. A *voir dire* was held and a police officer, a social worker and the child's mother testified as to what effect testifying in court might have on the child. The trial judge concluded that such an exclusion order was necessary to obtain a full and candid account of the complainant's allegations and directed that the child give her testimony from another courtroom from which her evidence would be transmitted by closed-circuit television. On subsequent appeal, the accused raised several questions of procedural fairness²⁹⁵, one being that the accused, who was unrepresented by counsel, did not have a proper opportunity to object to the witnesses on the issue of the s. 486(2.1) application. The Manitoba Court of Appeal ruled that a trial judge was entitled to hold a *voir dire* to ascertain the facts upon which his opinion will be formed as to whether the exclusion of the complainant was necessary in order to obtain a full and candid account of her allegations, pursuant to s. 486(2.1),

293 *Ibid.* at p. 33.

294 (1990), 58 C.C.C. (3d) 16, 79 C.R. (3d) 119 (Man.C.A.).

295 The other grounds raised, which involved the infringement of the accused's fundamental rights, included: the requirement that the accused cross-examine through an intermediary; the identification of the accused; the waiving of the *voir dire*; the videotape and the complainant's statement; and the cross-examination of other witnesses.

but that the Crown was not entitled to call witnesses who were not qualified as experts, to express their opinions on the issue.²⁹⁶ Having found that there were procedural irregularities of this nature, which ultimately denied the accused a fair trial, the Manitoba Court of Appeal allowed the appeal against conviction and ordered a new trial.

B. CLOSED-CIRCUIT TELEVISION SET-UP: PRACTICAL ASPECTS

The legislation is also silent on the precise procedure to be adopted in circumstances where a complainant testifies outside a courtroom by way of closed-circuit television. A number of cases have addressed the practical aspects of setting up the anteroom and the video-telecommunication link to receive a complainant's testimony.

In the **R. v. Kilabuk**²⁹⁷ judgment, the Supreme Court of the Northwest Territories articulated in detail the proper procedure and logistics for the taking of the child's evidence by means of closed-circuit television. The court stipulated:

1. Evidence of the witness will be taken in a room adjacent to the courtroom. (Old Clerk's office)
2. Persons present during the taking of the witness' evidence will be:
Crown Counsel.
Defence Counsel.
Female support person who is as neutral as possible and will not intervene or interfere with proceedings.
Interpreter (female). Child may speak English and/or Inuktitut.
Camera operator.

296 Contrast this with other cases where courts have admitted hearsay testimony from non-expert witnesses (see **Appendices M and N**).

297 (17 September 1990), Iqalut CR00844 (N.W.T.S.C.) [unreported], (1990), 60 C.C.C. (3d) 413 (N.W.T.S.C.).

Clerk (not agreed upon as yet).

3. The camera will show every person in the interview room, and the face of the witness shall be visible at all times.
4. There will be sequential translation and the interpreter should be given a chance to interpret and the witness shall be informed of this process.
5. Telephone lines will be used to communicate from the courtroom to the interview room. If the accused has anything to say to his lawyer, counsel for the accused in the courtroom will relate what the accused has said to counsel in the anteroom. The child witness is to communicate through Crown Counsel. If an objection is raised then counsel will move back into the courtroom, leaving the witness in the interview room. Then once a court ruling is made on the objection, counsel will then return to the interview room.
6. The only equipment to be in the interview room is the video camera and the tape needed.
7. A videotape recording of the proceeding should be made.
8. One or two colour monitors will be situated in the courtroom for the benefit of the judge, jury and accused, transmitting what is taking place in the interview room.
9. The placement of counsel and support person shall be decided by agreement of counsel or if agreement fails, by order of the Court.
10. If counsel and defendant need to speak to each other during the proceedings, there will be an interruption of the examination in the interview room and they will be allowed to have a private meeting.
11. The court reporter shall remain in the courtroom and shall rely on the video monitor and voice transmission for the purpose of recording all of the proceedings.
12. The Crown's office will make all the arrangements and there will be no expense to the defendant or his counsel.
13. The inquiry required by **s. 16** of the **Canada Evidence Act** will be carried out in the examination room through the video equipment.

14. If the complainant is to be sworn, then the clerk will be allowed to go into the examination room and swear the witness instead of doing it through television.
15. The evidence of the witness shall be interrupted at reasonable intervals to provide the accused with an opportunity for person-to-person consultation with his counsel.

In allowing a 4½-year-old complainant to testify in a sexual assault case against her father, the provincial court judge, in **R. v. W.(A.)**, *supra*, adopted the procedural guidelines for closed-circuit testimony established in the American case of **New Jersey v. Sheppard**, *supra*²⁹⁸ (see **Appendix P** for a modified version). Judge Edmondstone ruled:

Accordingly, I order that the complainant give her evidence in a room separate from, but adjacent to or near the courtroom where the preliminary hearing is to be conducted in accordance with the conditions annexed hereto as "Schedule A", reserving, however, to counsel the right at any time to apply for a variation in the conditions on the basis that the conditions fail to satisfy the requirement that the accused has the ability to consult with his counsel in private, or for any other valid reason.

As the anteroom where the child will be giving her evidence is really an extension of the courtroom, I further order that a female support person, other than a person who is to be called as a witness, shall be permitted to be in the anteroom in reasonably close proximity to the witness, but this person shall not be permitted to communicate in any way, by word, gesture, or other signal, with the witness and I further reserve the right to vary this section of the order if a violation should occur. (at 7)

298 See **Appendix O**.

The New Jersey Supreme Court procedure was also followed in R. v. W.(P.F.)²⁹⁹, where the court ruled that a 10-year-old child complainant be allowed to testify outside the courtroom against his father.

It is submitted that there are some other practical and procedural concerns associated with closed-circuit television as an alternative method of receiving complainants' testimony, which should be considered, namely:

- a. The *voir dire* process may be lengthy and the procedure expensive.
- b. the traditional courtroom may not be physically suited to accommodate the procedures.
- c. Not every court facility will have access to the necessary equipment. Should every court have its own equipment or should there be mobile units?
- d. Are there resources available in smaller or rural communities to provide the required set-up?
- e. Is it cost-effective, given the rarity of the situation?
- f. There are possibilities of limited perspective, distortion of images or enhancement inherent in the use of closed-circuit television equipment which may affect the assessment of witness credibility.

In R. v. Dick(S.), *supra*³⁰⁰, the first British Columbia case where the procedure was allowed, the *voir dire* proceeding involved three full days of argument by counsel and the calling of numerous Crown witnesses before the trial judge made the order. Meanwhile, the 6-year-old complainant waited (either in the court or at a nearby hotel)

299 (7 November 1989), Windsor (Ont.P.C.) [unreported].

300 The writer monitored this case and was present in court (throughout the two-month proceedings) and personally witnessed these events.

to be called to testify in the event the application was unsuccessful. After the order was granted, one complete day was required for technicians to set up the equipment to connect the courtroom to the ante-room electronically to receive the child's testimony. Ultimately, the video transmissions were of questionable quality. The television images lacked clarity and the jury and the observers in the courtroom had difficulty seeing the child's facial expressions and demeanour when she testified. This case raises the issue of whether the closed-circuit television procedure is an effective and/or practical way to provide testimony to the fact-finder. Given the inherent problems associated with the application and procedure — (the major deterrent being the complete and accurate assessment of witness credibility through the television medium) — it is likely that prosecutors would invoke the measure only as a last resort, after all reasonable efforts to obtain the child's testimony have failed. It would be logical to assume that prosecutors would prefer a "live witness" whenever possible.

V. CHALLENGES TO LEGISLATION

The screen and closed-circuit section of the Criminal Code, s. 486(2.1)(2.2), has undergone various constitutional challenges since January 1988. The constitutionality of the legislation has been challenged under these relevant sections of the Charter:

- s. 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.

• • •

- s. 11(d) Any person charged with an offence has the right . . . to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

If a court finds that there is an infringement of either (or both) of the above-mentioned sections, an analysis under s. 1 of the Charter of Rights will take place. This section is as follows:

- s. 1 The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

In early 1989, a challenge to the provision under ss. 7 and 11(d) of the Charter was made and rejected in R. v. Dick(S.), *supra*. The Supreme Court of British Columbia ruled that the impugned section did not offend the Charter and held that the extraordinary procedures were necessary to assist the 6-year-old child complainant to give her testimony. Mr. Justice MacKinnon commented briefly on the constitutionality of the legislation by stating: "I am not accepting the submissions that the Charter has been breached."³⁰¹ The court provided no further elucidation on the issue.

In R. v. R.(M.E.), *supra*, the Nova Scotia Court of Appeal was called upon to rule on the following ground of appeal:

301 At p. 6.

That Mr. R's right to a fair trial guaranteed by the Charter was infringed in that he was deprived of the right to confront his accuser, the complainant, when she was permitted to testify, from outside the courtroom, which testimony was transmitted to the courtroom by closed-circuit television.

The appellate court upheld the constitutionality of the section. Mr. Justice MacDonald, who delivered the judgment of the court, stated that:

The right to face one's accusers is not in this day and age to be taken in the literal sense. In my opinion, **it is simply the right of an accused person to hear the case against him and to make answer and defence to it . . .** There is no merit in the appellant's submission that his common law right to face his accuser was infringed by the order permitting his granddaughter to testify from outside the courtroom. (at 122-123) [emphasis added]

The court further ruled that the accused's constitutional challenge should not be entertained because it had not been raised in the lower court (and thus not argued at that level) and that the Attorney General for Canada had received no notice (and thus was deprived of an opportunity to participate in the proceedings).

In R. v. B.(A.) (No.2)³⁰², the defence challenged the section on the basis that the screen:

- a. prevented the accused from having full opportunity to examine the complainant; and
- b. created an inference of guilt which offended the presumption of innocence in essence, violating ss. 7 and 11(d) of the Charter.

302 (15 June 1989) (Ont.D.C.) [unreported].

Logan Dist. Ct. J., of the Ontario District Court, found that s. 486(2.1) offended both sections of the Charter (because it violated the "right to cross-examination"), but can be "saved" as a reasonable limit under s. 1 of the Charter. The constitutionality of the legislation was upheld under s. 1 since it satisfied the prerequisite criteria defined by Dickson C.J.C. in R. v. Oakes³⁰³, that:

- a. its object (in this case - to obtain a "full and candid account") is of sufficient importance to override a constitutionally provided right and freedom; and
- b. the means to satisfy that objective are proportional to achieve that end.

The court commented on the "**objective**" criterion set out in Oakes as follows:

The objective is to allow the court "to obtain a full and candid account of the acts complained of from the complainant". Surely this objective represents the essence of a criminal case which involved a child complainant. Anything less than a full and candid account of the complainant can adversely affect the course of justice. **The fundamental nature of the objective of s. 442(2.1) warrant in my view overriding the constitutionally protected rights and freedoms expressed in ss. 7 and 11(d).** (at 9) [emphasis added]

With respect to the "**means**" criterion of Oakes the court opined:

. . . the means provided to accomplish the objective, meet the proportionality test. Whether the Crown or the accused makes an application for a screen, **the section affords the judge the opportunity to balance the interests of the accused with the interests of society.** Obviously he must decide what is fair to society in each case. (at 9) [emphasis added]

303 (1986), 24 C.C.C. (3d) 321; 26 D.L.R. (4th) 200; [1986] 1 S.C.R. 103 (S.C.C.), at C.C.C. p. 348.

In his reasons for judgment, Judge Logan ruled that:

. . . in each case the judge must balance the interests of society and the accused. . . the section has been carefully worded to allow the trial judge to make a decision about fairness to the accused which might vary from case to case. The section allows flexibility and removes the rigidity in a developing area of the law designed to counteract the malaise of sexual child abuse. (at 11)

The court went on to remark that a rational connection existed between the use of a screen device and the objective of Parliament. He noted:

. . . it provides a method by which the fundamental objective of the section can be achieved. I find the use of the screen is rationally connected to the objective of obtaining a full and candid account on acts of which there has been a complaint. (at 12)

The District Court of Ontario, in R. v. C.(W.R.)³⁰⁴, was called upon to rule on the constitutional validity of s. 486(2.1). In allowing an 8-year-old complainant to testify behind a screen, the court found that, since the screen simply prevents the complainant from seeing the accused, the accused's right to confront his accuser face-to-face was only minimally impaired and that the screen did not hinder a fair trial. The Honourable Mr. Justice Clarke, in his ruling, stated:

I agree with the Crown that the phrase "face-to-face" must be given a large interpretation based on the actual prejudice to the accused in conducting a full defence. I find in the instant case that such prejudice would be minuscule and in any event, must be balanced against the rights of society.

304 (27 August 1990), Milton 3949/89 (Ont.D.C.) [unreported].

Section 486(2)1, enacted as an exception to the right of face-to-face confrontation, was designed to cover sexual offences involving young children. Parliament recognized that a young girl is naturally reluctant to discuss sexual offences, and that this reluctance can substantially interfere with her ability to narrate the events fully and candidly. Section 486(2)1 facilitates such full and candid disclosure. (at 3)

The justice went on to elaborate that assuming (but without finding) that the screen legislation violated ss. 7 and 11(d) of the Charter, he would rely on the decision of R. v. B.(A.) (No.2), *supra*, that it can be saved by s. 1.

The most significant Charter case (which was recently decided in the Supreme Court of Canada) was another case heard originally at trial in the Ontario District Court. In R. v. Levogiannis (No.1), *supra*, the accused, who was convicted of sexual interference of a 12-year-old boy contrary to s. 151 of the Criminal Code, challenged the constitutionality of s. 486(2.1) of the Code on the grounds that it violated ss. 7 and 11(d) of the Charter. The Crown had applied to have the infant complainant permitted to testify behind a screen pursuant to the new section and the application was granted on the basis of *viva voce* evidence proffered by the Crown. The accused argued that the use of the screen interfered with his right to confront his accuser and constituted an unwarranted limitation of his right of cross-examination. He further contended that by placing him behind a screen when the complainant testified created an inference of guilt.

The Ontario District Court considered the American case of Coy v. Iowa³⁰⁵, where the Supreme Court of the United States held that an accused has the right under the Sixth Amendment to a face-to-face confrontation with a witness at his trial giving

305 487 U.S. 1012, 108 S. Ct. 2798, 43 CrL 3226 (1988), 56 U.S.L.W. 4931 (U.S.S.C.).

evidence against him. The court found that such confrontations assisted to ensure the integrity of the fact-finding process by making it more difficult for witnesses to fabricate their evidence. In distinguishing the American case, Coy, Jenkins D.C.J. concluded that there was no entrenchment of such a right in our Charter:

Clearly, there are basic differences between the Constitutions of Canada and the United States which make the *Coy* case of limited value in interpreting our Charter. One such difference is that the Sixth Amendment to the United States Constitution gives the accused the right to confront his accusers. **No such right is enshrined in our Charter.**

In addition, in the *Coy* case, the judge did not exercise his discretion concerning the use of a screen. Section 486(2.1) of our *Code* allows the judge to exercise a discretion in each case as to whether a screen is necessary. (at 494) [emphasis added]

Secondly, the Levogiannis court considered the decision in R. v. B.(A.) (No.2), *supra*, which held that the placement of a screen between the accused and the complainant interfered with the accused's right to a full cross-examination of the child complainant. Thus, His Honour Judge Logan held that s. 486(2.1) violated ss. 7 and 11(d) of the Charter, but that it was saved by s. 1 of the Charter since it was a reasonable limitation of the accused's rights.³⁰⁶

306 Canadian courts have explicitly ruled that the "right to confront" does not exist, per se, in Canada. Logan Dist. Ct. J. pointed to the opinion of Wilson, J. in R. v. Potvin, *supra*:

I would respectfully reject the finding...that..."the right of an accused to confront the witnesses testifying against him at his trial is an established principle of fundamental justice." [T]he "right to full cross-examination" is a component common to the American "right to confront" and to the Canadian "rights to fundamental justice and a fair trial"...Thus, the Sixth Amendment cases may be pertinent in Canada. (at p. 300 C.C.C.)

Jenkins, D.C.J. rejected the finding of the R. v. B.(A.) (No.2) court. Rather, the court was of the opinion that:

While His Honour Judge Logan held in *R. v. B.(A.)* that the use of a screen infringed the accused's right of cross-examination, he did not say how that right was infringed. With respect, I am unable to agree that a screening device which does not prevent the accused from seeing the complainant or the other participants in the trial infringes his right of cross-examination.

While confrontation between the accused and the complainant is an element of cross-examination which may make it more difficult for the complainant to lie, it is not an essential element. **Confrontation between the accused and an infant complainant may have to be abandoned in some cases to ensure that the infant is able to give a full account of the circumstances surrounding the alleged offence.** (at 494-495) [emphasis added]

In response to the accused's argument that the screen raised an inference of guilt thereby infringing his right to a fair trial, the court opined:

It suggests to the court that the complainant was so traumatized by the events resulting in the charge that he or she is unable to face the accused. Certainly that is a factor that may be taken into account by the trial judge in exercising his discretion concerning the use of a screen. (at 495)

The court concluded that the Criminal Code section did not violate ss. 7 and 11(d) of the Charter:

In a case where the trial judge determines that the techniques for preparing a child witness to give evidence are inadequate and that the quality of the child's testimony will be seriously affected unless a screen is used, then it is fair that such a device be employed. (at 495)

The accused Levogiannis appealed his conviction (and sentence of 60 days imprisonment) to the Ontario Court of Appeal.³⁰⁷ The ground of appeal against conviction put forward by the appellant was that s. 486(2.1) infringed both his right to liberty guaranteed by s. 7 of the Charter and his rights to be presumed innocent and to a fair hearing guaranteed by s. 11(d) of the Charter. Particularly, with respect to s. 7, since the appellant's liberty was at stake in the trial of the offence which resulted in his conviction, the question was whether his being deprived of it was in accordance with the principles of fundamental justice. The ultimate issue to be decided was whether a principle of fundamental justice was involved as a result of the trial judge's order pursuant to s. 486(2.1) — the effect of which restricted the child complainant's view of the appellant. In this branch of the argument, the appellant submitted that he had an inherent right to an unobstructed view of the complainant while the complainant testified, and a right to be in the sight of witnesses testifying against him. The Ontario Court of Appeal found that that particular right was not embodied in a principle of fundamental justice. The appellate court held that, while the effect of the screen was to block the complainant's view of the accused intentionally, it did not prevent the accused, his counsel, Crown counsel, or the judge from seeing the complainant when he testified. The court was of the opinion that there is no basic tenet or principle in our judicial or legal system that an accused person is entitled to an unobstructed view of a witness testifying against him, including an absolute right to be in the sight of witnesses.

307 R. v. Levogiannis (No.2), *supra*.

The Court of Appeal concluded that the impugned legislation did not violate an accused's fundamental rights under s. 7 of the Charter:

. . . since it is an accepted tradition of our legal system that judge, jury, witnesses, accused and counsel are all present in the sight of each other, it can be said that normally an accused has the right to be in the sight of witnesses who testify against him or her . . . Accepting that it is a right, of a kind, I do not think that it can be said to be an **absolute** right, in itself, which reflects a basic tenet of our legal system. **It is a right which is subject to qualification in the interests of justice.** (at p. 75 C.C.C.) [emphasis added]

In arriving at its decision, the court examined early and contemporary jurisprudence from England, Canada, New Zealand, and the United States. First, the court followed the early English decision of Lord Coleridge in R. v. Smellie, *supra*³⁰⁸, where an accused appealed his conviction of assault, maltreatment and neglect of his 11-year-old daughter. During the trial, prior to the complainant's testimony, the court ordered the accused to sit on the stairs leading out of the prisoner's dock, out of sight of the witness while she gave her evidence.³⁰⁹

The Court of Appeal then cited with approval a recent Canadian case, R. v. R.(M.E.), *supra*, where the Nova Scotia Supreme Court, Appeal Division, ruled that the order under s. 486(2.1)(2.2) allowing the complainant to testify outside the courtroom

308 In this case, not only was the accused out of the sight of the witness, the witness was out of the accused's sight as well.

309 The court also applied a New Zealand case, R. v. Accused(T.) [1989] N.Z.L.R. 560 (C.A.), which upheld the trial judge's ruling for permitting a 12-year-old girl to testify against her father behind a one-way glass screen. Similarly, the court followed a British case, R. v. X. Y. and Z. (30 October 1989) Court of Appeal Criminal Division [unreported], where the lower court's order for child witnesses to testify behind a screen was justified.

by closed-circuit television did not offend the accused's common law right to face his accuser.

Next, the Court of Appeal considered in detail two United States Supreme Court decisions, Coy v. Iowa, *supra*³¹⁰, and Maryland v. Craig³¹¹, which were concerned with the accused's rights under the confrontation clause contained in their Sixth Amendment. The court drew a parallel between the American cases and the one before it and found that the majority and dissenting opinions in both U.S. cases provided valuable analyses

310 This was the first child witness case to reach the United States Supreme Court on the issue of alternatives to in-court testimony by complainants. At trial, a one-way glass screen had been erected in the courtroom separating the child witnesses from the accused during their testimony. Without deciding *inter alia* whether face-to-face confrontation could be abrogated, the Supreme Court ruled that Iowa's statute, which created a generalized presumption of secondary trauma to child witnesses, was not sufficient to justify an exception to the constitutional right of confrontation contained in the Sixth Amendment. Rather, the court mandated "individualized findings that these particular witnesses needed special protection". The Supreme Court formally acknowledged that the right of confrontation was not absolute, and may yield to "other important interests". In a concurring opinion, Justice O'Connor articulated her position vis-a-vis the nature of those "other important interests":

The protection of child witnesses is, in my view and in the view of a substantial majority of the States, just such a policy. The primary focus therefore likely will be on the necessity prong. I agree with the Court that more than the type of generalized legislative finding of necessity present here is required. But if a court makes a case-specific finding of necessity, as is required by a number of state statutes, (citing statutes) our cases suggest that the strictures of the Confrontation Clause may give way to the compelling state interest of protecting child witnesses. (at 43 CrL 3229)

The justice explicitly described State statutes which authorized one-way and two-way closed-circuit television, as well as provisions for videotaped evidence, as protective measures that were not "necessarily doomed" by the court's decision (at 43 CrL 3229). For an in-depth analysis of this case, see: Cukjati, 1989; and Forman, 1989.

311 110 S. Ct. 3157 (1990) (S.C.U.S.). The United States Supreme Court upheld the constitutionality of a Maryland statute which allowed child victims in sexual abuse cases to testify outside the courtroom by closed-circuit television. The court shaped a constitutional exception allowing states to create special procedures to protect child witnesses when there are case-specific findings of need. The court ruled that before an alternative to direct confrontation can be allowed, it must be established that the child would be traumatized, not by the courtroom generally, but by the defendant's presence, and further, that the child's emotional distress would be "more than de minimus".

of the issues relevant to Canadian Charter cases of this genre. Following this review,

Mr. Justice Morden arrived at this conclusion³¹²:

In the United States, where there is an expressly conferred constitutional "right to be confronted with the witnesses against [the accused]" and this is interpreted to mean face-to-face confrontation, the right is not an absolute one. As Justice O'Connor said for the majority in *Maryland v. Craig, supra*, at p. 5046:

The central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact. The word "confront", after all, also means a clashing of forces or ideas, thus carrying with it the notion of adversariness. . . . The combined effect of these elements of confrontation — physical presence, oath, cross-examination, and observation of demeanour by the trier of fact — serves the purposes of the Confrontation Clause by ensuring that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American criminal proceedings. (at p. 75-76 C.C.C.)

In resolving the constitutional issue, the court justified the special treatment accorded by the legislation by stating:

. . . child witnesses may be, in some important respects, different from adult witnesses and, accordingly, face-to-face confrontation affects them differently than it does adults. (at 84)

312 Morden A.C.J.O. accepted the general truth of this proposition: that the rationale underlying the right to face-to-face confrontation is that it is said to be more difficult to lie about a person when required to look at that person eye to eye. However, he reiterated the observations of Cooke P. in *R. v. Accused(T.)*, *supra*, that in some cases, eye-to-eye contact may frustrate the obtaining of as true an account from the witness as is possible. (at 75)

This proposition was then buttressed by a direct statement to this effect found in the judgment of McMullin J. in **R. v. Accused(T.)**, *supra*³¹³:

For children, fear of the defendant's presence in the courtroom is frequently mentioned as one of the most traumatic aspects of the criminal justice system. Historically, looking the defendant in the eye as one accuses him or her of a crime was held to be an acid test of the truth. But when the accuser is a child, this confrontation may offer a convenient means of intimidating the witness, resulting in serious, damaging effects on the child's testimony. This may be especially so in intrafamilial child sexual abuse cases. The interests of justice are not served when victims are unable to effectively give their evidence due to the close physical proximity of the accused. (at 671)

The court found further support for its policy statement from American sources. The court cited with approval a brief filed with the Supreme Court of the United States in **Maryland v. Craig**, *supra*, (a case which struck a balance between protecting children and preserving the accused's right of confrontation):

Reports of child abuse in this country have increased in recent years. With this increase have come concerns that the legal system is often insensitive to child witnesses. Psychologists have turned their attention to the study of the capabilities of children to testify, jurors' reactions to child witnesses, and the emotional effects of involvement in the legal process on child witnesses.

The resulting body of research supports the proposition that children as a class may be especially likely to be emotionally distressed by courtroom confrontation with their alleged abusers. While this may argue for permitting the use of protective measures in many cases, there is also evidence that a substantial number of children are capable of testifying fully and accurately under conventional criminal procedures without serious and lasting harm.

313 The court was quoting this passage from the Report of the Advisory Committee on the Investigation, Detection and Prosecution of Offences Against Children, 1988.

. . . Research also demonstrates that testifying in confrontation with the alleged abuser may in many cases cause child victim-witnesses to refuse to testify or to testify less completely than they are capable. Research further shows that jurors tend unduly to consider the comprehensiveness of children's testimony in evaluating their truthfulness. Requiring child witnesses to undergo face-to-face confrontation, therefore, may in some cases actually disserve the truth-seeking rationale that underlies the Confrontation Clause.³¹⁴

The Court of Appeal went on to consider another issue raised by the appellant — namely the bearing of s. 11(d) of the Charter on s. 486(2.1) in terms of its impact on his right to the presumption of innocence and to a fair trial. The appellant basically argued that the use of a screen in front of the child witness, which obstructed the witness' view of the accused, in essence, prejudiced the accused in the minds of the jury. The inference created, it was submitted, was that since the courtroom had been arranged to protect the complainant from seeing the accused, the accused must be guilty; otherwise the protection would not be necessary. According to the appellant, the adverse inference undermined the presumption of innocence and resulted in an unfair trial. In finding that the "screen need not prejudice the rights of an accused person to a fair trial", and as a result did not violate s. 11(d) of the Charter, the court found support from the dissenting opinion in Coy v. Iowa, *supra*. Justice Blackmun, in his dissent, specifically dealt with a submission concerning the prejudicial impact of the use of the one-way screening device and was unpersuaded by that argument. Mr. Justice Morden held that, while

314 Brief for Amicus Curiae American Psychological Association in Support of Neither Party, filed with the Supreme Court of the United States in Maryland v. Craig, *supra*, March 2, 1990, pp. 2-4. See also: Wollitzer, 1988 for a discussion of a defendant's right to confront witnesses.

there was no suggestion that the use of a screen would prejudice a trial by judge alone, an appropriate direction should be given to the jury not to draw an adverse inference:

I think that it should be the usual practice for the judge to instruct the jury to the effect (and here I am not suggesting any particular wording) that the use of the screen is a procedure that is allowed in cases of this kind by reason of the youth of the witnesses and that, since it has nothing to do with the guilt or innocence of the accused, the jury must not draw any inference of any kind from its use and, specifically, that no adverse inference should be drawn against the accused because of it. (at 79)

The court further held that the jury instruction should be given before the screen is used and as a reminder in the judge's charge to the jury at the end of the trial.³¹⁵

In its final analysis, the appellate court concluded that even if there was an infringement of ss. 7 and 11(d), s. 486(2.1) nevertheless constituted a reasonable limit within the meaning of s. 1 of the Charter:

Finally, if there is infringement, it would, in my view, be minimal. There is no reasonable argument that the effects of the legislation so severely entrench on the rights in question that they outweigh the importance of the object. (at 85-86)

As a result, the appellant's appeal from conviction was dismissed.³¹⁶

315 The court noted that this method was formulated in R. v. H.(D.) *supra*.

316 The appeal of R. v. M.(P.), *supra*, was argued at the same time as this appeal, in which the same issue as to the constitutionality of s. 486(2.1) was raised. The court found no merit on that ground of appeal and gave the same reasons as in Levogiannis [and now reported 1 O.R. (3d) 351].

Levogiannis subsequently appealed the judgment of the Ontario Court of Appeal to the Supreme Court of Canada³¹⁷ on the grounds that the Court of Appeal erred in finding that s. 486(2.1):

- a. did not violate ss. 7 and 11(d) of the Charter; and
- b. if it did infringe on the Charter, the infringement would be justified under s. 1 of the Charter.

On June 15, 1993, the Supreme Court of Canada gave a brief oral judgment dismissing the accused's appeal from the judgment of the Ontario Court of Appeal and provided answers to the constitutional questions. The court stated that the reasons would follow.

In the recently reported decision, the Supreme Court of Canada "totally" agreed with the reasons of Morden A.C.J.O. of the Ontario Court of Appeal. Madam Justice L'Heureux-Dubé wrote:

Parliament ... is free to enact or amend legislation in order to reflect its policies and priorities, taking into account societal values which it considers important at a given time. It is clear that, in enacting s. 486(2.1) of the *Criminal Code*, Parliament was well aware of the plight of young victims of sexual abuse, as well as the need to curtail such abuse. This is perfectly legitimate. The only limit placed on Parliament is the obligation to respect the Charter rights of those affected by such legislation. (at 336)

• • •

Section 486(2.1) of the *Criminal Code* has been carefully worded to protect the rights of the accused, while at the same time facilitating the giving of evidence by young victims of sexual abuse of varying kinds. I find the appellant's attack on the constitutionality of s. 486(2.1) of the

317 R. v. Levogiannis (No.3) (1993), 85 C.C.C. (3d) 327 (S.C.C.).

Criminal Code unfounded. Further, I agree with the respondent that "neither historical review, comparisons of the jurisprudence of other free and democratic societies, nor present day Canadian constitutional and evidence jurisprudence, support the Appellant's contention". Since s. 486(2.1) does not infringe either ss. 7 or 11(d) of the Charter, there is no need to resort to s. 1 of the Charter.

Parliament has devised s. 486(2.1) in such a way as to properly balance the goal of ascertaining the truth and the protection of children as well as the rights of accused to a fair trial by allowing cross-examination and by tailoring the use of screens to the complainants' age and confining their use to limited and specific types of crimes. Furthermore, s. 486(2.1) of the *Criminal Code* preserves the discretion of the trial judge to permit such use only when the "exclusion is necessary to obtain a full and candid account of the acts complained of from the complainant". Since there was no infringement of the principles of fundamental justice nor of the right to be presumed innocent or to a fair trial, s. 486(2.1) of the *Criminal Code* is constitutional. (at 342)

The Prince Edward Island Supreme Court, in **R. v. A.(B.N.)**³¹⁸, in another case involving a constitutional challenge to a s. 486(2.1) order for a young complainant to testify behind a screen, took notice of the conflicting decisions in **B.(A.)(No.1)** and **Levogiannis** respecting the constitutionality of the section based on ss. 7 and 11(d) of the **Charter**. Ruling on the side of the **Levogiannis** judgment, Mr. Justice McQuaid stated:

If confrontation as between accused and complainant can, or might, result in a form of intimidation of the complainant inhibiting full disclosure, then natural justice, which must operate in favour of both accused and complainant equally, may well require the application of some type of physical mechanism which excludes confrontation.

318 (1990), 10 W.C.B. (2d) 659 (P.E.I.S.C.); (12 September 1990), (P.E.I.S.C.) [unreported].

That, as I see it, is the purpose and intent of section 486(2.1). If that be the case, then it would seem to me to follow that s. 486(2.1) is eminently consistent with ss. 7 and 11 of the Charter, and I would so hold. (at 3-4)

VI. "OTHER DEVICE"

The legislation provides for a court to consider the use of an "**other device**" that would allow the complainant not to see the accused if the court "is of the opinion that the exclusion is necessary to obtain a full and candid account of the acts complained of from the complainant". While the dissertation research found no formal judicial interpretation of the term, Canadian courts have exercised discretion in developing procedures to reduce the anxiety of child complainants when they testify.

In a British Columbia case, R. v. Morris, *supra*, the trial judge, after rejecting the Crown counsel's application for a child complainant to testify behind a screen, ordered the accused to sit in the back row of the courtroom, out of the direct vision of the child witness. Defence counsel had proposed the alternative to the judge and the Crown reluctantly acquiesced.

In an Alberta case, R. v. Loggie³¹⁹, a 10-year-old complainant became reticent with the accused "glaring" at him during his testimony. With consent of both counsel, the provincial court judge ordered the accused to be seated in a corner of the courtroom adjacent to the bench so, in effect, the bench acted as a "screen". Subsequently, the

319 (5 April 1988), Fort McMurray (Alta.P.C.) [unreported].

witness was able to continue with his evidence. As a final question to the child, the Crown asked him to identify the accused. At this juncture, the complainant stepped out of the witness stand and pointed to the accused.

In another British Columbia case, **R. v. Ghini**, *supra*³²⁰, after a 7-year-old complainant became unresponsive on the witness stand during direct examination, the Crown counsel requested an adjournment. During the recess, Crown counsel made an application to the judge in his chambers to have a screen device separate the child from the accused, who was seated a few feet away. Sheriffs then entered the courtroom and erected a wooden barrier between the witness box and the counsel table where the accused sat. Proceedings then resumed in court with no objection from defence counsel. This "wooden screen" prevented the child from seeing the accused, as well as restricting the accused's observation of the child. The child was then able to complete his examination in direct and cross-examination. Defence counsel questioned the child on the side of the barrier where the child sat. At no time did the accused or his counsel raise an objection concerning the unusual arrangement.

Other innovative procedures have been allowed by courts and apparently consented to by counsel involved. These include the examples of: an Ontario case where two court bailiffs held up a sheet while a child testified; and a Saskatchewan case where an office divider was placed between the child complainant and the accused.³²¹

320 The writer was present in court and witnessed the described events.

321 These two cases were reported in a memorandum from Crown counsel to the Criminal Appeals and Special Prosecutions Branch of the Attorney General for British Columbia headquartered in Vancouver, B.C. without case citations.

Graham (1990) reported that there was a courtroom design in downtown Montreal where the witness would testify facing the judge directly and the accused would sit behind and out of the sight of the witness.

Creative alternatives have been approved by courts in other jurisdictions: a one-way mirror was allowed³²²; and in Western Australia, in a situation where the closed-circuit television procedure is permitted, it is the child who remains in the courtroom and the accused is the party who observes the child testifying from another room by the video link (Law Reform Commission of Western Australia 1990).

VII. CONCLUSION

It is clear from the dissertation research that courts require that an evidential basis be established by Crown in order for the court to form the "opinion that the exclusion is necessary to obtain a full and candid account of the acts".³²³ It is also evident from an analysis of the case law that the *voir dire* process is the proper procedure to be followed (see **Appendices M** and **N**). Courts have considered, as admissible and corroborative, psychological and hearsay evidence called by the Crown in support of s. **486(2.1)** applications. The type of evidence tendered varies from establishing that a child has a specific fear of the accused to providing evidence of the "inhibiting sensitivities"

322 In the American case, Coy v. Iowa, *supra*.

323 R. v. Levogiannis (No.1), *supra*; R. v. M.(P.), *supra*; R. v. B.(A.) (No.1), *supra*.

unique to an individual child, i.e. the child attempted suicide.³²⁴ Courts have accepted testimony on the issue from Crown counsel, parents of the complainants, therapists, social workers, child sexual abuse experts, psychologists, paediatricians, police officers, etc. In rare circumstances, the child complainant has been required to testify in the *voir dire*, but most courts are of the view that such a requirement would defeat the purpose of the legislation.³²⁵

From a practical standpoint, the calling of expert witnesses, who can give evidence concerning the specific reasons why a child would not be able to testify without a screen or closed-circuit television link, will enhance the likelihood of a court granting the order.³²⁶ In the opinion of one court:

The judge can best make his or her decision **only** after the judge has heard **expert testimony** on the reason why the child might not be able to give a "full and candid account of the acts".³²⁷

Courts denied screen applications in **8/50** cases. No expert evidence was called in **7** of those cases by the Crown.³²⁸ In the remaining case³²⁹, an expert in child abuse testified but was unable to state unequivocally to the court whether the screen would or

324 R. v. (B.(A.) (No.2), *supra*.

325 R. v. Carr, *supra*.

326 The London Family Court Clinic, in its Child Witness Project in the London-Middlesex Courts, found that 6% of the cases they examined had successful applications made by Crown for the screen and expert testimony was given in 70% of these cases (1991). (The number of cases studies was not reported.)

327 R. v. B.(A.) (No.2), *supra*, at p. 4.

328 In R. v. W.(M.R.) (14 April 1989), Victoria 48500F (B.C.C.C.) [unreported], the court took into consideration the fact that the Crown had not called expert witnesses in the *voir dire*.

329 R. v. W.(K.E.), *supra*.

would not assist the child in giving her testimony. As earlier discussed, the court denied the Crown's request on the basis that the test set out in the section was not met.

In the only case where an application for closed-circuit television was denied, the Crown called an expert but failed to establish through the psychological testimony that the child had a specific fear of the accused.³³⁰

From an analysis of the case law, the obvious objective of s. 486(2.1) is found in its phrase "**necessary to obtain a full and candid account of the acts complained of from the complainant**". The Ontario Court of Appeal, in R. v. Levogiannis (No.2), *supra*, emphasized the fact that the provision was intended to "enhance the reliability of the testimony of child witnesses" and to promote "the proper administration of justice". While acknowledging that the object is one which "bears on a pressing and substantial concern", the court stated in unequivocal terms the true policy consideration underpinning the legislation:

The prevention of trauma is not the expressed object of our legislation although, undoubtedly, the trauma of the witness may, in many cases, be the most important factor to be considered in deciding whether the statutory requirement has been met.

...[I]t is important to note the policy behind the rule which presents face-to-face confrontation is, generally, the same — **to create conditions designed to enhance the reliability of the evidence.** (at p. 83 C.C.C.) [emphasis added]

That interpretation of the legislation seems inconsistent with the concern of Parliament expressed in the debates in the House of Commons to protect child witnesses

330 R. v. Dick(B.), *supra*.

from the traumatizing effect of the courtroom. Given the current framework of the legislation, it is evident why Canadian courts have interpreted the section in the manner as suggested by the Levogiannis court. Screen and closed-circuit television procedures, it is submitted, have been allowed by courts — not to protect the psychological well-being of a child (by mitigating the negative effects of testifying on him or her), but rather to obtain the evidence which the witness would otherwise be unable to give the court, which is the stated objective of the legislation despite what the evidence shows was Parliament's intention.³³¹

This dissertation argues that the legislation should be re-drafted to reflect a parliamentary commitment to protect child witnesses from secondary trauma associated with testifying in court.³³² As the legislation now stands, it is only concerned with the "necessity" of the procedure to provide the giving of the evidence. To accomplish such a goal, it is submitted that:

331 Mr. Justice Morden, in R. v. Levogiannis (No.2), *supra*, contrasted the objective of Canadian legislation (which, in his opinion, was narrower and more specifically directed to the administration of justice) with the object of American legislation which has been found to be the well-being of a child. He quoted from the judgment of Maryland v. Craig, *supra*, where Justice O'Connor said:

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. That a significant majority of States has enacted statutes to protect child witnesses from the trauma of giving testimony in child abuse cases attests to the widespread belief in the importance of such a public policy. (at 5048)

332 As discussed at the beginning of the chapter, the Legislative Committee on Bill C-15 was particularly sensitive to the issue that children suffered from secondary trauma when forced to testify in the presence of an accused. The Committee entertained submissions from many experts on the subject prior to the drafting of the legislation.

a. Legislation should be drafted to mandate an automatic court order to use the procedure (either screen or closed-circuit television) upon request by Crown (on behalf of the child complainant)³³³ This would eliminate the necessity of holding a *voir dire* to meet the statutory standards of establishing an "evidential basis" on a "balance of probabilities" and avoid the arbitrariness and subjectiveness of judges in making the determination. There should be no need for the Crown to establish an "evidential basis" of the anticipated "trauma". The proposed alternative has several significant advantages:

- the *voir dire* process of lengthy legal submissions and the calling of expert evidence will be eliminated;
- an adverse inference of guilt of the accused will not be made by a jury if the legislation mandates the procedure(s) on the basis that children suffer trauma as a result of testifying in open court; and
- judges no longer have a discretion to allow the use of the procedures.

b. Legislation should be drafted to permit **all** child witnesses (under 14 years, as defined by s. 16 of the **Canada Evidence Act**) who testify in any criminal proceeding to have access to screen and closed-circuit television procedures. Under the current provision, these special measures are restricted to young

333 This would leave open the possibility that a particular child may wish to give evidence in open court to benefit from the "therapeutic effects" of testifying against an accused.

In **R. v. Malcolm**, *supra*, an unafraid and very confident 11-year-old female complainant expressed her desire to tell the judge her story and to confront the accused with her accusations in court. The writer was in court and witnessed the child giving her testimony. She displayed no signs of emotional distress during both direct and cross-examination. However, after testifying, she stated that she felt relieved and that she had "done the right thing". The trial was subsequently adjourned to a later date. To the disappointment of the child and the Crown counsel, the accused did not reappear for the continuation and a bench warrant was issued for his arrest. The case remains unadjudicated.

victims who complain of **enumerated sexual offences**. Common sense dictates that children who are victims of other criminal acts (e.g. assault causing bodily harm, aggravated assault), or who have witnessed any criminal offence (particularly family violence) may feel justifiably threatened or intimidated by an accused.³³⁴ It is argued that the use of extraordinary measures such as screen or closed-circuit television which exist in the present legislation, should be permitted in all cases where child witnesses testify and risk trauma. An example of how said legislation might read for recommendations (a) and (b) would be:

s. 486 (2.1) Notwithstanding section 650, where an accused is charged with any **Criminal Code** offence, and the complainant or witness is, at the time of the trial or preliminary inquiry, under the age of **fourteen** years, upon request of a party, the judge shall order that the procedures of giving evidence (i.e. screen or closed-circuit television) be adopted to the needs of any child witness in order to prevent trauma to the child or to obtain a full and candid account of the acts complained of from the complainant or witness.

Notation: Young persons between the ages of 14 and 17 years may make an application to the court for a similar order.³³⁵

334 The writer has observed child witnesses (who were not complainants) being equally emotionally distressed and fearful of testifying in the presence of the accused.

335 There is an amendment to **s. 486(2.1)**, soon to be proclaimed, which would extend the screen or closed-circuit T.V. procedure to include sexual abuse complainants of any age who are "able to communicate the evidence but may have difficulty doing so by reason of a mental or physical disability" (1992, S.C. c. 21, s. 9).

New South Wales has enacted legislation which mandates the use of closed-circuit T.V. in all trials for child witnesses under 10 years of age. The trial judge must instruct the jury that this is a procedure required by law and that no inference of guilt should be drawn (Szwarc, 1991). In England and Wales, a study of 154 cases has found that closed-circuit T.V. enhanced the ability of children to give evidence. The procedure, which was widely supported by the courts, has now been extended in some jurisdictions to include physical assaults (Davies and Noon, 1991).

- c. Legislation may be drafted to allow a court (or jury) to receive the child complainant's evidence in another manner or forum which eliminates the necessity of the witness to giving *viva voce* evidence in court. (Some American jurisdictions have statutes which allow out-of-court statements to be admitted as evidence, or allow the use of videotape technology to reproduce a witness's evidence when the witness is unavailable for trial.)³³⁶

336 As of December 1989, 28 American states have statutorily created a special hearsay exception for victims of child sexual abuse. These statutes were the results of the United States Supreme Court decision, **Ohio v. Roberts** 448 U.S. 56 (1980), where the court fashioned a two-branch test for determining the trustworthiness of an out-of-court statement made by a witness who does not testify at trial. The United States Supreme Court ruled that, first, the "statement must either fall into a firmly rooted hearsay exception or have adequate indicia of reliability". (at 66) Secondly, the court held that it is "normally" required to demonstrate the witness' unavailability to testify. According to U.S. Federal Rule of Evidence 804(a):

"Unavailability as a witness" includes situations in which the declarant —

- (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or
- (2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or
- (3) testifies to a lack of memory of the subject matter of his statement; or
- (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
- (5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance...by process or other reasonable means.

Additional grounds for unavailability, which frequently apply in child sexual abuse prosecutions, include incompetence of the witness, the danger of severe psychological injury to the child from testifying, and unwillingness or inability to testify.

While the Supreme Court has not yet had an opportunity to directly address the issue of defining "psychological unavailability", the District of Columbia Court of Appeals, in **Warren v. United States** 436 A. 2d 821 (D.C.Ct. App. 1981), articulated four factors which contribute to a determination of "psychological unavailability":

1. probability of psychological injury as a result of testifying;
2. degree of anticipated injury;
3. expected duration of the injury; and
4. whether the expected psychological injury is substantially greater than the reaction of the average victim of rape, kidnapping, or terrorist act.

No doubt, mental health experts will play a significant (and controversial) role in the assessment of children's "psychological unavailability".

Finally, since the constitutional validity of the provision has been upheld, as a result of the Supreme Court of Canada decision in **R. v. Levogiannis (No.3)**, *supra*, Crown counsel should cite the case as authority in support of any application under **s. 486(2.1)(2.2)**. As well, there are numerous persuasive authorities from lower courts to which Crown counsel may make reference for the court's consideration.

CHAPTER 4: CRIMINAL CODE S. 715.1 VIDEOTAPED EVIDENCE

It's really hard to make it [testifying] easier — there's only so much you can do.

Quote from child victim
(London Family Court Clinic: Child Witness Project (Sas *et al.*, 1993))

I. INTRODUCTION

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.³³⁷

According to the broad policy goals gleaned from the debates in the House of Commons, this Criminal Code section was enacted:

- a. to enhance the successful prosecution of child sexual abuse; and

337 No analogous provision existed in the Criminal Code prior to the enactment of **Bill C-15**.

The enumerated sections are as follows:

- | | | | |
|--------|--|--------|--|
| s. 151 | - Sexual Interference | s. 172 | - Corrupting Children |
| s. 152 | - Invitation to Sexual Touching | s. 173 | - Indecent Acts |
| s. 153 | - Sexual Exploitation | s. 271 | - Sexual Assault |
| s. 155 | - Incest | s. 272 | - Sexual Assault With a Weapon
Threats to a Third Party or
Causing Bodily Harm |
| s. 159 | - Anal Intercourse | s. 273 | - Aggravated Sexual Assault |
| s. 160 | - Bestiality | | |
| s. 170 | - Parent or Guardian Procuring Sexual Activity | | |
| s. 171 | - Householder Permitting Sexual Activity | | |

- b. to improve the experience of the child victim/witness (by minimizing the problems of the child sexual abuse victim giving evidence).

In proceedings involving the enumerated sexual offences against a person under 18 years, a videotape of the child's disclosure may be admitted in court. The videotape must be made within a reasonable time after the offence and the videotaped evidence must describe the acts complained of and the complainant must adopt the taped statements as substantially true at trial. If Crown counsel seeks to have a videotape admitted, a *voir dire* should be held to determine whether it should be tendered as evidence.

The rationale for this new section is based on the following arguments:³³⁸

1. A videotape made early in the investigative process captures and preserves the spontaneity and vividness of the disclosure. It is the best mechanism for establishing or enhancing the credibility of the child's statements, since the original disclosure is often more detailed and emotional than the child's testimony at trial months later. A videotape may also help to undermine the proposition that the child has been coached. Further, a child is less likely to recant if there is a tape of the initial disclosure.

338 Children in the Justice System: A National Conference on the Use of Video Evidence in Child Sexual Abuse Cases, Conference Proceedings, 1988. Videotaped evidence has been used for other common law purposes, including:

- to prepare a witness for court;
- to refresh a witness' memory;
- as past recollection recorded;
- to rebut an allegation of recent fabrication;
- as an exception to the hearsay rule;
- to form part of a confession if the accused was shown and referred to the videotape in the confession;
- to reveal interview techniques (in rebuttal or re-examination);
- as previous inconsistent statements (in cross-examination);
- as a basis of an expert's opinion; and
- as sentencing submissions. (Ministry of Attorney General, Province of B.C., Practitioners' Manual, Harvey and Dauns, 1992)

2. A videotape discourages the necessity of multiple disclosures by a child. It significantly reduces the number of times a child must be interviewed by various professionals. The tape becomes a permanent record of the child's complaint without the necessity of needless repetition. A videotape will also be useful for refreshing a child's memory prior to testifying in court.
3. A videotape may encourage confessions and guilty pleas. The American experience with videotaping suggests that, if the tape is shown to the accused prior to trial, a guilty plea is often precipitated, which saves the child from the stress of testifying.³³⁹

The legislation does not remove the traditional requirement that the complainant testify in court and be subject to cross-examination, even though videotaping was originally proposed as a way of saving a child from the trauma of testifying in court. It will be necessary for courts to develop criteria for the admitting of the videotape.

Various legal issues have been created by the legislation. **Section 715.1** mandates the tape to be made "**within a reasonable time**" after the offence. What constitutes a "reasonable time" will require judicial elaboration. It may be argued that current wording may not accurately reflect the reality of child sexual abuse, as some children may disclose months or even years after the actual incident (Bulkley, 1988; Finkelhor, 1986). Proponents of the legislation hope for a broad interpretation by the courts, which will take into account the dynamics of the disclosure process. Since many children

339 The American experience also reveals that videotaped statements have other beneficial effects, including:

- a. they facilitate treatment of the offender (i.e. cathartic aspects - if accused accepts responsibility - see rationale 3 above);
- b. they curtail recanting by the complainant;
- c. they preserve the statement at a time when memory is fresh and outside influence is somewhat less;
and
- d. they have been useful as an aid to expert testimony.

(Children in the Justice System: A National Conference on the Use of Video Evidence in Child Sexual Abuse Cases, Conference Proceedings, 1988.)

disclose incrementally, generally with more traumatic and detailed information being revealed as the child becomes more comfortable with the investigative procedure, a video made during the initial interview is unlikely to capture the full details of the abuse.³⁴⁰

Prior to a tape being admitted, its contents must be adopted by the complainant. The courts will have to define what constitutes an "**adoption**". It may mean a mere acknowledgement by the complainant that the tape is, and continues to be, a true account of the abuse or it may require detailed testimony by the complainant which must be substantially equivalent to the taped version. The lack of procedural direction in the legislation creates these legal concerns:

- For the videotape to be admissible, must the complainant adopt all of the contents of the videotape while testifying?
- What is the effect on the admissibility of the videotape if the complainant, while testifying, contradicts or expands upon some of the evidence of the videotape version?
- What happens if the complainant adopts the contents of the videotape but refuses to answer any questions on cross-examination?
- Can the videotape evidence only consist of the complainant's description of the specific acts complained of, or can the whole tape dealing with peripheral circumstances and/or collateral issues also be admitted?
- What is the impact on admissibility if leading questions were asked by the interviewer during the videotaping? (Hendrickson, 1988:8)

Another legal concern is that the wording of the section does not provide any guidelines as to its proposed exclusive use. In practice, not only can Crown counsel use

340 Children in the Justice System: A National Conference on the Use of Video Evidence in Child Sexual Abuse Cases, Conference Proceedings, 1988. See also: Harvey, 1988.

the videotape in direct evidence, it is left open for defence counsel to use the tape as rebuttal evidence or in the sentencing process. Once admitted, the contents of the tape may, in fact, be attacked according to general principles of evidence, such as relevance or hearsay.

The constitutionality of this section will require judicial resolution. The new provision will likely be challenged under ss. 7 and 11(d) of the Charter. An argument relating to ss. 7 and 11(d) would be that the procedure of substituting evidence given under oath for videotaped evidence is contrary to the principles of fundamental justice and does not amount to a fair hearing, since the defence has been denied the opportunity to cross-examine adverse witnesses.

II. RESEARCH QUESTIONS

The legal, constitutional and procedural issues will be resolved as courts address the implications of this section. This dissertation documents the interpretations of this provocative provision through case law and case studies (see **Appendix R**).

The dissertation research attempts to answer the following questions:

- A. Was a *voir dire* conducted?
- B. What kind of evidence did the Crown call to support its application?
- C. What is the judicial interpretation of "**within a reasonable time**"?
- D. What is the judicial interpretation of "**adopts the contents of the videotape**"?

- E. What is the judicial interpretation of "**describes the acts complained of**"?
- F. What constitutional or **Charter** challenges have been made with respect to the legislation?
- G. Do judges allow videotaped evidence of young complainants?
- H. What are the practical and procedural concerns associated with the legislation?
- I. What are the research implications as a result of the judicial interpretation of the legislation?

III. ANALYSIS OF CASES

The dissertation research includes the analysis of **21** cases (**6** reported and **15** unreported) where s. 715.1 applications were made by the Crown (see **Appendix R**). A *voir dire* was conducted in each case in order for the presiding judge to make a legal ruling on the admissibility of the videotaped evidence. Judges admitted videotaped evidence pursuant to the new provision in **16** cases and ruled it inadmissible in **5** cases. Constitutional challenges to the legislation were made in **8** cases. The constitutional validity of s. 715.1 was upheld in **5** cases, including a very recent Supreme Court of Canada decision.³⁴¹

In **R. v. Keller**³⁴², Madam Justice Fraser articulated the **procedural** criteria which must be satisfied by Crown in order to invoke **s. 715.1** successfully. In the *voir dire*, the following requirements must be met:

341 **R. v. L.(D.O.)** (1993) 85 C.C.C. (3d) 289 (S.C.C.).

342 (5 June 1989), Edmonton 88032763C5 (Alta.Q.B.) [unreported].

1. an offence under one of the prescribed sections must be involved;
2. the complainant must have been under 18 at the time the offence is alleged to have been committed;
3. the videotape must have been made within a reasonable time after the alleged offence;
4. the complainant must have described in the videotape the acts complained of; and
5. the complainant must adopt the contents of the videotape while testifying.

The legislation is unequivocal on the necessity of the complainant to testify. The first criterion has not been the subject of any judicial discussion in the cases examined. The latter four requirements have elicited considerable judicial comment and interpretation.

Since the more contentious components of the provision are:

- a. what constitutes "**within a reasonable time**";
- b. what constitutes "**adopts the contents of the videotape**"; and
- c. what constitutes "**describes the acts complained of**",

this chapter will begin with an analysis of those elements and will expand into related legal and practical issues. This will be followed by an examination of the Charter cases and a conclusion.

A. "WITHIN A REASONABLE TIME"

From the dissertation research, the judicial interpretation given to the phrase "**within a reasonable time**" ranges from **2 days** to **6 months** after the alleged acts. (See **Appendix R.**)

In one of the first unreported decisions dealing with the interpretation of this section, the trial judge, in **R. v. Scott**³⁴³, ruled that a videotape of a 9-year-old girl disclosing allegations of rape to a therapist **4 to 5 months** after the alleged offence occurred was made "**within a reasonable time**". The court took into consideration the fact that the child was unwilling to make a full disclosure to the police, her mother or social workers at the time of the alleged acts. The complainant was 8 years old when the accused, who was a stranger to the child, apprehended her from a fairground and attempted to have sexual intercourse with her. When she resisted and began to cry, the accused beat her on the buttocks with his leather belt resulting in substantial bruising of the area. The child's mother testified that when she questioned the child about the bruises, the child refused to speak about it. The court acknowledged that considerable efforts were made by the child's parents, the police and counsellors to get the child to explain what happened. The child was finally able to make a full statement to a counsellor after several months of therapy at a rape crisis centre. Mr. Justice Dilks made note of the fact that no jurisprudence yet existed under **s. 715.1** to assist him with the ruling. Notwithstanding the absence of any persuasive authority on the subject, the judge admitted the videotaped evidence of the complainant. Mr. Justice Dilks, in the *voir dire* ruling, stated:

343 (14 June 1988), Barrie (Ont.D.C.) [unreported].

What is a reasonable time surely depends on all the circumstances. It is to be observed in passing that it's not "**at the first reasonable opportunity**" or "**as soon as practicable**" as one finds in other legislation dealing with, for example, the taking of breath samples, but it is **within a reasonable time**. (at 17) [emphasis added]

In **R. v. Keller**, *supra*, the Alberta Court of Queen's Bench was called upon to make a ruling on the admissibility of videotaped evidence of a 4½-year-old complainant made **3 months** after the alleged offence. Madam Justice Fraser, in an effort to give an interpretation of the phrase "**within a reasonable time**", held"

The third procedural requirement involves an analysis of the meaning of the videotape having been made "**within a reasonable time**" after the alleged offence, as those words are used in Section 643.1.³⁴⁴ The interpretation of what is a reasonable time is a **question of law**, and whether in any given case the videotape was made within such reasonable time as may be applicable in the circumstances is a **question of fact**.

Black's Law Dictionary describes the words "**reasonable time**" as depending on the nature, purposes and circumstances of each case. In my view, the proper basis upon which to interpret this section is to treat the words "**within a reasonable time**" as meaning such time as is fairly and reasonably involved having regard to the subject matter and attendant circumstances. Accordingly, what is a reasonable time will depend upon a number of factors. (at 2-3) [emphasis added]

In an attempt to delineate what factors ought to be considered relevant, the court heard evidence from an expert on the dynamics of disclosure in child sexual abuse cases (in particular, intra-familial cases such as the one before the court). The court summarized the expert witness' testimony as follows:

344 s. 715.1 was formerly referred to as s. 643.1.

The evidence given by Douglas E., who was accepted by this court as an expert in child sex abuse and in particular, in the area of disclosure relating thereto, was of considerable assistance. He emphasized that disclosure by child victims of sexual abuse more often than not is accidental rather than purposeful, and that this is attributable in many cases to the relationship which exists between the offender and the child victim.

Where the offender is a parent, the child, who has been told that the parent is there to nurture [sic] him, begins to assume the role that he is to blame for the sexual abuse, thereby militating against disclosure by the victim. Mr. E. also pointed out that typically the initial disclosure is just the beginning - and that oftentimes, it will take months or years for a child to disclose the whole story of his victimization.

Although Mr. E. confirmed that it is not possible to predict with certainty in any given case when disclosure will occur, it is apparent from his evidence that the relevant factors will include the individual victim and the nature of the abuse. It is also of particular importance to note Mr. E.'s view that the expiry of time between the offence and the disclosure does not mean that there would be a lessening of what is remembered by the victim. (at 3)

The court then held that in determining what is a "**reasonable time**" in any given case will involve an assessment of a number of factors, which include:

- (a) The age of the child;
- (b) The relationship of the offender to the child;
- (c) The nature of the sexual abuse;
- (d) The seriousness of the sexual abuse;
- (e) The length of time the abuse occurred;
- (f) The frequency of the abuse and,
- (g) The **period** of time during which one could reasonably expect the child in question to have accurate recall. (at 3-4)

Madam Justice Fraser concluded that anytime within **6 months** would be reasonable:

These facts, coupled with R's young age at the time of the alleged abuse (approximately four and a half years), the fact the alleged offender is his father, a person whom he would be entitled to trust, the fact the alleged offence was not an isolated incident, and the fact it involved alleged anal intercourse by the father have led me to the conclusion that within a reasonable time in these circumstances would have been any time within **six months of the alleged offence** - and on the facts of this case, the videotape was most certainly made within a reasonable time as all circumstances point to the assaults having occurred within at least a three month period prior to the videotape having been made. Thus, this procedural requirement of the section has also been met by the Crown. (at 5) [emphasis added]

In another unreported Alberta case, R. v. B.(K.) and B.(R.)³⁴⁵, Mr. Justice Power accepted the concept of "**reasonable time**" formulated in R. v. Keller. In the judgment, which allowed the videotaped evidence of a 5-year-old complainant, which was made **5½ months** after the alleged offence, he stated:

With respect to that phrase contained in s. 715.1 "within a reasonable time," I agree with the comments expressed by Madam Justice Fraser in the case of Her Majesty The Queen v. Ingo Keller, number 8803 2763 C5, where at page 2 she states,

"The third procedural requirement involves an analysis of the meaning of the videotape having been made 'within a reasonable time' after the alleged offence, as those words are used in Section 643.1. The interpretation of what is a reasonable time is a question of law, and whether in any given case the videotape was made within such reasonable time as may be applicable in the circumstances is a question of fact.

Black's Law Dictionary describes the words "reasonable time" as depending on the nature, purposes and circumstances of each case. In my view, the proper basis upon which to interpret this section is to treat the words

345 (4 July 1990), Calgary 8901-0707-CO (Alta.Q.B.) [unreported].

'within a reasonable time' as meaning such time as is fairly and reasonably involved having regard to the subject matter and attendant circumstances. Accordingly, what is a reasonable time will depend upon a number of factors."

Thus in determining what is a reasonable time in any given case will involve the assessment of the age of the child, the relationship of the offender to the child, the nature of the sexual abuse, the seriousness of the sexual abuse, the length of time the abuse occurred, frequency of the abuse, the period of time during which one could reasonably expect the child in question to have accurate recall.³⁴⁶ (at 15-16)

The Alberta Court of Appeal, in **R. v. Meddoui**, *supra*, held that a videotape is made within a "**reasonable time**" after the alleged offence if it is made when the events were sufficiently fresh and vivid to be probably accurate. The complainant in this case was an 8-year-old girl. The police made a videotape of a second interview with her **2 days** after the alleged incident. The appellate court ruled on the issue as follows:

346 Justice Powell pointed out that the Canadian legislation focuses on when the video is being made, while American statutes incorporate other strict criteria:

The phrase "within a reasonable time" is ambiguous - American legislation focuses on the issue of reliability in three senses: (a) accuracy of memory by requiring the judge to examine the time factor; (b) absence of selective editing by requiring the judge to examine the context in which the statement was made and; (c) absence of pressure, suggestions or cuing by requiring the judge to examine the circumstances of the statement.

The Texas statute is perhaps the most rigorous requiring: (a) that no attorney for either party to be present; (b) proof of integrity of the tape; (c) that the statement was not made in response to questioning calculated to elicit a particular statement; (d) voice identification; (e) that the person who conducted the interview be present as a witness and; (f) that the recording be made available to the accused prior to the trial. (To be found in the **Texas Criminal Procedure Code**, Article 38.071(2)1985, section 2(a) at p. 16.)

It is submitted that the learned judge omitted to explain that some American statutes were drafted as an alternative to having a child complainant testify in court. The videotaped evidence of the child complainant would be admitted as a hearsay exception as if the child were unavailable for trial. The procedural requirement of the Canadian provision is less rigorous because the complainant still must testify in court and be subject to cross-examination on the contents of the videotape.

The law about "**freshness**" in the context of past recollection recorded applies. I can see no error of law by the learned trial judge. (at 360 C.C.C.)

In **R. v. Laramée**³⁴⁷, one of the issues on appeal to the Manitoba Court of Appeal was whether the videotape was made within a reasonable time after the alleged occurrence. Mr. Justice O'Sullivan held that the time delay between the initial complaint and the videotape (the sexual abuse lasted 2½ years and the taped interview took place some months after the last alleged act) was unreasonable so as to preclude the admissibility of the evidence. In this case, the constitutionality of the legislation was struck down as violating ss. 7 and 11(d) of the **Charter**. The Manitoba Court of Appeal suggested that even if the legislation had been upheld, the Crown's application would have failed on the above-mentioned ground.

B. "ADOPTS THE CONTENTS OF THE VIDEOTAPE"

The Alberta Queen's Bench, in **R. v. Keller**, *supra*, was one of the first courts to provide an interpretation of the procedural prerequisite that the complainant "**adopts the contents of the videotape**". Madam Justice Fraser made the proposition that the admissibility into evidence of a videotape recording pursuant to s. 715.1 (formerly s. 643.1) was, in essence, an opportunity for the Crown to put in evidence a prior consistent statement by its witness. The court was of the view that the new provision "is

347 (1991), 65 C.C.C. (3d) 465 (Man.C.A.).

not silent as to the substantive use to which the evidence may be put", unlike s. 9(2) of the Canada Evidence Act, which deals specifically with prior inconsistent statements.

The learned justice held that the test would be similar to that for adoption of prior statements:

Because this section provides that a videotape which would not otherwise be admissible in evidence is to be treated as being admissible providing the specified procedural requirements therein have been met, it is extremely important to ensure that the witness has, in fact, accepted the truth on the witness stand during trial of the events recorded therein.

Some guidance as to what is meant by "adoption" of the contents of the videotape may be found in those cases dealing with this concept in the context of prior inconsistent statements by witnesses. The meaning of "adoption" of a prior statement was considered by the Alberta Court of Appeal in R. v. Smith 66 A.R. 195. In this case, the court noted that the question, and in my view this approach applies equally to the facts at hand, is **whether the witness now accepts the statement as being true, not whether the witness acknowledges that when the statement was given it was true.**

The court stated at page 200 the following:

"A qualified acceptance is not such an acceptance. The question to be asked as was pointed out by Estey J. in R. v. McInroy...is whether the witness has '**adopted it in the witness box as being the truth as she now sees it**'...:

Similarly, in R. v. Antoine,...it is said that adoption applies where the witness '**under oath has admitted the truth of the statement**'." (at 7-8) [emphasis added]

The legislation does not stipulate **when** the complainant must adopt the contents of the videotape, except that it must be "**while testifying**". In R. v. Scott, *supra*, the court resolved the issue by asking the child complainant in the *voir dire* (in the absence of the jury), the following question:

Q: You've seen the tape, that's you and the counsellor, is what you are saying to the social worker true? (at 59)

The child responded that it was true. Mr. Justice Dilks then concluded that this was sufficient for the complainant to adopt the contents of the tape. He stated:

Section 643.1 does not specify when the complainant must adopt the contents, except that it must be "while testifying". She clearly did so during the voir dire. Furthermore, she said that she was prepared to do so again in front of the jury and before the video tape is shown to the jury. (at 18-19)

In the result, the jury was recalled and the videotape was admitted as evidence.

In R. v. Meddoui, *supra*, the Crown petitioned the court to rule on the admissibility of a police-videotaped interview with a 7-year-old girl taken 2 days after the alleged sexual offence. In the opinion of the Crown, the child's recollection of the alleged events had diminished by 40% to 50% since 7½ months had elapsed before the trial. The Crown counsel in this case outlined the procedural steps to be followed for s. 715.1 applications:³⁴⁸

1. Announce to the court that you are entering a voir dire under s. 715.1 of the Criminal Code regarding a videotape of the complainant.
2. Call evidence as to the proof of the tape. In other words continuity and the taking of the tape should be proven by the Crown. In this case, I called Det. L. who was the interviewer of the complainant and Det. A. who was monitoring the video equipment outside the interview room to ensure that everything was proceeding satisfactorily.

348 From a memorandum filed by the prosecutor on the case for dissemination to designated Bill C-15 Crown counsel.

3. Once you proved the tape then call the victim.
4. The Judge will have to make a ruling whether she is to be sworn or unsworn and then show the video in open court to the victim. (I also had her view it four days prior to her testimony at Police Headquarters with the same detective.)
5. Once the video is concluded, inquire of the victim whether she "adopts the video" or in other words officially accepts it as her evidence in chief.
6. Ask the court for a ruling on whether the complainant adopts it and whether the video was taken within a reasonable period of time in accordance with 715.1 Criminal Code.
7. If the video is ruled inadmissible, the matter ends there and you would be allowed to treat and deal with the witness as you would any other witness. If the ruling is that the victim adopted it and that it was taken within a reasonable period of time then you continue.
8. If admissible you can then question the victim further in chief, for example on the issue of identity of the attacker or to elaborate on important points as to the actus reus or the person that committed the crime.
9. Once this is concluded, the defence has a full opportunity to cross-examine the complainant on her evidence in chief which consists of her oral testimony in court as well as her videotape evidence.

The child, who testified unsworn, told the trial judge that she remembered the taping and that she sought to be truthful in the police interrogation. She observed the tape in the presence of the judge and declared that what she had said in the tape was true in her recollection.

The learned trial judge ruled that the Crown had proven all the essential elements for the admissibility of the videotape and allowed it in as "**evidence for the truth of the**

contents".³⁴⁹ The court ruled that the child had adopted the contents of the videotape "beyond a reasonable doubt" and that the tape had been made within a reasonable time. The accused was convicted of the sexual assault.

The accused subsequently appealed his conviction. In the first reported ruling by an appellate court on the new legislation, the Alberta Court of Appeal upheld the trial judge's ruling on the admissibility of the child complainant's videotaped evidence.³⁵⁰ The Court of Appeal provided an interpretation of this new Criminal Code provision. Mr. Justice Kerans, with Harradence and Girgulis J.J.A. concurring, remarked on the purpose for the creation of s. 715.1 as follows:

In summary form, my view is that this new provision **makes a modest modification of the existing law of evidence to recognize the difficulties some child witnesses have in the articulation of their testimony.** The change offers 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**

349 A videotape may be used in a civil matter involving the sexual abuse of children. For a comparison, see Winnipeg Central Child & Family Services and R.A. and R.C. (May 1988), Winnipeg (Man.Q.B.) [unreported]. This was a civil action brought on by the Plaintiff for permanent guardianship of three children, based on allegations of sexual abuse by their father. The admissibility into evidence of a videotape of the children detailing the abuse was the subject of this motion. The court held that the videotape should not be admitted into evidence for its truth and suggested that the children, who were capable of giving evidence, could do so behind a screen or other device, to avoid confrontation with their father. However, the court allowed the videotape into evidence for the limited purpose of further demonstrating the children's state of mind. In ordering the permanent guardianship of the three children, the judge stated:

Those statements on videotape are not accepted for the truth of the matter but they are there for the evidence that the statements were made by the children. If ever statements cried out for an answer, those words coming from the very mouths of those children cried out for an answer and in the face of those statements Mr. X. chose to stand mute.

I am entitled in a civil case to draw an inference from that and I do. I draw an inference from that, that he is not able to deny those statements. (at 19)

350 R. v. Meddoui, *supra*. The accused's appeal from conviction was allowed on other grounds concerning the constitutionality of the search and seizure. The Alberta Court of Appeal ordered a new trial on the grounds that the trial judge had improperly admitted some physical evidence obtained by the police in violation of the accused's constitutional rights.

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.** In such a case, however, the judge should offer a warning to the jury appropriate to the case about the weight of the evidence. (at 350 C.C.C.) [emphasis added]

The Alberta Court of Appeal gave an articulation of the different meanings that might be given to the word "**adopt**" in the context of existing evidentiary rules. The court outlined the four potential variables:

1. The witness might adopt the earlier statement in the strongest sense of recalling both it and the events discussed, *and* positively confirming the truth of what the statements say about the events.
2. **The witness might adopt the statement in the less strong sense that, whether or not she recalls the events discussed, she does believe them to be true because she recalls giving the statement and her attempt then to be honest and truthful.**³⁵¹
3. The witness might adopt that statement in the weak sense that, while she has no present recall of the events discussed, she does believe them to be true because she at least recalls giving the statement and her attempt then to be honest and truthful.
4. The witness might adopt the statement in the weakest sense: she admits to having made the statement but will not admit to any attempt to be truthful and, indeed, might deny it. (at 351 C.C.C.) [emphasis added]

The court considered the second meaning of "**adopt**", a rather liberal one, to be the correct interpretation. Mr. Justice Kerans ruled that, in effect, s. 715.1 removes one of the prerequisites for the post-recollection exception to the hearsay rule; namely the

351 Contrast this with the interpretation given in **R. v. Keller**, *supra*.

condition that at the time the witness testifies she has no recollection of the events recorded. He stated:

I reject any suggestion that the adopting witness need not recall the events *or* the taping. The word "adopt" cannot reasonably bear that interpretation.

The best I can make of the new law is that it lifts the condition about clear memory loss in the traditional formulation of the "past recollection recorded" rule. The basic rule in *Wigmore on Evidence* (Chadbourn rev. 1970), vol. 3, c. 28, §744 *et seq.* provided:

1. The past recollection, must have been recorded in some reliable way.
2. At the time, it must have been sufficiently fresh and vivid to be probably accurate.
3. The witness must be able now to assert that the record accurately represented his knowledge and recollection at the time. The usual phrase requires the witness to affirm that he "knew it to be true at the time".
4. The original record itself must be used, if it is procurable. (at 352 C.C.C.)

The learned justice went on to remark on the weakness of the traditional rule:

In my view, the law under review deals with this area of problem. One weakness of the traditional formulation of the rule about past recollection recorded is that it fails to deal with the witness whose memory might be good but whose present ability to articulate is very weak. In such a circumstance, a very early account might be of more probative force than present testimony, and arguably should be admitted for consideration...

Thus, I can see the point also of an "articulation" exception for children who find themselves in a witness-box. It does them no injustice to say generally of children that they tend not to have large vocabularies and can have difficulty expressing ideas. The very young cannot possibly verbalize all they know. Where the child might remain almost mute in the

traditional method of inquiry, question and answer, he might divulge much more in casual and spontaneous activity, even play activity, at the taped interrogation. As I understand this concept, the child might even report a fact unselfconsciously.

I therefore prefer the second of the four possible meanings of "adopt" in the new law. (at 354 C.C.C.)

Mr. Justice Kerans held:

The tape, if the tests discussed in these reasons are met, can be admitted as evidence in **proof of the truth of the contents, and its weight is for the jury.** (at 359 C.C.C.) [emphasis added]

The appellate court concluded that the issues of admissibility and weight should not be confused. The law on admissibility instructs us on what is useful for a jury to hear. In considering the weight to be attached to the tape, however, the trier of fact must consider whether the witness, when making the tape, had a motive to lie or was under some pressure internally or externally, and whether the method of questioning used was suggestive and persistent. The Court of Appeal dealt with the specific issue raised by the defence, namely that the videotaped evidence was unreliable because the interrogating officer asked leading questions of the witness. The appellate court held that it would be a matter of weight to be given to the evidence as opposed to an issue of its admissibility³⁵²:

352 Contrast this with **R. v. Kilabuk**, *supra*, where the court ruled that the probative value of the contents of the videotape was so greatly diminished by the nature of the leading questions that it is outweighed by its prejudicial effect and should not be admitted as evidence. The **Kilabuk** court also warned of the practical problems of videotapes replete with objectionable hearsay, grossly leading questions or suggestions on material issues of fact and that

...the greatest care will obviously have to be taken in preparing a videotape for use under s. 715.1 so as to ward off imputations of coaching a witness through off-camera cues and

Just as at trial leading questions are not inadmissible, but only go to weight, a tape cannot be excluded just on that ground. (at 360)

At the lower court it was held that it is open to the judge to "edit out" "inadmissible" segments of a videotape. Mr. Justice Scollin of the Manitoba Queen's Bench stated that portions of the tape could be "expunged from that tape and not paid attention to by the judge or the jury" (at 19). He went on to remark:

...[I]f on the tape itself there are references, for example, that offend the rule against similar acts, or that offend the rule against hearsay because the child says that such and such is the case because our Aunty Minnie says it, if there is material of that sort, then the proper time to make your objection is now. And I don't care whether the child adopts it or not, but the child can only adopt, and I will pay attention only to admissible material. (at 20)

In the final analysis, the appellate court concluded that, in the circumstances where a witness cannot recall and affirm the contents on the tape, the presiding judge should probably give the jury a special warning about relying on the evidence.

While the Alberta Court of Appeal was not asked to decide on the constitutional validity of the section, the court hinted that it would have rejected a **Charter** challenge if one was invoked by the accused. In a sympathetic posture, the court observed that since the provision deals with an evidentiary matter and does not create an offence, the

so forth. (at 417)

In a similar vein, a British Columbia judge ruled that evidence should be adduced surrounding the production of the videotape, since it would be manifestly unfair to admit the tape if undue influence had been exercised on the child before the taping began: **R. v. Wright(M.)**, *supra*.

courts should strive "to give effect to the evident object of the legislation" (at 350-351 C.C.C.).

C. **"DESCRIBES THE ACTS COMPLAINED OF"**

S. 715.1 provides no guidance or parameters on what constitutes a description of the acts complained of. The amorphous nature of the language leaves open the potential for different judicial interpretations.

In **R. v. Meddoui**, *supra*, the Alberta Court of Appeal ruled on the accused's ground of appeal that the videotape should not have been admitted because it contained statements beyond those permitted by the section. Mr. Justice Kerans held that the term "**describes the acts complained of**" includes a description of the accused. He stated:

In my view, the "acts complained of" include a description of her assailant. It is impossible to draw a tight line around an interrogation. A judge should not exclude on this ground for occasional excess, and should attempt excision before exclusion. (at 360 C.C.C.)

In **R. v. Keller**, *supra*, counsel for the Crown made submissions to the court that although the section refers to the complainant having adopted the contents of the videotape, all that the witness must of necessity adopt are those portions of the videotape in which the complainant describes the acts complained of. The Crown did not dispute the fact that there may have been portions of the videotape that were not adopted by the child complainant. During both cross-examination and re-examination, the complainant

indicated that there were parts of the tape where he was confused or may not have been telling the truth. The trial judge, while not deciding the very issue, did concede:

...[T]here may well be cases in which the errors in the videotape are so minor, trivial or irrelevant to the issues at hand that a court can conclude that the requirements of Section 643 have been met, even though strictly speaking the complainant has not adopted all of the contents of the videotape. (at 9)

Defence counsel in the Keller case made the proposition that because the words used in court by the complainant "he [in reference to the accused — father] would put his penis in my bum" were not used in the videotape, the acts described in the videotape do not conform to the acts described in court. In the videotape, the complainant gave, with the assistance of the anatomically detailed dolls provided by Social Services, a graphic description of the alleged sexual acts. The court was of the opinion that "no one viewing the videotape could be mistaken about the acts complained of, particularly since he described verbally how his dad put cream in his bum, how he pushed hard, and how it hurt" (at 6).

The trial judge ruled that the acts described by the complainant in court were wholly consistent with the acts described by him during the videotape. She said:

There is nothing in Section 643.1 which prescribes that the acts complained of must be described verbally and not graphically. Moreover, when one considers the possible ages of potential victims of child abuse and the legitimate social purpose underlying Section 643.1, that is to facilitate the disclosure of child sexual abuse, it would be, in my view, unreasonable and inconsistent with the legislators' intention to adopt the view that the description of the acts complained of must be verbal only and involve the use of terminology which one could not reasonably expect young children to be aware of. (at 6)

Similarly, in **R. v. B.(K.) and B.(R.)**, *supra*, the court dealt with the ambiguity of s. 715.1 by stating:

It is not clear whether the statement must be an oral description, or whether it may be accompanied by a demonstration, such as the usage of anatomically correct dolls. (at 19)

In the videotape, the 5-year-old complainant gave a detailed account of the sexual abuse and graphically demonstrated it with anatomically detailed dolls. The court acknowledged "that that is an aid that professional interviewers dealing with young children require and need and...it is quite proper to make use of those anatomically correct dolls so that the child can properly explain to the interviewers what has transpired" (at 19).

IV. CHARTER CHALLENGES TO LEGISLATION

There have been **6** reported and **3** unreported cases where the constitutional validity of the legislation was tested. (See generally **Appendix R.**) In the face of ss. **7** and **11(d)** **Charter** challenges, the legislation was constitutionally upheld in **6** cases — the most recent being a Supreme Court of Canada decision.

In the first reported decision dealing with s. 715.1, the constitutionality of the legislation was struck down in a ruling on a *voir dire*. In **R. v. Thompson**³⁵³, the application by the Crown to introduce into evidence the videotape of a 17-year-old complainant was denied. Mr. Justice McKenzie, of the Alberta Court of Queen's Bench, ruled that s. 715.1 was unconstitutional because it violated ss. 7 and 11(d) of the **Charter** and the provision cannot be saved by s. 1 of the **Charter**. His reasons were that:

1. the videotape is unsworn evidence not available to convict an accused;
2. the legislation's age limit (accepting tapes of complainants under 18 years) is arbitrary; and
3. "the ability to attack the evidence is disproportionate to the ability of the Crown to produce it" — the Crown has an unfair advantage, because their evidence on videotape is always available, while the defence only has opportunity to cross-examine in the more intimidating atmosphere of a courtroom.

In the final analysis, the court suggested that the constitutionality would be upheld if the section was "directed simply at very young children". Rather, MacKenzie J. held that the arbitrary age limit itself was fatal to this legislation.

In a *voir dire*, in **R. v. Christensen**³⁵⁴, on the admissibility of the videotaped evidence of a 7-year-old sexual assault complainant, the defence challenged the legislation as contravening ss. 7 and 11(d) of the **Charter**. In determining whether the impugned

353 (1989), 68 C.R. (3d) 328 (Alta.Q.B.). The accused was convicted, notwithstanding the adverse ruling to the Crown's case. As a result, the Crown was not able to appeal the ruling that the videotape provision was unconstitutional. For an analysis of the case, see the opposing commentaries in the annotation at 68 C.R. (3d) 331 by Bala and Rauf (1989).

354 (14 June 1989), 905 (Ont.D.C.) [unreported]; (1989), W.C.B. (2d) 8.

provision violated these **Charter** sections, the court analyzed the overall legislative scheme as opposed to examining the individual circumstances of the case. The Ontario District Court judge acknowledged that, while the legislation preserved the right of the accused to confront the accuser on cross-examination as a principle of fundamental justice, it was nevertheless an infringement of ss. 7 and 11(d) of the **Charter**. Mr. Justice McMahon opined:

I recognize that Section 643.1 [715.1] would require the complainant to be present for cross-examination after adopting the evidence in the videotape, but **under a set of circumstances that are so different as to be fundamentally unfair**. (at 4) [emphasis added]

The learned Justice provided no elucidation on this point. The court further stated that the legislation contained no mechanism to govern the circumstances under which the videotape is made. The court added:

There is no provision for judicial discretion in the section. It is admitted whether it is elicited by a series of leading questions or whether it contained hearsay evidence. (at 4)

In determining whether the section can be saved by s. 1 of the **Charter**, the court, adopting the decision of **Thompson** held that the proportionality test of **R. v. Oakes**, *supra*, had not been satisfied because the section applied not only to very young children but also to complainants who are almost 18 years of age. In the reasons for judgment, Justice McMahon concluded:

Now I have been speaking of a child, but what is the situation if the accused at the time of the offence was one day over 18 and the complainant one day under 18. In that case is the proportionality test passed? I would say not. I might be persuaded that Section 1 of the Charter might apply if it related only to children of tender years, but clearly it does not and is therefore **excessive in meeting the needs of the legislation**. (at 6) [emphasis added]

Contrary to the **Thompson** and **Christensen** rulings, the Alberta Court of Queen's Bench, in **R. v. B.(K.) and B.(R.)**, *supra*, held that the use of videotapes does not violate the precepts of procedural fairness and fundamental justice pursuant to ss. 7 and 11(d) of the **Charter**. Mr. Justice Power noted:

Framers of s. 715.1 did not in any way take away the entrenched right of defence counsel to cross-examine the victim with respect to the admissions made on the video tape.

In my view, s. 715.1 of the Criminal Code of Canada can be justified in a free and democratic society. It is extremely important to protect young children from sexual abuse. (at 11)

...Parliament believed that the accused's rights were adequately protected because the child must adopt the contents when testifying and is available for cross-examination. (at 12)

Similarly, the Supreme Court of the Northwest Territories, in **R. v. Kilabuk**, *supra*³⁵⁵, upheld the constitutional validity of the provision. The court was unpersuaded by the authority in **R. v. Thompson**, *supra*, and, in particular, adopted as the "correct view" the unreported decision of Mr. Justice Power in **R. v. B.(K.) and B.(R.)**, *supra*.

355 Notwithstanding the constitutional ruling, the court did not allow the videotape to be admitted into evidence because of the leading nature of the questioning of the child complainant.

Mr. Justice DeWeerd, ruling that s. 715.1 does not infringe an accused's rights as guaranteed under ss. 7 and 11(d) of the Charter, held:

It is now well established that the principles of fundamental justice need not be infringed by the introduction of videotape evidence in a criminal trial. For example, such evidence has been received to reveal what occurred when an alleged confession was made to a police officer and numerous other instances can be cited. The special problems faced with very young witnesses, particularly where giving an account of traumatic events in their lives, make use of videotape necessary if their evidence is to be heard at all in many cases. Provided the proper safeguards are observed and no undue prejudice to the accused can be shown, the probative value of such evidence, depending on all the circumstances, may so far outweigh the risk of undue prejudice to the accused that the evidence may be ruled admissible. (at 416)

In an unreported case, R. v. L.(D.O.), *supra*, a Manitoba court also refused to follow the decisions of R. v. Thompson, *supra*, and R. v. Christensen, *supra*. The accused was charged with three counts of sexual assault against a 9-year-old child victim. At trial, the Crown sought to introduce the videotaped interview with the police where she disclosed the alleged incidents. The accused made a constitutional argument that s. 715.1 contravened the Charter. The court dismissed the defence's motion, holding that the section was constitutional. Mr. Justice Scollin ruled that there is nothing in the legislation which offends the constitutional rights guaranteed an accused under the Charter, since the complainant must adopt the statements in the videotape and be subject to cross-examination. The court further ruled that, even if the accused's rights under ss. 7 and 11(d) of the Charter were infringed, s. 1 of the Charter could be invoked to justify the provision as a "reasonable limit". Following a *voir dire*, the court admitted the videotape.

The accused subsequently appealed his conviction for sexual assault to the Manitoba Court of Appeal. In 1991, the case was indexed as **R. v. Laramee**, *supra*³⁵⁶, and marked the first occasion an appellate court was called upon to decide the constitutional question surrounding the validity of s. 715.1. The five-member court handed down a unanimous decision striking down the legislation. In her judgment, Madam Justice Helper held that s. 715.1 contravened ss. 7 and 11(d) of the **Charter** and could not be sustained under the override clause, s. 1, of the **Charter**. The **Criminal Code** section, according to the learned justice, ignores "the common law evidentiary rule that precludes the admission in evidence of previous consistent statements" (at 498).

In a lengthy judgment, she further stipulated that the section offends two fundamental elements of the criminal justice system which require:

1. that sworn evidence be presented in a public courtroom in the presence of the accused; and
2. that the accused have the right to be present when the evidence is presented and to test that evidence by cross-examination. (at 498)

Helper J.A. next addressed the issue of whether the violation could be justified under s. 1 of the **Charter**. For the s. 1 analysis, the justice applied the Supreme Court of Canada's objective/means test formulated in **R. v. Oakes**, *supra*. The two-branch test must be satisfied by the Crown when it is established that the legislation infringes a right

356 As a result of the constitutional ruling, the practice of videotaping child complainants' statements by the R.C.M.P. in British Columbia was suspended pending an outcome from an appeal to the Supreme Court of Canada (from conversations with an R.C.M.P. official concerning policy). As well, Crown counsel in British Columbia were reluctant to proceed with applications under the section as a result of the Manitoba case (from conversations with designated Bill C-15 prosecutors). The **Laramee** decision was followed in **R. v. M.(J.L.)** (1991), 68 C.C.C. (3d) 344 (Sask.Q.B.). See McGillivray (1992) for an insightful analysis of the **Laramee** decision.

or freedom guaranteed under the Charter. The two criteria must be met: first, the legislative objective must be of such a pressing and urgent nature to justify infringing a Charter right. Secondly, the means chosen to attain that objective must be proportional to the ends. The proportionality test consists of three components:

1. the measures must be rationally connected to the objective;
2. the measures must impair the right as little as possible; and
3. their effects must not so severely infringe upon the accused's rights that they outweigh the objective to be addressed.

Madam Justice Helper acknowledged that the problems of sexual offences against children, and the problems children face when testifying in court, were clearly important enough to override Charter rights. However, she was of the view that, while such a legislative objective was valid, the means chosen to achieve it were not. The justice was of the opinion that the section did not meet its objective of protecting the child complainant from the trauma of testifying in court. She opined:

Section 715.1 does not meet its objective. There appears to be little sense in protecting a child from the formality of a court-room 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. (at 500)

Mr. Justice Twaddle, in a separate opinion, concurred with Madam Justice Helper that s. 715.1 violated s. 7 of the Charter on the grounds that it denied a "great principle of conceptual justice", the best evidence rule. He also found that the infringement of s.

7 could not be saved by s. 1 of the Charter because, by failing to alleviate the potential trauma for the child complainant, the section defeats the very goal which might have justified its enactment.

Furthermore, it was held that the legislation was "overbroad" since it protected all victims under 18 even though there is no evidence to sustain such an age limit.

Madam Justice Helper stated:

All the literature submitted in support of the adoption of legislation to protect victims of sexual offences addresses the difficulties encountered by a young child in dealing with a judicial system designed for mature adults. Parliament, however, adopted the age of 18 years as one of the criteria for the admission of evidence of victims of sexual offences. There is no evidence whatever to sustain an age limit of 18 years for the admission of such evidence rather than 10, 12 or 14 years as recognized in other jurisdictions. The legislation is overbroad. Not all minor victims require the protection of this legislation. (at 500)

With the rest of the court concurring on the constitutional issue, the Manitoba Court of Appeal held that the Charter violation resulted in an unfair trial for the accused. In the result, the appeal against conviction was allowed and a new trial ordered.

The Crown appealed the Manitoba Court of Appeal decision to the Supreme Court of Canada — now indexed as R. v. L.(D.O.). On September 16, 1992, the Chief Justice articulated the following constitutional questions to be answered by the court:

1. Does s. 715.1 of the Criminal Code, in whole or in part, limit the rights guaranteed under s. 7 of the Charter?
2. If the answer to the first question is in the affirmative, does s. 715.1 of the Criminal Code constitute a reasonable limit prescribed by law as can be demonstrably justifiable in a free and democratic society, pursuant to s. 1 of the Charter?

3. Does s. 715.1 of the Criminal Code, in whole or in part, limit the rights guaranteed under s. 11(d) of the Charter?
4. If the answer to the third question is in the affirmative, does s. 715.1 of the Criminal Code constitute a reasonable limit prescribed by law as can be demonstrably justifiable in a free and democratic society, pursuant to s. 1 of the Charter?

The appeal was heard by the Supreme Court of Canada on June 15 and 17, 1993. The constitutional questions were answered orally by the court (but judgment in the appeal was reserved) as follows:

- a. Constitutional questions 1 and 3 were answered in the negative.
- b. Questions 2 and 4 therefore did not require answers.

The Supreme Court of Canada rendered a written judgment on November 26, 1993, which has just recently been reported³⁵⁷. Chief Justice Lamer spoke for the majority.

He said:

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

357 (1993), 85 C.C.C. (3d) 289 (S.C.C.).

rights guaranteed under s. 7 or s. 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 18 contained in s. 715.1 is not arbitrary, but rather is consistent with laws which define the age of majority to be 18 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 s. 11(d) of the Charter, it is unnecessary to consider whether s. 715.1 can be justified under s. 1 of the Charter. (at 294-295)

In concurring reasons, Madam Justice L'Heureux-Dubé remarked:

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 court-room 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. (at 307)

Commenting on the s. 7 constitutional question, in the context of child sexual abuse, she wrote:

...[T]he 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. ... 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. ... **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.** (at 312) [emphasis added]

The Chief Justice, on behalf of the Supreme Court of Canada, concluded:

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, pre-conditions 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. (at 326)

V. PRACTICAL AND PROCEDURAL ASPECTS

Various practical and procedural considerations have arisen out of this legislation.

A primary concern for judges has been the expertise and techniques of the interrogator.

In **R. v. Kilabuk**, *supra*, Mr. Justice DeWeerd spoke of his reservation in this manner:

I will add that I say this with regret, bearing in mind the attempt by Parliament in Section 715.1 of the Criminal Code to provide a procedure to enable young children and other persons under disability to communicate their complaints to the Court. I take the view that it will require more than legislation to give effect to that objective. What is quite plainly required are the resources to give that legislation its intended effect. This would include the appropriate training of social workers and police officers, so that the provisions of Section 715.1 might be given their intended meaning and effect having regard to the constraints upon a court such as this in conducting a criminal case under the constitution and law of Canada, as it now stands. (at 4)

In **R. v. Meddoui**, *supra*³⁵⁸, the Alberta Court of Appeal made reference to similar concerns that there is no requirement that the interviewer be a person in authority. The court quoted from the literature as follows:

The interviewer is usually a health-care or social work professional who is motivated towards treatment of the child and not the prosecution of a

child abuser. Pursuit of that goal can lead to suggestive questioning and persistent pressure... (Bevan, 1989:456)

and made reference to an American study:

Perhaps the most critical aspect of the videotaped statement is the expertise of the interviewer...[I]t is often difficult to obtain a clear story from a child without some degree of prompting. Moreover, if the child has been pressured or threatened into silence, the interviewer may feel compelled to reinforce the child as the story unfolds. These questioning techniques, though perfectly reasonable and even beneficial in a therapeutic milieu, are dangerous in a Court of Law. (Whitcomb, 1985:62)

As referred to earlier, the Meddoui court held that the method of questioning went to weight to be attached to the evidence by the trier of fact.

The Crown counsel, in R. v. B.(K.) and B.(R.), *supra*, illustrated some of the practical problems associated with bringing on an application under the legislation. During trial preparation, the prosecutor formed the opinion that the 5-year-old complainant would be a very poor witness due to her young age, short attention span and reluctance to interact with strangers in the court system. Furthermore, the child was difficult to interview because of her playfulness, inattention and inability to comprehend the seriousness of the case. The child's difficulties were exacerbated further by the presence of a "very high-strung" and "aggressive" mother. A videotaped interview was finally conducted where the child gave a detailed and graphic account of the sexual abuse with the use of anatomically detailed dolls. The *voir dire* took three days. The process consisted of the calling of expert witnesses by the Crown, cross-examination by the defence, the raising of constitutional arguments by the defence, the playing of the

videotape, and the testimony of the child complainant. The videotape was one hour and 15 minutes in length. Crown counsel described some of the problematic events in the course of the *voir dire*.³⁵⁹

1. The R.C.M.P. officer who took part in the interview was called to introduce himself and the other social worker. The officer brought with him to court a television screen and VCR.
 - a. Although the courtroom was opened a half an hour early in order to ensure that the equipment was set up before court started, the R.C.M.P. member arrived late and consequently it was after 2:00 p.m. before the equipment was installed.
 - b. The officer brought a very small television screen with him. I have asked the officer to get an extra large screen for Court of Queen's Bench. The very small screen made it difficult for the defence lawyers to see the picture and in addition, it necessitated the two accused moving from the docket to the other side of the courtroom. As one of the accused was in custody this caused some concern, although he was in leg irons.
 - c. The sound quality was very poor on the video and it could not be enhanced. The R.C.M.P. therefore, prepared a transcript of the interview.
2. In order for the victim to view the video it was necessary for her to get off the stand and sit beside Crown counsel for well over an hour. It is not an easy task keeping a 5-year-old sitting still at the best of times and expecting her to watch a video and be quiet was almost impossible. While she glanced at the video periodically, most of her time was spent drawing, wiggling in her chair, waving at various people in court and whispering to the Crown prosecutor.
3. The victim then had to take the stand after the video was played to "adopt the contents of the videotape while testifying". Needless to say, asking the 5-year-old if she adopts the contents of the

359 A memorandum from Ms. Janice Darling, Crown prosecutor, dated January 26, 1989, circulated to designated Bill C-15 prosecutors, Alberta Attorney General Ministry.

videotape would have resulted in a blank stare or at worst the answer of "no". I therefore settled for asking her if she was the person shown in the videotape and asking her if what she told the police officer and the social worker were true, to which she fortunately answered "yes".

4. Another major issue is that the child must be made available for cross-examination. During cross-examination the victim spent a fair amount of time climbing about the witness box and the efforts to cross-examine her, as if she was an adult, can best be described as pathetic. The victim continues to be a very poor witness and her evidence is completely unpredictable.

The Crown concluded her report by commenting:

Fortunately one of the accused gave a watered-down confession and there is medical evidence to substantiate the abuse, so there is some chance of successfully prosecuting this case.

In the end, the judge found that all the procedural requirements of s. 715.1 had been complied with and ruled that the videotape was admissible.

Another case which underscores the inherent difficulties surrounding the implementation of the provision, was R. v. Meddoui, *supra*. The Crown's *voir dire* application, at trial, evolved into several days of the tendering of evidence and counsel arguments and submissions. The Crown had proposed to prove the videotape in a manner analogous to proving an accused's voluntary statement.³⁶⁰ Firstly, the defence argued that, in order to prove that the statement was made in a reasonable time, **all** those connected with the production of the videotape, as well as those who had an opportunity to influence the child's performance on the tape, must be called as witnesses. It was also

360 The authority relied upon by the Crown was R. v. Milgaard (1971), 2 C.C.C. (2d) 206 (Sask.C.A.).

argued that the Crown had to prove, as in the law of recent complaint, that the information in the videotape was not elicited as a result of leading, inducing or intimidating questions. The trial judge rejected those defence arguments and held that the circumstances surrounding the making of the videotape did not go to the issue of admissibility but to weight.

Another line of argument pursued by the defence was that, since there was a short interruption in the middle of the videotape interview (to allow the child to go to the washroom, get a drink, etc., during which time another police officer had contact with her), the Crown did not capture the whole statement and, therefore, the videotape was inadmissible. The justice was not persuaded by this argument, and held that the issue did not go to admissibility and may only go to weight with respect to the portion of the videotape after the break.

Another novel defence submission consisted of the argument that the child complainant was not paying attention to portions of the tape and thus could not legally have adopted it. To support this argument, the defence called a witness (who was "planted" in court to observe the child while she watched the hour-long videotape) to testify that the child was distracted and had not viewed the videotape completely from beginning to end. The trial judge rejected the argument that the tape should have been ruled inadmissible because the child failed to pay sufficient attention while it was shown in court. When the same issue was raised on appeal, the Alberta Court of Appeal agreed with the lower court decision and concluded that it was, in law, sufficient for the witness

to state that she recalled giving the statement, and that she believes she told the truth at that time.

In a British Columbia preliminary inquiry, R. v. Sock, *supra*³⁶¹, the Crown attempted to bring on a *voir dire* application. The proceedings went as follows:

The Crown: I'll also be asking that a videotape of a statement by the complainant, Kelly D., which was made four days after the incident, February 22nd, was made by Detective H. at the police station and she, in the course of that interview relates what happened to her on the night of February 18th. I'll also be -- and that's pursuant to Section 715.1 of the Criminal Code.

I'll also be calling Kelly D. herself to basically adopt the -- what she said in that statement.

You're looking puzzled, Your Honour. Should I refresh your memory with respect to those sections?

The Court: Well, you can refresh all you like but that isn't going to help me.

The Crown: Section 715(1). That provides for videotaped evidence to be admitted for the truth of their contents, as long as the complainant -- as long as it's made within a reasonable time and the claimant adopts it.

Now, Kelly D. and her mother flew in over the weekend so I only saw this this morning through a series of mistakes or errors, I guess. So she's only been in this morning and partly for that reason I'm going to be submitting the tape rather than asking her to testify as to the details of the incident at this time.

The Court: I have not had the experience in dealing with this section. If this is done, is it still possible for the defence to cross-examine, or is that eliminated as well?

The Crown: That's right, yes. The defence can cross-examine the child on anything she says in court and on the evidence given on the tape.

The Court: I see.

361 The writer monitored this case in court.

The Crown: It is a new section and it has been used in a series of different courts across the country. Different issues have arisen. Sometimes the Crown elects not to use the tape and just have the child testify as we used to do. There are a lot of issues that come out of it, but I'm electing at this stage of the game to have the videotape played. My friend hasn't told me what his position is on it, so --

The Defence: I've had no experience with this section either, Your Honour. I'm content with it going along for the purpose of preliminary and then cross-examining, Your Honour, in that order.

The Court: Have you seen it?

The Defence: No, Your Honour.

The Crown: It has been made available to my friend, Your Honour. Both tapes.

Oddly, the court elected to receive the testimony of the child complainant, not as part of a *voir dire*, but as examination-in-chief. The excerpt from the transcript is as follows:

EXAMINATION-IN-CHIEF BY THE CROWN:

Q: Now, Kelly, do you remember living in Vancouver last year with your mom and your two brothers? Do you remember --

A: Yeah.

Q: -- that and you lived in a house with some other people?

The Court: Yes? Do you remember that? Okay. Yes.

Q: Can you say yes, because the lady --

A: Yes.

Q: -- is recording what you say.

The Court: She has to hear you talk. So do I.

Q: And do you remember when the police came one night and you remember Val H. --

A: Yeah.

Q: -- taking you to the police station, you remember that?

A: Yeah.

Q: And do you remember making a T.V. show?

A: Yeah.

Q: And who was in that T.V. show, the video show?

A: Me, my mom, and --

Q: You're looking at Val here. Do you mean Detective H.?

A: Yeah.

Q: Okay, and do you remember making a show about what happened to you about a year ago?

A: Yeah.

Q: And did you see that video in my office this morning?

A: Yeah.

Q: And who was in the video, the one that you saw this morning?

A: My mom, me --

Q: Who was asking you the questions? Do you remember who was asking you the questions on the T.V. show? Was it the police lady? It was Val sitting here, wasn't it?

A: Yeah.

Q: And when you looked at it today, who was in the room with you when you watched that video?

A: My mom, me, and --

Q: You're looking at the detective again. Val?

A: Val.

Q: Was I there for some of the time too? and did you look at that whole tape?

A: Yeah.

Q: And watch it? And was that the truth about what happened to you? Did that really happen to you what you told Detective H?

A: Yeah.

The Crown: Those are my questions, Your Honour. Normally I would have shown the tape first, but because of the time we haven't done that, and my friend has a synopsis on it.

The Court: Well, it has to be done sooner or later, but --

The Crown: Yes, it will be. (at 37-38)

The defence then proceeded to cross-examine the witness. Midway through the cross-examination, the judge interrupted the defence lawyer and stated:

The Court: Wait -- just a moment. Somewhere down the line you're going to have to show this video and then open this up all over again, I presume, unless of course you

want to consent to its content, Mr. F. I mean, if you wish to continue with the line of questioning that you have been doing, go right ahead because it to some extent may well be independent of what's on the T.V. show. I don't know because I don't know what's on the T.V. show, but there is before me evidence that what's on the T.V. show is apparently truthful of whatever was said then. But again, I don't know what was said then and maybe you do, but at some stage I would think the -- the adoption has to be formally be made of what this video is, if it's going to be pursued, and I take it the Crown is --

The Crown: I'm planning to call Detective H. next. I was going to do it before that, because of time constraints we've done it the other way around and I'll be calling Detective H. to prove the videotape and show the videotape in court.

The Court: Well, aren't you going to show it to the witness?

The Crown: She's already seen it, Your Honour. She saw it this morning and she's adopted that. It can be shown in court. I chose to do it that way.

The Court: Okay. You follow the procedure that you think is suitable. Carry on then, Mr. F. (at 47)

At this stage of the proceedings, the Crown entered into a *voir dire* and called the detective who conducted the videotape interview with the child. The videotape was then played to the court and ultimately entered into evidence as an exhibit.

The evidence of the detective was recorded as follows:

EXAMINATION-IN-CHIEF ON VOIR DIRE BY THE CROWN:

Q: Now, Detective H., you were one of the investigating detectives with respect to this alleged sexual assault of Kelly D. which apparently occurred on the night of the 17th and the 18th of February of last year?

A: That's correct.

Q: Now, were you contacted by the D.'s?

A: Yes. Mrs. D. called me on the 21st of February, Your Honour.

Q: And did you meet with her?

A: I spoke with her on the phone and arranged to make -- to have her bring her child K. into the police station the following afternoon, February the 22nd.

Q: Did you pick her up?

A: No, they came -- they came --

Q: She brought her in?

A: They came to the police station, Your Honour.

Q: Okay, and you made a video -- you had an interview with her and videotaped that?

A: That's correct.

Q: Who was present for that interview?

A: Myself, Mrs. D. and K.

Q: Now, this apparent incident occurred on the night of February 17th and 18th. You saw her on the 22nd?

A: That's correct.

Q: Can you explain what the four-day delay was? If there was a delay?

A: Well, I was assigned on the case on the 19th, Your Honour, and given the caseload on the Sexual Offences Squad, three days isn't considered to be a delay. However I got the case. I'm not sure if I tried -- I think I tried to contact Mrs. D. and had to leave messages because I don't believe there was a phone, or she wasn't out. Anyway, she called me and she called me so she must have had a message to call me, so it was just a couple of days in trying to get a hold of each other and as soon as I did we had the child come in the next day.

Q: And the interview was conducted at the police station at 312 Main Street?

A: Yes. 312 Main Street, Your Honour.

Q: And who was present for that interview in the interview room?

A: I was, Mrs. D., and K.

Q: Okay. Was there any discussion about the apparent incident before the actual -- what we're going to see on the video?

A: No, there wasn't, Your Honour.

Q: And do you have an original of the video with you today?

A: Yes. This is it here.

The Court: Miss W., are you now going to run the video? Is that --

The Crown: I am going to run the video, yes. Can you see it?

The Court: I can see it, and presumably there is some audio, but if it's filed will be an exhibit, so whatever is coming off the screen will simply not form part of the record. The tape itself is the record, and hopefully nobody will talk during the course of the playing of the video.

(VIDEO BEING PLAYED)

The Crown:

Q: Was that the extent of your interview with K. that day?

A: That was, Your Honour.

Q: And were you present in the Crown's office this morning when this tape was played --

The Clerk: Excuse me, Your Honour. If the machine could be shut off, I can't record --

The Court: You can't be heard unless you yell, Miss W.

The Crown: If I speak louder will that be all right?

The Court: Not really.

The Crown:

Q: All right. Now with respect to replaying the tape, was that tape the same tape that we've seen today replayed in the Crown Office this morning with Kelly D. being present?

A: Yes. It was, Your Honour.

Q: Did she watch the entirety of that tape?

A: Yes, she did.

Q: Was her mother present for that videotape?

A: Yes, she was.

Q: And was that the only tape she watched this morning in your presence?

A: The only one that I saw her watch, yes, Your Honour.

The Crown: I'd ask that that tape, Your Honour, be admitted as an exhibit.

The Defence: No objection, Your Honour.

The Court: Exhibit 2. (at 53-55)

It is obvious, in this case, that the procedure for the adoption of the videotape did not conform with s. 715.1 requirements. One would have to question how the child could have adopted a tape which she had viewed outside of the courtroom, and that was not played in court, until after the so-called "adopting" of it. With no objections from the

defence counsel as to the peculiar manner in which the videotape was "adopted", the judge never provided a ruling on its admissibility.

In view of the obvious and serious practical problems in giving effect to the section, it is submitted that, as a matter of practicality, the provision is rarely used.³⁶² Crown were reluctant previously to invoke the section because of the anticipated constitutional challenge to the legislation. Following the Alberta case of **R. v. Thompson**, *supra*, and more particularly, the persuasive (but wrong) decision of the Manitoba Court of Appeal in **R. v. Laramee**, *supra*, the Crown practice of invoking s. 715.1 was significantly curtailed. Despite the constitutional issue being authoritatively resolved by the Supreme Court of Canada in **R. v. L.(D.O.)**, *supra*, it is submitted that the technical difficulties inherent in satisfying the procedural prerequisites will prohibit frequent use of the legislation in the future. In the Alberta Court of Appeal case, **R. v. Meddoui**, *supra*, Mr. Justice Kerans, in adopting a common sense approach, made this observation:

I emphasize also that introduction of the tape might not always be seen as useful. A witness who can express herself adequately in the box probably has no need of it. And, I suspect, juries will always be more open to persuasion by live description. (at 355 C.C.C.)

362 Notwithstanding a well-developed and sophisticated police program that videotaped over 600 interviews in Manitoba over a four-year period, only four videotapes were ultimately used for trial purposes (Videotaping Project, Manitoba Department of the Attorney General, developed in 1988).

VI. CONCLUSION

In R. v. B.(K.) and B.(R.), *supra*, Mr. Justice Power stated that the intention of the legislators in drafting s. 715.1 was as follows:

The impetus for reform in amending the Criminal Code of Canada and in particular 715.1 has been the concern that children when confronted by the accused may be traumatized or intimidated and therefore unlikely to give a full account of the incident. If the accused is a parent or other relative of the child there is concern that the child does not wish to testify at all. Testifying is a significant source of distress to any complainant, but it is likely to be particularly so for children in sex abuse cases where the accused is commonly a person occupying a position of trust or authority over the child. **The objective of s. 715.1, is not to lessen the trauma of young persons testifying in a criminal court. The child is always subject to cross-examination with respect to the video tape and the accompanying testimony.** (at 11) [emphasis added]

...In passing s. 715.1 Parliament of Canada intended to facilitate prosecutions for child sexual abuse cases. The use of video tapes **may reduce the amount of time a child will spend in court.** (at 12) [emphasis added]

The justice went on to emphasize the two weaknesses of the legislation as being:

1. problems of cuing and suggestibility; and
2. it does not reduce trauma.³⁶³

Expanding on the latter concern, he provided this critical analysis:

363 It is interesting to note that, in R. v. Laramee, *supra*, Madam Justice Helper, to the contrary, wrote in her judgment that the objective of the section was to prevent children from having to endure the trauma of testifying in court. Justice Power went on to query "why then is the section limited to complainants who are less than eighteen at the time the alleged offence was committed? A number of American states have recognized that trauma may affect adults, dependent upon the nature of the offence." (at 11)

It will not reduce trauma - The subject of the traumatic effect of testifying is a controversial one. Some professionals suggest there is a negative impact on the child while others have said the opposite - indeed, that it may be therapeutic, give[n] proper preparation and follow-up.

But, even assuming traumatic effects, this section will not assist for the child must appear in court to testify as to the truth of the content, and be subject to cross-examination...

One gets the impression that the idea of videotaped evidence of a child was hastily borrowed from the United States, where about 25 states have enacted legislation providing for videotaped evidence of a child. However, **that legislation was intended to reduce trauma, for videotaped statements were to be used as an alternative to oral testimony where the child was unavailable as a witness...** (at 11) [emphasis added]

It is submitted that, under the current legislative framework, a child complainant who must testify in a *voir dire* "to adopt the contents of the videotape", not surprisingly, spends **more** time in court. It is further argued that the added appearance on the witness stand, which is necessary to satisfy the procedural prerequisite imposed by the legislation, defeats the broad social purpose envisioned by Parliament "to improve the experience of the child witness". In a recent longitudinal study, cross-examination by defence counsel has been found significantly to be the most traumatic part of the court process for child witnesses (Sas *et al*, 1993). In the dissertation cases examined, child complainants were still subjected to extensive cross-examination emanating from their evidence given in examination-in-chief.³⁶⁴ As well, by adopting the contents of the videotape, the witness is susceptible to cross-examination on rebuttal on all aspects of the

³⁶⁴ See Angelomatis' (1989) research on defence tactics in questioning children in court and common impeachment strategies used in cross-examination of child complainants in sexual abuse cases.

videotape, which may include collateral issues, hearsay and other inadmissible evidence.

An observer examined why videotaped evidence is a "double-edged sword" in this manner:

From the defense perspective, videotapes of children's early statements or interviews can contribute to effective cross-examination. For example, it should be recognized that children's interviews are seldom straightforward. During a videotaped interview, a child may refuse to talk, deny or contradict any previous allegations, or provide only partial or inconsistent information. The videotaped statement may even contradict the child's testimony at trial. Such inconsistencies naturally raise questions about the child's credibility and truthfulness. (Whitcomb, 1992:98)

This dissertation takes the position that Mr. Justice Power's interpretation *viz* — the legislative objective of s. 715.1 is not to lessen trauma to children who testify in court — is the correct one. It should be noted that the Parliamentary Committee that reviewed **Bill C-15** had indicated that the overriding purpose of s. 715.1 was "**to preserve evidence**" and not about preventing trauma to children.

The author is further persuaded by Mr. Justice Power's opinion that the concept of videotaped evidence ("hastily") imported from the United States, may have been ill-conceived by Canadian lawmakers. It is submitted that the American statutes (premised on a special hearsay exception for out-of-court statements) are fashioned in a manner which more rationally connects the objective of a statute to its means. The whole legislative scheme underpinning such statutes focuses on the psychological well-being of the child witness in criminal proceedings. This is not the case for the Canadian

legislation. It is submitted that, the overbroad legislative policy goals preclude any real coherent and logical linkage to the means sought. Consider this analytical conceptualization (assuming that the "objective" satisfies the first branch of the Oakes test):

RATIONAL CONNECTION - OBJECTIVE/MEANS TEST

	OBJECTIVE	MEANS	DESIRED GOAL MET
<p>U.S. STATUTES:</p> <p>Stated</p>	To prevent trauma to the child complainant from testifying in court	Use of videotaped evidence as an alternative to live testimony in court by the child complainant	Yes
<p>CANADIAN LEGISLATION:</p> <p>Intended</p>	<p>a. To enhance the successful prosecution of child sexual abuse cases</p> <p>b. To improve the experience of the child complainant (by minimizing the problems of the victim giving evidence)</p> <p>c. To preserve evidence</p>	<p>s. 715.1: The admission of a videotape to enhance/ augment the child complainant's testimony</p>	<p>a. Difficult to measure</p> <ul style="list-style-type: none"> • videotape may bolster the credibility of the complainant • videotape may be preserving inconsistent statements, peripheral/ collateral issues, hearsay and other inadmissible evidence • videotape can be effective defence tool for cross-examination and impeachment of witness <p>b. Difficult to measure</p> <ul style="list-style-type: none"> • complainant must testify on <i>voir dire</i> application • does not reduce but increases complainant's testimonial time • complainant still subject to extensive cross-examination on direct evidence • complainant subject to cross-examination on contents of videotape <p>c. Yes</p> <ul style="list-style-type: none"> • captures vivid and detailed disclosure • avoids multiple interviews • useful for trial preparation and refreshing the complainant's memory • can precipitate confessions and guilty pleas • but - see (a) above

As earlier referred to, courts have given different and conflicting justifications for the enactment of s. 715.1. In R. v. Keller, *supra*, the Alberta Queen's Bench held that the legitimate social purpose underlying the section was "to facilitate the disclosure of child sexual abuse". The same provincial court, in R. v. B.(K.) and B.(R.), *supra*, stated that the purpose was not to lessen trauma to children testifying in court, but "to reduce the amount of time the child will spend in court". The Manitoba Court of Appeal, taking an opposite approach in R. v. Laramée, *supra*, was of the opinion that the goal of the legislation was "to protect child complainants from the trauma of testifying in court". The Alberta Court of Appeal, in R. v. Meddoui, *supra*, acknowledged that s. 715.1 was created "to recognize the difficulties some children witnesses have in the articulation of their testimony". It is interesting to note that, if the same analytic scheme were applied, the judicial interpretations for the purpose of s. 715.1 articulated in Keller and Meddoui would satisfy the rational connection test and the formulations provided in B.(K.) and B.(R.) and Laramée would fail.

It is further argued that the awkward and amorphous language of the legislation, even in the face of meaningful judicial interpretation, creates procedural difficulties which must call into question whether the sought-after consequence (i.e. the enhancement of the child complainant's credibility through videotape preservation of the disclosure) is worth the prosecutorial effort. The cases examined earlier compellingly portray the functional realities associated with the invocation of the provision.³⁶⁵ Under the current legislative scheme, the mandatory requirement, that the complainant testify in a *voir dire*

365 R. v. B.(K.) and B.(R.), *supra*; R. v. Meddoui, *supra*; R. v. Sock, *supra*.

application, creates an added testimonial burden on child witnesses which seems onerous, unfair and untenable. In theory and in practice, a child complainant must testify and be subject to cross-examination on **four** different occasions in court, these being:

1. at the preliminary inquiry;
2. at the preliminary inquiry for the *voir dire* ruling;
3. at the trial; and
4. at the trial for the *voir dire* ruling (in the absence of the jury).

This dissertation argues that the policy goal of the legislation should be reformulated to **protect child complainants of sexual abuse from the trauma associated with testifying in court**. It is submitted that **s. 715.1** should be repealed and replaced with a form of legislation analogous to the special hearsay exceptions created statutorily for child sexual abuse victims by the United States Supreme Court in **Ohio v. Roberts**, *supra*. That court fashioned a two-branch test for determining the trustworthiness of an out-of-court statement made by a witness who does not testify at trial. The United States Supreme Court ruled that, first, the "statement must either fall into a firmly rooted hearsay exception or have adequate indicia of reliability".³⁶⁶

366 At 66. Statutes for a special hearsay exception have been created by 28 states. As well, 27 states require the finding of trustworthiness and 15 states require corroborative evidence before the hearsay statement of an unavailable witness is admissible. For a comprehensive review of the salient features of the U.S. statutes and related court rulings with respect to the Sixth Amendment Confrontation Clause, see: Hill and Hill (1987); Stephen (1987); Hockley-Cann (1988), Illinois; Wixom (1986), Utah; Miller (1986), Texas; Bressler (1988), Washington; Thumann (1989) - see **Appendix S**.

In State v. Ryan³⁶⁷, the State of Washington Supreme Court formulated nine factors of sufficient "**indicia of reliability**" to guide judges in determining whether a child's hearsay statement is trustworthy. These factors are as follows:

1. whether there is a motive to lie
2. the general character of the declarant/child
3. whether more than one person heard the statement
4. whether the statement was spontaneous
5. the timing of the statement and the relationship between the declarant/child and witness
6. the statement contains no express assertions about past fact
7. cross-examination could not show the declarant/child's lack of knowledge
8. the possibility of the declarant/child's faulty recollection is remote
9. the circumstances surrounding the statement are such that there is no reason to suppose the declarant/child misrepresented the defendant's involvement. (at Wash.2d:175-176)

Secondly, the United States Supreme Court held that it is "normally" required to demonstrate the witness' unavailability to testify. According to U.S. Federal Rules of Evidence, 804(a):

"**Unavailability as a witness**" includes situations in which the declarant—

- (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of his statement; or
- (2) persists in refusing to testify concerning the subject matter of his statement despite an order of the court to do so; or
- (3) testifies to a lack of memory of the subject matter of his statement; or
- (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

367 103 Wash. 2d 165, 691 P. 2d 197 (1984). The Washington statute is restricted to child sexual abuse victims under the age of 10 years.

- (5) is absent from the hearing and the proponent of his statement has been unable to procure his attendance...by process or other reasonable means.

Additional grounds for unavailability, which frequently apply in child sexual abuse prosecutions, include incompetence of the witness, the danger of severe psychological injury to the child from testifying³⁶⁸, and unwillingness or inability to testify.

While the Supreme Court has not yet had an opportunity to address the issue of defining "psychological unavailability" directly, the District of Columbia Court of Appeals, in **Warren v. United States**, *supra*, articulated four factors which contribute to a determination of "psychological unavailability":

1. probability of psychological injury as a result of testifying;
2. degree of anticipated injury;
3. expected duration of the injury; and
4. whether the expected psychological injury is substantially greater than the reaction of the average victim of rape, kidnapping, or terrorist act.

It is beyond the scope of this dissertation to attempt to draft legislation of this genre. The American statutes for a special hearsay exception have survived constitutional challenges under the Sixth Amendment Confrontation Clause. It is submitted that, in Canada, no such entrenched or absolute right exists in our **Charter**.

368 In **R. v. H.(H.C.)** (25 June 1991), Vancouver CC910357 (B.C.S.C.) [unreported], a case which the author monitored in court, a 4½-year-old boy complainant of sexual assault against his physician mother, did not testify at the trial because of further "psychological injury". There was corroborative evidence from two nannies and testimony from an expert witness with respect to the psychological and emotional state of the child. The jury convicted the accused. This might have been an appropriate case where the videotaped evidence of the child can be admitted in court as a special hearsay exception (if that were available). A pre-trial hearing would be conducted to determine the "unavailability" of the child to testify due to potential severe psychological harm.

Rather, "it is a right which is subject to qualification in the interest of justice".³⁶⁹ It is argued that Canadian legislators can create a **Criminal Code** provision which embodies as paramount the goal to protect the child victim of sexual abuse from further trauma from testifying in court, while at the same time meeting the requisites of fundamental justice and fair play to the accused.

As an alternative to the more radical approach advocated above, it is submitted that, at a bare minimum, the legislation should be re-drafted to mandate an automatic court order to admit the videotaped evidence upon request by the Crown. This would eliminate the necessity of having the child complainant testify on the *voir dire* application. The child would, in addition to giving evidence *viva voce* in court, "adopt" the contents of the videotape during the examination-in-chief. The defence would then have an opportunity to cross-examine the witness on all aspects of the elicited evidence. Under this scheme, the videotaped evidence would be an issue of weight, not admissibility, to be decided by the trier of fact.

Finally, failing any reform to the present legislation, Crown counsel should cite as authority, in s. 715.1 applications, the Supreme Court of Canada decision in **R. v. L.(D.O.)**, *supra*, which resolves the constitutional validity of the section in a definitive manner. As well, Crown should be prepared to argue the admissibility of videotape

369 **R. v. Levogiannis (No.2)**, *supra*, at 75 C.C.C.

evidence as an exception to the rule against hearsay. Some Canadian courts have shown a willingness to expand the parameters of current hearsay exceptions. This issue will be discussed in the chapter on hearsay statements of child complainants.

CHAPTER 5: EXPERT WITNESS (RELATED EVIDENTIARY ISSUE)

The only thing I remember was the defence lawyer — he grilled me, twisted everything I said, made me feel like a criminal and as if [my step-father] was the victim.

Talk to [child witnesses] on their own level. I was 16 and I was confused.

Quotes from child victims
(London Family Court Clinic: Child Witness Project (Sas *et al*, 1993))

I. INTRODUCTION

Basic rules of evidence have evolved, through common law and statutory enactment, to govern the nature and scope of expert testimony in both criminal and civil spheres of litigation. For example, the law of evidence developed rapidly to respond to the need for psychiatric opinion evidence in determining the legal status of an offender. The phenomenon of the forensic psychiatrist as an expert witness in the criminal adversarial process, once considered a rarity, has become commonplace in Canada.³⁷⁰

³⁷⁰ See Angelomatis (1984; 1987) for a comprehensive analysis of the psychiatrist as an expert witness in insanity defence trials and other criminal proceedings. See also: Ho, 1980; Ennis and Litwack, 1977; and Diamond and Louisell, 1965 for academic debate on the issue in the United States.

In child abuse cases, medical doctors have been routinely qualified to give expert opinion evidence about the nature and extent of any physical injuries and their causation.³⁷¹ As well, medical practitioners have qualified as expert witnesses in child sexual abuse cases. In recent years, there has been a growing acceptance of pediatricians and other forensic experts testifying in court as to the medical manifestations of child sexual abuse. Typically, in such cases, the major evidence sought to be admitted is sperm or seminal fluid residue on a victim's body or clothing, or physical damage to genital, vaginal and rectal areas (DeJong, 1989). Where such evidence exists, the prosecution would naturally introduce it to support a child complainant's allegation of sexual abuse. This type of expert testimony is generally admissible (DeJong and Ross, 1988).

While expert evidence on the behavioural syndromes and dynamics of child sexual abuse is now admissible in many U.S. jurisdictions³⁷², the question, whether an expert in these matters will be allowed to testify in Canadian courts, has not been definitely settled in law (at the time of the introduction of **Bill C-15**). The issue of whether Canadian judges will permit expert psychological evidence in child sexual abuse cases requires empirical investigation.

371 In **R. v. Millar** (1989), 49 C.C.C. (3d) 193 (Ont. C.A.), the Ontario Court of Appeal held that in a physical child abuse case, the opinions of qualified experts were admissible on the issue of whether certain injuries were caused accidentally or intentionally. The opinions were held to be admissible even though they were on the ultimate issue which the jury had to decide. The basis upon which the opinions were held to be admissible was that the jury could receive "useful assistance from the witnesses who have extensive knowledge and experience in the detection of cases of child abuse" and that the expert witnesses had "special knowledge and experience going beyond that of the trier of fact" (at 218).

372 The law of evidence in this area is more developed in the United States. See McCord (1986) and Lorenzen (1988) for a comprehensive analysis of the American case law and statutes.

It has been argued that expert evidence, proffered as corroboration of sexual abuse, would maximize the fact-finders' access to reliable information and enhance their ability to make more informed decisions, without usurping their role. McCormack (1987), who advocates the use of experts, states:

...[T]he dynamics of child sexual abuse and behavioural indicators should be used to assist the trier of fact by disabusing it of widely held misconceptions about child sexual abuse, so it may evaluate the evidence free of the constraints of popular myth. (at 45)

In essence,

the courts seem to be drawing a rather fine distinction between expert evidence, which establishes that the child is telling the truth and evidence which establishes that the child was the victim of abuse. (Stewart and Bala, 1988:38)

Through case studies and case law analysis, the dissertation research is developed to capture the evolution of the law of evidence relevant to the role of such experts. In addition, the use of other experts, who give testimony on the cognitive and moral development, and functional limitations of children, to Canadian courts in child sexual abuse cases, will be documented and analyzed (see **Appendix T**).

II. RESEARCH QUESTIONS

The dissertation research attempts to answer the following questions:

- A. What is the common law, in Canada, governing the use of expert witnesses generally, and specifically in child sexual abuse cases?
- B. What kind of expert witness is being called to testify in child sexual abuse cases?
- C. What is the purpose for calling expert witnesses in child sexual abuse cases?
- D. What kind of expert evidence is being called?
- E. Who calls the expert witness?
- F. What rulings and/or comments have judges made?

This chapter will include an historical examination of the common law governing the use of expert witnesses, an analysis of the cases and developing jurisprudence, a discussion of the controversy surrounding the involvement of expert witnesses in child sexual abuse cases, and a conclusion.

III. THE EXPERT WITNESS: COMMON LAW - AN HISTORICAL PERSPECTIVE

The foundation of the rules governing expert opinion evidence was first laid down in **Folkes v. Chadd et al**³⁷³ by Lord Mansfield:

...[T]he opinion of scientific men upon proven facts may be given by men of science within their own science.³⁷⁴

373 (1782), 3 Doug. 157, 99 E.R. 589.

374 Lawton, J. in **R. v. Turner** [1975] Q.B. 834, at 841.

This classical formulation of the role of the expert witness was the benchmark for the admission of opinion evidence by men of science without personal knowledge of the facts.³⁷⁵ A subsequent statement of the law to justify the admission of expert opinion was articulated in **Peake on Evidence** (1808):

Though witnesses in general can speak only as to facts, yet in questions of science persons versed in the subject may deliver their opinion upon oath on the case proved by other witnesses. (at 199)

In an attempt to establish a firmer principle concerning who may qualify as an expert, Lord Russell of Killowen, C.J., in **R. v. Silverlock**³⁷⁶, provided a further elaboration:

The question is, is he peritus? Is he skilled? Has he an adequate knowledge? Looking at the matter practically, if a witness is not skilled the judge will tell the jury to disregard his evidence. There is no decision which requires that the evidence of a man who is skilled in comparing handwriting, and who has formed a reliable opinion from past experience, should be excluded because his experience has not been gained in the way of his business. (at 771)

In an early Canadian case, **Rice v. Sockett**³⁷⁷, Falconbridge, C.J.K.B. laid down the principle that there is no one single formula for ascertaining whether a witness is an expert in a particular field, rather, quoting from **State v. Davis**³⁷⁸:

375 For another noteworthy case, see **Beckwith et al v. Sydebotham** (1807), 1 Camp. 116, 170 E.R. 897.

376 [1894] 2 Q.B. 766.

377 (1912), 8 D.L.R. 84 (Ont.Div.C.) at 85.

378 (1899), 33 S.E. 449.

...[T]he derivation of the term "expert" implies that he is one who by experience has acquired special or peculiar knowledge of the subject of which he undertakes to testify, and it does not matter whether such knowledge has been acquired by study of scientific works or by practical observation. Hence, one who is an old hunter, and has thus had much experience in the use of firearms, may be as well qualified to testify as to the appearance which a gun recently fired would present as a highly-educated and skilled gunsmith. (at **Rice v. Sockett**, 85)

The classic American case on the admissibility of scientific evidence is **Frye v.**

U.S.³⁷⁹. The general test has been enunciated as follows:

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs. (at 1014).

Rule 702 of the **Federal Rules of Evidence**³⁸⁰, first in force in 1926, encapsulated the essential definition of who are expert witnesses; under what circumstances they may testify; and how:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Wigmore (1920) provides this succinct summary of the history:

379 293 F. 1013 (D.C.Cir. 1923). See the article by Saks and Wissler (1984) where they review the basic rules of evidence and procedure for expert witnesses in the United States..

380 (1975) Public Law 93-595; 88 Stat. (S702, 1990). Half the states have their own explicit rules, and virtually all of them closely match the Federal Rule (Saks & Van Duizend, 1983).

The sum of the history is, then, that the original and orthodox objection to "mere opinion" was that it was the guess of a person who had no personal knowledge, and the "mere opinion" of an expert was admitted as a necessary exception; that the later and changed theory is that wherever inferences and conclusions can be drawn by the jury as well as by the witness, the witness is superfluous; and that thus an expert's opinion is received because and whenever his skill is greater than the jury's... (Chadbourne rev. 1978 at 641)

A. QUALIFICATION OF AN EXPERT WITNESS AND OPINION EVIDENCE

While s. 7 of the Canada Evidence Act³⁸¹ provides the mechanism for parties, in criminal and civil proceedings, to call professional or other experts for the purpose of giving opinion evidence, the Act, however, gives no definition of such persons. Rather, conventional rules of evidence have evolved from the common law to govern the special status of the expert witness in the judicial process.

Prior to allowing a witness to testify in the capacity of an expert, the court must first rule that the witness qualifies as an "expert"³⁸². The question of whether a witness' testimony is to be received as expert evidence is a question of law to be determined by the judge in a *voir dire*.³⁸³ The expert's qualifications are put into question, upon which there may be cross-examination by a party seeking to impeach the credentials of the

381 R.S.C. 1970, C.E.-10.

382 See Cohen (1978) and Maloney and Tomlinson (1972) where they outline the criteria for expert qualification.

383 Preeper and Doyle v. The Queen (1888), 15 S.C.R. 401; Smith v. Mason (1901), 1 O.L.R. 594; Kelliher v. Smith, [1931] 4 D.L.R. 102; [1937] S.C.R. 672 (S.C.C.); Taylor v. Gray, [1937] 4 D.L.R. 123 (N.B.C.A.); R. v. German, [1947] O.R. 395; R. v. Marks (1952), 103 C.C.C. 368 (Ont.C.C.); R. v. Kuzmack (1954), 110 C.C.C. 338 (Alta.C.A.); R. v. Hutchinson (1976), 13 O.R. (2d) 591 (Ont.C.A.).

witness. After hearing evidence for and against, and allowing cross-examination, the court will then rule whether the expert can testify as an expert witness.

It is not enough that the expert witness may possess specialized knowledge or qualifications, however; his or her evidence must be in the nature of "**opinion evidence**". It is the function of the court to decide whether the testimony given is, in fact, in the category of "opinion evidence" - *viz.*, an opinion on facts already proved involving scientific or technical knowledge (Cross, 1985; Delisle, 1989; McWilliams, 1974; 1984):

The court must look not only to the witness himself, to consider whether he is a professional or other expert, but even more to the character of his evidence, to decide whether it is in the category of opinion evidence. The fact that a witness may possess specialized knowledge or qualifications not possessed by the ordinary witness is not decisive of the matter. Unless his testimony was also in the nature of opinion evidence, that is an opinion on facts already proved scientific or technical knowledge, it is not expert evidence within the limitations of s. 7 testimony. Even of a person possessing special skills, it is not expert testimony if it merely establishes the proof of facts through the employment of such special skills. (McWilliams, 1974:165)

The rationale for requiring the expert to provide the trier-of-fact with the basis of his or her opinion "is not a deduction from the opinion rule, but rests on the principle of testimonial qualifications that a witness's grounds of knowledge must be made to appear" (Wigmore, 1940b:119). Such an approach is well-embedded in Canadian case law.³⁸⁴

Two standard approaches for the admissibility of expert opinion evidence have been promulgated in Canadian case law. The Supreme Court of Canada, in **Kelliher v.**

384 **R. v. Neil** (1957), 119 C.C.C. 1 (S.C.C.); **R. v. Times Square Cinema Ltd.** (1971), 4 C.C.C. (2d) 229 (Ont.C.A.); **R. v. Dietrich** (1970), 1 C.C.C. (2d) 49 (Ont.C.A.); **R. v. Rosik** (1970), 2 C.C.C. (2d) 351 (Ont.C.A.); **R. v. Phillion** (1975), 5 O.R. (2d) 656, 20 C.C.C. (2d) 191 (Ont.C.A.), (1977), 33 C.C.C. (2d) 535 (S.C.C.). See Silverman (1972).

Smith, *supra*, articulated a "necessity" or "narrow" test, wherein an expert may be called only if the subject under inquiry is too complex and incoherent for a jury to draw rational inferences from the facts.³⁸⁵ Lamont, J., declared:

The object of expert evidence is to explain the effect of facts of which otherwise no coherent rendering can be given. (at D.L.R. 116)

Mr. Justice Lamont, speaking for the majority, quoted Beven on Negligence, 4th ed., at page 141 as follows:

To justify the admission of expert testimony two elements must co-exist:

(1) The subject-matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge.

(2) The witness offering expert evidence must have gained his special knowledge by a course of study or previous habit which secures his habitual familiarity with the matter in hand.

This attitude is also reflected in R. v. McMillan³⁸⁶, where Martin, J.A. noted:

385 There is a line of contemporary cases which reflect the "necessity" or "narrow" approach established in Kelliher v. Smith, *supra*. Adopting a conservative stance, the Ontario Court of Appeal excluded opinion evidence in R. v. Robertson (1975), 21 C.C.C. (2d) 305 (Ont.C.A.), as to whether an accused simply had a disposition for violence of a not uncommon degree. In D.P.P. v. Jordan, [1976] 3 All E.R. 775 (H.L.), at 788, the House of Lords rejected the evidence of a psychologist as to the effect of an obscene publication on a normal mind. In R. v. Faid (1981), 61 C.C.C. (2d) 28 (Alta.C.A.), on a self-defence to a charge of murder, the Alberta Court of Appeal rejected psychiatric opinion evidence called by the defence as to the accused's disinclination to commit a "violent" crime. In R. v. Valley (1986), 26 C.C.C. (3d) 207 (Ont.C.A.), the Ontario Court of Appeal, concurring with the trial judge, disallowed psychiatric evidence sought by the defence to show that the victim, who provoked the incident by sexually attacking the accused, possessed sado-masochistic tendencies. The court held that the psychiatrist's opinion was of a "conjectural" nature and that the jury would not be appreciably assisted by such evidence. In R. v. Oakley (1986), 24 C.C.C. (3d) 351 (Ont.C.A.), psychiatric evidence as to what constitutes non-insane automatism, which the trial judge relied on, was held to be irrelevant and inadmissible by the Ontario Court of Appeal.

386 (1975), 23 C.C.C. (2d) 160 (Ont.C.A.).

An expert witness is entitled to give opinion evidence in relation to matters upon which ordinary persons without special knowledge of the subject would be unlikely to form a correct judgment. (at 175)

In 1961, a less stringent requirement was subsequently enunciated in R. v. Fisher³⁸⁷. The Supreme Court of Canada adopted a "helpfulness" or "broader" approach, wherein an expert may be called upon to assist the jury even though the jury is deemed to be capable of drawing its own rational inferences from the factual evidence. The lower court, the Ontario Court of Appeal, appeared to have used the less demanding "helpfulness" criterion to admit psychiatric opinion evidence as to the accused's mental capacity to form the requisite intent for murder. The fact that the psychiatrist had not examined the accused and had based his opinion solely on the strength of having read the accused's statement affected the weight the jury would place on the evidence and not its admissibility. In the majority judgment, Aylesworth, J.A. said, *inter alia*, that in "many instances opinion evidence is received upon the very issue the court has to decide" (at 19), and being a specialist in psychiatry the witness was "qualified to express an opinion upon the mental capacity of an individual such as the appellant to form a certain intent" (at 21). The Supreme Court of Canada affirmed the grounds for admission of psychiatric opinion evidence broadly stated by Aylesworth, J.A.:

It is trite to say that a witness may not give his opinion upon matters calling for special skill or knowledge unless he is an expert in such matters nor will an expert witness be allowed to give his opinion upon matters not within his particular field. Finally, **opinion evidence may not be given upon a subject-matter within what may be described as the**

387 (1961), 130 C.C.C. 1 (S.C.C.), 34 C.R. 320, aff'd 1961 S.C.R. 535 (S.C.C.).

common stock of knowledge. Subject to these rules, the basic reasoning which runs through the authorities here and in England, seems to be that **expert opinion evidence will be admitted where it will be helpful to the jury in their deliberations and it will be excluded only where the jury can as easily draw the necessary inferences without it.** When the latter is the situation, the intended opinion evidence is superfluous and its admission would only involve an unnecessary addition to the testimony placed before the jury. Over 60 years ago Thayer, in his Preliminary Treatise on Evidence at Common Law wrote (p. 525):

There is ground for saying that, in the main, any rule excluding opinion evidence is limited to cases where in the judgment of the Court, it will not be helpful to the jury. Whether accepted in terms or not, this view largely governs the administration of the rule. (at 24)³⁸⁸ [emphasis added]

The Law Reform Commission of Canada, in their **Report on Evidence** (1977), recommended that experts be allowed to testify not only "on matters which are beyond the understanding of the jury but as well as to matters of which they have knowledge whenever such evidence would be of assistance to the jury" (s. 3).

388 The broader approach taken in **Fisher** has been followed by the Supreme Court of Canada, in **Bleta v. The Queen**, [1965] 1 C.C.C. 1; 48 D.L.R. (2d) 139; [1965] S.C.R. 561. The Ontario Court of Appeal, in **R. v. St. Pierre**, [1973] 1 O.R. 718 (Ont.C.A.), (1974) 3 O.R. (2d) 642, 17 C.C.C. (2d) 489 (Ont.C.A.), reversed the lower court ruling and held that the issue to be decided (whether certain sexual behaviour constituted normal sexual conduct) was beyond the competence of an unassisted jury. In reaching its decision, the appeal court clearly adopted the standard of "**helpfulness**" by relying heavily on the witness's qualifications as that of a "psychiatrist who has made a study of sexual behaviour" (at 728). In **R. v. Scopelliti** (1981), 63 C.C.C. (2d) 481, on the accused's charge of murder, the trial judge allowed the defence to call a psychiatrist to testify as to the relationship between moderate levels of alcohol and aggression. The Ontario Court of Appeal held that such evidence was beyond the "**common stock of knowledge**", and properly the subject of expert opinion evidence.

B. ULTIMATE ISSUE

There exists a long-standing common law rule that a witness cannot express an opinion upon any of the issues, whether of law or fact, which the jury have to determine.³⁸⁹ This rule, which evolved principally from civil cases, prohibits a lay or expert witness from giving an opinion upon which an "ultimate fact" or "ultimate issue" turns in a case (*viz.*, the issue upon which the determination of guilt or innocence will hinge).³⁹⁰ The status of the ultimate issue doctrine in Canadian law of evidence has been somewhat amorphous and uncertain. In recent decades, through common law, the rule has undergone judicial reformation and repudiation.³⁹¹ In this section, cases from upper levels of the judicial hierarchy are contrasted with the decisions at trial to show how the law determined at the appellate level is applied by trial judges.

R. v. Fisher, *supra*, a decision of the Supreme Court of Canada, was a modern judicial attempt to ameliorate the stringent formulation that opinion evidence may not be received on the "very question".³⁹² The Supreme Court of Canada was in substantial

389 Joseph Crosfield & Sons Ltd. v. Techno-Chemical Laboratories Ltd. (1913) 29 T.L.R. 378 at 379; R. v. Wright (1821) Russ & Roy 456 at 458.

390 Halsburys' Laws of England; Cross, 1985. The strictness of the rule has been attacked by various legal scholars (Wigmore, 1920-1 Chadbourn Rev. 1978; Cross, 1985; McWilliams, 1984; Delisle, 1989; Schiffer, 1978).

391 A well-established principle of evidence in Canadian jurisprudence was the rule against oath-helping — namely, that a party may not call a witness to testify that another witness is being truthful. This principle was affirmed by the Supreme Court of Canada in R. v. Beland and Phillips (1987), 60 C.R. (3d) 1 (S.C.C.); R. v. Kyselka [1962] O.W.N. 160, 37 C.R. 391, 133 C.C.C. 103 (Ont.C.A.); R. v. Burkart and Sawatsky, 45 C.R. 383, 50 W.W.R. 515, [1965] 3 C.C.C. 210 (Sask.C.A.); R. v. Helpard (1979), 49 C.C.C. (2d) 35 (N.S.S.C.App.Div.).

392 See R. v. Neil, *supra*, at 688-89.

agreement with the judgment of the Ontario Court of Appeal, wherein, Aylesworth, J.A. stated, *inter alia*, that:

In many instances opinion evidence is received upon the very issue the Court has to decide... (at C.R. p.341)³⁹³

The court then went on to cite numerous authorities to buttress this proposition (at 341 C.R.).

In **R. v. McDonald**³⁹⁴, O'Hearn, Co. Ct., J., a trial judge, upon making reference to "the now obsolete notion that a witness may not be asked to determine the issue of a case", commented:

This, of course, is sound where the answer involves a conclusion of law, but the now accepted view of the authorities on evidence is that the witness may be asked any fact that is relevant unless it is excluded by some exceptional rule. (at 241)

The English case, **D.P.P. v. A B and C Chewing Gum Ltd.**³⁹⁵ recognized the weakness of the ultimate issue rule. Upon a retrial, on an indictment of selling obscene cards to children, a child psychiatrist's opinion evidence about the effect which "battle cards" contained in packages of chewing gum would have on young children, was held

393 See Kenny (1983) for the policy basis for such an argument. He summarizes three ways in which experts may usurp the role of the trier of fact as follows: "by testifying to the naked conclusion," instead of providing information about the accused to assist the jury in making the ultimate judgment about guilt or innocence. In another way the juridical process is distorted if experts act like judges, tacitly imposing on the jury a meaning of their own for statutory terms such as "responsibility". Finally, experts can usurp the functions of the legislature, by testifying on the basis of convictions of general policy, e.g. that people who are sick in a certain way should not be sent to prison" (at 208).

394 (1966), 9 C.L.Q. 239 (N.S.Co.Ct.).

395 [1968] 1 Q.B. 159; [1967] 2 All E.R. 504. See also **R. v. Palmer**, [1981] 1 N.S.W.L.R. 209 (N.S.S.C.), at 214.

to be admissible. Lord Parker, C.J., in ruling that the expert was not, in a strict sense, being asked the very question which the court had to decide, made these astute comments concerning the common law prohibition on questions on the ultimate issue:

I cannot help feeling that with the advance of science more and more inroads have been made into the old common law principles. Those who practise in the criminal courts see every day cases of experts being called on the question of diminished responsibility, although technically the final question "Do you think he was suffering from diminished responsibility?" is strictly inadmissible, it is allowed time and time again without any objection. (at 164 Q.B.; 506 All E.R.)

A leading Canadian case which dealt with the subject was **R. v. Lupien**³⁹⁶. The accused was charged with attempted gross indecency with another male who, in fact, was a female impersonator. The primary issue before the Supreme Court of Canada was the admissibility of psychiatric opinion tendered to show that the accused's normal personality and his defence mechanism would cause him to reject homosexual advances and that he would not knowingly have engaged in homosexual practices. The trial court had rejected the testimony on the ground that the opinion that the expert was expected to give "comes too close to the very thing the jury had to find on the whole evidence" (at 279). Although the Supreme Court of Canada upheld the conviction, the majority of the court did hold that the lower court erred in excluding the psychiatric opinion. In a lucid judgment, Hall J. declared:

It is true, as Davey, C.J.B.C. points out in his dissent, that the answer which the psychiatrist was expected to give "comes too close to the very

396 [1970] 2 C.C.C. 193, 71 W.W.R. 110 (S.C.C.).

thing the jury had to find on the whole of the evidence." I do not think that this is a valid reason for rejecting the evidence...That type of evidence is very close, if not identical, to the conclusion the jury must come to in such a case if it is to find that the accused was not guilty because he did not have the intent necessary to support conviction. The weight to be given the opinion of the expert is entirely for the jury, and it is the function of the trial judge to instruct the jury that the responsibility for weighing the evidence is theirs and theirs alone. (at 279)

Notwithstanding the trial judge's erroneous ruling, the Supreme Court of Canada concluded that the evidence of the accused's guilt was so great that the Court of Appeal should have dismissed the appeal on the ground that the omission had created no substantial miscarriage of justice.

Another formulation of the "ultimate issue" doctrine is that an opinion is inadmissible if it "usurps the function of the jury". In the Ontario Court of Appeal decision **R. v. St. Pierre**, *supra*, Dubin, J.A. upon consideration of this particular variation of the rule, held that "such objection is not by itself a reason for excluding opinion evidence" (at 650 O.R.). Yet, in **R. v. French**³⁹⁷, a different bench of the same court reinstated the very formulation of the rule previously abandoned by their brethren in **St. Pierre**. In a display of judicial conservatism, Mr. Justice MacKinnon held:

To receive such evidence might, indeed, open a Pandora's box, from which there could be no resiling, of confusion and usurpation of function...The Courts must be chary of limiting or usurping the jury's duty and function in this area [of psychiatric evidence concerning a witness's credibility]. It is not "empty rhetoric" to speak of the "usurpation" of the function of the jury in these circumstances. (at 211)

397 (1977), 37 C.C.C. (2d) 201 (Ont.C.A.).

This ruling, in effect, renders the expert opinion inadmissible on the basis that it "invades the province of a jury" (at 211).³⁹⁸

In another case before the Ontario Court of Appeal, **R. v. Phillion**, *supra*, Jessup, J.A., speaking for the majority, remarked without equivocation:

...[T]he witness was being asked to express his opinion directly that the accused had not committed the act constituting the offence charged. We are all of the opinion that such evidence was properly rejected by the learned trial Judge as being inadmissible. (at 362)

In **R. v. Swietlinski**³⁹⁹, a clarification was made by the court when it held that where it is clear that facts are in dispute, expert opinion may not be received on the ultimate issue. For example, a psychiatric witness cannot give an opinion on the state of mind of an accused, based on the evidence that he heard in court, because such an opinion would depend on the expert's own assessment of the evidence. Conversely, if the facts are admitted or are not in dispute, in the exercise of his or her discretion, a trial judge may allow the ultimate question to be framed.

Several judicial pronouncements have indicated that a qualified expert may express an opinion on an ultimate issue if it is helpful to the triers of fact.⁴⁰⁰ According to this line of cases, the established criterion of admissibility of such opinion is the concept of "**helpfulness**". The case law seems to be suggesting that expert opinion

398 In the English decision, **R. v. Turner**, *supra*, the court also rejected opinion evidence on this very ground.

399 (1978), 44 C.C.C. (2d) 267 (Ont.C.A.), at 301; *aff'd* 55 C.C.C. (2d) 481 (S.C.C.).

400 **R. v. Clark** (1974), 22 C.C.C. (2d) 1 (Alta.C.A.), at 17; **R. v. Fisher**, *supra*; **R. v. Dubois** (1976), 30 C.C.C. (2d) 412 (Ont.C.A.); **R. v. Audy** (1977), 34 C.C.C. (2d) 231 (Ont.C.A.). This general proposition, however, does not apply to a lay person. Even if a lay person is able to make an intelligent judgment on an ultimate issue without the benefit of expert evidence, it is deemed inadmissible (**R. v. Clark**).

evidence, if it is admissible at all, will always be admissible on an ultimate issue (McWilliams, 1988).

A judicial statement on the status of the law can be found in R. v. Graat⁴⁰¹.

Howland, C.J.O., on behalf of the Ontario Court of Appeal, concluded:

In Canada the ultimate issue doctrine may now be regarded as having been virtually abandoned or rejected. Where evidence has been rejected on the basis of the doctrine, such rejection can be explained on other grounds. In some instances the opinion evidence should be rejected because the trier of fact, whether Judge or jury, is just as well qualified as the witness to draw the necessary inference. Accordingly, the non-expert testimony is superfluous, as it is of no appreciable assistance to the Judge or jury...In the final analysis, even with the benefit of the expert's evidence the jury still has to make the final determination of the issue, so that the expert is not really usurping the jury's function. (at 443)

It would be logical to conclude, on the basis of evolving case law, that the "ultimate issue rule is an artificial and functionless rule of semantics" (Schiffer, 1978:210).

While the historically grounded rationale for the rule is premised on the prevention of the infringement on the role of the jury, Wigmore has described it as "one of those impracticable and misconceived utterances which lack any justification in principle" (1920-1:19). There is now general consensus in Canada that the status of the ultimate issue rule should be cleared up by legislation. The Federal/Provincial Task Force (1982) has recommended in their report the adoption of the following provision:

Section 40:

401 (1980), 55 C.C.C. (2d) 429 (Ont.C.A.); appeal dismissed (1982), 2 C.C.C. (3d) 365 (S.C.C.).

40. A witness may give opinion evidence that embraces an ultimate issue to be decided by the trier of fact where:

- a) the factual basis for the evidence has been established;
- b) more detailed evidence cannot be given by the witness; and
- c) the evidence would be helpful to the trier of fact.

In **R. v. Abbey**⁴⁰², Mr. Justice Dickson, speaking for the court, said:

With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. "An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary": (R. v. Turner (1974), 60 Cr. App. R. 80 at p. 83, per Lawton L.J.). (at 40)

Expert testimony on the ultimate issue in the context of child sexual abuse and in the reception of children's evidence is important. Testimony on the ultimate issue by experts can provide corroboration of a child's evidence. Expert testimony, more generally, in the context of children's evidence, may be necessary in order to assist the court in interpreting the evidence of children.

402 (1982), 29 C.R. (3d) 163, 68 C.C.C. (2d) 394, [1982] 2 S.C.R. 24 (S.C.C.).

C. HEARSAY AND SECONDARY SOURCES OF INFORMATION

There is a time-honoured common law rule underpinning the law of evidence that opinion testimony must comply with the hearsay rule.⁴⁰³ The primary concern of the rule against admission of hearsay evidence is the "veracity" of the statements made in court by witnesses.⁴⁰⁴ Traditionally,

the principal justification for the exclusion of hearsay evidence is the abhorrence to the common law of proof which is unsworn and has not been subjected to the trial by fire of cross-examination. (R. v. Abbey (1982), 29 C.R. (3d) 163 at 193.)

In Canada, a general rule governing the admissibility of hearsay evidence by an expert witness was articulated in R. v. Arbuckle⁴⁰⁵. Reflecting a rather orthodox expectation that an expert base his or her opinion only upon first-hand observation⁴⁰⁶, the British Columbia Supreme Court, in relation to the admissibility of the hearsay testimony of a probation officer, commented:

Certainly he may be allowed to state the facts upon which he bases his opinion, because an opinion has little weight unless the facts upon which it is based are known. But if the facts are known to the witness on hearsay only, the witness' statement of the facts is not probative of the truth of the facts on which the opinion is based...the opinion of...any...witness allowed to give opinion evidence is of value only to the

403 Wright v. Tatham (1838), 5 Cl. & Fin. 670, 112 E.R. 488 (H.L.).

404 R. v. O'Brien (1977), 35 C.C.C. (2d) 209 (S.C.C.).

405 [1967] 2 C.C.C. (2d) 32 (B.C.S.C.).

406 See Pattenden (1982) and Ho (1980) for a cogent discussion of hearsay opinion evidence in general. For a critique of the doctrine from a psychiatric perspective, see Diamond & Louisell (1965) and Ennis & Litwack (1977).

extent that it is based on facts which are known to be true...the facts of which the witness has no personal knowledge must be proved in the ordinary way. (at 41)

A line of contemporary cases has examined, *inter alia*, the issue of whether a psychiatrist can relate to the court information derived at "second-hand", which underpins his or her opinion. The Supreme Court of Canada, in Wilband v. The Queen⁴⁰⁷, established an exception to the hearsay rule which recognizes statements made by an accused to a psychiatrist. Adopting a more relaxed attitude towards the strict hearsay rule, the court ruled that the psychiatrist's opinion, though based partly on hearsay, was nevertheless admissible. Mr. Justice Fauteux, for the majority, reasoned that the hearsay base is only to be considered in determining the weight to be attached to the resulting opinion and not to its admissibility:

The evidence, in this case, indicates that to form an opinion according to recognized psychiatric procedures, the psychiatrist must consider all possible sources of information, including second-hand source information, the reliability, accuracy and significance of which are within the recognized scope of his professional activities, skill and training to evaluate. Hence, while ultimately his conclusion may rest, in part, on second-hand source material, it is nonetheless an opinion formed according to recognized psychiatric procedures...The value of a psychiatrist's opinion may be affected to the extent to which it may rest on second-hand source material; but that goes to the weight and not to the receivability in evidence of the opinion... (at 11)

In R. v. Lupien, *supra*, the majority of the Supreme Court of Canada applied Wilband in allowing psychiatric opinion evidence which was based, in part, upon

407 [1967] 2 C.C.C. 6 (S.C.C.). See also R. v. Fisher (1973), 12 C.C.C. (2d) 513 (Alta. C.A.).

hearsay evidence from the accused himself. Ritchie, J., with whom Spence, J. concurred on the evidentiary issue, was of the view that, while the Wilband decision was concerned with "status" as opposed to "guilt or innocence of a particular crime", still, "what was said in that case in relation to the hearsay rule applies with equal force to the present circumstances" (at 117 W.W.R.).

In R. v. Rosik, *supra*, Gale, C.J.O., who felt that a judicial admonition should be given to a jury if an expert witness is relying on hearsay evidence, stated emphatically:

If an expert is allowed to give his opinion to a Court, he ought to be allowed to give the circumstances upon which that opinion is based. However, to the extent that those circumstances consist of hearsay evidence, the trial judge should always take great pains to warn the jury explicitly that such hearsay evidence cannot in any sense be regarded by them as evidence of the truth of what was alleged to have been said, but may only be considered for the purpose of appraising the value of resulting opinion. That is particularly so where the accused has not testified. (at 357)

As Woods, J.A. remarked in R. v. Perras⁴⁰⁸:

The evidence of a physician stating what a patient told him about his symptoms is not evidence as to the existence of the symptoms. To accept it as such would be to infringe the rule against hearsay. (at 213)

408 (1972), 8 C.C.C. (2d) 209; *aff'd* (1974) S.C.R. 659.

Retreating somewhat from the liberal approach of Wilband the Supreme Court of Canada made an authoritative statement with respect to "second-hand" expert psychiatric opinion in R. v. Abbey, *supra*⁴⁰⁹. In delivering the unanimous decision of the court, Dickson, J., firstly, recognized that the Wilband decision:

...does stand for the proposition that the second-hand nature of the basis of the opinion does not "contaminate" the opinion. This is consistent with the acceptance of expert evidence based, as it often is, upon hypothetical questions. For the judge or jury the expert's opinion is a question of fact which may be accepted or rejected as seen fit. The opinion, even if uncontradicted, is not determinative of an issue. (at 410)

The court's judgment went on to rely on Mr. Justice Ritchie's statement in R. v. Phillion, *supra*:

Statements made to psychiatrists and psychologists are sometimes admitted in criminal cases and when this is so it is because they have qualified as experts in diagnosing the behavioral symptoms of individuals and have formed an opinion which the trial Judge deems to be relevant to the case, but the statements on which such opinions are based are not admissible in proof of their truth but rather as indicating the basis upon which the medical opinion was formed in accordance with recognized professional procedures. (at 539)

Next, Mr. Justice Dickson underscored the care with which this kind of hearsay opinion evidence had to be treated:

The danger, of course, in admitting such testimony is the ever-present possibility, here exemplified, that the judge or jury, without more, will accept the evidence as going to the truth of the facts stated in it. The danger is real, and lies at the heart of this case. Once such testimony is

409 Prior to Abbey, the practice in Canada was that secondary sources of information relied upon by expert witnesses were related in evidence with little if any questions raised as to such a procedure.

admitted, a careful charge to the jury or direction to himself by the judge is essential. The problem, however, as pointed out by Fauteux, J. in Wilband, supra, resides not in the admissibility of the testimony but rather in the weight to be accorded to the opinion. Although admissible in the context of his opinion, to the extent that it is second-hand his testimony is not proof of the facts stated. Lawton L.J. in Turner, supra, spoke of this "elementary principle" which is "frequently overlooked" (p. 82):

Thereupon the judge commented that the report contained "hearsay character evidence" which was inadmissible. He could have said that all the facts upon which the psychiatrist based his opinion were hearsay save for those which he observed for himself during his examination of the appellant such as his appearance of depression and his becoming emotional when discussing the deceased girl and his own family. It is not for this court to instruct psychiatrists to draft their reports, but those who call psychiatrists as witnesses should remember that the facts upon which they base their opinions must be proved by admissible evidence. This elementary principle is frequently overlooked. (emphasis by Dickson, J. at 213 C.R.)

Mr. Justice Dickson concluded, with reference to the particular facts of the case:

In the present case Abbey did not testify...There was no admissible evidence properly before the Court with respect to: the delusions experienced by the accused; the accused having described the symptoms of his disease to his mother some six months prior to the commission of the offence; the accused having seen a psychiatrist before leaving for Peru; the accused's unstable conduct at the airport some days prior to leaving for Peru; or his bizarre behaviour in Peru. (at 213 C.R.)

Thus, the Supreme Court of Canada held that the trial judge erred in law by accepting as factual the hearsay evidence which formed the basis of the psychiatrist's opinion. Dickson, J., in conclusion, stated definitively:

It was appropriate for the doctors to state the basis for their opinions and, in the course of doing so, to refer to what they were told not only by Abbey but by others, but it was error for the judge to accept as having been proved the facts upon which the doctors had relied in forming their opinions. While it is not questioned that medical experts are entitled to take into consideration all possible information in forming their opinions, this in no way removes from the properly admissible evidence, the factual basis on which such opinions are based. **Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist.** Thus the trial judge erred in two respects. There was no admissible evidence of important facts regarding Abbey's conduct upon which the medical opinions were based. (at C.R. p.214) [emphasis added]

Since the Supreme Court of Canada decision in R. v. Khan (which will be discussed later), an expert's opinion may probably be admitted without laying a factual foundation for that opinion, if the expert's opinion is reliable and necessary. The expert's opinion should guarantee a degree of reliability in child sexual assault cases, which often are fraught with very difficult problems of proof of the facts. Expert opinion based on hearsay may be necessary and admissible.

IV. ANALYSIS OF CASES

Since 1986, there has been an emerging pattern of the use of expert witnesses in child sexual abuse prosecutions. Canadian courts have struggled to define parameters within the common law for the admissibility of expert testimony in child sexual abuse cases. The dissertation research reveals that a clear consensus has emerged among the

Canadian judiciary that expert witnesses may be called to testify concerning the dynamics of (all of these constructs being of American origin and conceptualization):

- a. children's reactions to victimization⁴¹⁰;
- b. child sexual abuse syndrome⁴¹¹; and
- c. child sexual abuse accommodation syndrome⁴¹².

410 From their comprehensive review of the literature, Lusk and Waterman (1986) found these seven "clusters" of effects of victimization on children:

1. *Affective problems*: guilt, shame, anxiety, fear, depression, anger.
2. *Physical effects*: genital injuries, pregnancy, sexually-transmitted diseases, somatic complaints (e.g. headaches, stomachaches, bedwetting, hypochondria), changes in appetite or sleep patterns.
3. *Cognitive effects*: concentration problems, short attention span.
4. *Behavioral symptoms*: "acting out" (hostile-aggressive behaviors, antisocial behaviors, delinquency, stealing, tantrums, substance abuse), withdrawal, repetition of the abusive relationship.
5. *Self-destructive behaviors*: self-mutilation, suicidal thoughts and attempts.
6. *Psychopathology*: neurosis, character disorders, multiple personalities, psychotic features.
7. *Sexualized behaviors*: excessive masturbation, repetition of sexual acts with others, atypical sexual knowledge. (quoted in Whitecomb, 1992:18-19)

411 Conte *et al* (1989) conducted a national survey of professionals with experience in evaluating children suspected of being sexually abused and found a high degree of consensus around these factors:

- age-inappropriate sexual knowledge
- sexualized play
- precocious behavior
- excessive masturbation
- preoccupation with genitals
- indications of pressure or coercion exerted on the child
- the child's story remains consistent over time
- the child's report indicates an escalating progression of sexual abuse over time
- the child describes idiosyncratic details of the abuse
- physical evidence of abuse (quoted in Whitcomb, 1992:20)

412 This construct was developed by an American psychiatrist as an aid to understanding children's reactions to sexual abuse by a family member or an adult with whom the child has a trusting relationship (Summit, 1983). The various dimensions of the syndrome are:

1. *Secrecy*. With few exceptions, child sexual abuse occurs when the child is alone with the perpetrator. Even when other children are present, the need for secrecy is made quite clear...The average child never asks and never tells.
2. *Helplessness*. ...Men who seek children as sexual partners discover quickly something that remains incredible to less impulsive adults: dependent children are helpless to resist or to complain.
3. *Entrapment and accommodation*. For many child victims, the secrecy and helplessness of the abusive situation leaves them, literally, no way out. The healthy response, then, is to find some means of accommodating continuing abuse. Some of the more extreme

From this body of literature, there is the tacit acknowledgement that sexual abuse victims experience adverse psychological consequences from their abuse. Sexual assaults of children are very difficult offences to prove since rarely is there any direct evidence, either eyewitness or physical, to corroborate a child's allegations. The frequent paucity of corroborative evidence in child sexual abuse cases has resulted in judicial reliance on psychological evidence as a substitute for direct evidence. From a prosecution perspective, the justification for the admission of such evidence is based on an analogy with more traditional medical evidence. If a medical doctor can testify about observed physical injuries as confirming evidence in an alleged physical assault, then it can be argued that an expert in child sexual abuse can testify about psychological injuries or behavioural symptoms as constituting corroborative evidence of a child's complaint of sexual abuse (McCormack, 1987). In some cases, psychological injuries are considered as real, and even more significant than physical injuries.⁴¹³

accommodation techniques include multiple personalities, prostitution, juvenile sex offenses, and substance abuse. These behaviors may be viewed as pathological among the children or adults who exhibit them, but they are actually skills that abused children use to survive.

4. *Delayed, conflicted, and unconvincing disclosure.* Disclosure often occurs after the abuse has been ongoing for some time, and children frequently "test the waters" by disclosing only "chapters" before they reveal the whole story. If the immediate reaction to the initial disclosure is disbelief, the rest of the story may never be divulged. Children who display any of the accommodation behaviors described above are even less likely to be believed.
5. *Retraction.* It has become a maxim among professionals in this field that, "Whatever a child says about sexual abuse, she is likely to reverse it...In the chaotic aftermath of disclosure, the child discovers that the bedrock fears and threats underlying the secrecy are true. Her father abandons her and calls her a liar. Her mother does not believe her or decompensates into hysteria and rage. The family is fragmented and all the children are placed in custody. The father is threatened with disgrace and imprisonment. The girl is blamed for causing the whole mess, and everyone seems to treat her like a freak. Given this scenario, there is little wonder that clinicians report retraction to be such a common phenomenon, particularly among incest victims. (quoted in Whitcomb, 1992:22-23)

413 **R. v. Pelletier** (28 September 1987), (Alta.Q.B.) [unreported].

There are two general purposes for the use of expert "syndrome" testimony by prosecutors, the first, and most common, being that the expert testimony is adduced for the purpose of directly advancing the Crown's case. It is led in chief in the Crown's case to help prove that a child was, in fact, sexually abused. In order to use syndrome evidence as circumstantial evidence of sexual abuse, a foundation must first be laid by having the complainant and/or witnesses describe the trauma, i.e. the sexual acts and the relationship between the complainant and the accused. Next, evidence is introduced which describes the behavioural changes (or common indicators) observed in the child complainant which are consistent with the syndrome. These can include a constellation of behavioural changes such as nightmares, atypical sexual behaviour, dissociative states, self-destructive behaviours, etc. At this stage, the prosecution would make an effort to eliminate other possible causes for the behaviours by calling evidence that there was no other trauma in the child's life, nor was the child exposed to sexually explicit materials or behaviours. The expert witness is then called to describe characteristics of the syndrome or a general profile of sexually abused children. The Crown can then elect to elicit the expert's diagnosis of the particular child as a victim of this syndrome or, alternatively, pose a hypothetical question to the expert witness summarizing the facts of the case and asking whether those facts are consistent with a child experiencing the syndrome.

The second manner in which syndrome testimony is commonly tendered by the prosecution is to rebut or neutralize defence attacks on a child complainant's credibility. The expert witness can rehabilitate a child witness who has been impeached on cross-

examination by explaining to the trier of fact such matters of the dynamics of delayed disclosure and false recantation. It has been argued that the exclusion of expert testimony on matters of delayed reporting and retraction has proved fatal to child sexual abuse cases because prosecutors have been unable to adequately explain to unassisted triers of fact that child victims may delay disclosures, recant, and yet be truthful in their allegations of sexual abuse (McCord, 1986).

The dissertation research included an examination of **113** *voir dire* applications on the admissibility of expert witnesses (see **Appendix U**). Crown experts were allowed to testify in **89** cases and not allowed to testify in **8** cases. Courts permitted the Crown to lead expert testimony in chief as corroboration of the complainants' evidence in **57** cases. In **13** instances, medical experts called on behalf of the Crown testified as to physical findings which would be consistent with sexual abuse. Crown psychologists, psychiatrists, social workers, counsellors and therapists were qualified to give opinion evidence on behavioural symptoms and dynamics of child sexual abuse in **55** cases. The admission of such evidence was denied in only **6** cases. Crown experts were also allowed to give psychological evidence in **6** cases to rebut defence impeachment of the child complainant. Behavioural psychological evidence was admitted in **15** cases in support of Crown applications for the use of the screen, closed-circuit television and videotaped evidence procedures. In addition, Crown experts testified on **3** occasions with respect to a child's ability to communicate evidence to assist a judge in making a determination under **s. 16** of the Canada Evidence Act.

The research also reveals a developing trend of defence experts being permitted by courts to give psychological and psychiatric opinion evidence. Courts admitted testimony in **12** cases and refused to accept it in **2** cases. Defence experts were allowed to testify for the following purposes:

- a. to rebut Crown expert evidence⁴¹⁴;
- b. to impeach the credibility of the child complainant⁴¹⁵; and
- c. to bolster the credibility of the accused by demonstrating that the accused did not fit the psychological profile of a paedophile or a sexual psychopath, and/or lacked the proclivity or propensity to commit the alleged acts⁴¹⁶.

Furthermore, a Crown expert may be called to testify to counter defence submissions that a child's behaviour was inconsistent with having been sexually abused. Without the assistance of expert evidence of that nature, adverse inferences may be drawn by the jury.

The most significant finding of the dissertation research is that the majority of Canadian appellate courts have shown great latitude in admitting expert evidence from pediatricians, psychologists, psychiatrists, and other mental health professionals on the dynamics of child victimization; child sexual abuse syndrome; and child sexual abuse

414 **R. v. C.(R.R.)** (5 July 1989), Vancouver CA009192 (B.C.C.A.) [unreported]; **R. v. H.(C.)**, *supra*; **R. v. B.(D.)** (June 1988), Vancouver (B.C.C.C.) [unreported].

415 **R. v. Boyd** (29 June 1988), Vancouver CC880704 (B.C.C.C.) [unreported]; **R. v. Duguay** (7 April 1988), Prince Rupert 9630 (B.C.C.C.) [unreported]; **R. v. A.(G.J.)** (1989), 70 C.R. (3d) 298 (B.C.C.C.); **R. v. Wald** (23 February 1989) 8703-0303-A2 (Alta.C.A.) [unreported]; **R. v. C.(A.)**, *supra*.

416 **R. v. H.(C.)**, *supra*; **R. v. Massaoutis**, *supra*; **R. v. Mohan** [1992] O.J. 743, 71 C.C.C. (3d) 321 (Ont.C.A.), leave to appeal to the Supreme Court of Canada. The Ontario Court of Appeal ruled in **Mohan** that the defence should have as much leeway as the Crown with respect to bolstering the credibility of the accused. The defence called expert testimony that the accused was not a sexual psychopath.

accommodation syndrome⁴¹⁷. Courts are now routinely allowing expert testimony on disclosure patterns⁴¹⁸; the false recantation syndrome⁴¹⁹; the syndrome of ambivalence towards an accused and continued association⁴²⁰; dissociative states⁴²¹; and memory problems of children who have been sexually abused⁴²².

In recent years, there is a discernible body of jurisprudence which has been developed to govern the use of such experts. **R. v. Beliveau**, *supra*, is one of the first appellate decisions in Canada bearing on the issue of the admissibility of expert evidence in a child sexual abuse case. The accused was convicted on a charge of gross indecency involving a 5-year-old girl. At trial, the Crown called a pediatrician to testify as an expert in the field of child sexual abuse. The doctor gave evidence that he had examined and interviewed the complainant and that, in his opinion, her behaviour and demeanour were "highly characteristic" of a child who has been sexually abused. In response to a

417 See **Appendices U and V**:

The Supreme Court of Canada affirmed the Saskatchewan Court of Appeal decision:

R. v. B.(G.), *supra*;

Alberta: **R. v. Manahan** (1990), 61 C.C.C. (3d) 139 (Alta.C.A.);

B.C.: **R. v. Beliveau** (1986), 30 C.C.C. (3d) 193 (B.C.C.A.); **R. v. C.(R.R.)**, *supra*; **R. v. C.(R.A.)** (1990), 57 C.C.C. (3d) 522 (B.C.C.A.); **R. v. S.(C.N.)** (14 September 1990), Vancouver CA009849 (B.C.C.A.) [unreported];

Manitoba: **R. v. Kostuck** (1986), 29 C.C.C. (3d) 190 (Man.C.A.), 43 Man. R. (2d) 84 (C.A.);

Nova Scotia: **R. v. R.(A.G.)** (13 April 1989), 02022 (N.S.C.A.) [unreported]; **R. v. H.(E.L.)**, *supra*;

Ontario: **R. v. Taylor**, *supra*; **R. v. F.(A.)** (11 October 1990) (Ont.C.A.) [unreported], (1990) 11 W.C.B. (2d) 214; **R. v. J.(F.E.)** (1990), 74 C.R. (3d) 269 (Ont.C.A.); **R. v. M.(D.E.)** (8 February 1990), 473 (Ont.C.A.) [unreported];

Quebec: **R. v. Roy** (1988), 62 C.R. (3d) 127 (Que.C.A.).

418 **R. v. C.(R.A.)**, *supra*; **R. v. M.(D.E.)**, *supra*; **R. v. Marchant** (15 September 1986), Vancouver (B.C.C.C.) [unreported]; **R. v. Mason**, *supra*.

419 **R. v. Poitras** (6 December 1990), Prince George 18954 (B.C.S.C.) [unreported]; **R. v. Taylor**, *supra*; **R. v. F.(A.)**, *supra*; **R. v. J.(F.E.)**, *supra*.

420 **R. v. Pelletier**, *supra*; **R. v. Levac** (17 September 1990), Nanaimo CR4155 (B.C.S.C.) [unreported]; **R. v. C.(R.A.)**, *supra*.

421 **R. v. Knapp** (16 January 1990) Drumheller (Alta.Q.B.) [unreported].

422 **R. v. H.(E.L.)**, *supra*; **R. v. C.(R.A.)** (1990), 57 C.C.C. (3d) 522 (B.C.C.A.); **R. v. Levac**, *supra*.

direct question by Crown counsel as to his opinion concerning the truthfulness of the complainant's evidence, he testified that, in his opinion, what she reported was accurate.

The accused raised a number of issues on appeal, none of which was directly related to the general question of whether the Crown should have been allowed to lead expert evidence of behavioral symptoms of child sexual abuse. Rather, the issue argued on appeal related to the introduction through the expert's testimony of previous consistent statements of the complainant and whether the complainant's credibility had improperly been bolstered by such evidence. Regarding the previous consistent statements, Mr. Justice Craig remarked:

The Crown did not lead the evidence of these statements to show consistency...Dr. Gossage would have to know the allegations and all of the circumstances in order to come to an opinion as to whether this child had been sexually abused. (at 202)

On the issue of whether the evidence of the expert constituted "oath-helping", the Justice stated:

The Crown called Dr. Gossage, primarily, to establish through his expert opinion that Kelly had been sexually abused. Although he conceded in cross-examination that a person in his position was always concerned about the veracity of a child's story, his conclusion was that Kelly had been sexually abused on more than one occasion by the same individual. Essentially, he came to that conclusion because of her behaviour and demeanour and because the story which she had told him was consistent with the story that she had told her mother, Crown counsel and the R.C.M.P. investigating officer. I think that he was entitled to rely on those circumstances in coming to his expert opinion. (at 204)

The Court of Appeal made the distinction between the admissibility of expert evidence for the purpose of determining whether the complainant was sexually abused as opposed to such evidence being adduced to indicate that the complainant was telling the truth. The appellate court ruled that an expert in child sexual abuse can testify about the basis of his opinion (namely, express an opinion that certain behaviour and demeanour were consistent with the child having been sexually abused). However, the court made it clear that opinion evidence cannot be given about the truthfulness of the witness (namely, to bolster the credibility of the complainant). In his concurring reasons for judgment, Mr. Justice Macfarlane ruled:

The evidence of Dr. Gossage, the specialist on child abuse, was led to show that this child had been sexually abused. He said, in effect, that a child of this age is unlikely to have a motive for lying about sexual abuse. He also compared what the child indicated to him with what the child had told her mother, the prosecution, and social workers, and found the stories to be consistent. He asked the child who had done this to her. All these questions were necessary, in his view, to confirm the opinion he had that she had been sexually abused. I am satisfied that his evidence was led, and would be treated by any judge, as necessary in assessing the validity of his opinion on an issue in the case, and not to establish that the child was a truthful witness. (at 204)

The court did not address the question of whether there was any empirical or scientific foundation for the expert's opinion. In the result, the court dismissed the accused's appeal and upheld his conviction.

In a Manitoba Court of Appeal case, **R. v. Kostuck**, *supra*⁴²³, held that questions put to an expert witness which go to deciding the ultimate issue, i.e. should the complainant be believed, are not admissible. The trial judge in this case had admitted a psychologist's opinion that "children very, very rarely lie about sexual abuse". In ordering a new trial, the high court ruled:

...that a witness, expert or otherwise, may not testify that an accused or any other witness, including a complainant, is likely telling the truth.
(at 196)

In an Ontario Court of Appeal case, **R. v. Taylor**, *supra*, the court ruled that the expert evidence called by the Crown to rebut the defence witnesses's attack on the complainants' credibility was admissible but could not be used to bolster the credibility of the complainants. In this case, the accused was convicted of the sexual assault of two emotionally disturbed young girls. During the trial, the defence called a number of witnesses who testified that they would not believe the complainants' testimony because of their propensity to fantasize about sexual assaults. The Crown, in reply, called two expert witnesses to testify that the complainants' behavioural symptoms and personality disorders were consistent with sexual abuse. In addition, the Crown experts testified as to the propensity of young victims of sexual assaults to fantasize in the manner of the complainants.

423 Similarly, other courts have ruled that expert evidence which is tendered to establish that a child complainant was telling the truth is inadmissible: **R. v. Beliveau**, *supra*; **R. v. Chin** (20 October 1987), Kamloops 139 (B.C.S.C.) [unreported]; **R. v. Taylor**, *supra*; **R. v. S.(C.N.)**, *supra*.

The primary ground of appeal was the issue of the trial judge's charge to the jury that the expert evidence could be considered as supporting the testimony of the complainants. The Ontario Court of Appeal held that expert evidence is admissible in rebuttal to reduce the impact of defence evidence as to the credibility of the complainants, particularly the expert evidence which tended to explain the accounts of earlier sexual abuse related by the complainants. However, the court ruled that the jury was not properly instructed on the use of the rebuttal evidence. Mr. Justice Cory stated:

What was essential in this case and what is missing from the charge is a clear direction as to the use that could be made of the expert evidence given in reply. The charge should have contained instructions to the effect that the defence had called many witnesses who stated they would not believe the testimony of the complainants because of their fantasizing with regard to other sexual assaults. The charge should have continued that the expert evidence called in reply indicated that such fantasies are in themselves characteristic of sexually abused children. The jury could then have been advised that the medical explanation of the fantastic stories might to some extent reduce the impact this fantasizing would have had on the credibility of the complainants if left unexplained. Further the jury should have been advised that the evidence given in reply could not be used to bolster the credibility of the complainants. The charge omitted these essential directions. (at 12)

The court, in particular, ruled inadmissible the evidence of the expert, in response to a question posed by the trial judge that, in her experience, only one or two percent of children who complained of sexual abuse are lying.

In 1986, in **R. v. Marchant**, *supra*, a British Columbia County Court judge admitted expert evidence on the disclosure patterns of sexually abused children. In allowing the Crown to lead evidence of a psychologist before the jury, Anderson, C.C.J. stated:

The next matter that I have considered is the disclosure pattern of alleged victims. In Mr. Smart's submissions he says that this is a matter which is akin to that of calling a psychologist to give evidence as to the frailty of human memory, and that the jury, exercising ordinary common sense, would be able to realize that disclosure patterns may vary according to a wide range of circumstances. In the present case, there are what might appear to be a number of unusual behavioral aspects, such as a delay in reporting, a fragmented disclosure pattern, a degree of ambivalence in feelings, a degree of recanting, an apparent reluctance to terminate the relationship. These are matters which come quickly to my mind. With deference to Mr. Smart's submissions, I feel that the evidence of an expert as to his experience with disclosure patterns of others may be of assistance to the jury in formulating its conclusions, and it can be put in evidence. (at 12)

In a 1987 Alberta case, R. v. Pelletier, *supra*⁴²⁴, the trial judge allowed a clinical psychologist to testify that the behavioral symptoms exhibited by the two child complainants, viz. lying, cheating, attention seeking, aggression, feelings of inadequacy and poor academic performance were consistent with sexual abuse. The judge acquitted the accused of the sexual assault charges. In the course of his Reasons for Judgment, he remarked:

I think in cases where there is testimony of children, any assistance that can be afforded to the Court should be provided and I am grateful for it. (at 23)⁴²⁵

424 The defence objected to the admissibility of the expert evidence at first, but after some argument, conceded that the evidence should be heard.

425 In R. v. Field, *supra*, the Ontario Court of Appeal ruled that it would be a reversible error for a trial judge simply to rely on "judicial notice" of the child sexual abuse syndrome instead of actually admitting expert testimony on the issue. In an empirical study of jurors' perceptions (Corder and Whiteside, 1988), 82% of all respondents indicated that they would need to rely on mental health professional testimony to decide whether or not a child has been sexually abused.

In the same case, a Father's Day card, written by the 8-year-old complainant to the accused, was entered as an exhibit in the trial. The Crown was allowed to call an expert in child sexual abuse to rebut an adverse inference which the defence would ask the trier of fact to draw. Crown counsel asked the psychologist the following question and received this reply:

Q: Speaking of purely as a layman it strikes me as unusual that a child who claims to have been sexually and physically abused by an adult would write such an affectionate Father's Day card. Does it strike you as the same way?

A: As a professional it doesn't strike me as strange at all. In my experience and I think it the experience of other people who have worked with these kinds of children, one of the hallmarks in their relationships with the perpetrator or alleged perpetrator is a great deal of ambivalence. They certainly become angry and upset about the actual abuse but in many cases the child often has some very positive aspects with the perpetrator. Often these children in families are singled out by the perpetrator not only in terms of the actual abusive behaviour per se, but also in terms of what is being coined as a special kind of relationship. These children may be favored above other children in the family because they have acquiesced with the demands of the perpetrator for sexual activity and sexual experience with the child. They may be even given concrete and material rewards such gifts, presents, outings, objects like that so it doesn't strike me as at all strange or inconsistent.
(at 29)

The Crown led the expert's evidence not for the purpose of establishing that because of the Father's Day card, the child was likely to have been sexually abused, but rather, to rebut the inference that the complainant's post-incident conduct was inconsistent with his complaint of sexual abuse by the father (if it were true).

In **R. v. J.(F.E.)**, *supra*, the Ontario Court of Appeal dealt with the admissibility of expert evidence on the phenomenon of "**false recantation**" by child sexual abuse victims. The accused was charged with numerous sexual offences against his daughter which began when she was 7 years of age and continued to age 15. Shortly before the preliminary hearing, the complainant wrote a letter to a Children's Aid Society social worker claiming that she had lied about her father having sexually abused her. At trial, the complainant testified on cross-examination that the letter was in fact not true, but that she had written it to help herself cope with the terrible events in her life. The Crown called a psychologist, who was an expert in the area of child sexual abuse, to testify that the complainant's letter was fairly typical of the recantations commonly manifested by children who have been sexually abused when they recognize the problems that their allegations have caused. The psychologist, who had not interviewed the girl, also testified that, in his experience, he had not encountered one case in which a child was being truthful when recanting.

The issue before the Court of Appeal was whether it was permissible for the Crown to call an expert to testify that the complainant's letter was typical of untruthful recantations of sexually abused children. The defence argued that such evidence was inadmissible because its purpose was to bolster or enhance the credibility of the child complainant. The Crown contended that the expert evidence relating to "the syndrome of recantation", was relevant and admissible to explain that the complainant's recantation should not be perceived as an impeachment of her credibility.

There appeared to be no appellate decision directly on point in Canada. In an attempt to reconcile the existing contradictory jurisprudence, Mr. Justice Galligan made these observations:

There are two lines of authority, which can often co-exist but which in this case seem to come into conflict. The first line of authority is that, generally speaking, expert evidence is not admissible to support the credibility of a witness. The other is that expert evidence is admissible to show that in cases of child abuse certain common psychological and physical conditions occur. I propose to make some brief reference to each of these two lines of authority.

Evidence adduced solely for the purpose of bolstering a witness's credibility is inadmissible. This exclusionary rule has been called "the rule against oath-helping". The existence and importance of the rule was emphasized by McIntyre J., speaking for four of the five judges who formed the majority of the Supreme Court of Canada in *R. v. B eland*, [1987] 2 S.C.R. 398, 60 C.R. (3d) 1, 36 C.C.C. (3d) 481 at 486-89, 43 D.L.R. (4th) 641, 9 Q.A.C. 293, 79 N.R. 263. Wilson J.'s dissenting judgment on behalf of the minority discloses that she recognized the existence of the rule. (at 272-273)⁴²⁶

The learned Justice continued on to discuss the other line of decisions, as follows:

The second line of authority is of relatively recent origin, and its rationale is explained in the reasons for judgment given by Wakeling J.A., speaking for himself, in *R. v. B.(G.)* (1988), 65 Sask. R. 134 at 148 (C.A.):

I do not need to resort to statistics to establish that there are many more cases now coming to trial involving sexual abuse of children and requiring a very difficult evaluation of youthful testimony. Under these circumstances, it is understandable that the courts should seek as much assistance as possible from those who can be qualified as experts. They can shed some additional light on evidence that would otherwise be of negligible value, so as to assist

426 The Justice went on to cite some examples of the rule's application: *R. v. Kyselka*, *supra*; *R. v. Taylor*, *supra*; *R. v. Kostuck*, *supra*; and *R. v. Burkart and Sawatsky*, *supra*, at 273.

the judge in reaching a determination of what facts have been adequately corroborated or otherwise established. (at 273)

He then referred to **R. v. Beliveau**, *supra*, and concluded that

...from the views expressed by Wakeling J.A. in *R. v. B.(G.)*, *supra*, that it can be used to show that certain psychological and physical conditions could be consistent with sexual abuse. If those conditions were proved to exist in a case, they could tend to support the child's evidence that there had been sexual abuse. (at 274)

The court explained the distinction between the competing lines of authority in this manner:

The distinction between those two circumstances may not always be easy to make. At first blush it may appear that there is not much of a difference between admitting expert opinion evidence to bolster credibility and admitting it to show that certain psychological and physical conditions are consistent with sexual abuse and thus capable of supporting the testimony of the child witness. **The difference is that in the first case the witness gives his or her expert opinion about truthfulness. In the second, the evidence is admitted only as tending to show a condition consistent with sexual abuse and therefore as being capable of supporting the witness's testimony.** It remains for the court to decide as a question of fact whether the psychological or physical conditions, as interpreted by the expert, do in fact support the testimony of the child witness. The distinction is crucial and must always be borne in mind. (at 274) [emphasis added]

In upholding the trial judge's admission of the expert evidence⁴²⁷, Mr. Justice Galligan wrote:

I think it should now be accepted by this court that properly-qualified expert opinion evidence about the general behavioral and psychological characteristics of child victim [sic] of sexual abuse is admissible for certain purposes. **It would violate the rule against oath-helping if a witness were allowed to express an opinion about the credibility of a particular witness.** However, in order to assist a judge or jury in deciding whether, in a particular case a recantation by a child of his or her allegations of sexual abuse should lead to a doubt about the witness's credibility, expert evidence about the general behaviour patterns of children in similar circumstances could be helpful...I would think that is [sic] is probably not generally know [sic] that children who have been sexually abused and have reported it commonly recant their allegations. Thus, in order for the trial judge in this case to decide whether this child's testimony should have been disbelieved because of the letter, he was entitled to know that recantations are common. (at 275-276) [emphasis added]⁴²⁸

427 The learned Justice was particularly persuaded by the reasoning in two American decisions on similar issues: U.S. v. Azure 801 F. 2d 336 (1986) United States Court of Appeals, Eighth Circuit; and Commonwealth v. Baldwin, 502 A. 2d 253, 348 Pa. Super. 368 (1985). In that case, Pennsylvania Superior Court Judge Beck, in his judgment, took judicial notice that child sexual abuse victims can be reluctant witnesses, in some cases refusing to testify or recanting prior allegations out of fear or coercion. He said at page 258:

In Middleton, 294 Or. at 435-36, 657 P. 2d at 1219-20, the Oregon court explained succinctly how this type of expert testimony assists the jury in understanding and evaluating the evidence:

"If a complaining witness in a burglary trial, after making the initial report, denied several times before testifying at trial that the crime happened, the jury would have good reasons to doubt seriously her credibility at any time. However, in this instance we are concerned with a child who states she has been the victim of sexual abuse by a member of her family. The experts testified that in this situation the young victim often feels guilty about testifying against someone she loves and wonders if she is doing the right thing in so testifying. It would be useful to the jury to know that not just the victim but many child victims are ambivalent about the forcefulness with which they want to pursue the complaint. . . . Explaining this superficially bizarre behaviour by identifying its emotional antecedents could help the jury better assess the witness's credibility."

428 The approach taken by Mr. Justice Galligan is consistent with the principle against oath-helping stated by McIntyre, J., on behalf of the majority of the Supreme Court of Canada, in R. v. Beland and Phillips, *supra*, as follows:

[T]he rule against oath-helping, that is, adducing evidence solely for the purpose of bolstering a witness's credibility, is well grounded in authority. (at C.R. p.10)

The Court of Appeal Justice ended his judgment by issuing an appeal to trial judges to use expert evidence of this nature in a careful and prudent manner:

I have not arrived at this conclusion without some reluctance. The admission of evidence of that kind, as well as being probative, could have a very serious prejudicial effect. The crucial issues in the criminal law, the credibility of witnesses and the guilt or innocence of accused persons, must not be decided by expert witnesses, no matter how high their qualifications. An impressively-qualified expert must not be allowed to appear to put his or her stamp of approval upon the testimony of a witness. Worrisome as I find those concerns to be, I am unable to say that they could prevent the evidence from being admitted. However, they do call for the greatest care on the part of trial judges in the use of such evidence.

The psychologist in this case, as has been noted, not only gave evidence about the general behavioral patterns of children involved in sexual abuse cases, but also **said that he had not seen one case where the recantation was truthful. That latter part of his evidence was clearly inadmissible.** (at 277) [emphasis added]

In May 1990, the Supreme Court of Canada rendered a decision in a high-profile case, which will have profound implications for governing the admissibility of testimony from expert witnesses in criminal cases. In a landmark judgment, **R. v. Lavallee**⁴²⁹, the Supreme Court of Canada upheld the admission of expert opinion on the "**battered woman syndrome**", a controversial doctrine which permits a self-defence plea even though there may be no "objective" imminent peril or threat to the accused. The reasonableness of a woman's perception of imminent harm must be judged subjectively, in the context of her own reality *viz.*, given what she experienced, whether she reasonably believed that her life was in danger. The jury had acquitted a battered woman

429 [1990] 1 S.C.R. 852, 55 C.C.C. (3d) 97 (S.C.C.). Mr. Justice Sopinka wrote a concurring opinion. See Boyle (1990) for an insightful discussion of the significance of this case.

of the second-degree murder of her common-law husband, but a new trial was ordered by the Manitoba Court of Appeal. The defence appealed this decision to the Supreme Court of Canada. A unanimous seven-judge bench restored the acquittal of the accused.

The expert evidence which formed the subject matter of the appeal came from a psychiatrist who had extensive professional experience in the assessment and treatment of battered wives. The two issues before the Supreme Court of Canada were:

1. the broad issue of whether the trial judge had properly admitted the expert evidence; and
2. the narrower issue of whether the trial judge's instructions to the jury with respect to the expert evidence were adequate.

Writing for the court, Madam Justice Wilson acknowledged that the expert testimony in the case being considered, was both relevant and necessary:⁴³⁰

The long-standing recognition that psychiatric or psychological testimony also falls within the realm of expert evidence is predicated on the realization that in some circumstances the average person may not have sufficient knowledge of or experience with human behaviour to draw an appropriate inference from the facts before him or her...The need for expert evidence in these areas can, however, be obfuscated by the belief that judges and juries are thoroughly knowledgeable about "human nature"

430 The learned justice noted that expert testimony on the psychological effects of wife battering has been accepted in American courts. She quoted from a New Jersey Supreme Court case, State v. Kelly, 478 A. 2d 364 (1976), where the court commended the value of expert testimony in these words:

It is aimed at an area where the purported common knowledge of the jury may be very much mistaken, an area where jurors' logic, drawn from their own experience, may lead to a wholly incorrect conclusion, an area where expert knowledge would enable the jurors to disregard their prior conclusions as being common myths rather than common knowledge. (at 378)

The New Jersey court concluded that the wife-battering relationship is "subject to a large group of myths and stereotypes" and as a result, it is "beyond the ken of the average juror and thus is suitable for explanation through expert testimony" (at 379). Madam Justice Wilson stated that she shared that view.

and that no more is needed. They are, so to speak, their own experts on human behaviour. This, in effect, was the primary submission of the Crown to this Court.

Expert evidence on the psychological effect of battering on wives and common law partners must, it seems to me, be both relevant and necessary in the context of the present case. How can the mental state of the appellant be appreciated without it? The average member of the public (or of the jury) can be forgiven for asking: Why would a woman put up with this kind of treatment? Why should she continue to live with such a man? How could she love a partner who beat her to the point of requiring hospitalization? We would expect the woman to pack her bags and go. Where is her self-respect? Why does she not cut loose and make a new life for herself? Such is the reaction of the average person confronted with the so-called "battered wife syndrome". We need help to understand it and help is available from trained professionals. (at 871-872)

Madam Justice Wilson went on to formulate principles upon which expert testimony can be properly admitted in such cases:

1. Expert testimony is admissible to assist the fact-finder in drawing inferences in areas where the expert has relevant knowledge or experience beyond that of the lay person.
2. It is difficult for the lay person to comprehend the battered wife syndrome. It is commonly thought that battered women are not really beaten as badly as they claim, otherwise they would have left the relationship. Alternatively, some believe that women enjoy being beaten, that they have a masochist strain in them. Each of these stereotypes may adversely affect consideration of a battered woman's claim to have acted in self-defence in killing her mate.
3. Expert evidence can assist the jury in dispelling these myths.
4. Expert testimony relating to the ability of an accused to perceive danger from her mate may go to the issue of whether she "reasonably apprehended" death or grievous bodily harm on a particular occasion.

5. Expert testimony pertaining to why an accused remained in the battering relationship may be relevant in assessing the nature and extent of the alleged abuse.
6. By providing an explanation as to why an accused did not flee when she perceived her life to be in danger, expert testimony may also assist the jury in assessing the reasonableness of her belief that killing her batterer was the only way to save her own life. (at 889-890)

She concluded that the expert evidence was properly admitted:

In my view, the trial judge did not err in admitting Dr. Shane's expert testimony in order to assist the jury in determining whether the appellant had a reasonable apprehension of death or grievous bodily harm and believed on reasonable grounds that she had no alternative but to shoot Kevin Rust on the night in question. (at 890)

On the narrower issue raised on appeal, the court held that the jury had been properly instructed by the trial judge. The Supreme Court of Canada concluded that, in the end:

Ultimately, it is up to the jury to decide whether, in fact, the accused's perceptions and actions were reasonable. Expert evidence does not and cannot usurp that function of the jury. The jury is not compelled to accept the opinions proffered by the expert about the effects of battering on the mental state of victims generally or on the mental state of the accused in particular. But fairness and the integrity of the trial process demand that the jury have the opportunity to hear them. (at 891)

The credibility of witnesses depends, in part, upon the shared experiences of the witness with the trier-of-fact. If something is incredible, it is not likely to have happened. The more unique a witness' experiences are, the harder it is for those experiences to be recounted in court in a manner which is understandable to those who must weigh it.

Where a syndrome alters a witness' perception of reality, that perception moves beyond the realm of everyday experience and the evidence of the witness becomes incredible and unbelievable. Syndromes have a logic which becomes understandable and credible if that logic is explained. Thus, it is important to have experts to reveal that logic. Courts are willing to rely on expert evidence because they are becoming sensitive to the uniqueness of the experiences of certain groups. The acceptance of expert evidence by the courts in order to deal with this uniqueness does not, it is submitted, tend to suggest that women or children have no credibility without such expert evidence. It is an acknowledgement by the courts that there is something credible in the reports of those witnesses which would be clarified if expert evidence is tendered. In fact, it represents a movement away from the historical treatment of the evidence of women and children as inherently unreliable.

The liberal approach taken in Lavallee was followed in a subsequent British Columbia Case. In R. v. C.(R.A.), *supra*, the British Columbia Court of Appeal upheld the trial judge's ruling to admit the testimony of a sexual abuse therapist. The appellate court held that the evidence of the expert was admissible as not being within the knowledge and experience of the jury. The court held that the expert testimony, which covered the complainants':

- a. delayed disclosure;
- b. failure to disclose to the mother;
- c. improvement and lapse of memory of the abuse over time; and
- d. continued association with the accused after the abuse —

could be helpful to a jury because, in the absence of such evidence, the jury might draw an adverse inference against the complainants. The appellate court also held that the expert evidence was properly admitted in light of the careful warning given by the trial judge to the jury. The trial judge had instructed the jury that many of the behavioural symptoms described by the expert as consistent with sexual abuse were also consistent with physical abuse of a non-sexual nature. In concluding that the expert evidence was admissible, the Court of Appeal stated:

In my opinion, where credibility is in issue, the evidence of an expert may be helpful to a jury in the sense that, but for the expert evidence, the jury might well draw an adverse inference against the complainants in failing to disclose the alleged sexual abuse when it took place and in delaying disclosure until the year 1987. The jury might well wonder why no complaints were made to the mother of the complainants. The jury would not understand how it could possibly be that the memory of the complainants had improved between the date of the preliminary hearing and the trial. The jury might also have wondered why the complainants continued to associate with the appellant after being sexually abused. (at 530)

In *R. v. B.(G.)*, *supra*, the Supreme Court of Canada was called upon to rule on a Saskatchewan Court of Appeal decision which set aside acquittals and ordered a new trial for three youths charged with sexual assault on an 8-year-old child. A clinical psychologist, specializing in the treatment of young sexual abuse victims, testified at trial that bed-wetting, nightmares and anxiety were common behavioural characteristics of young victims of sexual assault. The Saskatchewan Court of Appeal held that the trial

judge had erred in several ways⁴³¹, one being that he did not give sufficient credence to the expert's evidence on behavioral symptoms because he based the purpose of expert testimony on an erroneous assumption.

In reviewing the lower court's decision, Madam Justice Wilson observed that:

Wakeling J.A. (Gerwing J.A. concurring) said he was in full agreement with the judgment of Vancise J.A., but wanted to add a few comments on the possibility of expert testimony providing a basis for corroboration. He thought it was important to register his disagreement with the way in which the trial judge dealt with the expert testimony. Wakeling J.A. thought it apparent that the evidence of Dr. Wollert, the expert on child sexual abuse, had been given little credence by the trial judge. In his view, the trial judge's approach ran counter to the current view that the courts need and should be encouraged to seek assistance in the performance of their responsibilities when dealing with the evidence of children in sexual abuse cases. He stated at p. 148:

I do not need to resort to statistics to establish that there are many more cases now coming to trial involving sexual abuse of children and requiring a very difficult evaluation of youthful testimony. Under these circumstances, it is understandable that the courts should seek as much assistance as possible from those who can be qualified as experts. They can shed some additional light on evidence that would otherwise be of negligible value, so as to assist the judge in reaching a determination of what facts have been adequately corroborated or otherwise established.

Dealing more specifically with the facts at hand, he added at p. 149:

I think it can now be taken that evidence of an expert, in the nature of that given by Dr. Wollert as to the psychological and physical conditions which frequently arise as a result of sexual abuse of a child, is admissible. It provides assistance to the trial judge in concluding whether an assault has occurred. This kind of testimony is

431 The other errors were: that the trial judge erred in treating the date of the alleged offence as an essential ingredient of the offence; and that he erred in applying a strictly adult standard in assessing the credibility of the young complainant (the latter issue was discussed previously in the chapter on corroboration).

helpful, because it provides a benchmark which can hardly be doubted, as it is entirely unlikely that such things as bedwetting and nightmares are subject to be concocted or contrived by a youthful witness to support or buttress the reliability of any testimony that witness may later be called upon to give in court. It is always open to the trial judge to accept or reject expert testimony, but I am concerned that the trial judge's basis for giving little credence to Dr. Wollert's testimony was based on an erroneous assumption of its purpose. (at C.R. pp.356-357)

In the end, the Supreme Court of Canada affirmed the Saskatchewan Court of Appeal decision and endorsed the leading of that type of expert evidence in this case. Wilson, J., for a unanimous court, wrote:

Wakeling J.A. felt that the trial judge may not have given adequate credence to the evidence of the expert witness because of his concern that expert testimony not supplant his role as the trier of fact. However, all Wakeling J.A. did, it seems to me, was review the settled law regarding the admissibility of expert evidence. I need only say in dealing with this ground of appeal that I agree with Wakeling J.A.'s conclusion that **the expert evidence in this case was well within the bounds of acceptable and admissible testimony and that in cases of sexual abuse against children the opinion of an expert often proves invaluable.** (at C.R. p.369) [emphasis added]

The justice agreed with Wakeling J.A.'s *obiter dicta* comment that:

[T]he expert evidence should not be used to bolster the credibility of witnesses or indicate that they should be believed, since credibility is a matter exclusively reserved for the trier of fact. (at C.R. p.357) [emphasis added]

The Ontario Court of Appeal, in R. v. R.(S.)⁴³², followed the Supreme Court of Canada's approach in B.(G.). The Ontario Court of Appeal opined:

In all cases the admission of an expert's opinion that a complainant in a sexual abuse case is credible is extremely dangerous. In this case that danger was exacerbated by the manner in which the opinions were presented by the Crown and by the reference to the psychologist's opinion in the charge to the jury. The two opinions were put before the jury before the complainant testified. Thus, when she came to testify, her credibility had already been attested to by two persons whom the jury probably thought were impressively qualified to do so. In those circumstances, I think it is impossible to expect that the appellants, who had no similar impressive expert testimony putting a stamp of approval on their credibility, could have had their evidence fairly weighed and considered by the jury. (at 108-109)

The dissertation research documented only 6 occasions where courts refused to allow Crown expert witnesses to testify concerning behavioural syndromes. In a *voir dire* ruling, in R. v. Gallo⁴³³, a British Columbia Supreme Court judge refused to admit the evidence of a psychiatric social worker. The Crown had called the expert to testify concerning behavioural indicators which are consistent with sexually abused children and the disclosure patterns of victims of sexual abuse. In ruling that expert testimony on such matters is inadmissible, the court held:

I am not going to allow the evidence. I think it's getting into an area that really belongs to the jury. We ask the jurors to use their common sense, their common experience and they are all people with children, or most

432 (1992), 15 C.R. (4th) 102 (Ont.C.A.).

433 (8 September 1986), Vancouver (B.C.S.C.) [unreported]. Similarly, the Nova Scotia Court of Appeal, in R. v. Meisner (1992) 110 N.S.R. (2d) 270 (N.S.C.A.), also ruled that a social worker cannot testify as an expert witness that the complainant's behavioural symptoms were consistent with being sexually abused. In R. v. W. (1990), 2 C.R. (4th) 204 (Ont.P.C.), a child protection worker was not qualified as an expert witness to give "symptom" testimony.

of them at least, and I don't really think they need any scientific expert's testimony to assist them in determining whether the boy is telling the truth and if the Accused testifies, whether he is telling the truth. (at 11)

In **R. v. Banks**⁴³⁴, a *voir dire* was held to determine the admissibility of expert opinion evidence by a crisis centre clinician who had experience with 120 sexually abused children and had a degree in psychology. The Crown was seeking to introduce her evidence that:

- a. failure by the complainant to disclose the sexual abuse was consistent with the child being sexually abused; and
- b. certain outward manifestations of the complainant's behaviour subsequent to the alleged abuse are consistent with the complainant having been sexually abused.

The Ontario District Court ruled that the crisis centre worker cannot qualify as a sex abuse expert and that the evidence is inadmissible, saying emphatically:

The subject matter of this case is such that the jury is capable of reaching a sound decision without the assistance or intervention of expert opinion evidence. The child's behaviour does not exceed the boundaries of normal behaviour to the point where psychologists, psychiatrists or other experts in the field of human behaviour have to be summoned to assist the jury. This is a case where the collective wisdom of 12 adult jury members provides ample qualification for the determination of what happened and what was the significance of the child's subsequent behaviour without the need of additional input. The expert opinion evidence sought to be adduced in this case would not be helpful to the jury in its deliberations. In fact, the opinions expressed may very well hinder and confuse the jury because they lack certainty, consistency, and scientific foundation. The opinions expressed by the Crown's witness are based on her personal experiences and are not supported by any statistical

434 (30 March 1990), 944-020 (Ont.D.C.) [unreported].

analysis or empirical studies. No attempt was made to substantiate or prove any facts that formed the basis of the opinions expressed, except to establish the general work experience and education of the witness. As a result, no weight could be given to the evidence. Although there might be a slight probative value, the prejudicial effect would far exceed any such probative value. In order to qualify as an expert, one has to acquire a special or peculiar knowledge of the subject of which he or she undertake to testify. In this case the knowledge of Ms. Spiller with respect to the characteristics of sexually abused children was not conveyed to this court with sufficient clarity, detail and precision so that she could qualify as having the requisite knowledge of an expert witness. (at 6-7)

In **R. v. Crowell**⁴³⁵, the Nova Scotia Supreme Court reversed the lower court ruling which allowed a Crown psychiatrist to give an opinion that the statements made by the child complainant were consistent with the child being sexually abused. The appellate court held that the trial judge erred in law in treating as factual the hearsay evidence upon which the expert's opinion was based.

V. **THE CONTROVERSY**

The pattern of increased judicial reliance on expert witnesses from the behavioural sciences, in child sexual abuse prosecutions, has precipitated a debate in the United States over the proper role of experts in the adversarial process. In the past decade, American courts have witnessed an explosion of experts — called by both the prosecution and the

435 (1989), 91 N.S.R. (2d) 7 (N.S.S.C. App.Div.).

defence — to testify on matters of child victimization syndrome, child sexual abuse syndrome, and/or child sexual abuse accommodation syndrome.⁴³⁶

The issue of whether syndrome testimony should be admitted in court is controversial in nature.⁴³⁷ A proponent of the admission of syndrome testimony, Hensley

436 Expert evidence of that nature has been admitted in these cases: **Oregon v. Middleton**, 657 P. 2d 1215 (Oregon 1982); **Hawaii v. Kim**, 645 P. 2d 1330 (1982); **People v. Reid**, 475 N.Y.S. 2d 741 (N.Y.S.C.) (1984); **People v. Payan**, 173 Cal. App. 3d 27, 220 Cal. Rptr. 126 (1985); **People v. District Court of El Paso**, 776 P. 2d 1083 (Colo. 1989); **U.S. v. Azure**, *supra*; **Commonwealth v. Baldwin**, *supra*. For other notable U.S. cases, see:

Payne v. State, 21 Ark. App. 243, 731 S.W. 2d 235 (1987);
People v. Bledsoe, 36 Cal. 3d 236, 203 Cal. Rptr. 450, 681 P. 2d 291 (1984);
People v. Dunnahoo, 152 Cal. App. 3d 561, 199 Cal. Rptr. 796 (1984);
People v. Gray, 187 Cal. App. 3d, 231 Cal. Rptr. 658 (1986);
People v. Jackson, 18 Cal. App. 3d 504, 95 Cal. Rptr. 919 (1971);
People v. Kelly, 17 Cal. 3d 24, 130 Cal. Rptr. 144, 549 P. 2d 1240 (1976);
People v. Lucero, 724 P. 2d 1374 (Colo.App. 1986);
People v. Luna, 204 Cal. App. 3d 776, 250 Cal. Rptr. 878 (1988);
People v. McDonald, 37 Cal. 3d, 351, 208 Cal. Rptr. 236, 690 P. 2d 709 (1984);
People v. Payan, *supra*;
People v. Roehler, 167 Cal. App. 3d 353, 213 Cal. Rptr. 353 (1985);
People v. Rosco, 168 Cal. App. 3d 1093, 215 Cal. Rptr. 45 (1985);
People v. Stoll, 49 Cal. 3d 1136, 265 Cal. Rptr. 111, 783 P. 2d 698 (1989);
State v. Batangan, 71 Haw. 552, 799 P. 2d 48 (1990);
State v. Dumlao, 3 Conn. App. 607, 491 A. 2d 404 (1985);
State v. Haseltine, 120 Wis. 2d 92, 352 N.W. 2d 673 (1984);
State v. Hudnall, 293 S.C. 97, 359 S.E. 2d 59 (1987);
State v. Jurgens, 424 N.W. 2d 546 (Minn.App. 1988);
State v. McClary, 207 Conn. 233, 541 A. 2d 96 (1988);
State v. Moran, 151 Ariz. 378, 728 P. 2d 248 (1986);
State v. Myers, 359 N.W. 2d 604 (Minn. 1984);
State v. Tanner, 675 P. 2d 539 (Utah 1983).

Even the most restrictive U.S. courts have allowed syndrome testimony to dispel "popular myths and misconceptions". In **People v. Beckley**, 409 N.W. 2d 359 (Mich.App. 1987), the Michigan court permitted expert evidence of a "rape trauma syndrome" for the narrow purpose of rebutting an inference that the complainant's behaviour was inconsistent with that of an actual sexual abuse victim. The court concluded:

A victim's reaction to a sexual assault, especially if the assailant is a family member, are unique to the particular crime. The uniqueness puts the evidence beyond the jury's ability to evaluate the facts in issue absent expert testimony. Further there is general agreement among experts that the readiness of a victim of sexual assault vary quite significantly from those of an "average" crime. (at 401-402).

For a similar ruling see: **People v. Bowker**, 203 Cal. App. 3d 385, 249 Cal. Rptr. 866 (Cal.App. 1988).

437 For academic debate and legal analysis see: Roe (1985); Cohen (1985); Hensley (1986); McCord (1986); Melton and Thompson (1987); Serrato (1988); Bulkley (1988); Myers *et al* (1989); Levy (1989); LeMerc, 1987; Boreski, 1989; Borgeida, 1989; Yuille, 1989; Dulka, 1988; Pattenden, 1982; and Hall, 1989.

(1986), holds the view that the child sexual abuse accommodation syndrome satisfies all the criteria of the U.S. **Frye** test. In his opinion, syndrome testimony is justifiable both to enhance the credibility of a child complainant, who makes an allegation of sexual abuse, and to help prove that the sexual offence in fact occurred. Other academics, however, contend that, while syndrome testimony has a role in the courts, it should not be advanced for diagnostic purposes. Myers and his colleagues (1989) point out that many mental health professionals erroneously assume that, similar to the "**battered child syndrome**"⁴³⁸, the "**child sexual abuse accommodation syndrome**" can be used to detect sexual abuse in victims. They argue that, while the former syndrome is medical in nature, based on "objective evidence", the latter, accommodation syndrome, is inherently problematic because some of the components are not necessarily indicative of abuse. Thus, they conclude that the accommodation syndrome should not be used for the purpose of making diagnosis, but should be limited to providing triers of fact with an explanation of why so many children delay reporting the abuse and why they often recant and deny previous allegations of sexual abuse.

438 The "battered child syndrome" has become an accepted medical diagnosis of physical child abuse in the United States (Helfer and Kempe, 1987; Schmitt *et al.*, 1978). The various components of the syndrome are, according to Helfer and Kempe:

- a. the child is usually under three years of age;
- b. there is evidence of bone injury at different times;
- c. there are subdural hematomas with or without skull fractures;
- d. there is a seriously injured child who does not have a history that fits the injuries;
- e. there is evidence of soft tissue injury; and
- f. there is evidence of neglect.

The "battered child syndrome" simply indicates that a child found with the type of injuries outlined above has not suffered those injuries by accidental means.

There is widespread condemnation of the emerging practice of increased attempts by experts to apply various "syndromes" to characterize common behaviours shared by sexually abused children. This has been referred to as "a disturbing trend" (Whitcomb, 1992). From her extensive review of the literature, Whitcomb concludes:

Neither child sexual abuse, nor the "sexually abused child syndrome," nor the "traumagenic dynamics model," nor the "child sexual abuse accommodation syndrome" is an accepted psychiatric diagnosis. Nonetheless, these "syndromes," and the observations of sexually victimized children that underlie them, often serve as the basis for expert testimony in attempts to explain certain aspects of a child's behavior. (at 23)

Melton and Limber (1989) describe the serious limitations of syndrome testimony in this manner:

- First, a child may "feel" abused without actually having been abused *as defined by law*. Conversely, a child who was in fact abused (again, as defined by law) may not exhibit the expected reactions.
- Second, although a child may, in fact, have been abused at some point in time, this alone does not prove that the child was abused by the defendant at the particular point in question.
- Third, the extant syndromes are based on clinical intuition, not hard data. They lack a firm scientific foundation.
- Fourth, available statistical data are too easily misinterpreted. Although it is true, for example, that a high proportion of sexually abused children suffer symptoms of post-traumatic stress disorder (PTSD), it is equally true that PTSD could result from a variety of traumatic events, of which sexual abuse is but one. (at 1227)

Another outspoken critic, Myers (1989), cautions against the four common errors made in the use of such experts in court. Whitcomb (1992) summarizes Myers' (1989) concerns, as follows:

1. *Use of unqualified witnesses.* Because the courts have little guidance for the task of qualifying proffered experts, they tend to accept minimal credentials of academic degrees, publications, and/or prior expert witness experience. However, the subject of child sexual abuse is sufficiently complex to warrant more scrupulous attention to the qualifications of proffered experts. Otherwise, the trier of fact may base its findings on evidence that is unsupported by state-of-the-art research and clinical wisdom.

To remedy this problem, prosecutors and defense counsel should scrutinize the credentials of experts before engaging them as witnesses. In doing so, counsel must be very clear in their own minds about the nature of the desired testimony to be assured that the proposed expert will indeed "fill the bill." Someone who is in fact an expert on child sexual abuse accommodation syndrome may not be equally qualified to testify about children's memories or propensity to fantasize sexual abuse. Counsel might also routinely challenge each other's experts to establish that they are qualified. Similarly, judges might require counsel to document the credentials of their proffered experts and to demonstrate the link between those credentials and the content of the anticipated testimony.

2. *Testimony that exceeds expertise.*⁴³⁹ As an example, a social worker from the child protection agency might be called to testify about the child's use of anatomically detailed dolls during investigative interviews. While the social worker may have a great deal of clinical experience observing children's behavior with dolls, he or she may be unfamiliar with the research literature and rely solely on observations of doll-play in reaching an opinion that a child was sexually abused. To summarize the discussion in Chapter 3, these dolls were designed to help children communicate. They are invaluable in assisting children who, due to their embarrassment or inadequate verbal skills, cannot verbalize what happened to them. The courts have almost

439 This concern is an issue of professional ethics. It is currently being examined by the American Psychological Association with a view to the drafting of a Code of Ethics.

unanimously recognized and accepted the value of these dolls as demonstrative aids to children's testimony. The confusion arises when people attempt to interpret the child's interaction with anatomically detailed dolls as diagnostic of sexual abuse. While the weight of the research in this area suggests that abused children do play with the dolls differently than nonabused children, the findings are far from conclusive. Researchers repeatedly caution investigators against relying too heavily on doll-play when evaluating allegations of sexual abuse.

3. *Failure to articulate the theoretical justification for expert testimony.* Trial judges must be fully apprised in advance of the intended purpose of expert testimony so they can forestall inappropriate uses. Myers distinguishes between testimony intended to prove that abuse occurred and testimony intended to rehabilitate a child's credibility. Certain types of testimony may be admissible for one purpose but not the other, and the timing of the expert's testimony may be critical. For example, testimony that many sexually abused children recant their stories at some point during the investigation and adjudication of the charges may be inadmissible during the state's case-in-chief because it bolsters the child's credibility. Yet identical testimony may be admissible if offered to rebut a defense charge of fabrication.
4. *Misunderstanding of relevant literature.* Perhaps the strongest example of this error is misapplication of the child sexual abuse accommodation syndrome. As was shown above, because that syndrome was designed to assist clinicians in their work with children for whom abuse has already been determined, testimony asserting that a child's behaviors comport with the child sexual abuse accommodation syndrome should not be introduced as proof that sexual abuse occurred. Such testimony is usually admissible only to counter defense assertions that a child's behaviors are inconsistent with the behaviors one would expect of a victim of sexual abuse. Prosecutors and defense attorneys must make the effort to understand the relevant literature so they can use expert testimony accurately and beneficially. (at 117-119)

In response to the proliferation of expert testimony, Levy (1989) argues that child sexual abuse syndrome evidence should never be admissible in court proceedings. According to this observer, the symptoms of the syndrome are too broad and

overlapping, immeasurable, and premised on impressionistic results rather than actual scientific data. Since child sexual abuse is a relatively new and inexact field of study (Toth and Whalen, 1986), there is not enough established knowledge to make determinations about whether the symptoms are indicative of sexual abuse (Toth and Whalen, 1986; Levy, 1989; Cohen, 1985; Gardner, 1988; Buckley, 1988).

Grisso (1987) issues a stern warning that the majority of behavioural scientists who offer themselves as experts to give opinion evidence in courts are not certified as forensic specialists in their respective disciplines (which include psychiatry, psychology, social work, counselling, and to a lesser extent, pediatrics). As a result, these so-called experts may have limited knowledge of the very circumscribed role expert testimony should play in criminal proceedings (Whitcomb, 1992).

The evolution of the burgeoning expertise in child sexual abuse has been described in this way:

The expert evidence route has gone to extreme lengths in the United States. The child sexual abuse industry has invented a construct called "the child sexual abuse accommodation syndrome" and is busily attempting to inflict it on the criminal courts...In this area, however, abdication to child sexual abuse "experts" is of considerable danger because it is done on the assumption that the "independent", "specially trained", "authorised" expert is value neutral. Many are not. Many are on a crusade, the tenets of which include, for example, the belief that the criminal justice system with its insistence on proof beyond reasonable doubt and the presumption of innocence are merely silly images of the past which stand against the vindication of the rights of the child and the punishment of "the offender"...It seeks to describe the effects of sexual abuse on children and, by discovery of these effects on examination of children, determine whether sexual abuse has occurred and to thereby bolster the complainant's credibility. The industry is developing an immense literature of varying opinion and credibility. This is, in the

absence of safeguards, an extremely dangerous development. (Goode, 1989:41)

The increased willingness of courts to admit such evidence has invariably led to a "battle of experts" being played out in courtrooms across the United States. Whitcomb (1992) makes these observations about the "lucrative" practice:

The absence of consensus among behavioral scientists about many of the issues surrounding child sexual abuse and children's testimony paves the way for "battles of the experts" which tend to obscure, rather than clarify the fact-finding process.

A small number of behavioral scientists have become, in effect, professional experts who "ride circuit" around the country to testify in well-financed cases. This practice is detrimental both to the legal profession and to the mental health professions. (at 111)

In addition, it is argued that many clinicians, when drawn into the adversarial arena as expert witnesses, experience role conflict and, as a result, often become biased adversaries in the courtroom (Faust and Ziskin, 1988). In a similar vein, Levy (1989) argues that child abuse experts have a tendency to be fiercely committed to the role of the child advocate, and that often their objectivity and professional credibility should be subject to scrutiny.

A senior attorney for the National Center for the Prosecution of Child Abuse (Peters, 1990) criticizes the use of mental health experts by defence attorneys. He claims that the more prolific of these defence experts are willing to take "outlandish stands" in an effort to support accused child molesters. A few examples cited are:

1. Promoting simplistic checklists and scoring systems which purportedly assess the validity of the child's allegation;
2. Manipulating statistics and ignoring critical distinctions regarding unresolved and false reports to justify the assertion that the majority of reports of sexual abuse are false;
3. Testifying that a person does not fit the "Profile" of a child molester by virtue of their performance on the MMPI, penile plethysmograph or other psychological testing;
4. Asserting that children are highly suggestible and that they can be easily coached into making false allegations;
5. Promoting the theory that it violates the Hypocratic [sic] Oath for a physician treating sexual abusers to report new offenses revealed during the course of treatment. (at 1)

Upon careful review, the American National Centre for the Prosecution of Child Abuse recommends that prosecutors should avoid using mental health experts as witnesses, particularly in the case-in-chief, unless their testimony is absolutely necessary to make the case (Toth and Whalen, 1986). They recommend that expert testimony should be limited to only the following two situations:

- If the child is incompetent or otherwise unavailable to testify, and corroborative evidence is needed in order to introduce the child's out-of-court statement. (This situation only arises in those states with special child sexual abuse hearsay statutes requiring corroboration.)
- If the child victim's credibility will be seriously damaged by defense arguments. Even in this situation, the center recommends offering explanations through other witnesses or other evidence in the case before turning to expert testimony. (quoted in Whitcomb, 1992:119)

Roe (1985) summarized the current state of affairs in the United States in this way:

In sum, the solicitation of the expert's opinion on credibility or truthfulness of the victim does not seem legally sound or practically wise. (at 297)

From her comprehensive review of the U.S. case law, she confirmed the admissibility of low-impact expert evidence:

It appears well settled and a safe course of action for prosecutors in most states to introduce expert testimony explaining the reasons for delays in reporting, recantations, and, probably, inconsistencies in statements. (at 299)

In the final analysis, there is very little support for the practice of proffering expert opinion evidence on "syndromes" for the primary purpose of advancing the prosecution's case in the United States. Nor is there much support for the escalating trend towards more expert involvement in the prosecution of child sexual abuse cases. There is consensus that the role of mental health professionals, as expert witnesses in child sexual abuse cases, should be severely restricted (i.e. to rebut a defence assertion), until such time as the discipline acquires a solid scientific foundation.

VI. CONCLUSION

The most significant finding from the dissertation research is that Canadian judges, like their U.S. counterparts, are allowing, with regularity, expert testimony by mental health professionals to demonstrate that behaviours of a particular complainant are

consistent with behavioural patterns exhibited among sexually abused children. The expert evidence is being sought in-chief by the prosecution for the primary purpose of corroborating the child complainant's allegations of sexual abuse against an accused. In essence, this practice is an indirect form of oath-helping, which ultimately tends to bolster the complainant's credibility. It is also clear from the research that courts are permitting this kind of testimony on the grounds that the expert opinion evidence is capable of corroborating the complainant's evidence.

Canadian courts, however, have taken the unequivocal position that expert evidence of this particular genre cannot be admissible simply "to bolster the credibility of a complainant"⁴⁴⁰, or to express an opinion on the truthfulness of an individual complainant *viz.*, an ultimate issue to be decided by the fact-finder⁴⁴¹. The Supreme Court of Canada, in **R. v. B.(G.)**, *supra*, affirmed the Saskatchewan Court of Appeal's comment that

the expert evidence should not be used to bolster the credibility of witnesses or indicate that they should be believed, since credibility is a matter of exclusivity reserved for the trier of fact. (at C.R. p.357)

440 **R. v. B.(G.)**, *supra*; **R. v. Meisner**, *supra*; **R. v. Beliveau**, *supra*; **R. v. Taylor**, *supra*; **R. v. J.(F.E.)**, *supra*; **R. v. Kostuck**, *supra*. The only court to make a contrary ruling on this issue is the Ontario Court of Appeal, in **R. v. F.(A.)**, *supra*.

441 **R. v. Beliveau**, *supra*; **R. v. C.(J.W.)** (28 November 1990), Brampton (Ont. S.C.) [unreported]; **R. v. Chin**, *supra*; **R. v. Kostuck**, *supra*; **R. v. S.(C.N.)**, *supra*; **R. v. Taylor**, *supra*.

The Ontario Supreme Court, in R. v. C.(J.W.), *supra*, ruled that expert evidence on behavioural symptoms does not determine the ultimate issue, but goes to weight as to the reliability of the complainant's testimony — the capacity and motive of the victim to fabricate the incident. This new line of authority, which governs the scope of expert opinion evidence in child sexual abuse cases, appears inconsistent with the common law which has evolved to allow expert witnesses to testify as to an ultimate issue.⁴⁴²

In an attempt to define an appropriate role for expert witnesses in child sexual abuse cases, our appellate courts were heavily influenced by recent American judgments.⁴⁴³ As previously discussed, earlier Canadian courts have struggled with reconciling the conflicting common law, which has evolved to govern the admissibility of expert opinion evidence. The two approaches were the "necessity" test of Kelliher v. Smith, *supra*, and a "helpfulness" criterion enunciated in R. v. Fisher, *supra*. From the new case law examined, courts have provided no clear delineation with respect to which of those common law standards ought to be applied. In their judgments, judges did not specifically refer to the "necessity"/"helpfulness" dichotomy (enunciated in Kelliher v. Smith and Fisher), nor were their analyses based on such a framework. Rather, in R. v. Lavallee, *supra*, the Supreme Court of Canada held that the expert opinion on the "battered wife syndrome" was both "relevant" and "necessary". The court articulated the principles that:

442 See the previous discussion on ultimate issue and: R. v. Fisher, *supra*; R. v. McDonald, *supra*; D.P.P v. A B and C Chewing Gum Ltd., *supra*; R. v. Lupien, *supra*; R. v. Graat, *supra*.

443 R. v. B.(G.), *supra*; R. v. Lavallee, *supra*; R. v. J.(F.E.), *supra*.

...expert testimony is admissible to assist the fact-finder in drawing inferences in areas where the expert has relevant knowledge or experience beyond that of a lay person and that expert evidence can assist the jury in dispelling these myths. (at 889-890)

This formulation does not appear to be as restrictive as the narrow test in Kelliher v. Smith, *supra*.

In R. v. B.(G.), *supra*, the Supreme Court of Canada specifically approved the lower court's liberal approach to accepting the expert opinion of mental health professionals. Madam Justice Wilson quoted, with approval, a passage from Mr. Justice Wakeling's judgment:

...Courts should seek as much assistance as possible from those who can be qualified as experts...so as to assist the judge in reaching a determination of what facts have been adequately corroborated...evidence of an expert...as to the psychological and physical conditions which frequently arise as a result of sexual abuse of a child, is admissible. It provides assistance to the trial judge in concluding whether an assault has occurred. This kind of testimony is helpful, because it provides a benchmark which can hardly be doubted, as it is entirely unlikely that such things as bedwetting and nightmares are subject to be concocted or contrived by a youthful witness, to support or buttress the reliability of any testimony that witness may later be called upon to give in Court. (at C.R. pp. 356-357)

In R. v. C.(R.A.), *supra*, the British Columbia Court of Appeal, in upholding the trial judge's ruling to admit "syndrome" testimony from a child sexual abuse therapist, concluded that:

...the expert may be helpful to a jury in the sense that, but for the expert evidence, the jury might well draw an adverse inference against the complainant. (at 530)

It appears that these courts are fashioning a "helpfulness" principle that, in circumstances where the jury's knowledge of the matter may be most limited, or that the jury is likely to form misconceptions, then expert testimony is admissible to assist the fact-finders.⁴⁴⁴ The research presented clearly shows that judges are not addressing the question of whether there is any scientific basis for the so-called "syndrome" testimony.

A further finding, which emerges from court observation, is that both judges and opposing counsel are not challenging, to any significant extent, experts in order to establish their qualifications. When a party seeks to call an expert witness, a brief *voir dire* is entered into and, in almost all situations, the tendered witness is qualified as an expert (see **Appendix W** for an example of a *voir dire* inquiry and **Appendix X** for an example of a *voir dire* ruling, where the trial judge referred to the fact that the Crown expert's qualifications were "not really challenged" by the defence counsel). There is usually no serious scrutiny of the credentials of the expert⁴⁴⁵ and no detailed examination as to whether the expertise offered is acknowledged as scientifically valid and reliable by the relevant professional discipline. Only in a few cases were proffered expert witnesses disqualified from testifying about behavioural syndromes.⁴⁴⁶ The situation is similar in the United States. An author describes the state of affairs as follows:

...[C]ase law suggests that the qualification of experts is rarely an issue on appeal. The Federal Rules of Evidence offer little guidance on this

444 See also: **R. v. Pelletier**, *supra*, where the court held that, in cases where there is testimony of children, any assistance should be afforded to the court should be provided.

445 A curriculum vitae is usually presented to the court and opposing counsel and entered as an exhibit.

446 **R. v. Banks**, *supra*, a crisis intake clinician; **R. v. Meisner**, *supra*, a social worker; **R. v. Gallo**, *supra*, a psychiatric social worker; and **R. v. W.**, *supra*, a child protection worker.

issue and, historically, the courts have been fairly lenient in qualifying experts based on academic credentials and pertinent professional experience. In practice, challenges to a witness's expertise are more likely to occur during cross-examination at trial than upon introduction of the proffered witness. (Whitcomb, 1992:112)

Sagatun (1991) concludes:

Allegations of child abuse are difficult to prove, but they are equally difficult to defend against. Testimony that could be clearly prejudicial to the defendant must therefore be carefully considered and only accepted when it rests on sound scientific evidence. (at 213)

It is submitted that, judges and lawyers should be more diligent in challenging the qualifications of expert witnesses, as well as the legitimacy of their scientific fields. Cross-examination should be more rigorous and judges should define a set of parameters or guidelines for the qualifying of expert witnesses in child sexual abuse cases. It is argued that, it falls well within the discretion of trial judges to establish controls, which will limit the involvement of experts with questionable, or no legitimate, expertise. It is recommended that the Frye⁴⁴⁷ test, or an analogous and rigorous standard, be adopted in Canada to govern the admissibility of expert witnesses. The test is as follows:

Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently

447 See Frye v. U.S., *supra*.

established to have gained general acceptance in the particular field in which it belongs. (at 1014)⁴⁴⁸

The modern formulation of Frye has been captured in People v. Kelly, *supra*, and adopted by California courts as the "Kelly-Frye" rule to ensure that novel scientific methods of proof be based on matter that may reasonably be relied on. Under the two-branch test, the party who adduces the expert testimony must demonstrate: a) the general acceptance within the scientific community of the method on which the expert witness bases his or her testimony; and b) the qualification of the witness to give an opinion on this subject. The purpose of this requirement is to prevent triers-of-fact from being misled by the "aura of infallibility" that may surround unproven scientific methods⁴⁴⁹. If the expertise is not rigorously challenged for its scientific validity, the opinions of the expert would be tantamount to mere sophism.

It is further submitted that, until more is known about the scientific reliability of "syndrome" testimony, expert opinion on that subject should be restricted to situations

448 It should be noted that the United States Supreme Court recently rejected the Frye test as a necessary precondition for the admissibility of scientific evidence under the Federal Rules of Evidence. The court in Daubert v. Merrell Dow Pharmaceuticals, 113 S. Ct. 2786 (1993) stated:

"[G]eneral acceptance" is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence -- especially Rule 702 -- do assign to the trial judge the task of ensuring that an expert's testimony both rests on a **reliable foundation** and **is relevant to the task at hand**. Pertinent evidence based on scientifically valid principles will satisfy those demands. (at 2799) [emphasis added]

However, in R. v. Dieffenbaugh (1993), 80 C.C.C. (3d) 97 (B.C.C.A.), the British Columbia Court of Appeal said that expert opinion without "scientific study" may not be helpful and that such opinion may be inadmissible because its probative value is outweighed by its prejudicial effect. The court considered, but did not adopt, the Frye test.

449 Re Amber B. (1987) 191 C.A. (3d) 682, 236 C.R. 623. See also: Re Sara M. (1987) 194 C.A. (3d) (at 593), where the court ruled that the evidence given by a clinical psychologist with respect to "child molestation syndrome" did not satisfy the Kelly-Frye test because the syndrome was not recognized by professional organizations.

where a child's credibility is seriously damaged by defence challenges. Whitcomb (1992) argues that opinion evidence on "syndromes" should not be elicited. Instead,

...when offering testimony in rebuttal to defense challenges, experts need not, nor do they always rely on an identified "syndrome." Rather, they may focus specifically on the issue that was raised by the defense and draw on their own clinical experience or knowledge of the research literature to counter the defense assertions. For example, it is not at all uncommon for the courts to admit expert testimony to explain specific behaviors of an alleged sexual abuse victim, such as delay in reporting or recantations, once the defense has opened the door. There is no need for the expert to ascribe the child's behavior to any kind of syndrome. (at 117)

It is submitted that, in reality, as a result of the low threshold test adopted by the Supreme Court of Canada, in R. v. B.(G.), *supra*, lower courts will be bound by the "helpfulness" criterion to admit expert witnesses in child sexual abuse cases. It is further submitted that, again, in light of the B.(G.) ruling, the use of mental health experts in these cases — by both the prosecution and defence — will increase substantially. The concomitant result, similar to the American experience, will be an escalation of the "battle of the experts".⁴⁵⁰

450 In R. v. H.(H.C.), *supra*, the Crown called a clinical psychologist (who had 26 years of clinical experience) to testify about behavioural symptoms of sexually abused children. The defence then called a psychologist (who had 10 years clinical experience) to rebut the Crown expert's testimony. During the cross-examination of the defence expert by Crown counsel, this brief exchange took place:

Crown: Would you agree that Mr. Colby [the Crown's expert] has had more clinical experience than you in treating sexually abused children?

Defence Expert: But I have more degrees! [The defence expert was referring to the fact that he had a Ph.D. in psychology and a Master of Business Administration. The Crown expert only held a Master's degree in psychology.]

The author was present in court during this time and observed that the jury was clearly shocked at the defence expert's arrogant demeanour. There was a small outburst from spectators in the courtroom as well. This was only one example of the blatant acrimony, which existed between the parties to the litigation.

It is a further submission that the use of experts, in the criminal law, may subvert the fairness of the process because of an inherent economic imbalance between the parties. While the State can bring its considerable resources to bear by hiring experts who support the Crown's theory of the case, an inequity is created because an accused individual is unlikely to be able to match the State's capital resources.

A possible remedy for the minimization of the "battle of the experts" might be to establish an impartial non-adversarial panel of child sexual abuse experts. This board or panel could assist the court in making its determination whether a child victim should testify in court (i.e. the "psychological harm") or with the assessment of the credibility of children's evidence.

Finally, it is submitted that there be mandatory training for judges to sensitize them to the dynamics of child sexual abuse. It is argued that a better educated judiciary would limit the involvement of adversarial experts and reduce the drain of court resources necessary to facilitate lengthy litigation.

Throughout the trial, the defence counsel was particularly hostile and condescending towards the female Crown counsel, who was prosecuting the case. On several occasions, the Crown asked the judge to order that the defence counsel refrain from making demeaning and sarcastic comments about her adversarial skills and the manner in which she was handling the case.

CHAPTER 6: HEARSAY (OUT-OF-COURT) STATEMENTS OF CHILD COMPLAINANTS (RELATED EVIDENTIARY ISSUE)

Anyone under the age of 12 shouldn't have to testify — it's too much pressure.

Quote from child victim
(London Family Court Clinic: Child Witness Project (Sas *et al.*, 1993))

I. INTRODUCTION

There has been no statutory enactment of the law of evidence concerning hearsay (out-of-court) statements by a child sexual abuse victim. One of the salient recommendations of the **Badgley Report** was that such evidence be admissible in these criminal proceedings. Parliament, however, did not see fit to legislate in such a manner under Bill C-15.

Notwithstanding the lack of statutory guidelines, some significant exceptions to the hearsay rule, which prove pertinent to child sexual abuse prosecutions, have developed through current common law.

The dissertation research is designed to monitor and analyze judicial decision-making in this area of out-of-court statements in child sexual abuse cases (see **Appendix Y**). The dissertation research attempts to answer the following question:

What common law has evolved to govern the nature and scope of hearsay (out-of-court) statements of child complainants of sexual abuse?

II. HEARSAY - COMMON LAW AND THE PROBLEM

The common law rule against hearsay, considered one of the oldest canons in the law of evidence, has been defined as:

Written or oral statements, or communicative conduct made by persons who are not testifying are inadmissible if such statements or conduct are tendered either as proof of their truth or as proof of assertions implicit therein. (Sopinka and Lederman, 1974:39-40)

A classic formation for the hearsay rule can be found in Subramanian v. Public Prosecutor⁴⁵¹:

Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made. The fact that the statement was made, quite apart from the truth, is frequently relevant in considering the mental state and conduct thereafter of the witness or some other person in whose presence the statement was made. (at 969)

451 [1965] 1 W.L.R. 965.

Lord Normand, in Teper v. R.⁴⁵², held that the general rationale for the rule against the reception of hearsay evidence is that reported statements are untrustworthy evidence of the facts stated. He provided this general statement of the law:

The rule against the admission of hearsay evidence is fundamental. It is not the best evidence and is not delivered on oath. The truthfulness and accuracy of the person whose words are spoken by another witness cannot be tested by cross-examination, and the light which his demeanour would throw on his testimony is lost. (at A.C. p. 486)

The orthodox justification for the inadmissibility of hearsay is that it violates the fundamental principles of the common law formulated in Wright v. Tatham, *supra*, by the House of Lords:

One great principle in the law is, that all facts relevant to the issue may be proved; another is, that all such facts as have not been admitted by the party against whom they were offered, or by someone under whom he claims, ought to be proved under the sanction of an oath (or its equivalent introduced by statute, a solemn declaration), either on the trial of the issue or some other issue involving the same question between the same parties or those to whom they are privy. (at 515).

McCormick (1991) summarized the three basic tenets which underpin the adversarial system:

1. Evidence will be upon oath which provides some guarantee of sincerity.
2. The witness will be present which enables demeanour to be assessed as part of credibility and minimizes the risk of inaccuracy.

452 [1952] A.C. 480, 2 All E.R. 447 (H.L.).

3. The presence of the witness provides a full opportunity to cross-examine which is fundamental to a fair hearing. (at 726-728)

The Supreme Court of Canada, in Innisfil v. Vespra et al⁴⁵³, described the right to cross-examination as a fundamental component of natural justice and the greatest legal engine ever devised for the pursuit of the truth. Common law has excluded the admission of hearsay evidence on the basis that the evidence is inherently unreliable because the declarant of the statement is not observed by the trier of fact and is not available for cross-examination by the opposing party to test the declarant's perception, memory, narration and sincerity (Spencer and Flin, 1990; Thompson, 1990; Blok, 1993).

Various exceptions to the traditional hearsay rule have evolved through the common law to counter the strictness of this rule of evidence. These hearsay exceptions include statements of physical, mental or emotional state, spontaneous declarations, admissions against interest, and dying declarations (Delisle, 1989; Cross, 1985). The justification made for such hearsay exceptions is that the circumstances under which the statement was made provides "sufficiently strong indicia of reliability" permitting the fact-finder to reach the truth (Proffitt, 1988). Other hearsay exceptions require that the criterion of "necessity" be established prior to the admission of the statement (Delisle, 1989; 1991).

The major difficulty concerning the hearsay statements of children is that they do not generally fall within the categories of extant hearsay exceptions. According to

453 [1981] 2 S.C.R. 145 (S.C.C.).

Professor Thompson (1990), "reception of hearsay evidence from children is rare in the common law, which still defines the bulk of the exceptions".

Contemporary commentators are calling for the reform of hearsay rules for the statements of children (Ontario Law Reform Commission, 1991). Critics have argued that the hearsay rule amounts to "a disaster for justice in cases where children are concerned" (Spencer and Flin, 1990:136). In particular, they state:

[The] competency requirement and the rigours of the adversarial system often prevent children giving evidence in court themselves; and the hearsay rule makes it impossible for other people to repeat in court the accounts children gave them. (Spencer and Flin, 1990:136)

This results in courts being compelled to deal with offences committed against children without the opportunity to hear the child's account of what occurred (Yuille, King, and MacDougall, 1988).

It is argued that the hearsay evidence of children should be admissible because it may constitute the best evidence of the subject matter that is before the court (Proffitt, 1988). In addition, the out-of-court statements of a child may be the only substantive evidence available in the proceedings (Proffitt, 1988; Christiansen, 1987). Frequently, in child physical or sexual abuse cases, the evidence of a child is the primary and sole source of evidence. Judge d'A. Collings (1989) is of the opinion that the second-hand (hearsay) evidence of children is often the only option for taking cases of child abuse

before the courts (1989:374). That view is shared by an Ontario Family Court judge, in **R. v. Kathleen R.**⁴⁵⁴, where he stated:

[When] proceedings concern the best interests, safety, and in some cases, the life of a child [g]iven the enormous importance of such issues, the rules of evidence should stand aside when they would prevent the Court from hearing all the available evidence which might assist in determining the appropriate result. (at 14, per Thompson J.)

Professor Bala (1990) states:

The rules about previous consistent statements are generally sound. However, they should not be applied so strictly that the trier of fact is deprived of highly relevant information. Not infrequently in child sexual abuse cases, the initial disclosure of abuse by the child to a parent or other trusted person is graphic and directly supportive of the allegations which form the basis of the charge. (at 28)

Many forensic mental health professionals believe that the spontaneous statements of children are generally extremely accurate (Parker, 1982).

The movement towards the liberalization of the hearsay rule concerning the out-of-court statements made by children has gained momentum. There is an increased desire by the judiciary to spare children from the trauma of testifying in court (Nasmith, 1990b). Thompson J., in **R. v. Kathleen R.**, *supra*, acknowledged that "no one can deny the great difficulties potentially facing a child who must give evidence and be cross-examined in the alien environment of a courtroom" (at 36). Child witnesses, in some cases, are so intimidated by the court proceedings that they will refuse to give evidence

454 (31 August 1983), (Ont.C. Fam. Div.) [unreported].

(Eatman, 1987). As a result, if the child's out-of-court statements to a third party are inadmissible under the hearsay rule, highly probative evidence will not be considered by the trier of fact. Some judges have acknowledged the uniqueness of child sexual abuse cases. The growing awareness of the extent of the problem of sexual abuse, the increased reporting of such cases, and the recognition of the difficulty of proving the offence, have resulted in a new approach by some members of the judiciary to the hearsay statements of children in sexual abuse cases (Thompson, 1991).

In Children's Aid Society of Hamilton-Wentworth v. D.C.⁴⁵⁵, Beckett U.F.C.J. stated:

It is evident to me that if society is to protect young children from sexual abuse, some traditional rules of evidence do not and cannot apply. **The best evidence that we are likely to get from young children may be in the form of statements they make to others in the investigative or assessment process.** (at 9) [emphasis added]

III. ANALYSIS OF CASES

The dissertation research included the analyses of **32** cases, where courts made *voir dire* rulings with respect to the admissibility of hearsay statements of child complainants in sexual abuse cases (see **Appendix Z**). The statements were admitted in **24** cases and ruled inadmissible in **8** cases.

455 (30 March 1987), (Ont.F.C.) [unreported].

In recent years, Canadian courts have adopted a more liberal approach to the admission of hearsay evidence from children regarding alleged sexual abuse. A number of judgments have demonstrated the courts' willingness to create a new hearsay exception for the out-of-court statements of children in such cases. The "spontaneous declaration" (*res gestae*) exception was regarded as the most promising in terms of its applicability to hearsay statements of children (Thompson, 1991; Misner, 1991; Graham, 1989). This special hearsay exception, articulated, for example, in Ratten v. The Queen⁴⁵⁶, is applicable when a spontaneous statement is made by a declarant who is under the stress of nervous excitement caused by a startling event. According to the Privy Council, the admissibility of hearsay statements under this exception is contingent on the possibility of fabrication or concoction. Moreover, the spontaneous statements need not be made strictly "contemporaneous" with the event so long as the stress created by it is ongoing and the utterances are made before there has been time to contrive it.

The Ontario Law Reform Commission (1991) described the potential for the *res gestae* exception in this way:

With the test of spontaneity rather than exact contemporaneity, this hearsay exception was regarded as having significant potential with respect to the statements of children. As more cases involving young children reached the courts, it was expected that the scope of this hearsay exception would be widened since the temporal element could be liberally construed to extend to several hours or even a few days. (at 54-55)

Academics have endorsed a similar view. For example, Professor Thompson argued:

456 [1972] A.C. 378, [1971] 3 All E.R. 801 (J.C.P.C.).

In my view, a better appreciation of the modern basis for this exception which is implicit in its phrasing as an "excited utterance" would permit wider admissibility of children's statements, so long as counsel lay a proper foundation demonstrating the spontaneous nature of the statement and the child's condition of excitement at the time of the statement. One would think it easier to convince a judge that the "risk of concoction or fabrication" is much less in the case of a child — especially a young child — than an adult. (1989:48)

This approach, which is well developed in the United States⁴⁵⁷, appeared to be developing in Canada. Courts have shown a willingness to adopt a less strict threshold test of spontaneity in situations where a child is very young and the details of the disclosed sexual acts are beyond the child's knowledge. Ontario courts were the first to move in the direction of admitting a child's out-of-court statements, particularly if the statements were made soon after the alleged abuse occurred. In **R. v. Owens**⁴⁵⁸, the Ontario Court of Appeal allowed the parents to testify about statements made by their sons (who were allegedly sexually assaulted by a school teacher) to support the credibility of their children's evidence. Speaking on behalf of the court, Lacourciere J.A. stated:

One special circumstance to be considered in the exercise of judicial discretion in this area is the tender age of the principal witness. The voluntary and spontaneous account of an improper act, given by a child to his father or mother, may reasonably be thought to be free from suspicion.

...It is not necessary to show that an allegation of recent fabrication has been expressly made before the prior consistent statement becomes admissible...The allegation may be implicit from the conduct of the case. (at 280-281)

457 For a comprehensive state-by-state analysis of child hearsay statutes, see: American Prosecutors Research Institute (1992). The legislation has been ruled unconstitutional in 3 states, and in 14 states the constitutional validity of such provisions has been upheld by superior courts.

458 (1986), 33 C.C.C. (3d) 275 (Ont.C.A.).

While the hearsay rule did not permit the parents' testimony to act as "evidence of the facts stated, the court held that the "prior consistent statements" became admissible to rebut an allegation of recent fabrication or, in this case,

...where the defence contended that the children's sworn testimony was inconsistent in vital respects with their prior statements and was the result of their parents' coaching or the product of suggestions made to them by their parents and was not based on the children's antecedent memory of the event. (at 279-280)

The Owens decision represented the court's willingness to relax the hearsay rule by broadening the scope for admitting statements to establish consistency, and thus, "restoring the children's impugned credibility".

In one of the first reported decisions of this genre, R. v. Khan, *supra*⁴⁵⁹, the accused was a physician and the evidence indicated that while the child's mother was in another room waiting for her examination, Dr. Khan was alone with the child for a few minutes. The doctor then conducted an examination of the mother. When she returned to her child, the mother noticed that her daughter was picking at a wet spot on her sleeve. (The child's clothing was subsequently analyzed and found to contain a mixture of saliva and semen.) Approximately 15 minutes after leaving the doctor's office, the mother had the following conversation, in the car, with her daughter (according to the mother):

Mrs. O.: So you were talking to Dr. Khan, were you? What did he say?

459 This case (Ont.C.A.) went on to the Supreme Court of Canada. The court's decision will be considered below.

T.: He asked if I wanted a candy. I said yes. And do you know what?
Mr. O.: What?
T.: He said "open your mouth". And do you know what? He put his birdie in my mouth, shook it and peed in my mouth.
Mrs. O.: Are you sure?
T.: Yes.
Mrs. O.: You're not lying to me, are you?
T.: No. He put his birdie in my mouth. And he never did give me my candy. (at 201)

At the trial of the accused, on a charge of sexual assault, the Crown sought to introduce the statement made by the child (who did not testify). The trial judge refused to admit the hearsay statement by reasoning that the child had time to "subconsciously adopt or fudge her account".

The Ontario Court of Appeal ruled that the trial judge erred in law in excluding from evidence a "**spontaneous declaration**" made by a 3½-year-old child to her mother shortly (15 minutes) after the alleged sexual assault by her doctor. In allowing the child's spontaneous out-of-court statements to her mother to be admitted for the truth of its contents under the "**spontaneous declaration**" (*res gestae*) exception to the hearsay rule, Mr. Justice Robins stated:

[T]he statement need not be made strictly contemporaneous to the occurrence so long as the stress or pressure created by it is ongoing and the statement is made before there has been time to contrive and misrepresent. (at 207)

The Court of Appeal went on to state that a more flexible approach ought to be adopted when deciding whether a statement is "spontaneous" when given by a young

child. Reflecting a special sensitivity towards children, Mr. Justice Robins opined as follows:

Where the declarant is a child of tender years and the alleged event involves a sexual offence, special considerations come into play in determining the admissibility of the child's statement. This is so because young children of the age with which we are concerned here are generally not adept at reasoned reflection or at fabricating tales of sexual perversion. They manifestly are unlikely to use their reflective powers to concoct a deliberate untruth, and particularly one about a sexual act which in all probability is beyond their ken. For this reason, greater latitude, in my opinion, should be given to the temporal proximity between the time of the alleged event and the time of the statement. Delay in the making of a statement which if made earlier would be considered spontaneous should be viewed less strictly when made by a young child about an event of this kind.

...The fact that the child made her statement in response to this general question does not warrant the statement being characterized as narrative. The mother's total lack of suspicion or animosity towards the respondent together with the ingenuousness and guilelessness of the child in her recounting of the alleged happening can only lead to the conclusion that her statement was not likely infected with device or afterthought. While the nature and import of the alleged act were not fully understood by the child, and she did not appreciate that what she said the doctor had done was wrong, the act was so out of the ordinary as to be clearly capable of producing an ongoing effect on her and prompting a spontaneous statement at a time following the event. There is no requirement that the child manifest any intensity or pressure with respect to an act which she may not have understood. Given the child's age and the very brief time that elapsed between the alleged sexual act and the statement, the danger of fabrication appears remote. (at 210-211)

Four months after the Ontario Court of Appeal decision in **Khan**, in **R. v. Jones**⁴⁶⁰, the same court, with a bench comprised of Goodman, Robins and Grange J.J.A., held that the 8-year-old child's statement to her mother, 4 days after the alleged

460 (29 July 1988), Bracebridge (Ont.P.C.) [unreported], (1988), 44 C.C.C. (3d) 248 (Ont.C.A.).

sexual assault, was not admissible as part of the *res gestae* or part of the narrative of the offence. The Ontario Court of Appeal ruled that the trial judge erred in admitting the child's out-of-court statement and held that there was no other common law exception to the rule against leading prior consistent statements which was applicable in this case. The judgment of the court, which was delivered by Goodman J.A., did not refer to its earlier decision in **Khan**.

In **R. v. Malette**⁴⁶¹, the Ontario District Court applied the Ontario Court of Appeal's **Khan** decision and held that, in determining whether or not the child's statements were admissible as part of the *res gestae*, exact contemporaneity between the event and the statement was not a prerequisite. Furthermore, it is open to the court to consider any supporting or independent evidence which would tend to support both the reliability of the statements and the finding that the event occurred. Speaking for the court on the *voir dire* ruling, Desmarais D.C.J. opined:

On the basis of those facts, I am satisfied, firstly, that the event alleged to have occurred is of such a dramatic, or startling, nature as to form the prerequisite for the statement to be admitted as an exception to the hearsay rule. In my view, the child's statement coupled with the physical observations made by her mother and Dr. Sirwick, constitutes evidence of a startling and dramatic nature capable of forming the foundation necessary to establish its admissibility.

I am also equally of the view that notwithstanding the passage of some six to seven and a half hours between the purported act and the making of the statement to the mother, such statement can nonetheless be considered as spontaneous given the particular circumstances of this case. (at 13-14)

461 (1988), 6 W.C.B. (2d) 341 (Ont.D.C.).

The court concluded that:

In determining the admissibility of such hearsay evidence the weight to be given to such evidence is clearly irrelevant. If the statement meets the test as set out in the **Khan** decision then it should be admitted into evidence. The weight to be given to that evidence is then for the trier of fact to decide. (at 3)

The Saskatchewan Court of Queen's Bench followed the **Khan** ruling, in **R. v. Meacham**, *supra*, and admitted a 2½-year-old child's statements to her mother under the *res gestae* exception. The court stated:

There is authority supporting the Crown's argument that the words are admitted as an exception to the hearsay rule, and as part of the *res gestae*.

I have reviewed the cases put forward by the Crown and agree that what C. said, if she said it, is admissible as evidence at this trial.

Heidi B., C.'s mother, said she saw C. kiss her brother, J., a child born June 15, 1988 from the toes up and eventually place her mouth over his penis. When asked about this conduct, her response implicated the Accused in the sexual assault charged in this Indictment. As described by the mother, the speech by the child is so closely connected with what she was doing to her brother, as to be part of that act. I do not believe that the little girl understood that what she was doing to her brother was improper. Why then would she not be candid with her explanation. Secondly, even though what C. said was in response to her mother's inquiry, I do not believe that the truth of her response was affected. This little girl was just too young to have been influenced. This kind of evidence is, therefore, admissible. (at 2-3)

In **R. v. Kozy**⁴⁶², the Ontario Court of Appeal followed its own decision, in **Khan**, and held that the trial judge did not err in admitting, under the *res gestae* exception to the hearsay rule, a child's statement to a police officer. The court stated:

The second ground of appeal is that the trial judge erred in admitting the evidence of the complainant in response to the question of P.C. Moyan, "Is there a problem?" when she said, "Yes he forced me". The trial judge in careful reasons following the *voir dire* as to the admissibility of the statement held that the statement was admissible under the *res gestae* exception to the hearsay rule. He concluded that the statement was made sufficiently soon after the sexual assault as to exclude the possibility of concoction by the appellant. Notwithstanding his ruling the trial judge very carefully charged the jury that it was for them to determine what weight should be attached to the statement and he pointed out any possible frailties in its reliability. In our view the trial judge was correct in his ruling and direction to the jury. (at 3-4)

The Ontario District Court, in **R. v. Scott**⁴⁶³, held that the trial judge did not err in admitting the statements of a 3-year-old child to his mother as an exception to the hearsay rule. The court held that the statements, which were made by the child 1½ days after the alleged sexual assault, were admissible in evidence as "excited utterances".

Madam Justice Corbett ruled:

[S]tatements by a young child within a reasonable time in circumstances where the possibility of concoction or distortion or error is excluded and where there is no indication of a motive for fabrication or concoction, are admissible in evidence for the truth of their contents. (at 12)

462 (1990), 10 W.C.B. (2d) 220 (Ont.C.A.).

463 (21 June 1990), (Ont.D.C.) [unreported].

The court relied on as authority, the Supreme Court of Canada, in **R. v. B.(G.)**, *supra*, for the proposition that the judiciary ought to adopt a more "benign" approach with respect to the evidence of children. The court made no reference to the **Khan** case.

In **R. v. L.(J.)**⁴⁶⁴, the Ontario Court of Appeal held that the trial judge erred in allowing the out-of-court statements made by 8-year-old and 9-year-old complainants to their mother, disclosing the alleged sexual assaults. The Ontario Court of Appeal considered, but distinguished, its own earlier decision in **R. v. Owens**, *supra*, where the court admitted the prior consistent out-of-court statements of a child to her mother. The appellate court held that **Owens** was a case where there was an assumption that the defence was alleging "recent fabrication or wanted the evidence...to attempt to prove an inconsistency" in the children's testimony at trial. It is interesting to note that the Ontario Court of Appeal had an opportunity to apply the **Khan** ruling, formulated earlier by its own court, but failed to consider it.

The accused in **R. v. Khan**, *supra*, appealed the 1988 decision of the Ontario Court of Appeal to the Supreme Court of Canada.⁴⁶⁵ Contrary to the decision of the Ontario Court of Appeal, however, the Supreme Court of Canada refused to admit the child's statement to her mother under the category of a spontaneous declaration exception to the hearsay rule. Madam Justice McLachlin ruled that the statement was not made contemporaneously with the alleged offence, nor was it made under conditions of pressure or emotional intensity. This was made despite the *obiter dicta* in **Ratten v. The**

464 [1990] O.J. 427 (Ont.C.A.).

465 **R. v. Khan**, [1990] 2 S.C.R. 531, 79 C.R. (3d) 1, 59 C.C.C. (3d) 92 (S.C.C.).

Queen, *supra*, cited with approval in Canadian judgments⁴⁶⁶, that the statement need not be made strictly contemporaneous to the event. The learned Justice explicitly rejected the emerging trend in the United States (the admission of *res gestae* statements as an exception to the hearsay rule), which had been adopted by the Ontario Court of Appeal.⁴⁶⁷ Favouring the adoption of a more flexible approach, she stated:

I am satisfied that in applying the traditional tests for spontaneous declarations, the trial judge correctly rejected the mother's statement. The statement was not contemporaneous, being made 15 minutes after leaving the doctor's office and probably one-half hour after the offence was committed. Nor was it made under pressure or emotional intensity which would give the guarantee of reliability upon which the spontaneous declaration rule has traditionally rested. The question then is the extent to which, if at all, the strictures of the hearsay rule should be relaxed in the case of children's testimony. The issue is one of great importance in view of the increasing number of prosecutions for sexual offences against children and the hardships that often attend requiring children to re-tell and re-live the frequently traumatic events surrounding the episode in a long series of encounters with parents, social workers, police and finally different levels of courts.

The hearsay rule has traditionally been regarded as an absolute rule, subject to various categories of exceptions, such as admissions, dying declarations, declarations against interest and spontaneous declarations. While this approach has provided a degree of certainty to the law on hearsay, **it has frequently proved unduly inflexible in dealing with new situations and new needs in the law. This has resulted in courts in recent years on occasion adopting a more flexible approach, rooted in the principle and the policy underlying the hearsay rule rather than**

466 R. v. Babinski (3 April 1989), (Ont.D.C.) [unreported]; R. v. Schwartz (1978), 25 N.S.R. (2d) 335, 40 C.C.C. (2d) 161 (C.A.); and R. v. Slugoski (1985), 17 C.C.C. (3d) 212, 43 C.R. (3d) 369 (B.C.C.A.).

467 In considering the United States experience, McLachlin J. noted that courts there have relaxed the admissibility requirements for children's sexual abuse reports through the doctrine of spontaneous declarations. She noted that this had led to an apparent "rule of thumb" to the effect that declarations made up to 1 hour after the assault will generally be admissible, while those made later generally will not be. In rejecting the spontaneous declaration vehicle, McLachlin J. noted that it lacked a "necessity" requirement that might allow the Crown to use the hearsay evidence even in situations where there is no evidence that the child would suffer adversely. (at S.C.R. p.543)

the strictures of traditional exceptions. (at C.C.C. pp.99-100)
[emphasis added]

The Supreme Court of Canada departed from the traditional category approach for hearsay and instead applied the general requirements of "**necessity**" and "**reliability**", set out in Ares v. Venner⁴⁶⁸. In that case, a plaintiff sued for medical malpractice, which he claimed had resulted in the amputation of his leg for gangrene. The plaintiff sought to enter hospital records containing observations made by nurses as evidence of the onset of symptoms which, he claimed, doctors should have noticed and treated. In admitting the evidence, the Supreme Court of Canada had rejected the proposition that the categories of hearsay exceptions were closed. The Ares court created a new exception to the hearsay rule for hospital records and nurses' notes. The Supreme Court of Canada decided that:

Hospital records, including nurses' notes, made contemporaneously by someone having a personal knowledge of the matters then being recorded and under a duty to make the entry or record should be received in evidence as *prima facie* proof of the facts stated therein. (at D.L.R. p.16)

This exception was justified because of the "**reliability**" of such records and the "**necessity**" created from the disruption which would be caused to a hospital if the party were forced to call all the persons involved in the creation of even a single record relating to one patient. The Ares court accepted Lord Pearce's four-point test from

468 (1970), 14 D.L.R. (3d) 4, [1970] S.C.R. 608 (S.C.C.).

Myers v. Director of Public Prosecutions⁴⁶⁹. This test was quoted by Hall J. of Ares v. Venner, *supra*, as following from p.1041 of Lord Pearce's judgment:

In the first place, the case must be one in which it is difficult to obtain other evidence, for no doubt the ground for admitting the exceptions was that very difficulty. In the next place the declarant must be disinterested; that is, disinterested in the sense that the declaration was not made in favour of his interest. And thirdly, the declaration must be made before dispute or litigation, so that it was made without bias on account of the existence of a dispute or litigation which the declarant might be supposed to favour. Lastly, and this appears to me one of the strongest reasons for admitting it, the declarant must have had peculiar means of knowledge not possessed in ordinary cases. (at S.C.R. p.624)

McLachlin J., in Khan, summarized the tests of Lord Pearce as two general requirements, "**necessity**" and "**reliability**". Thus, even if an out-of-court statement does not fall within one of the established exceptions to the hearsay rule, it could still be admitted for its truth, if the court is satisfied that it can meet the broader test as follows:

The first question should be whether reception of the hearsay statement is necessary. Necessity for these purposes must be interpreted as "reasonably necessary". The inadmissibility of the child's evidence [because the child had no capacity to testify] might be one basis for a finding of necessity. But sound evidence based on psychological assessments that testimony in court might be traumatic for the child or harm the child might also serve. There may be other examples of circumstances which could establish the requirement of necessity.

The next question should be whether the evidence is reliable. Many considerations such as timing, demeanour, the personality of the child, the intelligence and understanding of the child, and the absence of any reason to expect fabrication in the statement may be relevant on the issue of reliability. **I would not wish to draw up a strict list of considerations for reliability, nor to suggest that certain categories of evidence (for**

469 [1965] A.C. 1001 (H.L.).

example the evidence of young children on sexual encounters) should be always regarded as reliable. The matters relevant to reliability will vary with the child and with the circumstances, and are best left to the trial judge. (at C.C.C. pp.104-105) [emphasis added]

In applying this open-ended approach to the facts of the case, the court opined:

The child's statement to the mother in this case meets both these general requirements as well as the more specific tests. Necessity was present, other evidence of the event, as the trial judge found, being inadmissible. The situation was one where, to borrow Lord Pearce's phrase, it was difficult to obtain other evidence. The evidence also bore strong *indicia* of reliability. T. was disinterested, in the sense that her declaration was not made in favour of her interest. She made the declaration before any suggestion of litigation. And beyond doubt she possessed peculiar means of knowledge of the event of which she told her mother. Moreover, the evidence of a child of tender years on such matters may bear its own special stamp of reliability. As Robins J.A. stated in the Court of Appeal (at p.210):

Where the declarant is a child of tender years and the alleged event involves a sexual offence, special considerations come into play in determining the admissibility of the child's statement. This is so because young children of the age with which we are concerned here are generally not adept at reasoned reflection or at fabricating tales of sexual perversion. They, manifestly, are unlikely to use their reflective powers to concoct a deliberate untruth, and particularly one about a sexual act which in all probability is beyond their ken. (at C.C.C. p.101)

In the result, the Supreme Court of Canada held that the trial judge had erred in the rejection of the child's out-of-court statements. In affirming the Ontario Court of Appeal ruling that the child's statement was admissible, Madam Justice McLachlin stated:

I conclude that hearsay evidence of a child's statement on crimes committed against the child should be received, provided that the

guarantees of necessity and reliability are met, subject to such safeguards as the judge may consider necessary and subject always to considerations affecting the weight that should be accorded to such evidence.

I conclude that the mother's statement in the case at bar should have been received. It was necessary, the child's *viva voce* evidence having been rejected. It was also reliable. The child had no motive to falsify her story, which emerged naturally and without prompting. Moreover, the fact that she could not be expected to have knowledge of such sexual acts imbues her statement with its own peculiar stamp of reliability. (at C.C.C. pp.105-106)

The Khan court was particularly alert to the issue of protecting the interests of the accused. The learned justice spent considerable time discussing the right of cross-examination, noting that it will not likely be present in cases where the child does not testify (at S.C.R. p.18). She concluded that the Ares relaxation of the hearsay rule is not limited to situations where cross-examination is available. Nonetheless, the court concluded that this will not be the general case, as "in particular, the requirement of necessity will probably mean that in most cases children will still be called to give *viva voce* evidence" (at S.C.R. p.548).

In R. v. W., *supra*, one of the first reported cases to apply the threshold tests of "necessity" and "reliability" enunciated in Khan, the preliminary inquiry judge commented:

I believe that an application of the test in *Khan* involves a court in a delicate balancing act, balancing the societal interest in having to proceed [with] prosecutions of alleged sexual assaults involving child victims, against the individual's right to a fair trial.

In my view, a court must be very vigilant where the Crown seeks to have a ruling of this nature made at the beginning of the case, in circumstances where the child has not (yet) been called to give *viva voce* evidence.

Notwithstanding great sympathy for children who are required to testify on intimate matters, the court must not lose sight of the wider picture, i.e., the balancing act involved in the *Khan* application. (at 210)

The Crown had asked the court to admit the hearsay statements of a 3½-year-old child made to her mother and step-sister, concerning allegations of sexual abuse by her father. The Crown had sought the admission of these statements so that the child, 4 years old at the time of the proceedings, would be spared from the emotional trauma of testifying in court. On the *voir dire*, the Crown had called a child abuse specialist, but the expert had not actually assessed the child for the purpose of determining potential trauma or harm to her in testifying.

The court ruled that the "**necessity**" test for the admission of the out-of-court statements was not established and, therefore, the court did not have to consider the "**reliability**" of those statements. Crawford Prov. J. stated:

In testifying for the Crown in this proceeding, Dr. Mian described the courtroom setting as "intimidating", "meant to be serious business", and "not meant to be a fun, user-friendly sort of place." I suspect that these observations would be echoed not only by children attending court, but by many adults as well. Both the courtroom setting and the subject matter of the attendance can be expected to lead to a feeling of unease for most people. The court can, of course, accept that these feelings may be stronger in children.

To the extent that considerations relating to the courtroom setting are linked to a general feeling of uneasiness for the child witness, and are otherwise not linked directly to issues of trauma and harm to the specific child victim, I am unable to find that they meet the threshold of the necessity test set out by McLachlin J. Likewise, I do not believe that these considerations *per se* can satisfy another aspect of the necessity test, for surely such would need to be considered in context with the concrete example given by McLachlin J., at least with respect to its serious nature. It is, of course, possible that the uneasiness of any witness may, in fact,

be an indication of a lack of truthfulness, an issue which needs to be addressed in the normal course by the trial Judge.

The court accepts that Dr. Mian is an authority in her field and that she has attempted to assist in clarifying this difficult area. However, in the absence of an actual assessment of B. by her for the purpose of determining the trauma or harm, I am unable to see that the "sound evidence" threshold of the necessity test has been met. (at 210-211)

Since the grounds of necessity were not made out in the absence of a psychological assessment of the child, the court concluded:

On the facts before me at this stage of the proceedings, it is unnecessary to render a ruling on the reliability factor in *Khan*, since even the most reliable evidence would not fit into the exception treated by that case where the evidence was not also necessary. As well, subsequent developments in this preliminary hearing may lead the Crown to re-examine the entire issue in *Khan* if any different light is shed on the necessity test, and it seems to me that the court should leave itself open to consider the second factor at that time. Suffice it to say that I read the requirements of the reliability test from p. 18 of the *Khan* judgment as involving an assessment by the court of a variety of factors which "vary with the child and the circumstances." My conclusion is also that this, therefore, involves a "reasonable reliability" on all the facts.

Accordingly, I find that the statements of B. to her mother, step-sister and to the C.A.S. worker, Mr. Senna, cannot be entered into evidence at this juncture based on the authority of *R. v. Khan*. (at 212)

The Supreme Court of British Columbia applied *Khan* in *R. v. S.(K.O.)*⁴⁷⁰, when admitting the hearsay statements of a 3-year-old child to her grandparents about allegations of sexual assault by her mother's common-law husband. It was conceded by counsel that calling the child to testify at the proceedings would not produce useful

470 (1991), 63 C.C.C. (3d) 91 (B.C.S.C.).

testimony. The statements were made on the night following the alleged incident. The hearsay tendered was the following:

Within half an hour of being returned to her grandparents by the accused and the child's mother, the child went to the bathroom. There was an anguished scream. When Mrs. R., the grandmother, asked her what was wrong, the child said, "It hurts to pee".

An examination showed a red and inflamed vaginal area.

The next night the same thing occurred. Mrs. R. and the child had this conversation:

- Q: What's wrong?
A: My pee pee hurts when I pee.
Q: Why does it hurt?
A: He put his fingers on my pee pee.
Q: Want to tell Poppa (grandfather)?
A: No.
Q: Why?
A: Daddy told me not to.
Q: Tell Poppa, he won't hurt you.

The child then went to her grandfather and said, "Poppa, Daddy was putting his fingers on my pee pee, that's why it's sore". (at 95)

The child was interviewed three days later by an experienced police officer and a social worker. The interview was videotaped, but the child refused to discuss the event with them. The court held that the Khan prerequisite of "**necessity**" has a two-fold meaning:

It must be necessary in the sense of the evidence being crucial to the case. That is evident here.

The other aspect is that it is *reasonably necessary* in the sense of the direct evidence not being available. (at 93)

The judge requested expert evidence to assist him with making a determination on the "reliability" branch of the Khan test. Wetmore J. stated:

The more difficult decision is in determining the reliability of the hearsay evidence. Again, the absence of an opportunity of assessing the particular child does not make the problem easier. Here again, however, the expert evidence is of some assistance. I refused to hear the opinion of Dr. Mills as to whether this particular child was lying or telling the truth to her grandparents. This is a question of fact for the trier of the case. I did receive his opinion that the child is a normal three-year-old and without quoting him, has the classic frankness, but also the limited capacity to think in terms of logic and progressive reasoning. Their statements are reactive as a rule. That is not to say children do not also lie on occasions, but this is again reactive and to avoid consequences such as punishment. The classic case of the broken cookie jar and both children telling the irate parent the other did it.

...What I take from *Khan* is that the reception of this hearsay testimony must have that degree of persuasiveness that it may be found truthful when weighed with the other evidence. In making that judgment on reliability to determine whether such evidence is receivable, such considerations as capacity, opportunity and motive to fabricate must be weighed in determining reliability not ultimate truthfulness or accuracy as it may finally be determined by the jury or judge in arriving at findings of fact. (at 94)

The judge went on to rule that there existed sufficient evidence of the reliability of the child's hearsay statement to make it admissible:

I have concluded I should permit the hearsay evidence to be tendered. The disclosure was spontaneous and arose in explaining her severe discomfort on urinating. The questions were not suggestive of answers. The child is adequately articulate and bright to appreciate what she believed occurred and her report is not cluttered with an affront to her moral values or any particular dislike of her father.

In *Khan* the observations of Robins J.A. are cited [at p.101]:

Where the declarant is a child of tender years and the alleged event involves a sexual offence, special considerations come into play in determining the admissibility of the child's statement. This is so because young children of the age with which we are concerned here are generally not adept at reasoned reflection or at fabricating tales of sexual perversion. They, manifestly, are unlikely to use their reflective powers to concoct a deliberate untruth, and particularly one about a sexual act which in all probability is beyond their ken.

While I am admitting the evidence, its weight will have to be determined at the end of the trial having in mind the frailties of this sort of evidence and its ultimate reliability as it is examined in light of the whole of the evidence. (at 94-95)

In R. v. Turner⁴⁷¹, the Crown sought to tender into evidence videotaped statements by a 4-year-old complainant to social workers without the necessity of the child testifying in court. The child, aged 6 at the time of the preliminary hearing, was not available to testify due to diminishing health. Counsel for the accused conceded that the videotaped interviews, which captured the child's disclosure of the alleged sexual acts, met the standard of "**reliability**". In applying the Khan test for that prerequisite, the court stated:

Indeed, this criterion has been satisfied to a very high degree. At the beginning of each recorded interview, we can see the CAS workers go through a little exercise with KH to ensure he understands that he must only tell them of things that are "real". The allegations in the disclosure are repeated, recorded, and clarified, all in the child's own words, and in age-appropriate language. During the interviews, the CAS workers interrupt from time to time to ask KH, "Is that real?" The child understands the purpose of the interviews, namely to talk about things that upset him. In context, each time the subject of the interview is brought

471 (1991), 12 W.C.B. (2d) 411 (Ont.P.C.).

up, the child starts to talk about "[J]". Further, the child's disclosure and observations corroborate other evidence at the hearing in support of some of the other charges, such as the accused flushing the heads of the other children in the toilet bowl. The words of the disclosure themselves describe an event which is consistent with an incident of sexual assault. There is no suggestion of the child being coached or led to say these things. (at 4)

The issue which remained for the court to determine was whether or not the "necessity" element of Khan was met. The court heard from three child abuse experts, who testified that the child's emotional condition had deteriorated since the disclosure and would be "emotionally unable" to relate the details of the sexual assault in court. Judge Main was satisfied that this was not a case of the child's inhibition or reluctance, but a genuine emotional inability to respond to further questioning about the alleged acts. In ruling the videotape admissible, the court concluded:

I will say at this point in my reasons that I am convinced by the evidence that this procedure is necessary. I find that to require this child to come to court at this stage in his life to testify about [J.] Turner would run the genuine risk of causing long-term and probably irreparable emotional harm to the child. I come to this conclusion after assessing a number of elements in the evidence at this *voir dire*, including the deterioration in KH's emotional health, including his present inability to communicate, the extent of the trauma to the child including nightmares and deep defence mechanisms, the effect that the abduction/threatening incident had on him, as well as the opinions of the two CAS workers and the Kinark psychometrist that to require KH to testify will likely cause him emotional harm.

The evidence of the deterioration of this child's emotional health is overwhelming. Although described initially as a normal fun-loving outgoing feisty little boy, we are now dealing with a child, according to Ms. MacIntosh, who is sad, depressed, listless, apathetic and anxious; who needs to alleviate his distress, who needs individual therapy and counselling, and who needs to defend himself; a child who blames himself for having done something that is bad; who states spontaneously that "he

had been asked enough questions" and he did not want to be asked any more questions; a child whose play is troubled with repetitive themes of violence and sexual overtones. (at 5)

The ruling in this case, it is submitted, creates an anomalous result because the videotape (containing the hearsay statements of the child) was admitted pursuant to common law, without relying on s. 715.1 of the Criminal Code. As discussed in the earlier chapter on this subject, the legislation sets out as a pre-condition, for the admission of hearsay evidence under s. 715.1, the requirement that the child complainant testify in court and "adopt the contents of the videotape". This provision arguably provides the only mechanism for the admission of videotaped hearsay statements of a child complainant in sexual abuse cases.

While this decision reflects the court's eagerness to provide a flexible interpretation of the Khan judgment, it results in a situation where the common law may be in direct conflict with statute law (which ought to be paramount). In effect, even if the child does not adopt the contents of the videotape statement, it is still admissible under the common law. This ruling resembles the American approach of creating, through statutes, special hearsay exceptions for receiving the videotaped out-of-court statements of child complainants in sexual abuse cases. These types of statutes were designed specifically to accommodate unique circumstances where young child complainants were "unavailable" or "unable" to testify in court. The common law approach to videotaped evidence as admissible hearsay has the virtue of avoiding the problems inherent in s. 715.1.

IV. CONCLUSION

There is no question as to which direction the Supreme Court of Canada has taken with respect to the hearsay statements of children. The Khan court has chosen to adopt a broad policy approach of "principled analysis over a set of ossified judicially created categories" (at C.C.C. p.269). The court has shown no interest in expanding the existing categories of special hearsay exceptions for receiving the evidence of child complainants of sexual abuse. Rather, the Supreme Court of Canada has opted for "increased flexibility in the interpretation of the hearsay rule" (at C.R. p.11). It is important to understand that Madam Justice McLachlin explicitly declined to create an exception for children to the rule against hearsay in Khan as was done in Ares v. Venner, *supra* (for hospital records), emphasizing instead that no strict list of considerations for reliability should be drawn up. If, on a case-by-case analysis, the requirements of "**necessity**" and "**reliability**" have been met, any hearsay statement has potential to be admissible. A legal academician has suggested that courts should consider these factors as indicia of reliability:

...whether the child's statement (1) discloses an embarrassing event that a child would not normally relate unless true, (2) is it a cry for help, (3) employs appropriate childlike language, or (4) describes an act of sexual contact that the child is not likely to realize is either possible or sexually gratifying to an adult unless actually experienced by the child. The age and maturity of the child, the nature and duration of the sexual contact, the physical and mental condition of the child when the statement was made, and the relationship of the child and the accused are also appropriately considered. On the other hand, the court should also

consider whether the statement may have resulted from suggestiveness or command by an adult close to the child. (Graham, 1989:479-480)

However, for any court to be satisfied that the **Khan** threshold test has been established,

...the new "principled" approach to the admission of hearsay may have the unfortunate consequence of greatly lengthening the trial of cases as courts are required to conduct an elaborate voir dire whenever one side or the other decides to forego the category approach and try out the new pigeon-holes of reliability and necessity. (Rosenberg, 1993:86)

The Supreme Court of Canada ruling, in **Khan**, has provoked strong criticism for its departure from **Ratten v. The Queen**, *supra*, in favour of the **Ares** approach to the hearsay statements of children. Bessner (1990) argues that the child's statement to her mother, some 15 minutes after leaving the doctor's office, should have been admitted under the "spontaneous declaration" exception:

Taking account of the fact that only a brief time had elapsed between the sexual episode and the child's statement to her mother, that the child was 3½ years old at the time of the alleged sexual assault, and that young children are not "adept at reasoned reflection or of fabricating stories of sexual perversion" (p.292), the child's statement could have been admissible under the spontaneous declaration exception. (at 19)

She agreed with the reasoning of the Ontario Court of Appeal in **Khan**, where Robins J.A. stated:

Exact contemporaneity is clearly not a prerequisite to spontaneity. The time that may elapse before a statement following an event capable of rendering it spontaneous is rendered inadmissible will depend on a variety of factors. These include, for instance, the nature and circumstances of the act or event, the nature and circumstances of the statement, the place where the event occurred or the statement was made, the possible influence of intervening events, and the condition and age of

the declarant. Each case must depend on its own circumstances; no two cases are identical, and the exact length of time is not subject to mathematical measurement. **In any given case, the ultimate question is whether the statement relating to the alleged startling event was made near enough in time to the event to exclude any realistic opportunity for fabrication or concoction.** (at 292) [emphasis added]

The Khan decision also drew criticism from the Ontario Law Reform Commission. The law reform body, in its report, stated:

In the Commission's view, there does not appear to be a logical rationale for the necessity requirement regarding the hearsay statements of children. The essential difficulty with the necessity requirement is that it precludes the admissibility of both the child's hearsay statement and the *viva voce* testimony of the child. **One must question why the Supreme Court is so reluctant to admit hearsay statements into evidence in cases in which the child declarant testifies. In fact, as previously stated, hearsay evidence may constitute the best evidence of what transpired.** (at 60) [emphasis added]

The Commission was in substantial agreement with Bessner (1990), when she concluded that:

A convincing argument could be made that **the hearsay statement of the child T. 15 to 30 minutes after she allegedly performed fellatio on her doctor is more reliable and has more probative value than the viva voce evidence of the child at the trial, one year after the sexual assault.** (at 20) [emphasis added]

Another observer commented in this fashion:

...[P]rior to *Khan*, counsel would take steps to ensure that the child was able to testify. If *Khan* were narrowly interpreted as dependent on the unavailability of the witness, the proponent of the child witness, usually the Crown, would have an interest in a finding that the child is unable to testify for whatever reason. The finding of incompetency would place the

child out of the reach of cross-examination while placing before the trier of fact the essence of the child's evidence. Certainly, the dramatic statement by the child to her mother in *Khan* was probably much more compelling than the testimony of the child years after the event and containing significant gaps. If we are interested in arriving at the truth surely it is better to let in both the hearsay statement and the child's viva voce testimony. (Rosenberg, 1993:73)

Notwithstanding the **Khan** ruling, the Ontario Law Reform Commission (1991) recommends legislation to broaden the admissibility of hearsay statements of children in **all** legal proceedings. Furthermore, the Commission advocates that admissibility of hearsay statements of children should not be contingent upon whether the child testifies:

In other words, the "necessity" requirement specified in *Ares. v. Venner* should not be a criterion for the admissibility of hearsay statements of children. Rather, reliability should be the sole requirement for the admissibility of out-of-court statements of young witnesses. It is our opinion that the new rule respecting the hearsay evidence of children proposed by the Commission will introduce clarity into the law and will permit what may be extremely probative evidence to reach the courts, without sacrificing the fundamental common law principle for the exclusion of hearsay statements. (at 68-69)

Similarly, the 1984 **Badgley Report on Sexual Offences Against Children** recommended that, with respect to sexual acts "performed with, on or in the presence of the child by another person" (at 399), hearsay statements of children under 14 years should be admissible irrespective of whether the child testifies. In criminal proceedings, it is recommended that:

1. A previous statement made by a child when under the age of 14 which describes or refers to any sexual act performed with, on, or in the presence of the child by another person.

2. Is admissible to prove the truth of the matters asserted in the statement.
3. Whether or not the child testifies at the proceedings.
4. Provided that the court considers, after a hearing conducted in the absence of the jury, that the time, content and circumstances of the statement afford sufficient indicia of reliability.
5. "Statement" means an oral or a recorded assertion and includes conduct that could reasonably be taken to be intended as an assertion. (at 399)

The **Rogers Report** (1990) has also proposed that the hearsay rules be reformed. The report recommended that all provincial legislatures should pass statutes to broaden the admissibility of hearsay statements of children in civil cases to ensure that child witnesses receive all the benefits of **Bill C-15**.

It is the writer's understanding that policy-makers in Ottawa are exploring these five options for a draft bill on the admissibility of hearsay evidence of children:

- (a) admit hearsay evidence in all cases so the consideration of the necessity or reliability of the evidence would go to weight of the evidence;
- (b) admit hearsay if it is found to be reliable, without the need to prove that it is necessary;
- (c) admit hearsay evidence if it is reliable and in the best interests of the child to be admitted;
- (d) admit hearsay evidence if it is reliable and necessary;
- (e) admit hearsay evidence to a different extent in different types of cases, using (c) for child protection and family law cases, and (d) in provincial offence prosecutions and civil proceedings. (Sas, Hurley, Hatch and Malla, 1993:11-12)

In the absence of any legislative reform, the scope and admissibility of hearsay statements of children in sexual abuse cases will continue to be circumscribed by common law. While the approach taken by the Supreme Court of Canada in **Khan** appears unequivocal, it is submitted that, the door should not be closed for courts to establish a new category of hearsay exceptions for child witnesses. Nor should courts be precluded from reassessing any existing hearsay exception, embedded in common law, to determine whether it can withstand the test of necessity and reliability.

**CHAPTER 7: CRIMINAL CODE s. 486(3)(4):
ORDER RESTRICTING PUBLICATION
(RELATED PROCEDURAL ISSUE)**

Having to share the most private things in my life with strangers.

**Quote from child victim
(London Family Court Clinic: Child Witness Project (Sas *et al*, 1993))**

I. INTRODUCTION

s. 486(3)-(4):

- (3) Subject to subsection (4), where an accused is charged with an offence under **section 151, 152, 153, 155, 159, 160, 170, 171, 172, 173, 271, 272, 273, 346 or 347**, the presiding judge or justice may make an order directing that the identity of the complainant or of a witness and any information that could disclose the identity of the complainant or witness shall not be published in any document or broadcast in any way.⁴⁷²

472 The analogous provision has existed in the **Criminal Code** since 1982. However, **Bill C-15** amended this section to cover the new sexual offences.

The enumerated sections are as follows:

- | | | | |
|--------|--|--------|--|
| s. 151 | - Sexual Interference | s. 173 | - Indecent Acts |
| s. 152 | - Invitation to Sexual Touching | s. 271 | - Sexual Assault |
| s. 153 | - Sexual Exploitation | s. 272 | - Sexual Assault With a Weapon
Threats to a Third Party or
Causing Bodily Harm |
| s. 155 | - Incest | s. 273 | - Aggravated Sexual Assault |
| s. 159 | - Anal Intercourse | s. 346 | - Extortion |
| s. 160 | - Bestiality | s. 347 | - Criminal Interest Rate |
| s. 170 | - Parent or Guardian Procuring Sexual Activity | | |
| s. 171 | - Householder Permitting Sexual Activity | | |
| s. 172 | - Corrupting Children | | |

All but the last two sections are sexual offences. The last two sections are offences in which the complainant's reputation is particularly at stake.

- (4) The presiding judge or justice shall
- (a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the complainant to proceedings in respect of an offence mentioned in subsection (3) of the right to make an application for an order under subsection (3) and
 - (b) on application made by the complainant, the prosecutor or any such witness, make an order under that subsection.

This new **Criminal Code** provision, under the **Bill C-15** amendments, confers a discretion on judges to make an order for non-publication. This provision can be invoked to protect a complainant or any witness in sexual offence cases by the specific prohibiting of publication of any information which may identify them. The request for an order restricting the publication or broadcast of any information that could disclose the identity of the victim or witness can be made by the complainant, the witness or the prosecutor.

Since the legislation does not invoke an automatic ban, prior arrangements should be made to have Crown counsel make an application for the publication ban on behalf of the witness. It is also the prerogative of the judge to initiate a ban. Ordinarily, in cases involving intra-familial (a parent or relative) abuse, the publication or broadcast ban also prohibits the publication of the name of the accused, as this may lead to the identification of the complainant. Once a request has been made, the presiding judge is required to grant the publication ban.

The dissertation research is designed to monitor such requests and any judicial comments in the granting of an order. Any defence objection to this, as well as judicial non-compliance with the amendment, will be documented (see **Appendix AA**).

II. THE COMMON LAW

The Supreme Court of Canada has acknowledged that **Bill C-15's** objective of promoting victims of sexual offences to make their complaints is sufficiently important to override the freedom of the press as guaranteed by **s. 2(b)** of the **Charter**. The constitutionality of the predecessor **s. 422(3)** was upheld by the Supreme Court of Canada in **R. v. Canadian Newspapers**⁴⁷³. When discussing the constitutionality of what is now **s. 486(3)**, Mr. Justice Lamer held:

In the present case, the impugned provision purports to foster complaints by victims of sexual assault by protecting them from the trauma of widespread publication resulting in embarrassment and humiliation. Encouraging victims to come forward and complain facilitates the prosecution and conviction of those guilty of sexual offences. Ultimately, the overall objective of the publication ban imposed by **s. 433(3)** is to favour the suppression of crime and to improve the administration of justice. (at 29-30)

The Supreme Court of Canada ruled that, while the provision did violate **s. 2(b)** of the **Charter** (freedom of expression), it is nonetheless a justifiable and reasonable

473 (1988), 43 C.C.C. (3d) 24 (S.C.C.).

limit on free expression under s. 1 of the **Charter**. Using a s. 1 analysis, the court concluded that there was a rational connection between the impugned section and the objective it seeks to attain and constituted a minimal impairment of the media's rights.

The ban on publication of the name of the complainant or witness does not automatically extend to prohibit the publication of the identity of the accused merely to protect his/her privacy.⁴⁷⁴ Courts only restrict the publication of the accused's name if the accused has the same surname as the complainant, or stands in *loco parentis* to the victim.

In **R. v. Southam Inc.**⁴⁷⁵, Boland J.A. said:

The prohibition ban should be confined to those cases where the accused is charged with a sexual offence involving a person with whom the accused shares a family name or to whom the accused stand in *loco parentis* (as in the case of incest) as the public has a genuine interest in knowing the identity of the accused. It is entitled to be advised that the police have conscientiously pursued a criminal investigation or put at ease where there has been a rash of crimes and an individual has been charged. The name of the individual is important as it is the only means of verifying the accuracy of the report. Furthermore, publication of the name of the accused will prevent speculation and damaging rumours against innocent parties and ensure the rights of the accused to a fair trial. The essential quality of the criminal process in a democracy is the absence of secrecy. The public has the right to be informed and the media has a duty to advise the public what is happening in the courts. Openness prevents abuse of the judicial system and fosters public confidence in the fairness and integrity of our system of justice. (at 142)

474 **R. v. Unnamed Person** (1985), 22 C.C.C. (3d) 284 (Ont.C.A.). The court ruled that "there is no jurisdiction in any court to prohibit the publication of the identity of the accused's name just to protect the privacy of the accused" (at 287-288). See also: **R. v. G.(D.)**, (1988) 39 C.R. (3d) 369 (Ont.H.C.).

475 (1987), 37 C.C.C. (3d) 139 (Ont.C.A.).

The Ontario Court of Appeal held that the discretion of the trial judge extends beyond a ban on the name of a complainant and is not restricted to a limited category of cases such as incest and other intra-familial offences. The court ruled that the trial judge had erred in granting an application to ban the name of the accused, who was a school teacher, without supporting evidence. Furthermore, the court held that the order was not necessary to protect the identity of the complainant.

In **R. v. O.(R.R.)**⁴⁷⁶, the British Columbia Court of Appeal held that in a case involving incest, the non-publication order must extend beyond covering the name of the complainant to include the name of the accused in order to protect the identity of the complainant.

Similarly, in **R. v. Dalzell**⁴⁷⁷, the Ontario Court of Appeal ruled that a court has no authority to order a publication ban solely to protect an accused. In upholding the trial judge's ruling, the Ontario Court of Appeal concluded that, while the order constituted a violation of s. 2(b) of the **Charter**, the accused's equality rights under s. 15 and the right to privacy under s. 7 of the **Charter** had not been infringed.

In **R. v. Publications Photo-Police Inc.**⁴⁷⁸, the Supreme Court of Canada held that parties who violate the order banning publication in a sexual assault case may be

476 (22 March 1990), Vancouver CAV01054 (B.C.C.A.) [unreported].

477 (1991), 63 C.C.C. (3d) 134 (Ont.C.A.). See also: **R. v. London Free Press** (1990), 75 O.R. (2d) 161 (Ont.H.C.).

478 (1990), 54 C.C.C. (3d) 576 (S.C.C.). See also: **R. v. Edge et al** (7 March 1988), Vancouver CA005584 (B.C.C.A.) [unreported], where the British Columbia Court of Appeal held that the trial judge erred in ruling that *mens rea* is not relevant to the issue of whether a contempt has occurred. The Court of Appeal further held that the party who is in contempt must be allowed to show that all reasonable steps were taken to avoid the commission of the offence. A "due diligence" test was applied by the appellate court and the accused(s) failed to show that they took all reasonable steps to satisfy that requirement.

cited for contempt of court. This is notwithstanding the existence of s. 486(5) of the Criminal Code, which makes such a violation a separate summary conviction offence.

III. CONCLUSION

From the dissertation research, it is clear that no authority or jurisprudence has evolved to address the legitimacy of s. 486(3)(4) as it pertains to an order restricting publication of the identity of the complainant. There have been no defence objections or challenges to the provision with respect to the same issue. The Crown's applications for a publication ban for the non-disclosure of the identity of the complainant are automatically granted by courts. The applications are routinely requested for child complainants who testify in sexual assault cases and are given *pro forma* upon the Crown establishing that the witness is under 18 years of age. As the research reveals, the ban on publication has extended to prohibit the publication of the accused's name in numerous cases involving incest, intra-familial sexual abuse, and in *loco parentis* relationships. (See the Index of Cases for all the cases where the accused's surname is represented by an "initial".)

**CHAPTER 8: CRIMINAL CODE s. 486(1):
EXCLUSION OF PUBLIC (CLOSED COURTROOM)
(RELATED PROCEDURAL ISSUE)**

There were people there I didn't know and even two of my dad's witnesses and my aunts, uncles, grandparents, all on his side.

I wanted to tell those young people [a high school tour] what it was like and that they had no right being there.

Quotes from child victims
(London Family Court Clinic: Child Witness Project (Sas *et al*, 1993))

I. INTRODUCTION

- s. 486(1) Any proceedings against an accused shall be held in open court, but where the presiding judge, provincial court judge or justice, as the case may be, is of the opinion that it is in the interest of public morals, the maintenance of order or the proper administration of justice to exclude all or any members of the public from the courtroom for all or part of the proceedings, he may so order.

This is an existing Criminal Code provision which may be of assistance in child sexual abuse cases. There may be occasions where the presence of the public or friends or relatives of the accused in the courtroom make it inordinately difficult for the child to testify. This section allows counsel to make an application for the judge to order the courtroom to be closed to the public during the testimony of a child witness. The

dissertation research documented and analyzed the invocation and implementation of this section (see **Appendix BB**).

II. THE COMMON LAW AND ANALYSIS OF CASES

Canadian courts have traditionally been reluctant to exclude the public from the courtroom, even in cases which involve sexual assault of young victims (Bala, Harvey and McCormack, 1992).⁴⁷⁹ In **R. v. Quesnel and Quesnel**, *supra*, the Ontario Court of Appeal ruled that the trial judge erred in making an order that the entire Crown's case be held "in camera". The Crown had successfully applied for an order to exclude the public so that there would be "no embarrassment" to the four teenage complainants when they testified about alleged unlawful intercourse and other sexual offences. To avoid confusion in the proceedings (as the Crown had proposed to call each complainant and their mother in succession), the trial judge ordered that the whole of the Crown's case be held "in camera". The Ontario Court of Appeal ruled that the trial judge erred in making the order and, in the result, a public trial was not held as required by law, and the convictions of the accused must be quashed. The appellate court held that there was insufficient information and reasons provided by the Crown to justify the order. Brooke J.A. stated:

479 **R. v. Warawuk** (1978), 42 C.C.C. (2d) 121 (Alta.C.A.).

I agree with the appellant that there was really insufficient information and reason upon which to make the order to hold the whole or part of the Crown's case *in camera*. It is hard to imagine any trial, civil or criminal, where men or women, boys or girls, and particularly the latter, have to testify as to sexual behaviour that the witness will not be embarrassed. But this alone is not reason to suppose that truth is more difficult or unlikely or that the witness will be so frightened as to be unable to testify. In this case there was no suggestion that the latter might be so. Further, counsel cannot arrange his case to create "mass confusion" and so avoid a public trial when it is quite obvious that a simple rearrangement would eliminate any problems. (at 274-275)

There is a burden upon the Crown to satisfy the court that the "proper administration of justice" will be undermined if the witness cannot provide a full and candid account of the evidence in an open courtroom.

The leading pre-**Bill C-15** case on this issue is **R. v. Lefebvre**⁴⁸⁰, in which a decision by the Quebec Court of Appeal ruled that, where the presence of people in the courtroom made the complainant so nervous that she could not testify, the potential adverse effect on the proper administration of justice permitted the court to exercise its discretion to exclude the public. The court indicated that exclusion of the public would be preferable to sequestering the witness.

In **R. v. Allan**⁴⁸¹, the British Columbia Court of Appeal upheld the trial judge's ruling to exclude the public from hearing the testimony of a young female complainant in a sexual assault trial. The trial judge alluded to the fact that judges should adopt a sensitive approach to the interpretation of s. 486(1), particularly if an expert can assist the court to see a need for the exclusion. County Court Judge Allan stated:

480 (1984), 17 C.C.C. (3d) 276 (Que.C.A.).

481 (7 August 1991), Vancouver CA011662 (B.C.C.A.) [unreported].

It is clear that the starting point is the basic right of an accused to have a public trial and the right of the public to attend at the trial. Those rights can only be displaced by the limited grounds set out in 486(1). The issue is whether having established that testifying in a closed court would be in the complainant's best interests because of her fragile emotional health satisfies the test under section 486(1). In my view, in these circumstances it does.

Bill C-15 illustrates the legislative intent to broaden the rights of children with respect to judicial procedures. Accordingly, the proper administration of justice should be interpreted broadly to meet that legislative intent. I think on the basis of what I have heard from C.B.'s mother and her therapist, her anxiety and stress will be heightened by the presence of the public in the courtroom, and will, by virtue of that fact, impair her ability to testify as a result.

Accordingly, it seems to me that the Crown has satisfied the test of establishing that, in these particular circumstances, testifying in a closed court is necessary for the proper administration of justice. The public, therefore, will be excluded for the evidence of C.B. (at 3-4)

On appeal, the British Columbia Court of Appeal approved of the trial judge's exercise of discretion and held that the proper administration of justice would be better served if the young complainant could give her evidence in a closed courtroom.

The dissertation research included the examination of **16** cases where applications were made to the court to exclude the public from hearing the evidence of young complainants in sexual assault proceedings (see **Appendix CC**). Orders for closed courtrooms were granted in **11** of those cases, and denied in **5** cases. There were no elaborate *voir dire*s conducted in any of the cases researched. Crown counsel usually made brief submissions and no serious judicial interpretation of the provision evolved from these cases. Judges, on the whole, were sympathetic and sensitive to the plight of young complainants having to testify in public about alleged sexual acts. There were no

strong arguments from defence counsel to Crown applications for a closed courtroom in the post-**Bill C-15** cases examined.

In one of the few cases where the application was denied, **R. v. Sock**, *supra*, the judge was not particularly persuaded by the Crown's submissions. The court, however, suggested that if a specific problem arose, a new application would be considered. The following is an excerpt from the transcript:

Ms. Wrigley: And I am also requesting an order under section 486(1), Your Honour, and I'm asking you to exercise your discretion in closing the courtroom and exclude the public from this case. It does involve a six -- seven-year-old child. She was six at the time and she will be testifying, and I would ask that the court be closed for that reason. I think it would facilitate the case, with the exception of two women that are in the courtroom. One is a researcher with the Attorney General's Department working on these kinds of cases. Her name is Cheryl Angelomatis. There is a criminology student by the name of Nicole Hussier [phonetic] and she has spoken to the little girl involved, and her mother. They don't seem to mind if they are in here.

The Court: Well, what's your position, Mr. Fung, or do you have a position?

Mr. Fung: I take no position, Your Honour.

Ms. Wrigley: I see Detective Kean is here. I presume she's watching to -- for further education or something. I have no objection to her being here as well.

The Court: Well --

Ms. Wrigley: I just want to -- Your Honour, the whole courtroom being full of a lot of strange people to the child, that's --

The Court: Well, that's something you're going to have to deal with if and when that happens because I -- I realize it would be easier perhaps to simply do that, but this is a court of law and the public are entitled to be here, and it's perhaps better if they're not here, but I'm not going to exclude people who aren't here.

Ms. Wrigley: All right. If there's a problem I can review my application.

The Court: Of course. (at 1-2)

III. CONCLUSION

S. 486(1) of the Criminal Code provides judges with the discretion to exclude (all or some) members of the public at any stage of a proceeding where "it is in the interest of public morals, the maintenance of order or the proper administration of justice". While this section has been invoked by the Crown in sexual abuse cases involving young complainants, some judges have shown a reluctance to impose exclusion orders.

In June of 1993, Parliament enacted legislation with the intent of increasing the protection afforded child witnesses (Bala, 1993). Specifically, the Criminal Code was amended to refer explicitly to the interests of child witnesses (in sexual offence cases) as a factor in deciding whether to clear a courtroom (Bala, 1993:366). This statutory provision was proclaimed into force on August 1, 1993:⁴⁸²

s. 486(1.1) For the purposes of subsections (1) and (2.3) and for greater certainty, the "proper administration of justice" includes ensuring that the interests of witnesses under the age of fourteen years are safeguarded in proceedings in which the accused is charged with a sexual offence, an offence against any of sections 271, 272 and 273 or an offence in which violence against the person is alleged to have been used, threatened or attempted.

482 Criminal Code R.S.C. 1985, c. C-46.

In requesting an order under this provision, Professor Bala (1993) recommends that the Crown should call expert or other witnesses to give evidence concerning the likely effect on the child complainant's emotional well-being if members of the public or supporters of the accused are present in court.

It is evident that the legislative intent behind this new provision is to encourage judges to adopt a more empathetic approach in cases where a child complainant may require the special protection of a closed courtroom. It is submitted, however, that the language of the legislation is ambiguous. The term "**ensuring that the interests of witnesses under the age of fourteen years are safeguarded**" is vague and will require judicial interpretation and refinement. In order for the Crown to invoke this section, it will be necessary for the court to conduct a *voir dire* and the Crown will need to satisfy the court that the procedure is required.

Canadian research has shown that child witnesses are intimidated by the presence of persons in the courtroom and, as a result, their ability to communicate the evidence in an effective manner is inhibited (Hornick and Bolitho, 1992). Empirical research, discussed previously, unequivocally suggests that testifying in a courtroom is a traumatic experience for child witnesses. It is submitted that, upon request, when child complainants are testifying there should be an automatic closure of the courtroom to all spectators.

A recent Canadian report (Sas *et al*, 1993) recommends that "**when children are testifying, the court should be closed in all cases**". From their longitudinal study of child victims, the London Family Court Clinic concluded:

Many children have expressed to us their intense discomfort about their public exposure during their testimony. The fact that there are strangers in the courtroom is reported by them as one of the most stressful aspects of testifying. In fact, many children have to testify in courtrooms filled with school tours making observation visits to the courthouse. Moreover, especially in senior youth court proceedings, large contingents of friends can come to the court to support the defendant. When the complainant and the defendant are from the same school, this is particularly difficult for the victim. The same is true in intra-familial cases where family members take the side of the accused and the child must testify while hostile relations are present. (at 21)

The dissertation research corroborates the above-mentioned findings. On numerous occasions, the author has observed children (on the witness stand) who became very distressed by the attendance, in court, of family members and friends who were supporters of the accused. It is a common practice for schools to conduct educational tours at court facilities and to make courtroom observations. Some child witnesses were upset by the presence of groups of school children and other spectators who were listening to their testimony. As well, some children were distracted by the constant flow of observers, lawyers, witnesses, and sheriffs entering and leaving the courtroom.

CONCLUSIONS

All I remember is that it [testifying] had to be the hardest thing in my life to do.

I believed that something was achieved [by testifying] — it was over with and I didn't have to see him again — no regrets.

I wish I'd done nothing. I just don't think court was the way to go. If I'd been older, I would have handled it alone.

Happy in a way [because Dad could come home], but also concerned about the future.

I was expecting him to go to jail so it made me feel bad. I felt really angry with the criminal justice system and with [the defendant].

[I felt like] I set myself up to fall.

That I told the truth, that it was over.

Quotes from children victims
(London Family Court Clinic: Child Witness Project (Sas *et al*, 1993))

Bill C-15, with its broad policy goals, represented Parliament's response to the social reality of child sexual abuse as an intractable and pervasive criminal phenomenon. Six years have passed since the implementation of the legislative package. The purpose of the evidentiary and procedural enactments of **Bill C-15** was to satisfy two broad policy goals (the subject matter of this dissertation), namely:

- a. to enhance successful prosecution of child sexual abuse cases; and
- b. to improve the experience of the child victim/witness.

Were those goals accomplished? With the effluxion of time, the legislation has undergone significant judicial interpretation. Considerable jurisprudence has been developed by most provincial appellate courts and by the Supreme Court of Canada. Notwithstanding meaningful judicial application and interpretation, the dissertation has identified limitations in the legislation in terms of both its conceptualization and its effectiveness.

The dissertation research has shown that s. 16 of the Canada Evidence Act has resulted in more children being allowed to testify under a "**promise to tell the truth**" prerequisite, who otherwise may have been disqualified from testifying as a result of their lack of understanding of the nature of an oath. In the British Columbia cases examined, it appears that judges are applying a low threshold test of "ability to communicate" in conjunction with the eliciting of a "promise to tell the truth" so that more, and younger, children are allowed to testify. To this end, it is submitted, s. 16 has been effective towards contributing to the legislative intent of "to enhance successful prosecution of child sexual abuse cases". In addition, British Columbia judges have permitted more children to give "sworn" testimony on the basis that they "understand the nature of an oath."⁴⁸³ From the cases studied, it is apparent that some judges were leading (*viz.*, instructing about religion and the meaning of taking an oath) child witnesses in order to qualify them in the giving of "sworn" evidence. As a result, it

483 The result that more children are being "sworn" may be a function of Crown counsel's preparation of child witnesses to satisfy the substantive test. British Columbia Crown, as a matter of practice, prepare child witnesses by coaching and instructing them about religion and that an "oath" means a promise to God that they will tell the truth (sometimes, with the implicit understanding that they will be punished by God if they lie in court) (from conversations with designated child sexual abuse prosecutors).

appears that British Columbia judges have shown a willingness to adopt a more liberal approach to admitting the testimony of children. However, this evidential provision, with its entrenched dichotomy of "sworn" and "unsworn" evidence (in essence, a hierarchy of testimony), is structurally flawed and anachronistic in light of developments in contemporary society. Furthermore, it appears that s. 16 may be unconstitutional and, thus, be subject to attack under ss. 2(a) and 15(1) of the Charter of Rights. A new Evidence Act, which would treat all children as competent witnesses, is proposed.

Section 274, the Criminal Code section which repeals the corroboration requirement, was envisaged by legislators as a positive development in the facilitation of successful prosecutions of child sexual abuse cases. The Supreme Court of Canada, in R. v. W.(R.), *supra*, took judicial notice that, with the removal of the requirement that a child's evidence be corroborated in law, it is no longer appropriate to assume that a child's evidence is less reliable than an adult's. In practice, however, the amendment has not engendered a substantial increase in convictions. The dissertation research has found that, because of the criminal burden of proof, British Columbia judges continue to require corroboration before convicting an accused on the evidence of a child. From the cases examined, there was only one instance where a judge convicted an accused without corroboration of the child's allegations. Thus, there is very little evidence to support the proposition that s. 274 is effective in enhancing successful prosecutions of child sexual abuse cases.⁴⁸⁴ Notwithstanding such a finding, the new legislation, which

484 It should be noted that British Columbia Crown counsel, as a matter of policy, rarely proceed with child sexual abuse cases where there is no corroboration (from discussions with designated child sexual abuse prosecutors). While more charges are now being laid, the Department of Justice's Canada-wide consultations (Schmolka, 1992) with numerous Crown and defence counsel, confirmed that the new provision, s. 274, had

allows a judge (or trier-of-fact) the option of convicting an accused in the absence of any corroboration, is a necessary and welcomed amendment which may prove to be effective in the future. Contrary to the class-approach prohibition in Vetrovec, some British Columbia judges persist in giving blanket warnings that children's evidence is untrustworthy and that it is dangerous to convict an accused on their uncorroborated evidence. It is argued that a common law prohibition is inadequate. A statutory amendment is proposed, which would prohibit judges from warning the jury that the testimony of children, as a class, is inherently unreliable.

Since the enactment of **Bill C-15**, the constitutionality of the procedural provisions — **s. 486(2.1)(2.2)** (Screen and Closed-Circuit T.V.) and **s. 715.1** (Videotaped Evidence) — has been upheld by the Supreme Court of Canada. The dissertation research has revealed that, in most cases, judges have allowed the use of these testimonial aids and protective procedures. Thus, it can be submitted that the legislation has proven to be effective in satisfying its general objective of "improving the experience of the child victim/witness in court". While the legislative options are conceptually desirable, in practice, the procedures (especially closed-circuit television⁴⁸⁵) are rarely used. Most Crown counsel, it is argued, prefer to have child witnesses testify "live" in the courtroom without such aids. It is argued, however, that the policy goal of the legislation should

not resulted in a modification of court practice — namely, no convictions without corroboration. The Department of Justice's multi-site study (Schmolka, 1992) found that, of 45 police officers surveyed in Toronto for the child victim/witness support report, 95% reported that it was difficult to lay a charge in child sexual abuse cases unless there was other evidence to support the child's testimony.

485 There is the practical difficulty of obtaining suitable video equipment. For example, in Ontario, there is only one closed-circuit system available in the province (in Ottawa) which cost \$50,000. Recently, when the equipment was required for court in a nearby county, the transportation and technical support costs amounted to \$3,000 for the trip (Sas, Hurley, Hatch *et al.*, 1993).

be reformulated to reflect a parliamentary commitment "**to protect child witnesses from secondary trauma associated with testifying in court**". At a bare minimum, new legislation should be drafted to mandate an automatic court order to use the procedures, upon the request of a party, which would extend to all child witnesses in any criminal proceeding. It is further proposed that s. 715.1 should be repealed and replaced with a form of legislation analogous to the special hearsay exceptions created statutorily for child sexual abuse victims in the United States.

It is submitted that **Bill C-15** has been significant as a catalyst to galvanize the judiciary to re-examine the restrictive rules of evidence governing the admissibility of children's evidence. Furthermore, the legislation has been effective in challenging courts to search for new ways to handle child sexual abuse cases. The dissertation research has shown that courts have instigated reform, through the rapid development of common law in the related evidentiary areas of expert witnesses and hearsay, which furthers the social policy goals of Parliament.

The Supreme Court of Canada, in **R. v. B.(G.)**, *supra*, has taken a liberal approach to accepting the expert opinions of mental health professionals. A significant finding from the dissertation research was that, with increased regularity, judges are allowing expert testimony to demonstrate that behaviours of a particular complainant are consistent with behavioural patterns exhibited among sexually abused children. Courts are permitting this kind of "syndrome" testimony on the grounds that expert opinion evidence is capable of corroborating a child complainant's allegation of sexual abuse against an accused. It is proposed, however, that judges should be more rigorous in

challenging the qualifications of expert witnesses, as well as the legitimacy of their scientific "opinions". It is recommended that the American Kelly-Frye rule, or an analogous and rigorous standard, be adopted in Canada to govern the admissibility of evidence by expert witnesses. Illegitimate opinions can hardly be helpful.

The dissertation research has found a discernable trend that the judiciary has become more sensitive to the unique problems children face as complainants and witnesses in sexual abuse cases. The Supreme Court of Canada, in R. v. B.(G.), *supra*, and R. v. W.(R.), *supra*, adopted the policy position that it would be "wrong to apply adult tests for credibility to the evidence of children". Madam Justice Wilson, in B.(G.), stated the proposition that "the judiciary should take a common sense approach when dealing with the testimony of children and not impose the same exacting standards on them as it does on adults". In particular, the B.(G.) court acknowledged, as a desirable development, the need for a more flexible and "benign" approach to be taken by judges in the evaluation of the credibility of children's evidence. It is submitted that this shift in judicial attitude constitutes further evidence that the judiciary is supportive of the underlying principles of **Bill C-15**.

In addition, Canadian appellate courts have shown a willingness to expand the parameters of traditional rules of evidence to admit and accept children's evidence. The Supreme Court of Canada, in R. v. Khan, *supra*, underscored the inflexibility of the conventional hearsay rule "in dealing with new situations and new needs in the law". Rather, the court chose to adopt a broad policy approach of increased flexibility in the interpretation of the hearsay rule for receiving the evidence of child complainants of

sexual abuse. If, on a case-by-case basis, the threshold requirements of "**necessity**" and "**reliability**" have been met, any hearsay statement may be admissible. Although the **Khan** court showed no interest in creating a special hearsay exception for children complainants of sexual abuse, it is arguable that the door should not be closed for future courts to establish such a new category. Such an approach was taken previously in Ontario.

The Supreme Court of Canada has also acknowledged that **Bill C-15**'s objective of encouraging child victims of sexual offences to make their complaints is sufficiently important to override the freedom of the press as guaranteed by **s. 2(b)** of the **Charter**. The new **Criminal Code** provision, **s. 486(3)(4)**, which confers a discretion on judges to make an order for non-publication of a victim's identity, has been effective and widely used. Upon request, the applications are routinely granted.

The dissertation research has provided evidence that some judges have manifested insensitivity and a lack of knowledge about the dynamics of child sexual abuse and the testimonial limitations of child sexual abuse victims as witnesses, which may prove to be barriers to successful prosecutions. It is recommended that judges receive education on these matters as well as child cognitive development and gender issues. With the increased reporting and prosecution of child sexual abuse⁴⁸⁶, other practitioners — police, interviewers, victim services personnel, mental health professionals, prosecutors and defence lawyers — should receive special training in the processing of these cases.

486 For some statistics, see: Department of Justice Reports (Schmolka, 1992; Hornick and Bolitho, 1992) and Rogers (1990).

On the whole, there is a basic need to change societal attitudes about the gender dimensions of child sexual abuse.⁴⁸⁷ Our society evolved from a patriarchal system which placed men in the dominant and inherently valued role, and women and children in an inferior or subordinate role. As a result of such a cultural system, sexual stereotyping for men and women was perpetuated and fostered. The Rogers Report (1990) describes the impact of such long-standing negative attitudes as follows:

Social attitudes that view women and children as sexual objects and blame the victim who is sexually harassed or assaulted continue to be a norm in our culture. When cases of sexual assault are before the courts, the preoccupation often seems to be with questions of use of force, possible enticement by the victim, and the moral character of the victim and the like, rather than on the basic responsibility and accountability of the perpetrator for his behaviour. There is a tendency to discount the seriousness of a perpetrator's behaviour, especially if little physical violence is involved or the assault takes place in the family. The victims, even children, are made to feel somehow responsible for their own victimization. These attitudes, which are prevalent throughout society including professionals and the courts, seriously undermine achieving a society in which females and males are treated equally. (at 18)

It is submitted that legislators and the courts can play a fundamental role in re-shaping societal attitudes. There is clear evidence, from the dissertation research, that **Bill C-15**, as interpreted by the judiciary, has resulted in an improved legal response to the sexual abuse of children. As social institutions, the law and the courts can significantly influence public perception and enhance public confidence by seeking justice for child victims of sexual abuse in a more humane and progressive manner.

487 The **Badgley** Committee reported that 98.8% of offenders were male and 1.2% were female (1984:215).

SUMMARY OF RECOMMENDATIONS

Chapter 1: s. 16 Canada Evidence Act

Repeal of s. 16 of the Canada Evidence Act, to be replaced with a new Canada Evidence Act which would allow every child to testify on a "promise to tell the truth to the court".

Chapter 2: s. 274 - Corroboration Not Required

A statutory enactment to append s. 274 to read:

- s. 274.1 Where an accused is charged with an offence referred to in s. 274, the judge shall not instruct the jury that the testimony of children, as a class, is inherently unreliable.

Chapter 3: s. 486(2.1)(2.2) - Screen and Closed-Circuit Television

Repeal of the current provision, to be replaced with:

- s. 486(2.1) Notwithstanding s. 650, where an accused is charged with any Criminal Code offence, and the complainant or witness is, at the time of the trial or preliminary inquiry, under the age of **fourteen** years, upon request of a party, the judge shall order that the procedures of giving evidence (i.e. screen or closed-circuit television) be adopted to the needs of any child witness in order to prevent trauma to the child or to obtain a full and candid account of the acts complained of from the complainant or witness.

Notation: Young persons between the ages of 14 and 17 years may make an application to the court for a similar order.

Chapter 4: s. 715.1 - Videotaped Evidence

Repeal of the existing section, to be replaced by a statutory enactment of a special hearsay exception for child sexual abuse victims.

Chapter 5: Expert Witness

A statutory enactment of a **Kelly-Frye/U.S. Federal Rules of Evidence** test, or an analogous standard, to govern the admissibility of expert witnesses.

Chapter 6: Hearsay Statements of Child Complainants

A statutory enactment of a special hearsay exception for child sexual abuse victims.

Chapter 7: s. 486(3)(4) - Order Restricting Publication

Repeal of the current provision, to be replaced by a statutory enactment to mandate an automatic order:

- s. 486(3) Subject to subsection (4), where an accused is charged with an offence under section 151, 152, 153, 155, 159, 160, 170, 171, 172, 173, 271, 272, 273, 346 or 347, the presiding judge or justice shall make an order directing that the identity of the complainant or of a witness and any information that could disclose the identity of the complainant or witness shall not be published in any document or broadcast in any way.

Chapter 8: s. 486(3)(4) - Exclusion of Public

A statutory enactment to mandate an automatic closure of the courtroom to all spectators (upon request of a party) when child complainants are testifying.

General

Mandatory education for judges, and other practitioners who deal with child sexual abuse victims, about gender issues, child cognitive development, and the dynamics of child sexual abuse.

Mandatory education for judges, and other practitioners who deal with child sexual abuse victims, about legislative enactments and common law pertaining to the prosecution of child sexual abuse cases.

The major strengths of the dissertation are the longitudinal nature of the research endeavour and its ecological validity. The dissertation research captured judicial decision-making and interpretation of the new evidentiary and procedural provisions, and the related common law issues of hearsay and expert witnesses, over a period of six years. It traced the evolution of cases from lower provincial courts to provincial appellate courts and to the highest Canadian judicial body, the Supreme Court of Canada. By documenting the implementation of the legislation and tracing other relevant developments in the common law through court decisions, the practical problems associated with the proffering of children's evidence in court become apparent. As a result, it was possible to examine critically whether the legislation was effective in meeting its social policy goals.

The main weakness of the dissertation research is that, because the primary data (71 cases and 146 s. 16 inquiries) analyzed for Chapters 1 and 2 consisted of unreported British Columbia decisions and, thus, reflect the decision-making of judges in this province, the study is of limited generalizability. Different precedents bind the courts in each province. For instance, a British Columbia Court of Appeal decision is binding on British Columbia courts and an Ontario Court of Appeal decision is binding on Ontario courts. A British Columbia Court of Appeal decision is not binding on Ontario courts, but merely persuasive. Similarly, an Ontario Court of Appeal judgment is only persuasive, not authoritative, in British Columbia. Because there are variations in the common law from province to province, the conclusions drawn from the British Columbia cases cannot be generalized to portray accurately decision-making by Canadian

judges from other provinces.

The issue of generalization of research findings is not a major problem for the remaining chapters of the dissertation, since judicial decisions from across Canada and different court levels were included for analysis. However, a further potential weakness would be that the cases studied were not representative of the actual number of child sexual abuse prosecutions in Canada. There is no accurate national data available currently.

While several Supreme Court of Canada decisions have reflected a more sensitive and flexible approach to the unique plight of children as complainants and witnesses in sexual abuse cases, further research is required to monitor whether and how lower courts are following the Supreme Court's lead. Furthermore, empirical research should be conducted to determine whether judges are controlling the parameters of how children are questioned in court by lawyers. It is hoped that the dissertation research will provide to policy-makers and practitioners some insight into the implementation of **Bill C-15** and related evidentiary issues. By examining how legislation takes effect — through judicial interpretation — what needs to be reformed emerges with greater clarity. The Supreme Court of Canada, in **Ares v. Venner**, *supra*, articulated the law-making role of judges as follows:

The common law is moulded by the judges and it is still their province to adapt it from time to time so as to make it serve the interests of those it binds. (at S.C.R. p.624)

Madam Justice L'Heureaux-Dubé, in dissent, in R. v. B.(C.R.), *supra*, stated:

When children are sexually assaulted there are generally no witnesses. When such matters become the subject of criminal prosecution it is usually a case of the victim's word against the accused's. . . . **The fact that most child sexual assaults occur under circumstances where the problem is hard to detect and even harder to prosecute places an obligation upon the judiciary to ensure that the abuses suffered by the victims are not perpetuated by an inability of the legal system to respond to the particular nature of the crime.** (at C.R. p.8) [emphasis added]

Parliament has sought justice for children who are victims of sexual assault. It is submitted that a more enlightened judiciary can effect positive social changes in the legal system more expeditiously than legislation can.

In an address to the Canadian Bar Association, Family Law Subsection (Vancouver), Madam Justice Beverley McLachlin, of the Supreme Court of Canada, remarked:

The recent reforms with respect to the evidence of children do not mark the end of the story, but only a beginning. . . . Faced with new problems, legislators and courts have acted to revise the law, propelled by a desire to make it workable and effective. But much remains to be done. We must all continue to work to the end of producing a judicial system which makes our society a happier and safer place for our children, while remaining sensitive to their individual trauma. (McLachlin, 1992:16, 19)

The legal system — the legislators and courts — must continue its struggle to balance competing societal interests while ensuring that children's needs are accommodated in the criminal law.

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**APPENDIX A:
CHAPTER 1: s. 16 C.E.A. - COMPETENCY INQUIRY**

Case _____
Proceeding _____ Date _____
Court _____ Judge _____
Crown _____ Defence _____
Child Complainant/Witness _____ Age _____

A. "ABILITY TO COMMUNICATE" COMPETENCY

1. What questions did the judge ask to determine the child's "ability to communicate" the evidence?

- | | |
|---|--|
| <input type="checkbox"/> Date of birth | <input type="checkbox"/> Education |
| <input type="checkbox"/> Family life | <input type="checkbox"/> Hobbies |
| <input type="checkbox"/> Nature of case | <input type="checkbox"/> Understanding of courts |
| <input type="checkbox"/> Other (general intelligence) _____ | |
| _____ | |
| _____ | |
| _____ | |

2. Did the judge permit Counsel to ask the child any questions concerning the child's "ability to communicate" the evidence?

- | | |
|---------------------------------------|--------------------------------------|
| <input type="checkbox"/> Yes, Crown | <input type="checkbox"/> No, Crown |
| <input type="checkbox"/> Yes, Defence | <input type="checkbox"/> No, Defence |
- If no, specify _____

3. Did Counsel ask the child any questions?

Yes, Crown

No, Crown

If yes, specify _____

Yes, Defence

No, Defence

If yes, specify _____

4. Did the judge allow Counsel to cross-examine the child concerning the child's "ability to communicate" the evidence?

Yes, Crown

No, Crown

Yes, Defence

No, Defence

If no, reasons _____

5. Did Counsel cross-examine the child?

Yes, Crown

No, Crown

If yes, specify _____

Yes, Defence

No, Defence

If yes, specify _____

6. **Did Defence counsel challenge the child's competency to give evidence?**
(ability to communicate the evidence)

Yes

No

If yes, specify _____

Crown arguments _____

7. **Judge's ruling:**

Able to communicate

Not able to communicate

Reasons _____

8. **Did the judge make any comments concerning a judicial standard for "ability to communicate the evidence?"**

Yes

No

If yes, specify _____

B. OATH COMPETENCY - "UNDERSTAND THE NATURE OF AN OATH"

1. What questions did the judge ask to determine "oath competency" (What test was applied?)

Antrobus/Brasier Test

- | | |
|--|--|
| <input type="checkbox"/> Belief in God | <input type="checkbox"/> Religious background/education |
| <input type="checkbox"/> Meaning of oath | <input type="checkbox"/> Truth vs. lie |
| <input type="checkbox"/> Promising God to tell the truth | <input type="checkbox"/> Spiritual consequences of lying |
| <input type="checkbox"/> Punishment | <input type="checkbox"/> Seriousness of allegation |

Budin Test

- | | |
|--|--|
| <input type="checkbox"/> Belief in God | <input type="checkbox"/> Religious background/education |
| <input type="checkbox"/> Church attendance | <input type="checkbox"/> Meaning of oath |
| <input type="checkbox"/> Truth vs. lie | <input type="checkbox"/> Promising God to tell the truth |
| <input type="checkbox"/> Moral consequences of lying | <input type="checkbox"/> Religious background/education |
| <input type="checkbox"/> Other _____ | |
-
-

Bannerman/Fletcher Test

- | | |
|--|--|
| <input type="checkbox"/> Solemnity of occasion | <input type="checkbox"/> Moral obligation in court |
| <input type="checkbox"/> Truth vs. lie | <input type="checkbox"/> Seriousness of allegation |
| <input type="checkbox"/> Importance of telling the truth | <input type="checkbox"/> Secular consequences of lying |
| <input type="checkbox"/> Punishment | |
| <input type="checkbox"/> Other _____ | |
-
-

2. **Did the judge permit Counsel to ask the child any questions regarding oath competency?**

Yes, Crown

No, Crown

Yes, Defence

No, Defence

If no, specify _____

3. **Did Counsel ask the child any questions?**

Yes, Crown

No, Crown

If yes, specify _____

Yes, Defence

No, Defence

If yes, specify _____

4. **Did the judge allow Counsel to cross-examine the child concerning oath competency?**

Yes, Crown

No, Crown

Yes, Defence

No, Defence

If no, reasons _____

5. Did Counsel cross-examine the child?

Yes, Crown

No, Crown

If yes, specify _____

Yes, Defence

No, Defence

If yes, specify _____

6. Did Defence counsel challenge the child's oath competency?

Yes

No

If yes, specify _____

Crown arguments _____

7. Judge's ruling:

Child sworn

Child not sworn

Reasons _____

C. "SOLEMN AFFIRMATION" COMPETENCY

1. What questions were asked by the judge to determine whether a "solemn affirmation" could be given?

- | | |
|--|--|
| <input type="checkbox"/> Reason | <input type="checkbox"/> Conscientious scruple |
| <input type="checkbox"/> Solemnity of occasion | <input type="checkbox"/> Seriousness of allegation |
| <input checked="" type="checkbox"/> Obligation to tell the truth | <input type="checkbox"/> Truth vs. lie |
| <input type="checkbox"/> Consequences of lying | <input type="checkbox"/> Punishment |
| <input type="checkbox"/> Other _____ | |

2. Did the judge permit Counsel to ask the child any questions regarding the desire to make a solemn affirmation?

- | | |
|---------------------------------------|---|
| <input type="checkbox"/> Yes, Crown | <input type="checkbox"/> No, Crown |
| <input type="checkbox"/> Yes, Defence | <input checked="" type="checkbox"/> No, Defence |

If no, specify _____

3. Did Counsel ask the child any questions concerning the child's capacity to make a "solemn affirmation"?

- | | |
|-------------------------------------|------------------------------------|
| <input type="checkbox"/> Yes, Crown | <input type="checkbox"/> No, Crown |
|-------------------------------------|------------------------------------|

If yes, specify _____

- | | |
|---------------------------------------|--------------------------------------|
| <input type="checkbox"/> Yes, Defence | <input type="checkbox"/> No, Defence |
|---------------------------------------|--------------------------------------|

If yes, specify _____

4. Did the judge allow Counsel to cross-examine the child regarding a "solemn affirmation"?

Yes, Crown

No, Crown

Yes, Defence

No, Defence

If no, reasons _____

5. Did Counsel cross-examine the child concerning the child's capacity to make a "solemn affirmation"?

Yes, Crown

No, Crown

If yes, specify _____

Yes, Defence

No, Defence

If yes, specify _____

6. Did Defence counsel challenge the child's "solemn affirmation" capacity?

Yes

No

If yes, specify _____

Crown arguments _____

7. Judge's ruling:

Affirmation allowed

Affirmation not allowed

Reasons _____

D. "PROMISING TO TELL THE TRUTH" COMPETENCY

1. What questions were asked by the judge to determine whether the child could give unsworn testimony on "promising to tell the truth"?

Seriousness of allegation

Solemnity of occasion

Understanding concept of promise

Truth vs. lie

Consequences of lying

Punishment

Other _____

2. Did the judge permit Counsel to ask any questions regarding the child's capacity to promise to tell the truth?

Yes, Crown

No, Crown

Yes, Defence

No, Defence

If no, specify _____

3. Did Counsel ask the child any questions?

Yes, Crown

No, Crown

If yes, specify _____

Yes, Defence

No, Defence

If yes, specify _____

4. Did the judge allow Counsel to cross-examine the child regarding the child's capacity to promise to tell the truth?

Yes, Crown

No, Crown

Yes, Defence

No, Defence

If no, reasons _____

5. Did Counsel cross-examine the child concerning capacity to promise to tell the truth?

Yes, Crown

No, Crown

If yes, specify _____

Yes, Defence

No, Defence

If yes, specify _____

6. Did Defence counsel challenge the child's ability to promise to tell the truth?

Yes

No

If yes, specify _____

Crown arguments _____

7. Judge's ruling:

Affirmation allowed

Affirmation not allowed

Reasons _____

E. JUDICIAL RULING - CHILD DISQUALIFIED FROM TESTIFYING

Reasons _____

Challenge to this ruling:

Yes, Crown

No, Crown

If yes, specify _____

Defence arguments _____

F. MISCELLANEOUS

1. **Did the judge make any comments concerning a distinction between the weight of sworn and unsworn evidence of children?**

Yes

No

If yes, specify _____

2. **Did the judge make any comments concerning the child's credibility?**

Yes

No

If yes, specify _____

3. Did the judge make any comments on the child's capacity:

To observe? _____

To recall? _____

To narrate? _____

To comprehend? _____

Other _____

4. Were there any constitutional or Charter challenges made surrounding any aspect of the inquiry?

Yes

No

If yes, specify _____

5. What was the duration of the competence inquiry?

6. Other observations, comments, unique considerations:

7. Judicially considered cases:

8. Statutes considered:

9. Authorities considered:

10. Rules considered:

11. Other i.e. necessity of vive voce evidence, judicial non-compliance (no inquiry), judge ordered Crown or Defence counsel to conduct inquiry:

**APPENDIX C:
CHAPTER 1: s. 16 C.E.A. - EVIDENTIARY ISSUES -
ANALYSIS OF TRANSCRIPTS⁴⁸⁸ - COMPETENCY TEST**

TYPE	AGES	NUMBER
SWORN: BRASIER/ANTROBUS TEST - RELIGIOUS Belief in God and Spiritual Consequences	6-13	77
SWORN: BUDIN TEST - RELIGIOUS Belief in God and Promise to God to Tell the Truth	6-13	24
SWORN: BANNERMAN/FLETCHER TEST - Moral Obligation and Solemnity of Occasion	6-13	12
SWORN: SOLEMN AFFIRMATION	7-13	4
DISQUALIFICATION: Promise to tell the truth 3 s. 16(4) 1	4-8	4
UNSWORN: PROMISE TO TELL THE TRUTH	5-13	25
TOTAL		146

488 B.C. unreported cases. There are four cases where judges applied the wrong test under the predecessor legislation. However, the legal determinations were: One sworn (Brasier/Antrobus); two sworn (Budin); and one unsworn (promise to tell the truth).

**APPENDIX D:
CHAPTER 1: s. 16 C.E.A. - EVIDENTIARY ISSUES -
ANALYSIS OF TRANSCRIPTS - COMPETENCY QUESTIONS**

A. "ABILITY TO COMMUNICATE" - GENERAL INTELLIGENCE

<i>GENERAL/FAMILY</i>	
Are you comfortable?	Do you have any questions to ask me?
What's your name?	Where do you live?
How old are you?	Do you live with your parents?
When is your birthday? How old will you be?	How many brothers & sisters do you have?
What's your doll's name?	What are their names?
How come the doll hasn't got any hair?	How old are they?
Do you play any sports?	Have you ever taken any trips or holidays away from your home with your parents?
What games do you play?	Where?
Do you read?	Did you like it?
What kind of books do you read?	Do you have a birthday party?

<i>SCHOOL</i>	
Do you go to school?	Who is your teacher?
What grade are you in?	What is on your report card?
What do you take up in Grade 2?	Do you like school?
What school do you attend?	Do you do well (How are you doing) in school?
Can you read yet?	What subjects do you take in school?
What can you read?	What is your favourite subject?
Have you written any tests this fall, any exams?	What is your least favourite subject? Why?
Do you have any friends in your class?	How did you do on this report card?

B. UNDERSTANDING OF PROCESS

GENERAL	
Can you see me up here?	Have you ever been in a courtroom before?
Who am I? What do you think I am?	Do you know why you are here today?
Do you know what my name is?	Have you given evidence in another trial?
Do you know what my job is? What do judges do?	Do you know what this case is all about?
Guess what my job is ... plumber, teacher, nurse or judge?	Are you nervous?

ROLE OF LAWYERS / QUESTIONS	
Do you know that they are lawyers and that they are going to be asking you questions?	Do you understand that I am here to make certain that no unfair questions are asked?
Do you understand that the lawyers will ask you about what you saw and heard?	Do you know that I am here to protect you from being asked unfair questions?
And do you know that you will have to answer those questions to the best of your memory?	When you are asked a question, do you think you can listen to it carefully and reply honestly?
Do you think you can say you don't remember if that's the case?	If one of the lawyers were to ask you a question that you were not certain of the answer, what would you say?
If you don't remember just say so - can you do that?	Do you feel that you can listen to the question, make certain that you understand, and answer it honestly?

SERIOUSNESS OF COURT/CASE	
Do you realize that this is a Court of Law and if you tell what you know about the matter you must be very careful to tell the truth and not tell a lie?	Do you understand that [the accused] is charged with a very serious charge?
Do you understand that if [the accused] were to be found guilty, it could have some unpleasant consequences for him(her)?	Do you know that [the accused] could go to jail if he(she) is guilty?
Do you understand the importance of telling the truth in court?	Do you know what kind of trouble you can get into if you don't tell the truth in court?
Why is it important to tell the truth in court?	Do you promise to tell the truth in court?

C. RELIGION AND SPIRITUAL CONSEQUENCES

RELIGION - OATH COMPETENCY	
Do you go to church? Did you ever go to church?	What's in the Bible?
Which church do you go to?	What things do you learn about God?
Do you go to Sunday School?	Can you tell me what you understand God to be?
What do you learn in Sunday School?	Where did you find out about God (Jesus)?
Do you believe in God?	Was God mentioned in the Sunday School you went to?
If you swear an oath on the Bible, does that bind your conscience? Do you understand what that means?	And if you don't tell the truth, what happens?
And when you swear on the Bible and say so help you God, or so help me God, what does that mean to you?	Who will punish you?
Do you understand what it means to swear on the Bible to tell the truth?	Do you also understand that to mean that God will punish you?
Do you understand that it is a promise to God that you will tell the truth?	And how would he do that?

D. MORAL OBLIGATION - DUTY TO TELL THE TRUTH

LIE VERSUS TRUTH	
Do you understand the importance of telling the truth in court?	Do you always try to tell the truth?
Why is it important to tell the truth in court?	Have you ever told a lie?
Do you promise to tell the truth in court?	What happens when you lie in court?
If you told a fib to your Mommy, what would she do to you?	If you lie today, who will punish you?
What does it mean to lie?	What happens if you told a fib in court?
Are you sure you know the difference between telling the truth and lying?	Will I get mad?
Are you going to tell me the truth?	I'll punish you, or Mommy?
What would make me angry? Telling a fib?	If you were asked to tell the truth, the whole truth and nothing but the truth, what would that mean to you?
You wouldn't want me to be angry with you, would you?	Do you know what it means to take an oath?
Do you know if anything happens to you if you don't tell the truth in Court?	Can you give me an example of a lie?
Can you tell me something about that, what kind of trouble you could be in?	If I said your sister's name is Joshua, is that the truth or a lie?
What does perjury mean?	What is a promise?
Have you heard of people that have been charged with perjury?	

**APPENDIX E:
CHAPTER 1: s. 16 C.E.A. - EVIDENTIARY ISSUES -
MR. JUSTICE BOUCK - SUGGESTED LIST OF QUESTIONS -
UNDERSTANDS NATURE OF OATH**

To determine whether the child understands the nature of an oath:

Where satisfied, the child is able to communicate the evidence and he does not want to affirm, an inquiry should be made to determine whether the child understands the nature of the oath.

Q: _____ (first name), I am going to ask you a few questions about your understanding of an oath before you testify. If you are allowed to take the oath, the Clerk will ask you to put your hand on the Bible and reply to this question:

"Do you swear that the evidence you shall give shall be the truth, the whole truth, and nothing but the truth, so help you God?"

Now I must ask you a few questions to see whether you understand the nature of this oath.

Q: Do you ever go to Church and Sunday School?

A: _____

Q: How often?

A: _____

Q: How many years have you been going?

A: _____

Q: Do you believe in God (or another Almighty)?

A: _____

Q: If you do take the oath that I just read to you, do you understand you will be telling God that what you are saying is the truth?

A: _____

Decision

If the judge is satisfied the child passes the **McKay/Budin** test:

- a) belief in God or another Almighty, and
- b) that in giving evidence under oath, he/she is telling such Almighty that what he/she says will be the truth,

then the child may be sworn.

(The Honourable Mr. Justice Bouck, February 5, 1988)

**APPENDIX F:
CHAPTER 1: s. 16 C.E.A. - EVIDENTIARY ISSUES -
MR. JUSTICE BOUCK - SUGGESTED LIST OF QUESTIONS -
UNDERSTANDS NATURE OF SOLEMN AFFIRMATION**

To determine whether the child understands the nature of a solemn affirmation:

Q: _____ (first name), how old are you?

A: _____

Q: Do you understand that you are here today because the Crown/accused believes you can tell (the jury and) me something about an incident that occurred on _____ day of _____, 19__ at _____? Before you can relate these events to us, I must ask you a few questions. If you are allowed to affirm, the Clerk will read you the following question:

"Do you solemnly affirm that the evidence to be given by you shall be the truth, the whole truth, and nothing but the truth?"

If you answer "yes", then you may testify. First of all, I must inquire as to whether or not you understand the nature of an affirmation.

Q: _____ (first name), could you please tell me the reason why you wish to affirm?

A: _____

Q: _____ (Ask any other questions that tend to illicit answers as to why the child may wish to affirm.)

Q: Do you realize that if you affirm you must tell the truth?

A: _____

Decision

If the judge is satisfied the child wants to affirm because of "conscientious scruples" i.e. an honourable, religious or upright misgiving, doubt or qualm about taking the oath, the child may be affirmed.

(The Honourable Mr. Justice Bouck, February 5, 1988)

**APPENDIX G:
CHAPTER 1: s. 16 C.E.A. - EVIDENTIARY ISSUES -
MR. JUSTICE BOUCK - SUGGESTED LIST OF QUESTIONS -
ABLE TO COMMUNICATE**

To determine whether the child is able to communicate:

Q: _____ (first name), what is your age?

A: _____

Q: Where do you go to school?

A: _____

Q: What grade are you in?

A: _____

Q: How well do you do in school?

A: _____

Q: Have you ever been in a courtroom before?

A: _____

Q: Do you know what this action (matter) is all about?

A: _____

Q: Have you ever told a lie?

A: _____

Q: Do you realize this is a court of law and if you tell what you know about this matter you must be very careful to tell the truth and not tell a lie?

A: _____

Q: Do you understand that both lawyers in this case will be asking you questions about the matters you saw and heard and you will have to answer these questions truthfully and to the best of your memory?

A: _____

Q: Do you understand that I am here to make certain that no unfair questions are asked and to protect you from these?

A: _____

Q: When you are asked questions do you think you can listen to them carefully and reply to them honestly?

A: _____

Q: Do you think you can say you don't remember if that is the case or you don't know if that is so?

A: _____

Q: Have you ever taken any trips or holidays away from your home with your parents?

A: _____

Q: Where?

A: _____

Q: Do you play any sports?

A: _____

Q: Do you read very much outside of school?

A: _____

Q: What do you read?

A: _____

Q: Do you know the difference between telling a lie and telling the truth?

A: _____

Q: Do you always try to tell the truth

A: _____

(The Honourable Mr. Justice Bouck, February 5, 1988)

APPENDIX H:
CHAPTER 1: s. 16 C.E.A. - EVIDENTIARY ISSUES -
AMERICAN COMPETENCY PROVISIONS, 1990

Under federal law (Victims of Child Abuse Act of 1990), children are presumed to be competent witnesses. State competency standards may be found in state laws, court rules of evidence, or codified rules of evidence. An analysis of each state's competency provisions as of December 31, 1990, revealed the following:

- 15 states dictate that every person is competent, with no specific requirements.
- 14 states assert that anyone is competent, regardless of age, providing certain minimum requirements are met. These requirements commonly include capability of expression (directly or through an interpreter) and an understanding of the duty to tell the truth.
- 20 states provide specifically for child witnesses.
 - In 4 states, children are required to demonstrate their competency before they are allowed to testify. 2 additional states require children to have the capacity to remember and communicate the facts in question, although there is no direct mention of a qualifying examination.
 - 9 states specifically exempt child sexual abuse victims from the competency requirements.
 - 4 states essentially waive the need for children to understand the nature of an oath.
 - 1 state merely asserts that age cannot be the sole reason for precluding a child from testifying.
- The state of Virginia lacks a specific statute or court rule regarding competency. Here, case law offers the only guidance on children's competency.

(Whitcomb, 1992:55-56)

**APPENDIX I:
CHAPTER 2: CRIMINAL CODE s. 274 -
CORROBORATION NOT REQUIRED**

Case _____ Date _____
Preliminary _____ Trial _____
Court _____ Jury _____
Judge _____
Crown _____ Defence _____
Child Complainant/Witness _____ Age _____

1. Was there any corroborative evidence in addition to the child's testimony?

Yes No

If yes, specify

- | | |
|--|--|
| <input checked="" type="checkbox"/> Mother | <input type="checkbox"/> Father |
| <input type="checkbox"/> Sibling | <input type="checkbox"/> Police |
| <input type="checkbox"/> Teacher | <input type="checkbox"/> Social worker |
| <input type="checkbox"/> Medical doctor | <input type="checkbox"/> Psychologist |
| <input type="checkbox"/> Psychiatrist | <input type="checkbox"/> Other complainant |
| <input type="checkbox"/> Accused | |
| <input type="checkbox"/> Other _____ | |
- _____

2. Did the judge warn the jury (or direct himself) that it is unsafe to convict on the uncorroborated evidence of a child (i.e. that independent confirming evidence is necessary)?

Yes No

If yes, specify _____

Did Crown counsel object?

Yes

No

If yes, specify _____

3. Did the judge make any comments regarding the repeal of S.586 (the need for corroboration on the unsworn evidence of a child)?

Yes

No

If yes, specify _____

4. Did Defence counsel oppose the repeal of the corroboration rule?

Yes

No

If yes, specify (any Charter arguments) _____

5. Did the judge make any comments concerning the new legislation (i.e. the appropriateness)?

Yes

No

If yes, specify _____

6. Did the judge make any comments regarding the weight to be given to sworn and unsworn evidence of a child?

Yes

No

If yes, specify _____

7. Did the judge warn the jury (or direct himself) as to the "inherent frailties" of children's evidence (i.e. Kendall-type warnings: capacity to observe, recollect; understand questions and giving intelligent answers; moral responsibility)?

Yes

No

If yes, specify _____

Did Crown counsel object to warning?

Yes

No

If yes, specify _____

Defence arguments _____

8. Did the judge make any comments on the child's capacity:

To observe _____

To recall _____

To narrate _____

To comprehend _____

Other _____

9. Did the judge make any comments concerning the complainant's credibility?

Yes

No

If yes, specify _____

10. Did the judge make any negative comments about the child (i.e. indicators of bias)?

Yes

No

If yes, specify _____

11. Were there any constitutional or Charter challenges made surrounding any aspect of this provision?

Yes

No

If yes, specify _____

12. Other comments, observations, unique considerations:

13. Judicially considered cases:

14. Statutes considered:

15. Authorities considered:

16. Rules considered:

17. Other:

**APPENDIX J:
CHAPTER 2: CRIMINAL CODE s. 274 -
CORROBORATION NOT REQUIRED -
RESULTS OF MONITORED UNREPORTED B.C. CASES***

TYPE	NUMBER
<i><u>PRELIMINARY INQUIRIES</u></i>	
Committed for Trial	12
Charges Dismissed	2
<i><u>TRIALS</u></i>	
Conviction (with corroboration)	27
Conviction (without corroboration)	1
Acquittal	23
Guilty Plea Entered (during proceedings)	3
Bench Warrant Issued (accused did not appear for continuation of trial)	3
TOTAL	71

- * Thirty-five (35) cases were monitored by actual presence in court for entirety of proceedings; analyzing the transcripts of the proceedings; review of file documents; and discussions with counsel.
- * Thirty-six (36) cases were monitored by analyzing the transcript of the proceedings; review of file documents; and/or from discussions with counsel.

**APPENDIX K:
CHAPTER 3: s. 486(2.1) - SCREEN APPLICATION**

Case _____ Date _____
Preliminary _____ Trial _____
Court _____ Jury _____
Judge _____
Crown _____ Defence _____
Child Complainant/Witness _____ Age _____

1. Did the Crown make an application for a screen?

Yes No

Reasons _____

2. Was a voir dire conducted?

Yes No

If no, reasons _____

3. Was the jury present?

Yes No

4. What evidence did the Crown call to support its application?

- Expert (psychological) Expert (medical)
 Social worker Police
 Parent

Other _____

5. Did the child have to testify?

- Yes No

Reasons _____

6. Did Defence counsel oppose the application?

- Yes No

If yes, reasons _____

Charter/constitutional arguments _____

Crown arguments _____

7. Judge's ruling:

Screen allowed?

Yes

No

Type of screen _____

Reasons _____

Other arrangements _____

8. Did the judge make any comments on a judicial standard for "necessary to obtain a full and candid account?"

Yes

No

If yes, specify _____

9. Were there any constitutional or Charter challenges made surrounding any aspect of this provision?

Yes

No

If yes, specify _____

10. Judicially considered cases:

11. Statutes considered:

12. Authorities considered:

13. Rules considered:

14. Other:

15. Other comments, observations, unique considerations:

**APPENDIX L:
CHAPTER 3: s. 486(2.1)(2.2) -
CLOSED-CIRCUIT T.V. APPLICATION**

Case _____ Date _____
Preliminary _____ Trial _____
Court _____ Jury _____
Judge _____
Crown _____ Defence _____
Child Complainant/Witness _____ Age _____

1. Did the Crown make an application for the child to testify via closed-circuit T.V.?

Yes No

Reasons _____

2. Was a voir dire conducted?

Yes No

If no, reasons _____

3. Was the jury present?

Yes No

4. What evidence did the Crown call to support its application?

Expert (psychological) Expert (medical)

Social worker Police

Parent

Other _____

5. Did the child have to testify?

Yes No

Reasons _____

6. Did Defence counsel oppose the application?

Yes No

If yes, reasons _____

Charter/constitutional arguments _____

Crown arguments _____

7. Judge's ruling:

Closed-circuit T.V. allowed?

Yes

No

Type of arrangements (ante room, etc.) _____

Reasons _____

8. Did the Court make any comments on a judicial standard for "necessary to obtain a full and candid account?"

Yes

No

If yes, specify _____

9. Were there any constitutional or Charter challenges made surrounding any aspect of this provision?

Yes

No

If yes, specify _____

10. Judicially considered cases:

11. Statutes considered:

12. Authorities considered:

13. Rules considered:

14. Other:

15. Other comments, observations, unique considerations:

**APPENDIX M:
CHAPTER 3: s. 486(2.1) -
SCREEN APPLICATION CASES**

ALLOWED	42
NOT ALLOWED	8
TOTAL	50

CASE*	AGE OF COMPL'T	EVIDENCE FROM	TYPE OF EVIDENCE AND FACTORS CONSIDERED	CHARTER/OTHER CHALLENGE	ALLOWED	PROCEDURE
Coy v. Iowa (U.S.S.C.) (1988)		<ul style="list-style-type: none"> District Attorney 	<ul style="list-style-type: none"> Emotional distress Fear of accused Fear of testifying 	<ul style="list-style-type: none"> Statute ruled unconstitutional 		1, 5, 8
R. v. A. (B.N.) (P.E.I.S.C.) (1990)		<ul style="list-style-type: none"> Crown 	<ul style="list-style-type: none"> Fear of accused Fear of testifying 	<ul style="list-style-type: none"> ss. 7 and 11(d) Constitutionality upheld 	Yes	1, 5, 7
R. v. Allan (B.C.C.A.) (1991)		<ul style="list-style-type: none"> Crown 	<ul style="list-style-type: none"> Fear of accused Fear of testifying Testified at preliminary without device 		No	1, 5

* See Index of Cases for citations.

PROCEDURE:

- 1 - *Vair Dire* Held
- 2 - Chambers Application
- 3 - Pre-Trial Motion
- 4 - Consent of Both Parties
- 5 - Application Opposed by Defence
- 6 - Child Testified
- 7 - Screen - One-Way
- 8 - Other Device Used - One-Way Mirror
- 9 - Other Device Used - Accused Out of Child's Field of Vision
- 10 - Other Device Used - Wooden Barrier
- 11 - Other Device Used - Accused Sat at Back of Courtroom

CASE*	AGE OF COMPL'T	EVIDENCE FROM	TYPE OF EVIDENCE AND FACTORS CONSIDERED	CHARTER/OTHER CHALLENGE	ALLOWED	PROCEDURE
R. v. Auckland (B.C.C.C.) (1988)		<ul style="list-style-type: none"> • Crown 	<ul style="list-style-type: none"> • Fear of accused • Fear of testifying 		Yes	1, 5, 7
R. v. Avignon (B.C.P.C.) (1989)		<ul style="list-style-type: none"> • Crown 	<ul style="list-style-type: none"> • Fear of accused • Fear of testifying 		Yes	1, 5, 7
R. v. B.(A.) (No.1) (Ont.P.C.) (1988)	16	<ul style="list-style-type: none"> • Parent • Expert - Social Worker • Expert - Crown Attorney • Police officer • Expert - Paediatrician 	<ul style="list-style-type: none"> • Had not seen accused for 6 months • Child's suicidal behaviour • Biological condition of child • Black-out of child • Extreme stress on diabetes • Specific fear of accused • Specific reticence about acts outside court • Intimidating behaviour by child's mother • Mental stress • Self-injurious behaviour 		Yes	1, 5, 7

* See Index of Cases for citations.

PROCEDURE:

- | | | | |
|-----|--------------------------------|------|--|
| 1 - | <i>Voir Dire</i> Held | 7 - | Screen - One-Way |
| 2 - | Chambers Application | 8 - | Other Device Used - One-Way Mirror |
| 3 - | Pre-Trial Motion | 9 - | Other Device Used - Accused Out of Child's Field of Vision |
| 4 - | Consent of Both Parties | 10 - | Other Device Used - Wooden Barrier |
| 5 - | Application Opposed by Defence | 11 - | Other Device Used - Accused Sat at Back of Courtroom |
| 6 - | Child Testified | | |

CASE*	AGE OF COMPL'T	EVIDENCE FROM	TYPE OF EVIDENCE AND FACTORS CONSIDERED	CHARTER/OTHER CHALLENGE	ALLOWED	PROC-EDURE
R. v. B.(A.) (No.2) (Ont.D.C.) (1989)	16	<ul style="list-style-type: none"> • Parent • Expert - Social Worker • Expert - Crown Attorney • Police officer • Expert - Paediatrician 	<ul style="list-style-type: none"> • Had not seen the accused for six months • Child's suicidal behaviour • Biological condition of child • Black-out of child • Extreme stress on diabetes • Specific fear of accused • Specific reticence about acts outside court • Intimidating behaviour by child's mother • Mental stress • Self injurious behaviour 	<ul style="list-style-type: none"> • ss. 7 and 11(d) violation • Constitutional under s. 1 Charter 	Yes	1, 5, 7
R. v. B.(S.) (Ont.D.C.) (1990)		<ul style="list-style-type: none"> • Crown 	<ul style="list-style-type: none"> • Fear of accused • Fear of testifying 	<ul style="list-style-type: none"> • ss. 7 and 11(d) • Constitutionality upheld 	Yes	1, 5, 7
R. v. Beck (B.C.P.C.) (1988)		<ul style="list-style-type: none"> • Crown 	<ul style="list-style-type: none"> • Fear of accused • Fear of testifying 		Yes	1, 5, 7

* See Index of Cases for citations.

PROCEDURE:

- 1 - *Voir Dire* Held
- 2 - Chambers Application
- 3 - Pre-Trial Motion
- 4 - Consent of Both Parties
- 5 - Application Opposed by Defence
- 6 - Child Testified
- 7 - Screen - One-Way
- 8 - Other Device Used - One-Way Mirror
- 9 - Other Device Used - Accused Out of Child's Field of Vision
- 10 - Other Device Used - Wooden Barrier
- 11 - Other Device Used - Accused Sat at Back of Courtroom

CASE*	AGE OF COMPLT	EVIDENCE FROM	TYPE OF EVIDENCE AND FACTORS CONSIDERED	CHARTER/OTHER CHALLENGE	ALLOWED	PROC-EDURE
R. v. Bernard (B.C.P.C.) (1991)		<ul style="list-style-type: none"> • Crown 	<ul style="list-style-type: none"> • Fear of accused • Fear of testifying 		Yes	1, 5, 7
R. v. Bianco (B.C.P.C.) (1990)		<ul style="list-style-type: none"> • Crown 	<ul style="list-style-type: none"> • Extreme fear of accused (grandfather) • Extreme fear of testifying 		Yes	1, 5, 7
R. v. Boyd (B.C.C.C.) (1988)	6	<ul style="list-style-type: none"> • Crown 	<ul style="list-style-type: none"> • Fear of accused • Fear of testifying • Child's tender age • Child undergoing psychiatric therapy • Screen used at preliminary • Child's expectation of a screen 		Yes	1, 5, 7
R. v. Burghgraef (Ont.P.C.) (1988)	7	<ul style="list-style-type: none"> • Mother • Expert - Social Worker 	<ul style="list-style-type: none"> • Child's conflicting feelings of fear/love/loyalty re accused • Fear of testifying • Mental distress • Self-injurious behaviour • Nightmares 		Yes	1, 5, 7

* See Index of Cases for citations.

PROCEDURE:

- 1 - *Voir Dire* Held
- 2 - Chambers Application
- 3 - Pre-Trial Motion
- 4 - Consent of Both Parties
- 5 - Application Opposed by Defence
- 6 - Child Testified
- 7 - Screen - One-Way
- 8 - Other Device Used - One-Way Mirror
- 9 - Other Device Used - Accused Out of Child's Field of Vision
- 10 - Other Device Used - Wooden Barrier
- 11 - Other Device Used - Accused Sat at Back of Courtroom

CASE*	AGE OF COMPLT	EVIDENCE FROM	TYPE OF EVIDENCE AND FACTORS CONSIDERED	CHARTER/OTHER CHALLENGE	ALLOWED	PROC-EDURE
R. v. C.(A.) (Ont.P.C.) (1989)		<ul style="list-style-type: none"> • Crown 	<ul style="list-style-type: none"> • Fear of accused • Fear of testifying • Shyness • Age • Emotional fragility 		Yes	1, 5, 7
R. v. C.(W.R.) (Ont.D.C.) (1990)	8	<ul style="list-style-type: none"> • Crown 	<ul style="list-style-type: none"> • Fear of accused • Fear of testifying 	<ul style="list-style-type: none"> • ss. 7 and 11(d) • Constitutionality upheld (can also be saved by s. 1) 	Yes	1, 5, 7
R. v. Carr (Man.P.C.) (1989)	10	<ul style="list-style-type: none"> • Expert - Child Abuse Worker • Foster Mother • Expert - Social Worker 	<ul style="list-style-type: none"> • Extreme fear of being face-to-face with the accused stepfather • Child was forcibly confined during acts 		Yes	1, 5, 7
R. v. Cooper (Ont.D.C.) (1990)	8	<ul style="list-style-type: none"> • Mother • Social Worker 	<ul style="list-style-type: none"> • Allowed at preliminary • Specific fear of accused • Child's expectation of use of screen 	<ul style="list-style-type: none"> • Assuming (without finding) violation of ss. 7 and 11(d) saved by s. 1 of Charter 	Yes	1, 5, 7

* See Index of Cases for citations.

PROCEDURE:

- 1 - *Voir Dire* Held
- 2 - Chambers Application
- 3 - Pre-Trial Motion
- 4 - Consent of Both Parties
- 5 - Application Opposed by Defence
- 6 - Child Testified
- 7 - Screen - One-Way
- 8 - Other Device Used - One-Way Mirror
- 9 - Other Device Used - Accused Out of Child's Field of Vision
- 10 - Other Device Used - Wooden Barrier
- 11 - Other Device Used - Accused Sat at Back of Courtroom

CASE*	AGE OF COMPL'T	EVIDENCE FROM	TYPE OF EVIDENCE AND FACTORS CONSIDERED	CHARTER/OTHER CHALLENGE	ALLOWED	PROCEDURE
R. v. Dick(A.) (B.C.P.C.) (1989)	14	<ul style="list-style-type: none"> • Mother 	<ul style="list-style-type: none"> • Fear of accused • Fear of testifying • Extreme nervousness • Very shy 		Yes	1, 5, 7
R. v. Dick(S.) (B.C.S.C.) (1989)	6	<ul style="list-style-type: none"> • Mother • Father • Expert - Play Therapist • Expert - Child Psychologist 	<ul style="list-style-type: none"> • Fear of testifying • Age • Anxiety of jury, courtroom • Specific fear of accused • Withdrawn and stressful 	<ul style="list-style-type: none"> • ss. 7 and 11(d) • Constitutionalality upheld (no reasons) 	Yes	1, 5, 7
R. v. Dodds (B.C.P.C.) (1992)		<ul style="list-style-type: none"> • Mother 	<ul style="list-style-type: none"> • Fear of testifying • Extreme shyness, nervousness • Reticence • Fear that accused would kill her 		Yes	1, 5, 7
R. v. Ghini (B.C.P.C.) (1989)	7	<ul style="list-style-type: none"> • Crown 	<ul style="list-style-type: none"> • Child froze on stand 		Yes	2, 10

* See Index of Cases for citations.

PROCEDURE:

- | | | | |
|-----|--------------------------------|------|--|
| 1 - | <i>Voit Dire</i> Held | 7 - | Screen - One-Way |
| 2 - | Chambers Application | 8 - | Other Device Used - One-Way Mirror |
| 3 - | Pre-Trial Motion | 9 - | Other Device Used - Accused Out of Child's Field of Vision |
| 4 - | Consent of Both Parties | 10 - | Other Device Used - Wooden Barrier |
| 5 - | Application Opposed by Defence | 11 - | Other Device Used - Accused Sat at Back of Courtroom |
| 6 - | Child Testified | | |

CASE*	AGE OF COMPLAINT	EVIDENCE FROM	TYPE OF EVIDENCE AND FACTORS CONSIDERED	CHARTER/OTHER CHALLENGE	ALLOWED	PROCEDURE
R. v. Griffin (B.C.S.C.) (1990)	12	<ul style="list-style-type: none"> • Crown 	<ul style="list-style-type: none"> • Fear of testifying • Specific fear of accused 		Yes	1, 5, 7
R. v. H.(B.C.) (Man.C.A.) (1990)		<ul style="list-style-type: none"> • Crown 	<ul style="list-style-type: none"> • Fear of accused • Fear of testifying 		Yes	1, 5, 7
R. v. H.(D.) (N.B.Q.B.) (1990)	12	<ul style="list-style-type: none"> • Mother • Expert - Social Worker • Expert - Sexual Abuse Therapist 	<ul style="list-style-type: none"> • Extreme shyness, nervousness • Extreme fear of testifying • Extreme fear of accused 	<ul style="list-style-type: none"> • ss. 7 and 11(d) • Constitutionality upheld 	Yes	1, 5, 7
R. v. Jones (Ont.P.C.) (1988)		<ul style="list-style-type: none"> • Crown 	<ul style="list-style-type: none"> • Fear of accused • Fear of testifying • Child threatened by accused 		Yes	1, 6, 7
R. v. Kiyawasew (B.C.C.C.) (1990)		<ul style="list-style-type: none"> • Foster Mother 	<ul style="list-style-type: none"> • Fear of testifying • Extreme fear of the accused • Timid and shy 		Yes	1, 5, 7

* See Index of Cases for citations.

PROCEDURE:

- 1 - *Voir Dire* Held
- 2 - Chambers Application
- 3 - Pre-Trial Motion
- 4 - Consent of Both Parties
- 5 - Application Opposed by Defence
- 6 - Child Testified
- 7 - Screen - One-Way
- 8 - Other Device Used - One-Way Mirror
- 9 - Other Device Used - Accused Out of Child's Field of Vision
- 10 - Other Device Used - Wooden Barrier
- 11 - Other Device Used - Accused Sat at Back of Courtroom

CASE*	AGE OF COMPLAINT	EVIDENCE FROM	TYPE OF EVIDENCE AND FACTORS CONSIDERED	CHARTER/OTHER CHALLENGE	ALLOWED	PROCEDURE
R. v. Knight (Ont. D.C.) (1988)		<ul style="list-style-type: none"> • Mother 	<ul style="list-style-type: none"> • Fear of testifying • Shyness • Fear of accused 		Yes	1, 5, 7
R. v. Lemky (B.C.P.C.) (1990)		<ul style="list-style-type: none"> • Crown 	<ul style="list-style-type: none"> • Fear of accused • Fear of testifying 	<ul style="list-style-type: none"> • ss. 7 and 11(d) • Ruled unconstitutional (no reasons given) 	No	1, 5
R. v. Levogiannis (No. 1) (Ont. D.C.) (1989)	12	<ul style="list-style-type: none"> • Expert - Child Psychologist 	<ul style="list-style-type: none"> • Increased fear of testifying • Fear of accused 	<ul style="list-style-type: none"> • ss. 7 and 11(d) • Constitutionality upheld (can also be saved by s. 1) 	Yes	1, 5, 7
R. v. Levogiannis (No. 2) (Ont. C.A.) (1990)	12	<ul style="list-style-type: none"> • Expert - Child Psychologist 	<ul style="list-style-type: none"> • Increased fear of testifying • Fear of accused 	<ul style="list-style-type: none"> • ss. 7 and 11(d) • Constitutionality upheld (saved by s. 1) 	Yes	1, 5, 7

* See Index of Cases for citations.

PROCEDURE:

- | | | | |
|-----|--------------------------------|------|--|
| 1 - | Voir Dire Held | 7 - | Screen - One-Way |
| 2 - | Chambers Application | 8 - | Other Device Used - One-Way Mirror |
| 3 - | Pre-Trial Motion | 9 - | Other Device Used - Accused Out of Child's Field of Vision |
| 4 - | Consent of Both Parties | 10 - | Other Device Used - Wooden Barrier |
| 5 - | Application Opposed by Defence | 11 - | Other Device Used - Accused Sat at Back of Courtroom |
| 6 - | Child Testified | | |

CASE*	AGE OF COMPLT	EVIDENCE FROM	TYPE OF EVIDENCE AND FACTORS CONSIDERED	CHARTER/OTHER CHALLENGE	ALLOWED	PROCEDURE
R. v. Levogiannis (No. 3) (S.C.C.) (1993)	12	• Expert - Child Psychologist	<ul style="list-style-type: none"> • Increased fear of testifying • Fear of accused 	<ul style="list-style-type: none"> • ss. 7 and 11(d) • Constitutionality upheld • Reasons to follow (results only) 	Yes	1, 5, 7
R. v. M.(P.) (Ont.D.C.) (1988)	12	• Crown	<ul style="list-style-type: none"> • Fear of testifying • Considerable reluctance to discuss acts • Fear of accused 	<ul style="list-style-type: none"> • ss. 7 and 11(d) • Constitutionality upheld 	Yes	1, 4, 7
R. v. M.(P.) (Ont.C.A.) (1990)	12	• Crown	<ul style="list-style-type: none"> • Fear of testifying • Considerable reluctance to discuss acts • Fear of accused 	<ul style="list-style-type: none"> • ss. 7 and 11(d) • Constitutionality upheld 	Yes	1, 4, 7
R. v. Martin (B.C.C.C.) (1988)		• Crown	<ul style="list-style-type: none"> • Fear of accused • Fear of testifying 		No (no explanation)	1, 5
R. v. McLeod (B.C.P.C.) (1990)		• Crown	<ul style="list-style-type: none"> • Fear of accused • Fear of testifying 		No (no explanation)	1, 5

* See Index of Cases for citations.

PROCEDURE:

- 1 - *Voir Dire* Held
- 2 - Chambers Application
- 3 - Pre-Trial Motion
- 4 - Consent of Both Parties
- 5 - Application Opposed by Defence
- 6 - Child Testified
- 7 - Screen - One-Way
- 8 - Other Device Used - One-Way Mirror
- 9 - Other Device Used - Accused Out of Child's Field of Vision
- 10 - Other Device Used - Wooden Barrier
- 11 - Other Device Used - Accused Sat at Back of Courtroom

CASE*	AGE OF COMPL'T	EVIDENCE FROM	TYPE OF EVIDENCE AND FACTORS CONSIDERED	CHARTER/OTHER CHALLENGE	ALLOWED	PROCEDURE
R. v. Milot (B.C.P.C.) (1993)	7	• Crown	<ul style="list-style-type: none"> • Fear of accused • Fear of testifying 		Yes	1, 5, 7
R. v. Morris (B.C.P.C.) (1988)	10	• Crown	<ul style="list-style-type: none"> • Fear of accused • Fear of testifying 		No	1, 3, 5, 9, 11
R. v. O'Bray (B.C.P.C.) (1988)		• Mother	<ul style="list-style-type: none"> • Fear of testifying • Extreme nervousness • Fear of the accused 		Yes	1, 7
R. v. P.(W.) (Ont.P.C.) (1988)	7	• Mother	<ul style="list-style-type: none"> • Fear of accused • Could not testify if able to see accused 		Yes	1, 5, 7
R. v. Pain (B.C.C.C.) (1991)		• Therapist	<ul style="list-style-type: none"> • Fear of testifying • Behavioral symptoms • Incestuous family • Crown unable to establish child had a fear of accused 		No	1, 5

* See Index of Cases for citations.

PROCEDURE:

- 1 - *Voir Dire* Held
- 2 - Chambers Application
- 3 - Pre-Trial Motion
- 4 - Consent of Both Parties
- 5 - Application Opposed by Defence
- 6 - Child Testified
- 7 - Screen - One-Way
- 8 - Other Device Used - One-Way Mirror
- 9 - Other Device Used - Accused Out of Child's Field of Vision
- 10 - Other Device Used - Wooden Barrier
- 11 - Other Device Used - Accused Sat at Back of Courtroom

CASE*	AGE OF COMPL'T	EVIDENCE FROM	TYPE OF EVIDENCE AND FACTORS CONSIDERED	CHARTER/OTHER CHALLENGE	ALLOWED	PROC-EDURE
R. v. Patterson (Ont.C.G.D.) (1990)		• Crown	<ul style="list-style-type: none"> • Fear of accused • Fear of testifying 		Yes	1, 5, 7
R. v. R.(P.S.) (Ont.D.C.) (1989)	14	• Expert - Psychologist	<ul style="list-style-type: none"> • Fear of accused • Fear of testifying • Child attempted suicide • General shyness • Emotional fragility • Withdrawn • High state of stress and fear 		Yes	1, 5, 7
R. v. Radowski (B.C.P.C.) (1990)		• Crown	<ul style="list-style-type: none"> • Age • Fear of accused • Fear of testifying 		Yes	1, 5, 7
R. v. Riley (Ont.D.C.) (1990)		• Mother	<ul style="list-style-type: none"> • Fear of testifying • Fear of attack by accused 		Yes	1, 5, 7
R. v. Seeley (Ont.D.C.) (1989)		• Parent	<ul style="list-style-type: none"> • Fear of accused • Fear of testifying 		Yes	1, 4, 7

* See Index of Cases for citations.

PROCEDURE:

- 1 - *Voir Dire* Held
- 2 - Chambers Application
- 3 - Pre-Trial Motion
- 4 - Consent of Both Parties
- 5 - Application Opposed by Defence
- 6 - Child Testified
- 7 - Screen - One-Way
- 8 - Other Device Used - One-Way Mirror
- 9 - Other Device Used - Accused Out of Child's Field of Vision
- 10 - Other Device Used - Wooden Barrier
- 11 - Other Device Used - Accused Sat at Back of Courtroom

CASE*	AGE OF COMPL'T	EVIDENCE FROM	TYPE OF EVIDENCE AND FACTORS CONSIDERED	CHARTER/OTHER CHALLENGE	ALLOWED	PROCEDURE
R. v. Shubert (B.C.P.C.) (1991)		• Expert - Psychologist	<ul style="list-style-type: none"> • Fear of accused • Fear of testifying 		Yes	1, 5, 7
R. v. Snow (B.C.P.C.) (1989)	7	<ul style="list-style-type: none"> • Expert - Child Psychologist • Mother 	<ul style="list-style-type: none"> • Fear of accused • Fear of testifying • Nightmares • Extreme anxiety 		Yes	1, 5, 7
R. v. T. (B.C.P.C.) (1988)		• Crown	<ul style="list-style-type: none"> • Fear of accused • Fear of testifying 		Yes	1, 5, 7
R. v. Threatful (B.C.P.C.) (1988)	7, 9	• Crown	<ul style="list-style-type: none"> • Fear of testifying • Mother is the accused • Specific fear of accused 		Yes	1, 5, 7
R. v. W.(A.) (Ont.P.C.) (1990)		• Expert - Psychologist	<ul style="list-style-type: none"> • Fear of accused • Fear of testifying 		Yes	1, 5, 7

* See Index of Cases for citations.

PROCEDURE:

- 1 - *Voir Dire* Held
- 2 - Chambers Application
- 3 - Pre-Trial Motion
- 4 - Consent of Both Parties
- 5 - Application Opposed by Defence
- 6 - Child Testified
- 7 - Screen - One-Way
- 8 - Other Device Used - One-Way Mirror
- 9 - Other Device Used - Accused Out of Child's Field of Vision
- 10 - Other Device Used - Wooden Barrier
- 11 - Other Device Used - Accused Sat at Back of Courtroom

CASE*	AGE OF COMPL'T	EVIDENCE FROM	TYPE OF EVIDENCE AND FACTORS CONSIDERED	CHARTER/OTHER CHALLENGE	ALLOWED	PROCEDURE
R. v. W. (K.E.) (Alta.Q.B.) (1990)	5	<ul style="list-style-type: none"> Expert Paediatrician (in child abuse) Mother Expert - Social Worker 	<ul style="list-style-type: none"> Fear of accused Fear of testifying Expert unable to say if device would assist in child giving evidence Child had sexually transmitted disease - Chlamydia 		No	1, 5
R. v. W.(M.R.) (B.C.C.C.) (1989)		<ul style="list-style-type: none"> Crown 	<ul style="list-style-type: none"> Fear of accused Crown did not call expert witnesses Did not establish child's fear of testifying 		No	1, 5
R. v. Westerguard (B.C.P.C.) (1989)		<ul style="list-style-type: none"> Crown 	<ul style="list-style-type: none"> Fear of accused Fear of testifying 		Yes	1, 5, 7
R. v. Wright (B.C.P.C.) (1988)		<ul style="list-style-type: none"> Crown 	<ul style="list-style-type: none"> Fear of testifying Age Fear of courtroom Specific fear of accused Extreme shyness 		Yes	1, 5, 7

* See Index of Cases for citations.

PROCEDURE:

- 1 - *Voir Dire* Held
- 2 - Chambers Application
- 3 - Pre-Trial Motion
- 4 - Consent of Both Parties
- 5 - Application Opposed by Defence
- 6 - Child Testified
- 7 - Screen - One-Way
- 8 - Other Device Used - One-Way Mirror
- 9 - Other Device Used - Accused Out of Child's Field of Vision
- 10 - Other Device Used - Wooden Barrier
- 11 - Other Device Used - Accused Sat at Back of Courtroom

CASE*	AGE OF COMPL'T	EVIDENCE FROM	TYPE OF EVIDENCE AND FACTORS CONSIDERED	CHARTER/OTHER CHALLENGE	ALLOWED	PROC-EDURE
R. v. Wright (M.) (B.C.P.C.) (1988)	5	<ul style="list-style-type: none"> • Crown 	<ul style="list-style-type: none"> • Fear of accused • Fear of testifying • Age of child • Extreme shyness 		Yes	1, 5, 7

* See Index of Cases for citations.

PROCEDURE:

- | | | | | | |
|---|---|--------------------------------|----|---|--|
| 1 | - | <i>Voir Dire</i> Held | 7 | - | Screen - One-Way |
| 2 | - | Chambers Application | 8 | - | Other Device Used - One-Way Mirror |
| 3 | - | Pre-Trial Motion | 9 | - | Other Device Used - Accused Out of Child's Field of Vision |
| 4 | - | Consent of Both Parties | 10 | - | Other Device Used - Wooden Barrier |
| 5 | - | Application Opposed by Defence | 11 | - | Other Device Used - Accused Sat at Back of Courtroom |
| 6 | - | Child Testified | | | |

**APPENDIX N:
CHAPTER 3: s. 486(2.1)(2.2) -
CLOSED-CIRCUIT TELEVISION APPLICATION CASES**

ALLOWED	9
NOT ALLOWED	1
TOTAL	10

CASE*	AGE OF COMPL'T	EVIDENCE FROM	TYPE OF EVIDENCE AND FACTORS CONSIDERED	CHARTER/OTHER CHALLENGE	ALLOWED	PROC-EDURE
Maryland v. Craig (S.C.U.S.) (1990)		<ul style="list-style-type: none"> District Attorney Brief for Amicus Curiae American Psychological Assoc. 	<ul style="list-style-type: none"> Emotional distress Fear of testifying Fear of accused 	<ul style="list-style-type: none"> Statute ruled constitutional Case specific findings of necessity 		
R. v. Dick (B.) (B.C.S.C.) (1988)	6	<ul style="list-style-type: none"> Parent Expert - Family Therapist Expert - Child Psychologist 	<ul style="list-style-type: none"> Fear of testifying Specific fear of accused not established 		No	1, 5

* See Index of Cases for citations.

PROCEDURE:

- 1 - *Voir Dire* Held
- 2 - Chambers Application
- 3 - Pre-Trial Motion
- 4 - Consent of Both Parties
- 5 - Application Opposed by Defence
- 6 - Child Testified
- 7 - New Jersey Supreme Court Procedure Followed

CASE*	AGE OF COMPLT	EVIDENCE FROM	TYPE OF EVIDENCE AND FACTORS CONSIDERED	CHARTER/OTHER CHALLENGE	ALLOWED	PROC-EDURE
R. v. Dick (S.) (B.C.S.C.) (1989)	6	<ul style="list-style-type: none"> • Parents • Expert - Family Therapist • Expert - Child Psychologist 	<ul style="list-style-type: none"> • Fear of testifying • Age • Anxiety of jury/courtroom • Specific fear of accused • Withdrawn and stressful 	<ul style="list-style-type: none"> • ss. 7 and 11(d) • Constitutionality upheld (no reasons) 	Yes	1, 5
R. v. Hillier (Man.C.A.) (1990)	8	<ul style="list-style-type: none"> • Police Officer • Social Worker • Mother 	<ul style="list-style-type: none"> • Fear of the accused • Tear of testifying 		Yes	1, 5
R. v. J.(J.V.R.) (Ont.P.C.) (1989)	7	<ul style="list-style-type: none"> • Crown 	<ul style="list-style-type: none"> • Child froze on witness stand • Tender age • Pressure on child induced reticence 		Yes	1, 4, 6
R. v. Jones (Ont.P.C.) (1988)		<ul style="list-style-type: none"> • Crown 	<ul style="list-style-type: none"> • Fear of testifying • Child threatened by accused • Coercion - induced her to refuse to answer questions 		Yes	1, 5, 6
R. v. Kilabuk (N.W.T.S.C.) (1990)	11	<ul style="list-style-type: none"> • Crown 	<ul style="list-style-type: none"> • Fear of accused • Fear of testifying 		Yes	1, 5
R. v. Milot (B.C.P.C.) (1993)	7	<ul style="list-style-type: none"> • Crown 	<ul style="list-style-type: none"> • Child had difficulty testifying behind screen 		Yes	1, 5, 6

* See Index of Cases for citations.

PROCEDURE:

- 1 - *Voir Dire* Held
 - 2 - Chambers Application
 - 3 - Pre-Trial Motion
 - 4 - Consent of Both Parties
-
- 5 - Application Opposed by Defence
 - 6 - Child Testified
 - 7 - New Jersey Supreme Court Procedure Followed

CASE*	AGE OF COMPL'T	EVIDENCE FROM	TYPE OF EVIDENCE AND FACTORS CONSIDERED	CHARTER/OTHER CHALLENGE	ALLOWED	PROCEDURE
R. v. R.(M.E.) (N.S.C.) (1989)	10	<ul style="list-style-type: none"> • Crown 	<ul style="list-style-type: none"> • Fear of testifying • Tender age • Shyness • Familial relationship to accused (grandfather) • Intimate nature of acts • Duration of acts 	<ul style="list-style-type: none"> • ss. 7 and 11(d) • Constitutionality upheld 	Yes	1, 5
R. v. W.(A.) (Ont.P.C.) (1990)	4½	<ul style="list-style-type: none"> • Expert - Psychiatrist • Social Worker • Child Abuse Worker • Mother 	<ul style="list-style-type: none"> • Fear of accused • Fear of testifying 		Yes	1, 4, 7
R. v. W.(P.F.) (Ont.P.C.) (1990)	8, 10	<ul style="list-style-type: none"> • Expert - Psychologist 	<ul style="list-style-type: none"> • Fear of testifying • Children angry in presence of accused (father) • Fearful of accused 		Yes	1, 4, 7

* See Index of Cases for citations.

PROCEDURE:

- 1 - *Voir Dire* Held
- 2 - Chambers Application
- 3 - Pre-Trial Motion
- 4 - Consent of Both Parties
- 5 - Application Opposed by Defence
- 6 - Child Testified
- 7 - New Jersey Supreme Court Procedure Followed

APPENDIX O:
CHAPTER 3: s. 486(2.1)(2.2) - NEW JERSEY v. SHEPPARD
PROCEDURE FOR CLOSED-CIRCUIT TELEVISION

1. The testimony of the child victim shall be taken in a room near the courtroom from which video images and audio information can be projected to courtroom monitors with clarity.
2. The persons present in the room from which the child victim will testify (testimonial room) shall consist, in addition to the child, only of the prosecuting and defense attorneys together with the cameraman.
3. The only video equipment to be placed in the testimonial room shall be the video camera and such tape recording equipment as may be appropriate to carry out the conditions herein set forth.
4. The courtroom shall be equipped with monitors having the capacity to present images and sound with clarity, so that the jury, the defendant, the judge, and the public shall be able to see and hear the witness clearly while she testifies.
5. It shall not be necessary to conceal the video camera. A video-tape shall be made containing all images and all sounds projected to the courtroom which tape shall be introduced in evidence as a state exhibit.
6. No bright lights shall be employed in the testimonial room.
7. Color images shall be projected to the courtroom by the video camera.
8. The video camera shall be equipped with a zoom lens to be used only on notice to counsel who shall have an opportunity to object.
9. The video camera, the witness and counsel shall be so arranged that all three persons in the testimonial room can be seen on the courtroom monitors simultaneously. The face of the witness shall be visible on the monitors at all times, absent, an agreement by counsel or direction by the court for some other arrangement. The placement of counsel in the testimonial room shall be at the discretion of each counsellor.
10. The defendant and his attorney shall be provided by the State with a video system which will permit constant private communication

between them during the testimony of the child witness.

11. An audio system shall be provided connecting the judge with the testimonial room to the end that he can rule on objections and otherwise control the proceedings from the bench.
12. In the event testimony is being recorded by use of a mechanical system, the video monitors or one of them shall be so connected to that equipment as to record all of the child witness' testimony.
13. In the event the proceedings are being recorded by court stenographer, that stenographer shall remain in the courtroom and shall rely upon the video monitors for the purpose of recording the testimony of the child victim.
14. All video equipment, the video-tape and the cameraman, shall be provided by and at the expense of the State.
15. The oath of the child witness may be administered by the judge using the audio equipment, or by the court clerk who may enter the testimonial room for that purpose only or otherwise as the judge may direct.
16. The testimony of the child witness shall be interrupted at reasonable intervals to provide the defendant with an opportunity for person-to-person consultation.
17. The trial court, before the child victim testifies, shall provide the jury with appropriate instructions concerning the video-tape presentation.
18. These conditions have been adopted by the court after counsel has been provided with the opportunity to make objections to them.

**APPENDIX P:
CHAPTER 3: s. 486(2.1)(2.2 - R. v. W.(ARTHUR) -
MODIFIED NEW JERSEY v. SHEPPARD
FOR CLOSED-CIRCUIT TELEVISION TESTIMONY**

CONDITIONS FOR RECEIVING THE EVIDENCE OF THE WITNESS, ANGELA W.

1. The evidence of the witness shall be taken in a room (herein called the testimonial room) adjacent to or near the courtroom where the preliminary inquiry is being conducted, from which testimonial room video images and audio information can be projected to the courtroom monitors with clarity.
2. The persons present in the testimonial room shall consist, in addition to the witness, of one Crown Attorney, one Defence Counsel, one female support person, and the camera operator if one is required.
3. The only video equipment to be placed in the testimonial room shall be the video camera and such tape and/or video recording equipment as may be appropriate to carry out the conditions herein.
4. A video tape and sound recording of the proceedings shall be made and the tape and recording shall be filed as an exhibit at the preliminary inquiry upon the completion of the evidence of the witness.
5. The courtroom shall be equipped with monitors having the capacity to present colour images and sound with clarity so that the accused and justice presiding at the preliminary inquiry shall be able to see and hear clearly the witness, the Crown Attorney and the Defence Counsel.
6. The video camera, the witness, the support person and counsel shall be so arranged that all four persons in the testimonial room can be seen on the courtroom monitors simultaneously. The face of the witness shall be visible on the monitors at all times, absent an agreement by counsel or direction by the court for some other arrangement. The placement of the counsel and support person shall be by agreement of counsel, or failing agreement, by order of the Court.
7. The defendant and his counsel shall be provided by the office of the Attorney General with an audio system which will permit constant

private communication between them during the testimony of the witness.

8. A video and audio system shall be provided connecting the justice with the testimonial room to the end that he may rule on objections and otherwise control the proceedings from the bench, and in such a manner that the witness may see and hear the justice.
9. In the event testimony is being recorded by the use of a mechanical system, the video monitor and sound transmission shall be so connected to that equipment as to record all of the proceedings and in such manner that the court monitor may determine that the recording is being faithfully carried out.
10. In the event that the proceedings are being recorded by a court reporter that reporter shall remain in the courtroom and shall rely on the video monitors and voice transmission for the purpose of recording all of the proceedings.
11. All video and sound equipment, the videotape and the cameraman shall be provided by and at the expense of the office of the Crown Attorney.
12. The inquiry required by section 16 of the Canada Evidence Act shall be carried out using the video and sound equipment as provided herein.
13. The oath of the witness, if she is to be sworn, or her promise to tell the truth if she is not to be sworn, but is found able to communicate the evidence shall be administered by the judge using the video and audio equipment, or by the clerk who may enter the testimonial room for that purpose only.
14. If required by counsel or by the accused, the evidence of the witness shall be interrupted at reasonable intervals to provide the accused with an opportunity for person-to-person consultation with his counsel.

**APPENDIX Q:
CHAPTER 4: s. 715.1 - VIDEOTAPED EVIDENCE**

Case _____ Date _____
Preliminary _____ Trial _____
Court _____ Jury _____
Judge _____
Crown _____ Defence _____
Child Complainant/Witness _____ Age _____

1. Did the Crown make an application for the introduction of videotaped evidence?

Yes No

Reasons _____

2. Was a voir dire conducted?

Yes No

If no, reasons _____

3. Was the jury present?

Yes No

4. What evidence did the Crown call to support its application?

Expert (psychological) Expert (medical)

Social worker Police

Other _____

5. Did the child have to testify?

Yes No

Reasons _____

6. Did Defence counsel oppose the application?

Yes No

If yes, reasons _____

Charter/constitutional arguments _____

Crown arguments _____

7. Judge's ruling:

Videotaped evidence allowed?

Yes

No

Type of arrangement _____

Reasons _____

8. Did the Court make any comments concerning:

a. tape (i.e. made within a "reasonable time")? _____

b. the exclusive use of the tape? _____

c. what constitutes an "adoption" by the complainant? _____

d. the adoption of all or only parts (i.e. the acts complained of) of the tape? _____

e. complainant credibility? _____

f. unusual procedures? _____

g. other? _____

9. Was the videotape accepted into evidence?

Yes No

Specify (all or some) _____

If no, reason _____

10. Was the videotape adopted by the complainant?

Yes No

Specify (all or some) _____

11. Was the videotape viewed in Court?

Yes No

Other arrangements _____

12. Were there any constitutional or Charter challenges made surrounding any other aspect of the inquiry?

Yes

No

If yes, specify _____

13. Judicially considered cases:

14. Statutes considered:

15. Authorities considered:

16. Rules considered:

17. Other:

18. Other comments, observations, unique considerations:

**APPENDIX R:
CHAPTER 4: s. 715.1 - VIDEOTAPED EVIDENCE
VIDEOTAPE APPLICATION CASES**

ALLOWED	16
NOT ALLOWED	5
TOTAL	21

CASE*	AGE OF COMPLY	EVIDENCE FROM	TIME-REASONABLE	EVIDENCE/FACTORS CONSIDERED	CHARTER CHALLENGE	ALLOWED	JUDICIAL COMMENTS/PROCEDURE
R. v. A.(J.F.) (Ont.C.A.) (1993)	8	<ul style="list-style-type: none"> • Crown 	Yes (few days after)			Yes (at trial)	<ul style="list-style-type: none"> • 1.2 • Court held that im-proper admission of portions of the videotape required new trial
R. v. A.(R.) (Man.Q.B.) (1988)		<ul style="list-style-type: none"> • Crown 				Yes	<ul style="list-style-type: none"> • 1.2 • Videotape cannot be admitted for the truth of its contents • Court allowed video for limited purpose of further demon-strating the child ren's states of mind

* See Index of Cases for citations.

PROCEDURE:

- 1 - *Voir Dire* Held
- 2 - Opposed by Defence Counsel
- 3 - Consent of Defence Counsel

CASE*	AGE OF COMPLT	EVIDENCE FROM	TIME-REASONABLE	EVIDENCE/FACTORS CONSIDERED	CHARTER CHALLENGE	ALLOWED	JUDICIAL COMMENTS/PROCEDURE
R. v. Argue (Ont.D.C.) (1991)	4	<ul style="list-style-type: none"> • Crown 			<ul style="list-style-type: none"> • ss. 7 and 11(d) • Constitutionally upheld 	Yes	1.2
R. v. B.(K.) and B.(R.) (Alta.Q.B.) (1990)	5	<ul style="list-style-type: none"> • Expert in child sexual abuse • Expert - child gynaecologist • Expert - medical doctor 	Yes (5½ mo.)	<ul style="list-style-type: none"> • Dynamics of disclosure • Age of child • Turmoil child lived under • Physical/mental abuse witnessed by child • Relationship of the accused to the child • Nature/seriousness of the sexual abuse • Period of time during which one could reasonably expect the child to have accurate recall 	<ul style="list-style-type: none"> • ss. 7 and 11(d) - use of videotapes does not violate the precepts of procedural fairness - does not remove entrenched right of Defence to cross-examine the victim • Constitutionally upheld • s. 1 Charter can be justified in free and democratic society because it is extremely important to protect young children from sexual abuse 	Yes	<ul style="list-style-type: none"> • 1.2 • The objective of s. 715.1 is not to lessen the trauma of children testifying in court • The objective of the legislation is to facilitate prosecution of child sexual abuse cases and videotapes may reduce amount of time a child spends in court

* See Index of Cases for citations.

PROCEDURE:

- 1 - *Voir Dire* Held
- 2 - Opposed by Defence Counsel

CASE*	AGE OF COMPL'T	EVIDENCE FROM	TIME-REASONABLE	EVIDENCE/FACTORS CONSIDERED	CHARTER CHALLENGE	ALLOWED	JUDICIAL COMMENTS/ PROCEDURE
R. v. B.(K.) and B.(R.) (cont'd)							<ul style="list-style-type: none"> • "Within a reasonable time" is a question of law and whether the lapse was made within such reasonable time is a question of fact • "Reasonable time" depends on nature, purposes and circumstances of each case
R. v. Beck (B.C.P.C.) (1988)		<ul style="list-style-type: none"> • Police Officer (interviewer) 				Yes	1. 2
R. v. Christiansen (Ont.D.C.) (1989)	7	<ul style="list-style-type: none"> • Crown 			<ul style="list-style-type: none"> • ss. 7 and 11(d) • Unconstitutional • Cannot be saved by s. 1 	No	<ul style="list-style-type: none"> • 1. 2 • Provision creates set of circumstances that are so different as to be fundamentally unfair • There is no provision for judicial discretion • Does not satisfy the proportionality test of <u>Oakes</u>

* See Index of Cases for citations.

PROCEDURE:

- 1 - *Voir Dire* Held
- 2 - Opposed by Defence Counsel
- 3 - Consent of Defence Counsel

CASE*	AGE OF COMPL'T	EVIDENCE FROM	TIME-REASONABLE	EVIDENCE/FACTORS CONSIDERED	CHARTER CHALLENGE	ALLOWED	JUDICIAL COMMENTS/PROCEDURE
R. v. Keller (Alta. Q.B.) (1989)	4½	<ul style="list-style-type: none"> Expert in child sexual abuse 	<p>Yes (3 mo.)</p> <p>The Court held that any time within 6 months would be reasonable</p>	<ul style="list-style-type: none"> Dynamics of disclosure Age of child Relationship of offender to child Nature, seriousness, frequency of sexual abuse Length of time abuse occurred Time one could reasonably expect child to have accurate recall 		No	<ul style="list-style-type: none"> 1, 2 "Within a reasonable time" is a question of law and whether the tape was made within such reasonable time is a question of fact "Reasonable time" depends on nature, purposes and circumstances of each case Test for "adopt the contents of the videotape" similar to test for adoption of prior consistent statements Adoption of the contents of the tape "while testifying" in the <i>voir dire</i> and in examination in chief (before the jury)

* See Index of Cases for citations.

PROCEDURE:

- 1 - *Voir Dire* Held
- 2 - Opposed by Defence Counsel

3 - Consent of Defence Counsel

CASE*	AGE OF COMPL'T	EVIDENCE FROM	TIME-REASONABLE	EVIDENCE/FACTORS CONSIDERED	CHARTER CHALLENGE	ALLOWED	JUDICIAL COMMENTS/PROCEDURE
R. v. Keller (cont'd)							<ul style="list-style-type: none"> Description of "acts complained of" need not be restricted to verbal account - account with anatomical dolls given by complainant acceptable Child failed to adopt parts of videotape (must adopt portions which describe the acts complained of)
R. v. Kilabuk (N.W.T.S.C.) (1990)	11	<ul style="list-style-type: none"> Crown 	Yes	<ul style="list-style-type: none"> Child attempted suicide by medication 	<ul style="list-style-type: none"> ss. 7 and 11(d) Constitutionally upheld Provided the proper safeguards are met and no undue prejudice is shown, the probative value of such evidence may so far outweigh the risk of undue prejudice to the accused (followed R. v. B.(K.) and B.(R.)) 	No	<ul style="list-style-type: none"> 1. 2 The Court ruled that the probative value of the contents of the videotape was so greatly diminished by the nature of the leading questions that it is outweighed by prejudicial effect The videotape is not an exhibit and is not available to the jury during deliberations

* See Index of Cases for citations.

PROCEDURE:

- 1 - *Voir Dire* Held
- 2 - Opposed by Defence Counsel

CASE*	AGE OF COMPL'T	EVIDENCE FROM	TIME-REASONABLE	EVIDENCE/FACTORS CONSIDERED	CHARTER CHALLENGE	ALLOWED	JUDICIAL COMMENTS/PROCEDURE
R. v. Knight (Ont. D.C.) (1988)	6	<ul style="list-style-type: none"> Social Worker 	Yes (within days)	<ul style="list-style-type: none"> Social worker identified the tape How taping was set up 		Yes	<ul style="list-style-type: none"> 1. 2 Numerous leading questions were used by interviewer No objections from defence
R. v. L.(D.O.) #1 (Man. Q.B.) (1989)		<ul style="list-style-type: none"> Crown 			<ul style="list-style-type: none"> ss. 7 and 11(d) Constitutionally upheld Can be saved by s. 1 	Yes	1. 2

* See Index of Cases for citations.

PROCEDURE:

- 1 - *Voir Dire* Held
- 2 - Opposed by Defence Counsel

3 - Consent of Defence Counsel

CASE*	AGE OF COMPL'T	EVIDENCE FROM	TIME-REASONABLE	EVIDENCE/FACTORS CONSIDERED	CHARTER CHALLENGE	ALLOWED	JUDICIAL COMMENTS/PROCEDURE
R. v. L.(D.O.) #2 (R. v. Laramée) (Man.C.A.) (1991)		<ul style="list-style-type: none"> • Crown 	<p>No</p> <p>Court felt the time delay between initial complaint and recording (abuse lasted 2½ years and interview took place months after last occurrence) was unreasonable so as to preclude the admissibility of evidence even if the legis-lation had been upheld</p>		<ul style="list-style-type: none"> • ss. 7 and 11(d) - offends "the common law evidentiary rule that precludes the admission in evidence of previous consistent statements" • Unconstitutional • s. 1 Charter - fails the "means" test of <u>R. v. Oakes</u> 	No	<ul style="list-style-type: none"> • The objective of the section is to prevent children from the trauma of testifying in court • Crown in showing the child the video-tape several times prior to rehearsing the witness which was a fundamental flaw in Crown's case
R. v. L.(D.O.) #3 (S.C.C.) (1993)		<ul style="list-style-type: none"> • Crown 			<ul style="list-style-type: none"> • ss. 7 and 11(d) • Constitutionally upheld 	Yes	1.2

* See Index of Cases for citations.

PROCEDURE:

- 1 - *Voir Dire* Held
- 2 - Opposed by Defence Counsel

CASE*	AGE OF COMPLET	EVIDENCE FROM	TIME-REASONABLE	EVIDENCE/FACTORS CONSIDERED	CHARTER CHALLENGE	ALLOWED	JUDICIAL COMMENTS/PROCEDURE
R. v. Lepage (Ont. P.C.) (1989)	6	<ul style="list-style-type: none"> • Mother 		<ul style="list-style-type: none"> • Tape was accurate recording of interview by social worker • Social worker viewed taping from other side of one-way mirror 		Yes	1. 2
R. v. M. (J.L.) (Sask. Q.B.) (1991)	8	<ul style="list-style-type: none"> • Crown 	No		<ul style="list-style-type: none"> • ss. 7 and 11(d) • Unconstitutional • Cannot be saved by s. 1 Charter 	No	1. 2
R. v. Meddoui (Alta. Q.B.) (1988)	8	<ul style="list-style-type: none"> • Police Officer (interviewer) • Police Officer (monitored equipment) 	<p>Yes (2 days)</p> <p>If events were sufficiently fresh and vivid to be probably accurate</p>	<ul style="list-style-type: none"> • Interviewer testified as to taking of videotape • Interviewer testified as to monitoring of equipment 		Yes	<ul style="list-style-type: none"> • 1. 2 • Videotape ruled admissible for the truth of the contents • Judge can edit out inadmissible segments of a videotape • The child adopted videotape "beyond reasonable doubt" • Defence called "planted" witness to testify child was distracted - had not viewed videotape beginning to end

* See Index of Cases for citations.

PROCEDURE:

- 1 - *Voir Dire* Held
- 2 - Opposed by Defence Counsel
- 3 - Consent of Defence Counsel

CASE*	AGE OF COMPLT	EVIDENCE FROM	TIME-REASONABLE	EVIDENCE/FACTORS CONSIDERED	CHARTER CHALLENGE	ALLOWED	JUDICIAL COMMENTS/PROCEDURE
R. v. Meddoui (Alta, C.A.) (1990)	8	<ul style="list-style-type: none"> Police Officer (interviewer) Police Officer (monitored equipment) 	Yes (2 days)	<ul style="list-style-type: none"> Acts complained of 		Yes	<ul style="list-style-type: none"> 1. 2 Upheld lower court rulings Leading questions are not inadmissible, but only go to weight, a tape cannot be excluded just on that ground Threshold test for adopt: witness might adopt statement in the less strong sense that, whether or not she recalls the events discussed, she does believe them to be true because she recalls giving the statement and her attempt then to be honest and truthful Term "describes the acts complained of" includes a description of the accused If the tests are met.

* See Index of Cases for citations.

PROCEDURE:

- 1 - Voir Dire Held
- 2 - Opposed by Defence Counsel

3 - Consent of Defence Counsel

CASE*	AGE OF COMPLT	EVIDENCE FROM	TIME-REASONABLE	EVIDENCE/FACTORS CONSIDERED	CHARTER CHALLENGE	ALLOWED	JUDICIAL COMMENTS/PROCEDURE
R. v. Paler (Man.P.C.) (1988)	17, 17	<ul style="list-style-type: none"> • Mother • Police Officer 	Yes (1 mo.)	<ul style="list-style-type: none"> • Testimony re how tape was made • Protocol in Youth Division and prioritization of intra-familial cases 		Yes	1. 2
R. v. S.(L.) (Sask.Q.B.) (1991)		<ul style="list-style-type: none"> • Three Crown Witnesses 		<ul style="list-style-type: none"> • Crown witnesses called as to conversations and dealings with child 		Yes	<ul style="list-style-type: none"> • 1. 2 • Court did not allow Crown to call child as witness
R. v. Scott (Ont.D.C.) (1988)	9	<ul style="list-style-type: none"> • Police Officer • Mother • Rape Crisis Counsellor 	Yes (4-5 mo.)	<ul style="list-style-type: none"> • Child would not tell police, social workers or mother what happened • Child only disclosed to rape counsellor after months of therapy 		Yes	<ul style="list-style-type: none"> • 1. 2 • What is reasonable time depends on all the circumstances • Not "at the first reasonable opportunity" or "as soon as practicable", but "within a reasonable time" to be determined by the judge
R. v. Sock (B.C.P.C.) (1990)		<ul style="list-style-type: none"> • Detective - interviewer 	Yes (4 days)	<ul style="list-style-type: none"> • Detective testified to prove and show videotape 		Yes	1. 3

* See Index of Cases for citations.

PROCEDURE:

- 1 - Voir Dire Held
- 2 - Opposed by Defence Counsel
- 3 - Consent of Defence Counsel

CASE*	AGE OF COMPL'T	EVIDENCE FROM	TIME-REASONABLE	EVIDENCE/FACTORS CONSIDERED	CHARTER CHALLENGE	ALLOWED	JUDICIAL COMMENTS/PROCEDURE
R. v. Sowa (Man. P.C.) (1989)	10	<ul style="list-style-type: none"> • Crown 		<ul style="list-style-type: none"> • Child adopted tape after viewing 		Yes	<ul style="list-style-type: none"> • 1 • Accused was unrepresented • Child was not cross-examined by accused
R. v. Thompson (Alta. Q.B.) (1989)		<ul style="list-style-type: none"> • Crown 			<ul style="list-style-type: none"> • ss. 7 and 11(d) • Unconstitutional • Cannot be saved by s. 1 Charter • Fails proportionality test 	No	<ul style="list-style-type: none"> • 1, 2 • The videotape is unsworn evidence not available to convict an accused • Arbitrary age limit itself fatal to legislation • Court alluded that constitutionality would be upheld if the section was directed at very young children • The Defence's ability to attack the evidence is disproportionate to the ability of Crown to produce it

* See Index of Cases for citations.

PROCEDURE:

1 - *Voir Dire* Held

2 - Opposed by Defence Counsel

3 - Consent of Defence Counsel

CASE*	AGE OF COMPL'T	EVIDENCE FROM	TIME-REASONABLE	EVIDENCE/FACTORS CONSIDERED	CHARTER CHALLENGE	ALLOWED	JUDICIAL COMMENTS/PROCEDURE
R. v. Toten (Ont. C.A.) (1993)	7	<ul style="list-style-type: none"> • Crown 	<p>Yes (2½ days after alleged assault)</p>		<ul style="list-style-type: none"> • ss. 7 and 11(d) • Constitutionally upheld 	Yes	<ul style="list-style-type: none"> • 1. 2 • Court held that the section does not provide for the admission of hearsay evidence since the witness must adopt the statement as part of her testimony • While s. 715.1 does operate as a further exception to the rule against admission of prior consistent statements, that rule is not a principle of fundamental justice nor one of the basic tenets of our judicial system • Court held that the trial judge has power to exclude statements where prejudicial effect outweighs probative value

* See Index of Cases for citations.

PROCEDURE:

1 - Voir Dire Held

2 - Opposed by Defence Counsel

3 - Consent of Defence Counsel

CASE*	AGE OF COMPLT	EVIDENCE FROM	TIME-REASONABLE	EVIDENCE/FACTORS CONSIDERED	CHARTER CHALLENGE	ALLOWED	JUDICIAL COMMENTS/PROCEDURE
R. v. Toten (cont'd)							<ul style="list-style-type: none"> • Court held that s. 715.1 can enhance truth-finding function of the trial since the videotape is made at a time close to the events, in an atmosphere which is less intimidating than the formal court setting. The use of the videotape comes as close as possible to placing the trier-of-fact at the interview.

* See Index of Cases for citations.

PROCEDURE:

- 1 - *Voir Dire* Held
- 2 - Opposed by Defence Counsel

3 - Consent of Defence Counsel

CASE*	AGE OF COMPL'T	EVIDENCE FROM	TIME-REASONABLE	EVIDENCE/FACTORS CONSIDERED	CHARTER CHALLENGE	ALLOWED	JUDICIAL COMMENTS/PROCEDURE
R. v. Wright(M.) (B.C.P.C.) (1988)	5	<ul style="list-style-type: none"> Police Officer 		<ul style="list-style-type: none"> Child adopted tape after viewing 		Yes	1. 2 <ul style="list-style-type: none"> Contents of tape adopted after watching 2 small segments of tape -- beginning and end (judge allowed) Judge directed Crown and police officer who made tape, and accused and his counsel, to determine which segments of tape would be admissible, and fast forwarded to those sections for the Court

* See Index of Cases for citations.

PROCEDURE:

- 1 - *Voir Dire* Held
- 2 - Opposed by Defence Counsel
- 3 - Consent of Defence Counsel

**APPENDIX S:
CHAPTER 4: s. 715.1 - VIDEOTAPED EVIDENCE
U.S. VIDEOTAPE STATUTES⁴⁸⁹
(FROM THUMANN, 1989)**

PROVISIONS

STATES

A Child Who Testifies Via Videotape
Does Not Testify at Trial

Arizona, California, Delaware,
Florida, Kansas, Kentucky,
Massachusetts, Mississippi, Missouri,
New Mexico, Oklahoma,
Pennsylvania, South Dakota, Texas,
Utah, Vermont

The Court Must Hold a Hearing to
Determine Emotional Trauma

California, Colorado, Florida, Maine,
Massachusetts, Mississippi, Missouri,
Utah, Vermont, Wisconsin

The Court Must Hold a Hearing to
Determine Mental Harm

Florida, Maine, Mississippi, Utah,
Wisconsin

The Court Must Hold a Hearing to
Determine Physical Harm

Maine

The Court Must Hold a Hearing to
Determine "Good Cause"

Arkansas, Nevada, New Mexico,
Pennsylvania

489 Derived from the following statutes: Alaska Stat. § 12.45.047 (1988); Ariz. Rev. Stat. Ann. § 12-2312 (1982); Ark. Stat. Ann. § 16-44-203 (1987); Cal. Penal Code § 1346 (West Supp. 1989); Colo. Rev. Stat. § 18-3-413 (1986); De. Code Ann. tit. 11 § 3511 (1987); Fla. Stat. Ann. § 92.53 (West Supp. 1989); Kan. Stat. Ann. § 22-3434 (Supp. 1987); Ky. Rev. Stat. Ann. § 421.350(4) (Michie/Bobbs-Merrill Supp. 1987); Me. Rev. Stat. Ann. tit. 15, § 1205 (Supp. 1988); Mass. Gen. Laws Ann. ch. 278, § 16D (West Supp. 1988); Miss. Code Ann. § 13-1-407 (Supp. 1988); Mo. Stat. Ann §§ 491.678, 491.680, 491.685, 491.693 (Supp. 1989); Mont. Code Ann. § 46-15-401-403 (1987); Nev. Rev. Stat. §§ 174.227, 174.229 (1985); N.M. Stat. Ann. § 30-9-17 (Supp. 1984); Okla. Stat. Ann. tit. 10, § 1148(c) (West Supp. 1987); Pa. Cons. Stat. Ann. tit. 42, § 5984 (Purdon Supp. 1988); S.D. Codified Laws Ann. § 23A-12-9 (1988); Tex. Code Crim. Proc. Ann. art. 38.071(1)-(4) (Vernon Supp. 1989); Utah Code Ann. § 77-35-15.5 (Supp. 1988); Vt. R. Evid. 807; Wis. Stat. § 967-04(7) (1985 & Supp. 1988).

The Court Must Hold a Hearing to Determine Whether Testifying in Court Hurts the Child's "Well-being"

South Dakota

The Court Must Hold a Hearing to Determine Whether the Child is "Medically Unavailable"

California, Colorado, Florida

The Age of the Child is a Key Variable

Alaska (16 or under), Arkansas (under 17), California (15 or under or mentally retarded), Colorado (under 15), Delaware (under 12), Florida (16 or under), Kansas (under 13), Kentucky (12 or under), Maine (under 16), Massachusetts (under 15), Mississippi (under 16), Missouri (under 17), New Mexico (under 16), Oklahoma (under 12), Pennsylvania (under 14; if under 16, a rebuttable presumption that videotaping will benefit the child; if over 16, a rebuttable presumption that videotaping will not benefit the child), South Dakota (under 16), Texas (12 or under), Utah (under 14), Vermont (under 13), Wisconsin (under 12; if under 16, in the interests of justice)

The Nature of the Crime is a Key Variable

Missouri, Oklahoma (crime must be committed by parent or other relative), Wisconsin

The Child's Physical Maturity and Understanding Are Key Variables

Wisconsin

The Desires of the Victim Are Key Variables

Florida, Montana

The Interests of Parents and Other Relatives Are Key Variables	None
The Court Must Base Its Findings on Clearly Articulated Factors	Massachusetts, Mississippi, Wisconsin
The Prosecutor May Make the Motion	Alaska, Arizona, Arkansas, California, Delaware (Deputy Attorney General), Florida, Maine, Massachusetts, Mississippi, Missouri, Montana, Nevada, New Mexico, Oklahoma, Pennsylvania, South Dakota, Texas, Utah, Vermont, Wisconsin
The Court May Make the Motion	Florida, Massachusetts, Mississippi, Montana, Nevada, Vermont, Wisconsin
Any Party May Make the Motion	Florida, Kansas, Kentucky, Mississippi, Oklahoma, South Dakota, Texas, Vermont
A Parent or Guardian May Make the Motion	Florida, Mississippi, Pennsylvania, Vermont
The Motion May Be Made at Any Time	Florida
The Motion Must Be Made Three Days Prior to Trial, Preliminary Hearing or Deposition	California, Colorado, Mississippi, South Dakota
The Defendant May Be Concealed from the Child's Sight and Hearing	Delaware, Florida, Kansas, Kentucky, Massachusetts, Mississippi, Nevada, Pennsylvania, Texas, Utah, Vermont

The Concealed Defendant Must Be Able to Communicate with His or Her Attorney	Massachusetts, Mississippi, Nevada, Pennsylvania, Vermont
The Camera Operator May Be Concealed from the Child's Sight and Hearing	Arizona, Delaware, Kansas, Kentucky, Oklahoma, Texas, Utah, Vermont
The State Must Pay Videotaping Costs	Delaware, New Mexico
The Court Determines Where the Videotaping Session Will Occur	Delaware, Massachusetts, Nevada, Wisconsin
The Videotaping Session Occurs in the Judge's Chambers	Arkansas, Missouri, New Mexico, Pennsylvania (or in a special facility)
The Usual Rules of Evidence/Procedure Apply	Alaska, Arkansas, Colorado, Missouri, Montana, New Mexico, Pennsylvania, South Dakota, Wisconsin
Toy Props Are Allowed at the Videotaping Session	None
The Number of People Present at the Session Are Explicitly or Impliedly Limited	Alaska, Arizona, Arkansas, Delaware, Kansas, Kentucky, Massachusetts, Montana, Oklahoma, Pennsylvania, Texas, Utah, Vermont, Wisconsin
The Videotape Is Subject to a Protective Order	Arkansas, California, Delaware, Mississippi, Montana, New Mexico, Wisconsin
The Videotape Must Be Destroyed Five Years After Judgment	California, Mississippi

There Must Be Widespread Publicity of the Act	None
The Statute Applies When the Child is Allegedly a Victim of Sexual Abuse	All
The Judge Need Not Be Present at the Videotaping Session Under Certain Conditions	Florida, Mississippi
The Defendant Need Not Be Present at the Videotaping Session	Florida, Missouri
The Court Must Consider and Reject Alternatives to Videotaping	None
The Court's Determination Must Be Based on Clearly Articulated Findings that Are Published in the Public Record	Massachusetts, Mississippi
The Court Must Ensure that the Videotape Medium is Accurate	Arizona, Delaware, Kansas, Massachusetts, Oklahoma, Texas, Utah, Vermont
The Jury Must Be Instructed Not to Draw Inferences from the Use of Videotaped Testimony	None
The Videotape Must Be Available to the Defendant Prior to Trial	Arizona, California, Delaware, Kansas, Kentucky, Massachusetts, Missouri, Oklahoma, Texas, Utah, Vermont

Statute Explicitly Provides that the
Child Must Be Under Oath

Maine, Missouri, New Mexico

The Videotaping Session Must
Approximate a Trial

Utah

**APPENDIX T:
CHAPTER 5: EXPERT WITNESS
(EVIDENTIARY ISSUE NOT IN BILL C-15)**

Case _____ Date _____
Preliminary _____ Trial _____
Court _____ Jury _____
Judge _____
Crown _____ Defence _____
Child Complainant/Witness _____ Age _____

1. Did Crown counsel seek to introduce expert evidence as corroboration; to enhance the credibility of the child; to rehabilitate the child?

Yes No

If yes, specify _____

2. What type of evidence was sought by the Crown?

Expert (Psychological):

Delayed disclosure Disclosure in stages

Recantation False allegations

Fear of accused

Impacts of abuse (behavioral symptoms, etc.), specify _____

 Other _____

Expert (psychiatric)

Medical doctor (nature and extent of injuries)

Expert (Physiological):

<input type="checkbox"/> Cognitive development	<input type="checkbox"/> Moral development
<input type="checkbox"/> Functional limitations	<input type="checkbox"/> Language capabilities
<input type="checkbox"/> Memory capabilities	
<input type="checkbox"/> Other _____	

3. Was a voir dire conducted?

Yes No

If no, reasons _____

4. Was the jury present?

Yes No

5. Did Defence counsel object to the introduction of such evidence?

Yes No

If yes, specify _____

Crown arguments _____

6. Judge's ruling:

Was expert evidence allowed?

Yes

No

Reasons _____

7. Did the Court make any comments concerning the admissibility of expert opinion evidence?

Yes

No

If yes, specify _____

8. Were there any constitutional or Charter challenges made surrounding any aspect of this application?

Yes

No

If yes, specify _____

9. Did Defence counsel seek to introduce any expert evidence as rebuttal?

Yes

No

If yes, specify _____

10. Did Crown counsel object to defence experts?

Yes

No

If yes, specify _____

Defence arguments _____

11. Judge's ruling:

Allowed

Not allowed

Reasons _____

12. Judicially considered cases:

13. Statutes considered:

14. Authorities considered:

15. Rules considered:

16. Other:

17. Other comments, observations, unique considerations:

**APPENDIX U:
CHAPTER 5: EXPERT WITNESS CASES**

	<u>Allowed</u>	<u>Not Allowed</u>
CROWN EXPERT	89	8
DEFENCE EXPERT	14	2
TOTAL	103	10

CASE*	TYPE OF EXPERT	REASON CALLED	TYPE OF EVIDENCE CALLED	ADMISSIBLE	CALLED BY	JUDICIAL COMMENTS/PROCEDURE
R. v. A. (G.J.) (B.C.C.C.) (1989)	• Pediatrician	• Corroboration	<ul style="list-style-type: none"> • Dynamics of child sexual abuse • Behavioural symptoms consistent with sexual abuse 	Yes	Crown	
R. v. A. (G.J.) (B.C.C.C.) (1989)	• Psychologist	• To rebut complainant's evidence	<ul style="list-style-type: none"> • Phenomenon of transference • Children are capable of mis-identification of accused 	Yes	Defence	
R. v. A. (S.I.) (Ont.S.C.) (1991)	• Pediatrician	• Corroboration	<ul style="list-style-type: none"> • Physical findings consistent with sexual abuse 	Yes	Crown	
R. v. Ablett (B.C.C.C.) (1989)	• Psychologist	• Corroboration	<ul style="list-style-type: none"> • Dynamics of child sexual abuse • Phenomenon of transference of identity 	Yes	Crown	

* See Index of Cases for citations.

CASE*	TYPE OF EXPERT	REASON CALLED	TYPE OF EVIDENCE CALLED	ADMISSIBLE	CALLED BY	JUDICIAL COMMENTS/ PROCEDURE
R. v. Aylward (Nfld.C.A.) (1992)	<ul style="list-style-type: none"> Psychiatrist 	<ul style="list-style-type: none"> To rebut the "defence of heterosexuality" 	<ul style="list-style-type: none"> Some men are bisexual and can be sexually attracted to adult women as well as to children and adolescent males 	Yes	Crown	<ul style="list-style-type: none"> Court held that the expert testimony which rebutted the "defence of heterosexuality" is admissible because it is information that "would not be within the general knowledge of the jurors."
R. v. B.(A.) (No.2) (Ont.D.C.) (1989)	<ul style="list-style-type: none"> Social Worker Crown Attorney Pediatrician 	<ul style="list-style-type: none"> Voir dire Screen application 	<ul style="list-style-type: none"> Had not seen the accused for six months Child's suicidal behaviour Biological condition of child Black-out of child Extreme stress on diabetes Specific fear of accused Specific reticence about acts outside court Intimidating behaviour by child's mother Mental stress Self-injurious behaviour 	Yes	Crown	
R. v. B.(D.) (B.C.C.C.) (1988)	<ul style="list-style-type: none"> Psychiatrist Social Worker 	<ul style="list-style-type: none"> Corroboration 	<ul style="list-style-type: none"> Behavioural symptoms consistent with sexual abuse 	Yes	Crown	
R. v. B.(D.) (B.C.C.C.) (1988)	<ul style="list-style-type: none"> Forensic Psychologist 	<ul style="list-style-type: none"> To rebut Crown expert 	<ul style="list-style-type: none"> Behavioural symptoms consistent with family conflict and turmoil 	Yes	Defence	

* See Index of Cases for citations.

CASE*	TYPE OF EXPERT	REASON CALLED	TYPE OF EVIDENCE CALLED	ADMISSIBLE	CALLED BY	JUDICIAL COMMENTS/PROCEDURE
R. v. B.(G.) (S.C.C.) (1990)	<ul style="list-style-type: none"> Clinical psychologist 	<ul style="list-style-type: none"> Corroboration 	<ul style="list-style-type: none"> Behavioural characteristics consistent with sexual abuse 	Yes	Crown	<ul style="list-style-type: none"> Affirmed Saskatchewan Court of Appeal decision Expert evidence on psychological and behavioural symptoms consistent with child sexual abuse admissible Expert evidence should not be used to bolster the credibility of witnesses
R. v. B.(K.) and B.(R.) (Alta.Q.B.) (1990)	<ul style="list-style-type: none"> Psychologist 	<ul style="list-style-type: none"> Voir dire Videotaped evidence application 	<ul style="list-style-type: none"> Dynamics of disclosure Age of child Turmoil child lived under Physical/mental abuse witnessed by child Relationship of accused to child Nature/seriousness of sexual abuse 	Yes	Crown	
R. v. Banks (Ont.D.C.) (1990)	<ul style="list-style-type: none"> Crisis Intake Clinician 	<ul style="list-style-type: none"> Corroboration 	<ul style="list-style-type: none"> Behavioural symptoms consistent with sexual abuse Delay in disclosure Failure of child to disclose 	No	Crown	<ul style="list-style-type: none"> Crisis centre worker cannot qualify as sex abuse expert No weight to be given to the evidence Jury qualified to reach sound decision without expert opinion Expert opinion not helpful to jury Expert opinion hinders/confuses jury because of lack of certainty, consistency and scientific foundation

* See Index of Cases for citations.

CASE*	TYPE OF EXPERT	REASON CALLED	TYPE OF EVIDENCE CALLED	ADMISSIBLE	CALLED BY	JUDICIAL COMMENTS/ PROCEDURE
R. v. Beliveau (B.C.C.A.) (1986)	<ul style="list-style-type: none"> • Pediatrician 	<ul style="list-style-type: none"> • Corroboration 	<ul style="list-style-type: none"> • Behavioural symptoms consistent with sexual abuse 	Yes	Crown	<ul style="list-style-type: none"> • Crown cannot ask expert witness whether he considered the child to be a truthful person • Expert evidence not admissible "to establish that child was a truthful witness" • Expert opinion not admissible simply to bolster credibility of complainant • Expert evidence capable of being corroborative of complainant's evidence
R. v. Bernard (B.C.P.C.) (1991)	<ul style="list-style-type: none"> • Psychologist 	<ul style="list-style-type: none"> • Corroboration 	<ul style="list-style-type: none"> • Psychological manifestations of sexual abuse • Behavioural symptoms consistent with sexual abuse 	Yes	Crown	
R. v. Boettger (B.C.C.C.) (1988)	<ul style="list-style-type: none"> • Psychologist 	<ul style="list-style-type: none"> • Corroboration 	<ul style="list-style-type: none"> • Behavioural symptoms consistent with sexual abuse 	Yes	Crown	
R. v. Boyd (B.C.C.C.) (1988)	<ul style="list-style-type: none"> • Psychiatrist • Social Worker 		<ul style="list-style-type: none"> • Dynamics of child sexual abuse • Behavioural symptoms consistent with sexual abuse • Unique behaviour of showing anxiety on the part of the accused 	Yes	Crown	
R. v. Boyd (B.C.C.C.) (1988)	<ul style="list-style-type: none"> • Forensic Psychologist 	<ul style="list-style-type: none"> • To rebut testimony of child complainant 	<ul style="list-style-type: none"> • Anxiety was consistent with family turmoil 	Yes	Defence	

* See Index of Cases for citations.

CASE*	TYPE OF EXPERT	REASON CALLED	TYPE OF EVIDENCE CALLED	ADMISSIBLE	CALLED BY	JUDICIAL COMMENTS/ PROCEDURE
R. v. Burghraef (Ont. P.C.) (1988)	<ul style="list-style-type: none"> Social Worker 	<ul style="list-style-type: none"> Voir dire Screen application 	<ul style="list-style-type: none"> Child's conflicting feelings of fear/love/loyalty re accused Fear of testifying Mental distress Self-injurious behaviour Nightmares 	Yes	Crown	
R. v. Burns (B.C.C.A.) (1992)	<ul style="list-style-type: none"> Psychiatrist Psychologist 	<ul style="list-style-type: none"> Corroboration 	<ul style="list-style-type: none"> Behavioural symptoms consistent with sexual abuse Dynamics of child sexual abuse 	Yes	Crown	
R. v. C.(A.) (Que.C.A.) (1992)	<ul style="list-style-type: none"> Psychologist 	<ul style="list-style-type: none"> To rebut complainant's evidence 	<ul style="list-style-type: none"> Evidence that the child complainant was manipulated or subjected to undue influence in a videotape interview conducted by child protection workers Interviewer bias re videotape Inappropriate use of anatomical dolls may have influenced child 	Yes	Defence	
R. v. C.(A.) (Que.C.A.) (1992)	<ul style="list-style-type: none"> Psychologist 	<ul style="list-style-type: none"> To rebut defence expert witness 	<ul style="list-style-type: none"> Appropriate videotaped interview The child had not been manipulated or subjected to undue influence during videotape interviews with child protection workers Appropriate use of anatomical dolls for investigative purposes 	Yes	Crown	
R. v. C.(A.) (Que.C.A.) (1992)	<ul style="list-style-type: none"> Psychologist 	<ul style="list-style-type: none"> Corroboration 	<ul style="list-style-type: none"> To rebut allegation of recent fabrication 	Yes	Crown	

* See Index of Cases for citations.

CASE*	TYPE OF EXPERT	REASON CALLED	TYPE OF EVIDENCE CALLED	ADMISSIBLE	CALLED BY	JUDICIAL COMMENTS/ PROCEDURE
R. v. C.(J.W.) (Ont.S.C.) (1990)	<ul style="list-style-type: none"> • Psycho-therapist • Psychiatrist 	<ul style="list-style-type: none"> • Corroboration 	<ul style="list-style-type: none"> • Post-Traumatic Stress Disorder • Behavioural symptoms consistent with sexual abuse 	Yes	Crown	<ul style="list-style-type: none"> • Expert evidence does not determine the ultimate issue but goes to weight as to the reliability of the complainant's testimony - capacity and motive of the victim to fabricate incident
R. v. C.(R.) (Ont.C.A.) (1989)	<ul style="list-style-type: none"> • Gynecologist 	<ul style="list-style-type: none"> • To bolster credibility of child complainant • Corroboration 	<ul style="list-style-type: none"> • Physical evidence - abnormal elasticity in anal passage 	Yes	Crown	

* See Index of Cases for citations.

CASE*	TYPE OF EXPERT	REASON CALLED	TYPE OF EVIDENCE CALLED	ADMISSIBLE	CALLED BY	JUDICIAL COMMENTS/ PROCEDURE
R. v. C.(R.A.) (B.C.C.A.) (1990)	<ul style="list-style-type: none"> • Counsellor/Sex Abuse Therapist 	<ul style="list-style-type: none"> • Corroboration 	<ul style="list-style-type: none"> • Behavioural symptoms consistent with sexual abuse • Delay in disclosure • Failure to disclose to non-abusive parent • Memory can improve over time • Continued association with the accused 	Yes	Crown	<ul style="list-style-type: none"> • Affirmed by Court of Appeal • Matters were beyond knowledge and experience of jury • Expert opinion helpful to jury, without it the jury might draw adverse inference (i.e. where a complainant fails to disclose alleged sexual abuse) • Experts can explain, through counselling, the complainant's memory can improve over time • Court must be careful to avoid dangers inherent in using expert witnesses • Expert witness must actually qualify as expert • Jury must be cautioned in manner in which expert evidence is to be used so as to avoid having jury place undue weight upon it
R. v. C.(R.R.) (B.C.C.A.) (1989)	<ul style="list-style-type: none"> • Psychologist 	<ul style="list-style-type: none"> • Corroboration 	<ul style="list-style-type: none"> • Behavioural symptoms consistent with sexual abuse 	Yes	Crown	

* See Index of Cases for citations.

CASE*	TYPE OF EXPERT	REASON CALLED	TYPE OF EVIDENCE CALLED	ADMISSIBLE	CALLED BY	JUDICIAL COMMENTS/PROCEDURE
R. v. C.(R.R.) (B.C.C.A.) (1989)	<ul style="list-style-type: none"> Psychiatrist 	<ul style="list-style-type: none"> To rebut Crown expert evidence 	<ul style="list-style-type: none"> Complainant was vengeful Confirmed that the literature reveals that false allegations are quite rare 	Yes	Defence	<ul style="list-style-type: none"> Court noted that Defence expert actually provided testimony supportive of the complainant's allegations that she was not fabricating the story from any motive of vengeance
R. v. C.(W.C.) (B.C.S.C.) (1987)	<ul style="list-style-type: none"> Physician 	<ul style="list-style-type: none"> Corroboration 	<ul style="list-style-type: none"> Physical findings consistent with sexual abuse 	Yes	Crown	
R. v. Carr (Man.P.C.) (1989)	<ul style="list-style-type: none"> Child Abuse Worker Social Worker 	<ul style="list-style-type: none"> Voir dire Screen application 	<ul style="list-style-type: none"> Extreme fear of being face-to-face with the accused Child was forcibly confined during acts 	Yes	Crown	
R. v. Chin (B.C.S.C.) (1987)	<ul style="list-style-type: none"> Pediatrician 	<ul style="list-style-type: none"> Corroboration 	<ul style="list-style-type: none"> Physical findings consistent with sexual abuse 	Yes	Crown	
R. v. Chin (B.C.S.C.) (1987)	<ul style="list-style-type: none"> Physician 	<ul style="list-style-type: none"> Corroboration 	<ul style="list-style-type: none"> Physical findings consistent with sexual abuse 	Yes	Crown	<ul style="list-style-type: none"> Evidence necessary in assessing the validity of his opinion on an issue in this case and not to establish that the child was a truthful witness
R. v. Crowell (N.S.S.C.) (1989)	<ul style="list-style-type: none"> Psychiatrist 	<ul style="list-style-type: none"> Corroboration 	<ul style="list-style-type: none"> Statements consistent with sexual abuse Dynamics of child sexual abuse 	No Allowed at trial - reversed on appeal	Crown	<ul style="list-style-type: none"> Trial judge erred in law in treating as factual the hearsay evidence upon which the expert's opinion was based

* See Index of Cases for citations.

CASE*	TYPE OF EXPERT	REASON CALLED	TYPE OF EVIDENCE CALLED	ADMISSIBLE	CALLED BY	JUDICIAL COMMENTS/PROCEDURE
R. v. D.(D.) (Ont.D.C.) (1991)	<ul style="list-style-type: none"> Psychologist 	<ul style="list-style-type: none"> Corroboration 	<ul style="list-style-type: none"> Behavioural symptoms consistent with sexual abuse 	Yes	Crown	<ul style="list-style-type: none"> Court held that some behavioural or emotional indicators of abuse are "equivocal in nature", and while "more likely to exist in abused children, may exist in children that have not been abused" as well If there is only limited emotional or behavioural evidence to support allegation, it may be viewed as so weak as to not constitute confirmation of abuse
R. v. D.(D.) (Ont.D.C.) (1991)	<ul style="list-style-type: none"> Physician 	<ul style="list-style-type: none"> Corroboration 	<ul style="list-style-type: none"> Physical findings (condition of the complainant's anus and vagina) consistent with sexual abuse 	Yes	Crown	
R. v. Dick(B.) (B.C.S.C.) (1988)	<ul style="list-style-type: none"> Family Therapist Child Psychologist 	<ul style="list-style-type: none"> Voir dire Closed-circuit TV application 	<ul style="list-style-type: none"> Fear of testifying Specific fear of accused not established 	Yes	Crown	
R. v. Dick(B.) (B.C.S.C.) (1988)	<ul style="list-style-type: none"> Pediatrician Psychologist Social Worker 	<ul style="list-style-type: none"> Corroboration 	<ul style="list-style-type: none"> Behavioural symptoms consistent with sexual abuse Dynamics of child sexual abuse 	Yes	Crown	
R. v. Dick (S.) (B.C.S.C.) (1989)	<ul style="list-style-type: none"> Play Therapist Child Psychologist 	<ul style="list-style-type: none"> Voir dire Screen application Closed-circuit TV application 	<ul style="list-style-type: none"> Fear of testifying Age Anxiety of jury, courtroom Specific fear of accused Withdrawn and stressful 	Yes	Crown	

* See Index of Cases for citations.

CASE*	TYPE OF EXPERT	REASON CALLED	TYPE OF EVIDENCE CALLED	ADMISSIBLE	CALLED BY	JUDICIAL COMMENTS/PROCEDURE
R. v. Dick (S.) (B.C.S.C.) (1989)	<ul style="list-style-type: none"> • Pediatrician • Psychologist • Social Worker 	<ul style="list-style-type: none"> • Corroboration 	<ul style="list-style-type: none"> • Behavioural symptoms consistent with sexual abuse • Dynamics of child sexual abuse 	Yes	Crown	
R. v. Diefenbaugh (B.C.C.A.) (1993)	<ul style="list-style-type: none"> • Physician • Pathologist (expert in forensic examination of genitalia of child victims of sexual abuse) 	<ul style="list-style-type: none"> • Corroboration 	<ul style="list-style-type: none"> • Physical injuries to the genitalia of 17-month-old child • Phenomenon of "anal gaping response" 	No	Crown	<ul style="list-style-type: none"> • Court held that the probative value of such evidence limited due to lack of proper scientific study • Court held that probative value did not outweigh prejudicial effect
R. v. Dodds (B.C.P.C.) (1992)	<ul style="list-style-type: none"> • Psychologist 	<ul style="list-style-type: none"> • Corroboration 	<ul style="list-style-type: none"> • Behavioural symptoms consistent with sexual abuse 	Yes	Crown	
R. v. Draper (B.C.C.C.) (1984)	<ul style="list-style-type: none"> • Psychologist 	<ul style="list-style-type: none"> • Corroboration 	<ul style="list-style-type: none"> • Dynamics of child sexual abuse • Behavioural symptoms consistent with sexual abuse 	Yes	Crown	
R. v. Duguay (B.C.C.C.) (1988)	<ul style="list-style-type: none"> • Physician 	<ul style="list-style-type: none"> • To rebut complainant's evidence 	<ul style="list-style-type: none"> • Complainant alleged sexual intercourse but the medical findings were inconsistent with that description • Stretching of the anus was consistent with other activities besides penetration 	Yes	Defence	<ul style="list-style-type: none"> • Court held that the medical evidence was not conclusive, but rather consistent with both Crown and Defence arguments
R. v. F.(A.) (Ont. C.A.) (1990)	<ul style="list-style-type: none"> • Expert in child welfare 	<ul style="list-style-type: none"> • Corroboration 	<ul style="list-style-type: none"> • Dynamics of sexual abuse • Recantation 	Yes	Crown	<ul style="list-style-type: none"> • Expert evidence admissible at trial to bolster the credibility of the complainant

* See Index of Cases for citations.

CASE*	TYPE OF EXPERT	REASON CALLED	TYPE OF EVIDENCE CALLED	ADMISSIBLE	CALLED BY	JUDICIAL COMMENTS/ PROCEDURE
R. v. Fitchett (Ont.C.A.) (1988)	<ul style="list-style-type: none"> Psychiatrist 	<ul style="list-style-type: none"> To rebut complainant's evidence 	<ul style="list-style-type: none"> The reliability of the complainant's story Complainant suffers from mental defect 	No	Defence	<ul style="list-style-type: none"> No foundation had been laid to show that the complainant suffered from a mental defect
R. v. Gallo (B.C.S.C.) (1986)	<ul style="list-style-type: none"> Psychiatric Social Worker 	<ul style="list-style-type: none"> Corroboration 	<ul style="list-style-type: none"> Dynamics of child sexual abuse Behavioural symptoms consistent with child sexual abuse 	No	Crown	<ul style="list-style-type: none"> Usurps function of jury Jurors do not require assistance of scientific expert's testimony to assist in determining which party is telling the truth
R. v. Garfinkle (Que.C.A.) (1992)	<ul style="list-style-type: none"> Psychiatrist 	<ul style="list-style-type: none"> Corroboration 	<ul style="list-style-type: none"> To establish that the accused was not a pedophile 	Yes	Defence	<ul style="list-style-type: none"> Court held that psychiatric evidence is admissible to show that the accused does not have a disposition to pedophilia
R. v. Griffin (B.C.S.C.) (1990)	<ul style="list-style-type: none"> Physician 	<ul style="list-style-type: none"> Corroboration 	<ul style="list-style-type: none"> Physical symptoms consistent with sexual abuse Vagina - sign of ongoing, persistent trauma 	Yes	Crown	<ul style="list-style-type: none"> Allowed as expert on physical abuse of children but not on sexual abuse of children
R. v. H.(C.) (B.C.P.C.) (1990)	<ul style="list-style-type: none"> Physician 	<ul style="list-style-type: none"> Corroboration 	<ul style="list-style-type: none"> Behavioural indicators - bed-wetting and nightmares - consistent with sexual abuse Failure and perception relating to accounting of dates Anal assaults consistent with acts 	Yes	Crown	
R. v. H.(C.) (B.C.P.C.) (1990)	<ul style="list-style-type: none"> Psychologist 	<ul style="list-style-type: none"> Corroboration 	<ul style="list-style-type: none"> Psychological profile of the accused based on interviews and a plethysmograph Accused not capable of committing alleged acts 	Yes	Defence	<ul style="list-style-type: none"> In convicting the accused, Court gave no weight to this evidence

* See Index of Cases for citations.

CASE*	TYPE OF EXPERT	REASON CALLED	TYPE OF EVIDENCE CALLED	ADMISSIBLE	CALLED BY	JUDICIAL COMMENTS/ PROCEDURE
R. v. H.(C.) (B.C.P.C.) (1990)	<ul style="list-style-type: none"> • Psychiatrist 	<ul style="list-style-type: none"> • To rebut Defence expert witness 	<ul style="list-style-type: none"> • Rebutting evidence of the defence psychologist • The use of plethysmograph in assessing the guilt or innocence of an alleged sex offender is not a generally accepted scientific method 	Yes	Crown	
R. v. H.(D.) (N.B.Q.B.) (1990)	<ul style="list-style-type: none"> • Social Worker • Sexual Abuse Therapist 	<ul style="list-style-type: none"> • Voir dire • Screen application 	<ul style="list-style-type: none"> • Extreme shyness, nervousness • Extreme fear of testifying • Extreme fear of accused 	Yes	Crown	
R. v. H.(E.L.) (N.S.C.A.) (1991)	<ul style="list-style-type: none"> • Social Worker 	<ul style="list-style-type: none"> • Corroboration 	<ul style="list-style-type: none"> • Behavioural symptoms consistent with sexual abuse • Depression; attempts to block out recollection of events; low self-esteem; lack of trust in others; inability to be specific as to details 	Yes	Crown	
R. v. H.(E.L.) (N.S.C.A.) (1991)	<ul style="list-style-type: none"> • Medical Doctors (2) 	<ul style="list-style-type: none"> • Corroboration 	<ul style="list-style-type: none"> • Physical evidence - sexual intercourse 	Yes	Crown	
R. v. H.(E.L.) (N.S.C.A.) (1991)	<ul style="list-style-type: none"> • Psychologist 	<ul style="list-style-type: none"> • Corroboration 	<ul style="list-style-type: none"> • Behavioural symptoms consistent with sexual abuse • Dynamics of child sexual abuse • Children unable to be specific as to time • Attempts to block out memory of alleged event • Lack of trust of others 	Yes	Crown	

* See Index of Cases for citations.

CASE*	TYPE OF EXPERT	REASON CALLED	TYPE OF EVIDENCE CALLED	ADMISSIBLE	CALLED BY	JUDICIAL COMMENTS/PROCEDURE
R. v. H. (H.C.) (B.C.S.C.) (1991)	<ul style="list-style-type: none"> Clinical Psychologist 	<ul style="list-style-type: none"> Corroboration 	<ul style="list-style-type: none"> Behavioural symptoms consistent with sexual abuse Dynamics of child sexual abuse 	Yes	Crown	
R. v. H. (H.C.) (B.C.S.C.) (1991)	<ul style="list-style-type: none"> Psychologist 	<ul style="list-style-type: none"> To rebut Crown expert witness 	<ul style="list-style-type: none"> Attacked the validity of the use of anatomically-correct dolls as an investigative tool 	Yes	Defence	
R. v. Heywood (B.C.P.C.) (1989)	<ul style="list-style-type: none"> Psychologist 	<ul style="list-style-type: none"> Corroboration 	<ul style="list-style-type: none"> Dynamics of child sexual abuse Behavioural symptoms consistent with sexual abuse 	Yes	Crown	
R. v. Heywood (B.C.P.C.) (1989)	<ul style="list-style-type: none"> Clinical Psychologist 	<ul style="list-style-type: none"> Corroboration 	<ul style="list-style-type: none"> Behavioural symptoms consistent with sexual abuse 	Yes	Crown	
R. v. J. (F.E.) (Ont.C.A.) (1990)	<ul style="list-style-type: none"> Psychologist 	<ul style="list-style-type: none"> Corroboration 	<ul style="list-style-type: none"> Dynamics of child sexual abuse Behavioural symptoms and mental state consistent with sexual abuse False recantation syndrome 	Yes	Crown	<ul style="list-style-type: none"> Expert opinion evidence not admissible to bolster credibility of complainant
R. v. K. (B.C.C.C.) (1989)	<ul style="list-style-type: none"> Pediatrician 	<ul style="list-style-type: none"> Corroboration 	<ul style="list-style-type: none"> Physical evidence of genitals consistent with sexual abuse 	Yes	Crown	
R. v. K. (P.V.) (N.S.S.C.) (1993)	<ul style="list-style-type: none"> Foster Mother (trained psychologist) 	<ul style="list-style-type: none"> Corroboration 	<ul style="list-style-type: none"> Testimony that 90% of allegations of sexual assault are true disclosures 	Yes (at trial) No (on appeal)	Crown	<ul style="list-style-type: none"> Court held that no proper foundation was laid for it to be admissible Court held that the evidence was oath-helping and intended to bolster the credibility of the complainant

* See Index of Cases for citations.

CASE*	TYPE OF EXPERT	REASON CALLED	TYPE OF EVIDENCE CALLED	ADMISSIBLE	CALLED BY	JUDICIAL COMMENTS/PROCEDURE
R. v. Keller (Alta.Q.B.) (1989)	<ul style="list-style-type: none"> Psychologist 	<ul style="list-style-type: none"> Voir dire Videotaped evidence application 	<ul style="list-style-type: none"> Age of child Relationship to accused Nature, seriousness, frequency of sexual abuse Length of time abuse occurred Time one could reasonably expect child to have accurate recall 	Yes	Crown	
R. v. Keller (Alta.Q.B.) (1989)	<ul style="list-style-type: none"> Psychologist 	<ul style="list-style-type: none"> Corroboration 	<ul style="list-style-type: none"> Dynamics of child sexual abuse Behavioural symptoms consistent with sexual abuse Disclosure patterns 	Yes	Crown	
R. v. Khurana (B.C.C.C.) (1989)	<ul style="list-style-type: none"> Expert on hypothermia 	<ul style="list-style-type: none"> Corroboration 	<ul style="list-style-type: none"> Camping experience which led to sexual acts 	Yes	Crown	
R. v. Knapp (Alta.Q.B.) (1990)	<ul style="list-style-type: none"> Psychiatrist 	<ul style="list-style-type: none"> Corroboration 	<ul style="list-style-type: none"> Dynamics of child sexual abuse Behavioural symptoms consistent with sexual abuse Dissociative state Psychogenic Amnesia of victims of sexual abuse Explanation of poor memory of critical incidents 	Yes	Crown	

* See Index of Cases for citations.

CASE*	TYPE OF EXPERT	REASON CALLED	TYPE OF EVIDENCE CALLED	ADMISSIBLE	CALLED BY	JUDICIAL COMMENTS/ PROCEDURE
R. v. Kostuck (Man.C.A.) (1986)	<ul style="list-style-type: none"> Psychologist 	<ul style="list-style-type: none"> Corroboration 	<ul style="list-style-type: none"> Dynamics of child sexual abuse Behavioural symptoms consistent with sexual abuse 	Yes	Crown	<ul style="list-style-type: none"> Expert opinion not admissible simply to bolster the credibility of the complainant Psychologist's evidence that "children very rarely lie about sexual abuse" not admissible Expert witness (or any witness) cannot testify that an accused or any other witness is likely to be truthful
R. v. L.(C.) (B.C.C.C.) (1984)	<ul style="list-style-type: none"> Psychologist 	<ul style="list-style-type: none"> Corroboration 	<ul style="list-style-type: none"> Dynamics of child sexual abuse Behavioural symptoms consistent with sexual abuse 	Yes	Crown	
R. v. Lavallee (S.C.C.) (1990)	<ul style="list-style-type: none"> Psychiatrist 	<ul style="list-style-type: none"> Corroboration 	<ul style="list-style-type: none"> Battered wife syndrome 	Yes	Defence	<ul style="list-style-type: none"> Court held that expert opinion was both relevant and necessary

* See Index of Cases for citations.

CASE*	TYPE OF EXPERT	REASON CALLED	TYPE OF EVIDENCE CALLED	ADMISSIBLE	CALLED BY	JUDICIAL COMMENTS/ PROCEDURE
R. v. LeBlanc (N.B.C.A.) (1992)	<ul style="list-style-type: none"> • Social Worker / Therapist (expert in sentimentology) 	<ul style="list-style-type: none"> • Corroboration 	<ul style="list-style-type: none"> • Behavioural symptoms consistent with sexual abuse 	Yes	Crown	<ul style="list-style-type: none"> • Trial judge not in error by admitting expert as an expert in "sentimentology" (the study of the behaviour of sexual assault victims) • Trial judge not in error in holding that, while social worker's expertise useful in providing therapy, it is of no assistance to the court in reaching its decision • Court held that the symptoms could arise from other kinds of psychological trauma besides sexual assault
R. v. Levac (B.C.S.C.) (1990)	<ul style="list-style-type: none"> • Psychologist 	<ul style="list-style-type: none"> • Corroboration 	<ul style="list-style-type: none"> • Dynamics of child sexual abuse • Behavioural indicators consistent with sexual abuse • Defence mechanism which operate psychologically to inhibit earlier reports of abuse • Victims continue to associate with their abuser • Complainant below normal intelligence 	Yes	Crown	
R. v. Levogiannis (No. 1) (Ont.D.C.) (1989)	<ul style="list-style-type: none"> • Child Psychologist 	<ul style="list-style-type: none"> • Voir dire • Screen application 	<ul style="list-style-type: none"> • Increased fear of testifying • Fear of accused 	Yes	Crown	

* See Index of Cases for citations.

CASE*	TYPE OF EXPERT	REASON CALLED	TYPE OF EVIDENCE CALLED	ADMISSIBLE	CALLED BY	JUDICIAL COMMENTS/PROCEDURE
R. v. M.(D.E.) (Ont.C.A.) (1990)	<ul style="list-style-type: none"> Psychologist 	<ul style="list-style-type: none"> Corroboration 	<ul style="list-style-type: none"> Behavioural symptoms consistent with sexual abuse Dynamics of child sexual abuse Threats by an abuser are common Reluctance and reticence of children to disclose Unusual for children to use tales of sexual abuse to manipulate situations 	Yes	Crown	<ul style="list-style-type: none"> Trial judge did not err in admitting the expert evidence
R. v. M.(P.S.) (Ont.C.A.) (1992)	<ul style="list-style-type: none"> Psychologist 	<ul style="list-style-type: none"> Corroboration 	<ul style="list-style-type: none"> Dynamics of child sexual abuse Behavioural symptoms consistent with sexual abuse (based in part on results of psychological test) 	Yes (at trial)	Crown	
R. v. M.(P.S.) (Ont.C.A.) (1992)	<ul style="list-style-type: none"> Psychologist 	<ul style="list-style-type: none"> To rebut Crown expert 	<ul style="list-style-type: none"> No psychological test available to determine whether the complainant's behaviour consistent with sexual abuse No literature to support value of psychological test 	Yes (at trial)	Defence	<ul style="list-style-type: none"> On appeal, the defence sought to tender evidence of further expert on whether literature supported the value of the psychological test. The court held that the evidence could have been obtained through exercise of due diligence and not "fresh" in relevant sense Evidence not resolving controversy raised at trial and could not have affected jury's assessment of expert evidence at trial

* See Index of Cases for citations.

CASE*	TYPE OF EXPERT	REASON CALLED	TYPE OF EVIDENCE CALLED	ADMISSIBLE	CALLED BY	JUDICIAL COMMENTS/PROCEDURE
R. v. Manahan (Alta.C.A.) (1990)	<ul style="list-style-type: none"> Psychologist 	<ul style="list-style-type: none"> Corroboration 	<ul style="list-style-type: none"> Behavioural symptoms consistent with sexual abuse Dynamics of child sexual abuse Complainant not fabricating evidence Complainant had not been coached Complainant's description of acts at different times consistent 	Yes	Crown	<ul style="list-style-type: none"> Expert opinion did not violate rule against oath helping Except new trial ordered by Court of Appeal because of inadequate direction to the jury Trial judge failed to adequately direct the jury as to the weight to be attached to the expert opinion
R. v. Marchant (B.C.C.C.) (1986)	<ul style="list-style-type: none"> Psychologist 	<ul style="list-style-type: none"> Corroboration 	<ul style="list-style-type: none"> Behavioural symptoms consistent with sexual abuse Dynamics of child sexual abuse Fragmented disclosure patterns of child sexual abuse Child's ambivalence towards accused False recantation 	Yes	Crown	
R. v. Mason (B.C.C.C.) (1987)	<ul style="list-style-type: none"> Psychologist 	<ul style="list-style-type: none"> Corroboration 	<ul style="list-style-type: none"> Behavioural indicators of sexual abuse Disclosure patterns of victims 	Yes	Crown	
R. v. Massautis (B.C.C.C.) (1988)	<ul style="list-style-type: none"> Child Psychiatrist 	<ul style="list-style-type: none"> Corroboration 	<ul style="list-style-type: none"> Dynamics of child sexual abuse Behavioural indicators consistent with sexual abuse 	Yes	Crown	
R. v. Massautis (B.C.C.C.) (1988)	<ul style="list-style-type: none"> Psychologist 	<ul style="list-style-type: none"> Corroboration To mitigate culpability 	<ul style="list-style-type: none"> Accused not a paedophile Accused does not suffer from a psychosexual disorder 	Yes	Defence	

* See Index of Cases for citations.

CASE*	TYPE OF EXPERT	REASON CALLED	TYPE OF EVIDENCE CALLED	ADMISSIBLE	CALLED BY	JUDICIAL COMMENTS/ PROCEDURE
R. v. Meacham (Sask. Q.B.) (1989)	<ul style="list-style-type: none"> Psychologist 	<ul style="list-style-type: none"> Corroboration 	<ul style="list-style-type: none"> Behavioural symptoms consistent with sexual abuse Dynamics of child sexual abuse Whether young children are likely to fabricate stories and the extent to which their testimony may be tainted by suggestion of others 	Yes	Crown	
R. v. Meisner (N.S.C.A.) (1992)	<ul style="list-style-type: none"> Social Worker 	<ul style="list-style-type: none"> Corroboration 	<ul style="list-style-type: none"> Behavioural symptoms consistent with sexual abuse 	No	Crown	<ul style="list-style-type: none"> Court held that a social worker cannot testify that the complainant's behavioural symptoms are consistent with being sexually abused Such evidence "the sole purpose...to bolster the credibility of the complainant" is inadmissible
R. v. Mohan (Ont.C.A.) (1992)	<ul style="list-style-type: none"> Psychiatrist 	<ul style="list-style-type: none"> Corroboration 	<ul style="list-style-type: none"> That the accused was not a sexual psychopath 	No (at trial) Yes (reversed on appeal)	Defence	<ul style="list-style-type: none"> Court ruled that the defence should have as much leeway as the Crown with respect to bolstering the credibility of the accused
R. v. O.(R.R.) (B.C.C.A.) (1990)	<ul style="list-style-type: none"> Psychiatrist 	<ul style="list-style-type: none"> Corroboration 	<ul style="list-style-type: none"> Accused is a paedophile Accused has a deep-rooted attraction to young girls 	Yes	Crown	

* See Index of Cases for citations.

CASE*	TYPE OF EXPERT	REASON CALLED	TYPE OF EVIDENCE CALLED	ADMISSIBLE	CALLED BY	JUDICIAL COMMENTS/PROCEDURE
R. v. Osolin (B.C.C.A.) (1992)	<ul style="list-style-type: none"> Psychiatrist 	<ul style="list-style-type: none"> To rebut complainant's evidence 	<ul style="list-style-type: none"> The complainant had previously been admitted to a psychiatric ward Psychiatric evidence about the complainant's lack of credibility because of her mental state 	No	Defence	
R. v. P.(C.) (B.C.C.A.) (1992)	<ul style="list-style-type: none"> Psychiatrist Psychologist 	<ul style="list-style-type: none"> Corroboration 	<ul style="list-style-type: none"> Dynamics of child sexual abuse Phenomenon of false recantation 	Yes	Crown	<ul style="list-style-type: none"> Court held that expert evidence admissible relating to question of recantation by young victims of sexual abuse Court held that the trial judge adequately cautioned the jury as to use to be made of psychologist's evidence
R. v. Pain (B.C.C.C.) (1991)	<ul style="list-style-type: none"> Therapist 	<ul style="list-style-type: none"> Corroboration 	<ul style="list-style-type: none"> Behavioural symptoms consistent with sexual abuse Characteristics of incestuous family 	Yes	Crown	
R. v. Pelletier (Alta. Q.B.) (1987)	<ul style="list-style-type: none"> Clinical Psychologist 	<ul style="list-style-type: none"> Corroboration 	<ul style="list-style-type: none"> Dynamics of child sexual abuse Behavioural symptoms consistent with sexual abuse 	Yes	Crown	<ul style="list-style-type: none"> In cases where there is testimony of children, any assistance should be afforded to the Court - should be provided
R. v. Poitras (B.C.S.C.) (1990)	<ul style="list-style-type: none"> Psychologist 	<ul style="list-style-type: none"> Corroboration 	<ul style="list-style-type: none"> Behavioural symptoms consistent with sexual abuse False recantation syndrome Frequency of recantation 	Yes	Crown	

* See Index of Cases for citations.

CASE*	TYPE OF EXPERT	REASON CALLED	TYPE OF EVIDENCE CALLED	ADMISSIBLE	CALLED BY	JUDICIAL COMMENTS/ PROCEDURE
R. v. R.(A.G.) (N.S.C.A.) (1989)	<ul style="list-style-type: none"> Psychologist 	<ul style="list-style-type: none"> Corroboration 	<ul style="list-style-type: none"> Dynamics of child sexual abuse Behavioural symptoms consistent with sexual assault 	Yes	Crown	<ul style="list-style-type: none"> Trial judge gave no weight to expert evidence and was not influenced in his decision by expert evidence
R. v. R.(P.S.) (Ont.D.C.) (1989)	<ul style="list-style-type: none"> Psychologist 	<ul style="list-style-type: none"> Voir dire Screen application 	<ul style="list-style-type: none"> Fear of accused Fear of testifying Child attempted suicide General shyness Emotional fragility Withdrawn High state of stress and fear 	Yes	Crown	
R. v. R.(S.) (Ont.C.A.) (1992)	<ul style="list-style-type: none"> Psychologist Children's Aid Society Worker 	<ul style="list-style-type: none"> Corroboration 	<ul style="list-style-type: none"> Behavioural (psychological) symptoms consistent with sexual abuse 	Yes	Crown	
R. v. R.(S.) (Ont.C.A.) (1992)	<ul style="list-style-type: none"> Psychologist Children's Aid Society Worker 	<ul style="list-style-type: none"> To bolster credibility of the complainant Corroboration 	<ul style="list-style-type: none"> To express their opinions to the effect that the complainant's story was credible 	Yes (admitted at trial) No (reversed on appeal)	Crown	<ul style="list-style-type: none"> Court held that expert evidence about their belief in the complainant's credibility was inadmissible because it offends the rule against oath-helping Trial judge erred in admitting the expert evidence - new trial ordered
R. v. Roy (Que.C.A.) (1988)	<ul style="list-style-type: none"> Psychologist 	<ul style="list-style-type: none"> Corroboration 	<ul style="list-style-type: none"> Dynamics of child sexual abuse Behavioural symptoms consistent with sexual abuse 	Yes	Crown	

* See Index of Cases for citations.

CASE*	TYPE OF EXPERT	REASON CALLED	TYPE OF EVIDENCE CALLED	ADMISSIBLE	CALLED BY	JUDICIAL COMMENTS/PROCEDURE
R. v. S.(C.N.) (B.C.C.A.) (1990)	• Physician	• Corroboration	• Sexual penetration of vagina	Yes	Crown	
R. v. S.(C.N.) (B.C.C.A.) (1990)	• Psychologist	• Corroboration	<ul style="list-style-type: none"> • Behavioural symptoms consistent with sexual abuse • Details given were beyond powers of fabrication of a 6-year-old child • High percentage of children's allegations of sexual assault being accurate 	Yes	Crown	<ul style="list-style-type: none"> • Expert evidence on the percentage of cases in which children's complaints of sexual assaults have been accurate "came very close to oath helping", thus not admissible
R. v. Shubert (B.C.P.C.) (1991)	• Psychologist	<ul style="list-style-type: none"> • Voir dire • Screen application 	<ul style="list-style-type: none"> • Fear of accused • Fear of testifying 	Yes	Crown	
R. v. Snow (B.C.P.C.) (1988)	• Child Psychologist	• Corroboration	• Behavioural symptoms consistent with sexual abuse	Yes	Crown	
R. v. Snow (B.C.P.C.) (1988)	• Child Psychologist	<ul style="list-style-type: none"> • Voir dire • Screen application 	<ul style="list-style-type: none"> • Fear of accused • Fear of testifying • Nightmares • Extreme anxiety 	Yes	Crown	
R. v. Snow (B.C.P.C.) (1988)	• Child Psychiatrist	<ul style="list-style-type: none"> • Voir dire • Oath competency 	• Child's ability to communicate the evidence	Yes	Crown	
R. v. Stephens (B.C.P.C.) (1990)	• Psychologist	<ul style="list-style-type: none"> • Voir dire • Oath competency 	• Mental competence of complainant to testify	Yes	Crown	

* See Index of Cases for citations.

CASE*	TYPE OF EXPERT	REASON CALLED	TYPE OF EVIDENCE CALLED	ADMISSIBLE	CALLED BY	JUDICIAL COMMENTS/PROCEDURE
R. v. T.(J.) (Ont.D.C.) (1991)	<ul style="list-style-type: none"> Psychologist 	<ul style="list-style-type: none"> Voir dire Oath competency 	<ul style="list-style-type: none"> Inability of child to testify 	Yes	Crown	<ul style="list-style-type: none"> In some situations, experts will give evidence about procedural matters, such as the inability of a child to testify
R. v. Taylor (Ont.C.A.) (1986)	<ul style="list-style-type: none"> Pediatrician 	<ul style="list-style-type: none"> To rebut defence witnesses attacking the credibility of the complainants 	<ul style="list-style-type: none"> Behavioural symptoms consistent with sexual abuse Children's propensity to fantasize 	Yes	Crown	
R. v. Taylor (Ont.C.A.) (1986)	<ul style="list-style-type: none"> Psychometrist 	<ul style="list-style-type: none"> To rebut defence witnesses attacking the credibility of the complainants 	<ul style="list-style-type: none"> Borderline personality disorder in children consistent with sexual abuse 	Yes	Crown	
R. v. Taylor (Ont.C.A.) (1986)	<ul style="list-style-type: none"> Psychologist 	<ul style="list-style-type: none"> To rebut defence witnesses attacking the credibility of the complainants 		Yes	Crown	<ul style="list-style-type: none"> Expert evidence admissible in rebuttal - to reduce impact of defence evidence as to credibility of complainants Expert evidence given in reply cannot be used to bolster credibility of complainants Expert opinion that only a small percentage of children who complain of sexual abuse lie ruled inadmissible Expert opinion that a child is telling the truth in relation to an alleged sexual act is inadmissible

* See Index of Cases for citations.

CASE*	TYPE OF EXPERT	REASON CALLED	TYPE OF EVIDENCE CALLED	ADMISSIBLE	CALLED BY	JUDICIAL COMMENTS/ PROCEDURE
R. v. Turner (Ont.P.C.) (1991)	<ul style="list-style-type: none"> • Social Worker • Child Abuse Specialist • Psychometrist 	<ul style="list-style-type: none"> • Corroboration 	<ul style="list-style-type: none"> • Dynamics of child sexual abuse • Behavioural symptoms consistent with sexual abuse • Disclosure patterns 	Yes	Crown	
R. v. W. (Ont.P.C.) (1990)	<ul style="list-style-type: none"> • Pediatrician 	<ul style="list-style-type: none"> • Corroboration 	<ul style="list-style-type: none"> • Physical symptoms consistent with sexual abuse 	Yes	Crown	
R. v. W. (Ont.P.C.) (1990)	<ul style="list-style-type: none"> • Child Protection Worker - Child Sexual Abuse Expert 	<ul style="list-style-type: none"> • Corroboration 	<ul style="list-style-type: none"> • Dynamics of child sexual abuse • Disclosure patterns 	No	Crown	
R. v. W.(A.) (Ont.P.C.) (1990)	<ul style="list-style-type: none"> • Psychologist 	<ul style="list-style-type: none"> • Voir dire • Screen application • Closed-circuit TV application 	<ul style="list-style-type: none"> • Fear of accused • Fear of testifying 	Yes	Crown	
R. v. W. (K.E.) (Alta.Q.B.) (1990)	<ul style="list-style-type: none"> • Pediatrician (in child abuse) • Social Worker 	<ul style="list-style-type: none"> • Voir dire • Screen application 	<ul style="list-style-type: none"> • Fear of accused • Fear of testifying • Expert unable to say if device would assist in child giving evidence • Child had sexually transmitted disease - Chlamydia 	Yes	Crown	
R. v. W.(L.E.) (B.C.C.C.) (1987)	<ul style="list-style-type: none"> • Psychologist 	<ul style="list-style-type: none"> • Corroboration 	<ul style="list-style-type: none"> • Physiological and behavioural responses consistent with sexual abuse 	Yes	Crown	
R. v. W.(P.F.) (Ont.P.C.) (1988)	<ul style="list-style-type: none"> • Psychologist 	<ul style="list-style-type: none"> • Voir dire • Closed-circuit TV application 	<ul style="list-style-type: none"> • Fear of testifying • Children angry in presence of accused (father) • Fearful of accused 	Yes	Crown	

* See Index of Cases for citations.

CASE*	TYPE OF EXPERT	REASON CALLED	TYPE OF EVIDENCE CALLED	ADMISSIBLE	CALLED BY	JUDICIAL COMMENTS/PROCEDURE
R. v. Wald (Alta.C.A.) (1989)	<ul style="list-style-type: none"> Psychologist 	<ul style="list-style-type: none"> To rebut complainant's evidence 	<ul style="list-style-type: none"> Amnesia/memory loss is a mental disorder Knowledge of circumstances Complainant's evidence inconsistent with memory loss that she claims to have suffered 	Yes	Defence	<ul style="list-style-type: none"> New trial was ordered by the Court of Appeal Trial judge erred in failing to allow evidence of expert to go to jury Expert opinion might be helpful to assist jury in determining what weight to attach to evidence of complainant's memory loss, and might have affected their assessment of her credibility
R. v. Wilson (B.C.C.C.) (1987)	<ul style="list-style-type: none"> Psychologist 	<ul style="list-style-type: none"> Corroboration 	<ul style="list-style-type: none"> Behavioural symptoms consistent with sexual abuse 	Yes	Crown	<ul style="list-style-type: none"> Court ruled that the expert opinion is an opinion as to a condition of a child analogous to a physical condition and on that basis the opinion is an assessment of the child and is not an assessment of the child's accusations
R. v. Zaharik (B.C.C.C.) (1988)	<ul style="list-style-type: none"> Psychologist 	<ul style="list-style-type: none"> Corroboration 	<ul style="list-style-type: none"> Behavioural and emotional indicators consistent with sexual abuse 	Yes	Crown	

* See Index of Cases for citations.

**APPENDIX V:
CHAPTER 5: EXPERT WITNESS
AMERICAN BAR ASSOCIATION (1982)
DYNAMICS OF INTRA-FAMILY CHILD SEXUAL ABUSE
AND PRINCIPLES OF CHILD DEVELOPMENTS**

1. SEXUAL ABUSE

a. Progression of Abuse

The sexual behaviour usually occurs progressively, sometimes up to full intercourse, over time.

b. Duration of Abuse

Sexual abuse usually occurs over a long period of time usually beginning when the child is pre-adolescent (8-11), and continuing into the teenage years. Children often endure the abuse because of bribes, misrepresentation of morality, affection, threats, parental psychological authority, fear of splitting up the family, hurting their mother, losing affection, as being blamed.

c. Lack of Force and Physical Injury

Because of the parents' psychological power over the child, force is often not necessary to accomplish the act; there is, therefore, rarely any physical injury.

d. Time of Disclosure of Abuse

If the child does disclose, there may be a delay between the last sexual incident and disclosure since disclosure is often triggered by other events (often related to conflicts with parents during adolescence). The delay will also mean there probably is no medical evidence of the sexual abuse.

e. **Passive Parents Role**

The passive parent, usually the mother, may unconsciously deny the abuse is occurring, and when it is disclosed, she initially may be ambivalent regarding whether to believe the child or her husband. With treatment, the mother often ultimately supports the child.

f. **Offender Characteristics**

Father-daughter incest constitutes the largest percentage of reported incest cases, and therefore is described here. The father who molests his daughter may be characterized in a variety of ways including: alienation or social isolation from persons outside the family, poor interpersonal relationships, deepseated feelings of inadequacy, poor impulse control, immediate gratification needs, low self-esteem, preference for prepubescent children, commits acts alone, repeated or compulsive behavior, and an otherwise law-abiding and superficially adaptive life. Some may be passive or introverted, while others are authoritarian or dominating.

g. **Retraction and Inconsistent Statement**

The family often pressures the child to retract the story, by, for example, telling her she will split up the family, send her father to jail, and cause her mother to lose financial support. The legal process can also exacerbate the situation and contribute to a child's retraction or refusal to testify. Moreover, the child may have ambivalent feelings toward the abusive parent, which might lead to his or her changing the story initially given at a later date or at trial.

2. **BEHAVIORAL INDICATORS OF SEXUALLY ABUSED CHILD**

- a. Neurasthenia symptoms with no physiological basis, including fatigue, weakness, headaches, bed-wetting, excessive urination, stomachaches, ringing in ears, sleeping, vasomotor, memory or concentration disturbances.
- b. Clinical depression, possibly leading to suicidal tendencies.
- c. Isolation from peers, restricted social activities.
- d. Runaway, truancy.
- e. Involvement with drugs, alcohol.
- f. Drop in academic performance.

- g. Pseudo-mature seductive behavior.
- h. Fear of men.
- i. Heavy household responsibilities (taken on mother's role).
- j. Prostitution, promiscuity.

**APPENDIX W:
CHAPTER 5: EXAMPLE OF VOIR DIRE
INQUIRY FOR ADMISSION OF AN EXPERT WITNESS**

C A N A D A
PROVINCE OF BRITISH COLUMBIA

IN THE SUPREME COURT OF BRITISH COLUMBIA
(BEFORE THE HONOURABLE MR. JUSTICE CALLAGHAN AND JURY)

No. 18954
Prince George Registry

Prince George, B.C.
December 6, 1990

HER MAJESTY THE QUEEN

AGAINST

CLARY POITRAS

(EXCERPT FROM)
PROCEEDINGS
AT

TRIAL

APPEARANCES:

A. BATE, QC, and
MS. D. POPE

for the Crown

D. P. KENNEDY, Esq.

for the Accused

YUILLE, J. C. (for the Crown) (Jury out)
 e in-chief on voir dire by Ms. Pope

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* * *

MS. POPE: My Lord, the next witness that the Crown intends to call is Dr. Yuille. And our intention in calling Dr. Yuille is to deal with the -- the issue of the recantation by the witness to Mr. Wagstaffe, the lawyer that she spoke to who we've had a great deal of cross-examination on the transcript of the statement provided.

It is not the Crown's intention to call Dr. Yuille for any purpose dealing with the credibility of the witness, and specifically when we deal with the issue of recantation it's to deal with his expertise in the area of -- of witnesses and recantation and some of the reasons that he has found have caused witnesses to recant.

Dr. Yuille's in the courtroom, Your Honour -- or My Lord. I'm prepared to call him at this time. My friend is prepared to make an opening address.

THE COURT: Very well. Call the doctor then on the voir dire.
 MS. POPE: Dr. Yuille.

JOHN CHARLES YUILLE, a witness called on behalf of the Crown, being duly sworn, testifies as follows:

THE CLERK: Will you please state your full name.

A John Charles Yuille, Y-u-i-l-l-e.

THE CLERK: Thank you. You may be seated if you wish.

A Thank you.

EXAMINATION IN-CHIEF ON VOIR DIRE BY MS. POPE:

Q Dr. Yuille, I had asked you to -- to provide us with a photocopy of your curriculum vitae. I'm just going to give you the copy that you provided. Sir, if you could, could you tell me, please, what your educational background is.

THE COURT: Do you have a copy for me? For me?

MS. POPE: Yes, I do, My Lord. Sorry.

A Yes. My Lord, I have a bachelor's and master's and doctorate degree in psychology. I received my doctorate in 1967 from the University of Western Ontario, and I specialized in the general area of human memory and cognition in my graduate studies. I spent a year at McGill University, '67 to '68, as a National Research Council post-doctoral fellow, and then joined the faculty at the University of British Columbia where I have been since, with the exception of sabbatical leaves, one spent

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1 at the University of Salzburg in Austria, and one that I
2 am currently spending in Cornell University in New York
3 State.

4 MS. POPE:

5 Q And, doctor, since you received your education that you
6 have just indicated to us, what have your -- have been
7 your areas of interest and your work experience since that
8 time?

9 A As I mentioned, my general area of interest has been in
10 human memory. In about the mid-1970s that focus moved to
11 the study of memory in the forensic context, in particular
12 the study of eyewitness and victim memory. And that has
13 been increasingly and is predominantly the focus of my
14 work now, has been for about 15 years. That's both adults
15 and children, and over the last half dozen years or so
16 increasingly focussing on children and their memory
17 development and their capacities to provide evidence about
18 complex events.

19 Q And what do you consider your definition of children? Or
20 when you're dealing with children, how do you classify
21 them?

22 A The -- the work that I have been doing with children as
23 victims and witnesses, because of the current interest in
24 child sexual abuse, has led to the -- a lot of the focus
25 of my work being in that arena. And we focus mostly on
26 victims and witnesses who are 16 years of age and under.

27 Q And can you tell me, doctor, what your experience is in
28 children abused, particularly sexual abuse, and your work
29 surrounding that area.

30 A This work in child sexual abuse has led me to develop
31 techniques for interviewing and -- and assessing children
32 in abuse cases. And those techniques have led me to
33 training professionals, child protection workers, police,
34 workshops with Crown and also with judges, dealing with
35 the general issues around sexual abuse.

36 The -- the focus of that work has -- of the training
37 has been to assist in dealing with these child abuse
38 cases. I may have lost track of the question, so you
39 might --

40 Q I think you're answering it very well, doctor. But when
41 you say that you're doing these training courses to deal
42 with the issues around child abuse, what in particular are
43 the issues that you see that arise out of sexual -- child
44 sexual abuse?

45 A Well, my work has been concerned with the investigation of
46 allegations, with the factors that affect how children or
47 victims disclose, when they disclose, the appropriate way

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- 1 the investigation should be done, the factors that affect
 2 the child or victim once they have disclosed, the
 3 preparation of the child for court, and the processes that
 4 the -- the victims are subject to between the time that
 5 the case first comes to the authorities and the appearance
 6 in court.
- 7 Q All right. And, doctor, as part of the training course
 8 that you give -- other than actually dealing with -- with
 9 other professionals in the area, can you tell me, doctor,
 10 have you had any hands-on experience dealing with
 11 children, particularly children witnesses of sexual abuse?
- 12 A Yes, I think it's essential that anyone who trains has to
 13 have continuing hands-on experience. Over the years, the
 14 past few years, I have been involved with a variety of
 15 cases of reported abuse. Our estimate about six months
 16 ago from my laboratory was that the cases that I have been
 17 involved in had probably totalled about 150 children that
 18 I had either interviewed myself or evaluated for others.
 19 The number's higher than that now, but I don't know
 20 precisely what it is.
- 21 Q And what would you say that your -- your dealings with
 22 those witnesses are as for the purposes of evaluating and
 23 your other interests that you may have in your hands-on
 24 experience?
- 25 A I -- my involvement with the -- directly with witnesses,
 26 it's usually on the request of the police or child
 27 protection or the Crown, occasionally for defence
 28 counsel. And I'm asked usually to interview the child, to
 29 make an assessment of the credibility of the child or
 30 the -- I should say the credibility of the evidence for
 31 whoever has asked me to participate in the case.
- 32 Q Does your experience give you any hands-on dealings with
 33 behavioural patterns of victims of child sexual abuse?
- 34 A Yes, certainly we -- indeed, the system we use pays
 35 considerable attention to the behavioural sequela of being
 36 abused. And I have also been involved in a number of
 37 projects which have looked at features around children and
 38 preparing children for court, and part of our concern has
 39 been with their behaviour, post-abuse behaviour.
- 40 Q Dr. Yuille, the particular issue that we're concerned with
 41 in this matter is recantation by child witnesses, in
 42 particular. Can you tell me, sir, what your -- your
 43 knowledge and experience is in dealing with those issues.
- 44 A Well, I'm familiar with all of the literature -- I think
 45 all of the literature that's been written around the issue
 46 of recantation. I have certainly investigated it in the
 47 cases that I have been involved in myself.

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 e in-chief on voir dire by Ms. Pope
 EXHIBIT A FOR IDENTIFICATION

1 I am on the National Advisory Committee for the Child
 2 Witness Project in London, Ontario. It's a federally
 3 funded project looking at ways of effectively preparing
 4 children for court. And as part of that project, one of
 5 the issues that was looked at was recantation.
 6 I am a consultant for the National Institute of
 7 Health in the United States. That's taking a look at
 8 training professionals in child abuse cases, and
 9 recantation is certainly an issue there as well.
 10 I might note that the -- the system I have developed
 11 for interviewing children has been adopted as the national
 12 standard for the United Kingdom, and recantation is also
 13 an issue that we're looking at in the research that we
 14 have planned for the United Kingdom as well.
 15 MS. POPE: My Lord, what I am seeking to do at this time is
 16 perhaps if we could enter Dr. Yuille's curriculum vitae as
 17 an exhibit on the voir dire in these proceedings and --
 18 THE COURT: Yes. Exhibit A on the voir dire.
 19 THE CLERK: Exhibit A on the voir dire, My Lord.
 20 MS. POPE: Thank you, My Lord

21
 22 EXHIBIT A FOR IDENTIFICATION - Copy of curriculum vitae
 23 of Dr. Yuille
 24

25 MS. POPE: And I'm seeking to qualify Dr. Yuille as a
 26 psychologist, as an area of expertise as of sexual abuse
 27 and dynamics of issues surrounding the issues of sexual
 28 abuse. And as I indicated earlier, My Lord, the very
 29 narrow issue that I would like to deal with on the voir
 30 dire and in the trial proper would be the issue of
 31 recantation, not credibility.
 32 THE COURT: Pardon me?
 33 MS. POPE: Not credibility, just recantation of witnesses.
 34 THE COURT: Yes. Any cross-examination as to the doctor's
 35 qualifications?
 36 MR. KENNEDY: No, Your Honour, I think that will be something
 37 for the whole of the voir dire.
 38 THE COURT: Yes. I'm prepared to accept him as an expert in
 39 his field. Proceed.
 40 MS. POPE:
 41 Q Dr. Yuille, I understand at some point you had the
 42 opportunity of meeting Sasha Poitras.
 43 A Yes, I did.
 44 Q All right. And as a result of some information that you
 45 became aware of as a predecessor to your meeting is as a
 46 result of some materials you've been provided, for
 47 example, the Crown report that's provided by the police

YVILLE, J. C. (for the Crown) (Jury out)
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1 and circumstances that I have related to you. You're
2 aware that Miss Poitras gave a complaint to the police
3 involving allegations against her stepfather, Clary
4 Poitras?

5 A Yes, I am aware of that.

6 Q And you are also aware, sir, that at some time she went
7 and spoke to a Mr. Wagstaffe, in January of 1990, and had
8 a recantation.

9 A Yes.

10 Q What I'd like to put to you, doctor, as a hypothetical is
11 if we have the facts of the witness in this case, Miss
12 Poitras, who has been removed from the family home
13 following a complaint of sexual abuse and put into a
14 foster home that she seems unhappy with and is running
15 away from, and is apparently receiving some pressures from
16 her mother to not proceed with her allegations, and has
17 not been able to talk to her spouses -- or her siblings,
18 her brother and sister, that she had been with in the
19 family home, and is apparently not being supported by her
20 mother, who is -- is the -- the wife of the -- the alleged
21 offender, Clary Poitras, in this case, would it be
22 unusual, sir, for a witness in those circumstances to
23 recant a -- an earlier allegation made to the police?

24 A My Lord, the phenomenon of recantation is at least
25 acknowledged sufficiently that some people have proposed
26 that as a part of a syndrome. Roland Summit, an American
27 researcher and practitioner in this field, for example,
28 has proposed what he called the accommodation syndrome,
29 which is a way that some victims of child abuse -- the
30 process that the -- the victim has to go through in order
31 to accommodate to having been abused. And one core part
32 of that accommodation syndrome is that of recantation.

33 In the Child Witness Project in London, Ontario, that
34 I mentioned a few moments ago, this project involved
35 assigning children to different kinds of preparation
36 schemes and then evaluating the outcome of those
37 preparations in several ways. One of the factors that
38 emerged out of this project -- it was a three-year project
39 and it's just being wound up at this point. One of the
40 major factors that emerged out of it was the issue of
41 parental support. That is, if the -- if it is
42 intrafamilial abuse -- that is, if the allegation involves
43 abuse by someone in the family -- the support or lack
44 thereof by the parents, and most of the time this is by
45 the mother, turns out to be the critical factor in
46 determining how the case proceeds. If the mother doesn't
47 support the child, this will create problems for the

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1 case. And certainly one of the reasons for that is that
2 will lead to a recantation; that the pressures concerning
3 change of financial status, loss of emotional support for
4 the mother, just general disruption of life, can mean that
5 she and perhaps the -- the siblings will put pressure on
6 the child who's disclosed and a false recantation will
7 occur.

8 Q Dr. Yuille, in the experience that you've had with the
9 case where there isn't any parental support, does it have
10 to be an outward type of pressure put on the child or is
11 it something that perhaps a child can just perceive as
12 being pressured? What can you say about that?

13 A Well, it's -- I think it's a combination of both in that
14 certainly the child -- and the older the child is, the
15 more perceptive they'll be about the consequences of
16 having disclosed. Obviously the -- the greater the
17 pressure that is directly exerted on the child, the more
18 likely it will lead to a recantation. But I have
19 certainly seen instances where the pressure seemed from
20 the outside to be relatively minor but led to a
21 recantation nonetheless.

22 Q What about the effect, sir, that was in the hypothetical,
23 of not being able to see -- see siblings in the family
24 situation?

25 A Yes, that's certainly part of the disruption. In your
26 hypothetical I was focussing on the impact from the
27 family. But from the victim's point of view or the
28 alleged victim's point of view, there are at least two
29 factors that can influence a recantation. One is that the
30 complete change or disruption of the -- of the child's
31 life, if they have been apprehended, for example, by child
32 protection agency and put into foster care or -- or some
33 other kind of care, if they're not happy there, if -- if
34 the change is something that is less than desirable, it
35 could all by itself exert some pressure for recantation.
36 And also just going through our systems, being interviewed
37 by police, being interviewed by child protection workers,
38 being prepared for court, testifying at the preliminary,
39 and so on, all of these are additional sources of pressure
40 for recantation.

41 For example, I was a consultant in a case in Quebec,
42 in Montreal, of abuse, and the children were repeatedly
43 interviewed. In fact, there were 14 suspects in this
44 particular case, and so there were 14 defence in the
45 court. Each child was cross-examined 14 times. Many of
46 those children began to recant on the stand. Just the
4 pressure of having to constantly repeat and be challenged

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 c. ss-exam on voir dire by Mr. Kennedy

1 about the story was a kind of pressure that led to
 2 recantation.
 3 Q Dr. Yuille, in the outline of the hypothetical question
 4 that I gave you, in those circumstances of the foster
 5 home, the -- the non-parental support, and being separated
 6 from the siblings, would it be unusual in those
 7 circumstances for a complainant to recant her complaint?
 8 A No, it wouldn't be.
 9 Q And would it be unusual for a complainant in those
 10 circumstances to recant and then go back to the original
 11 allegations and say that those original allegations were,
 12 in fact, true?
 13 A That depends entirely on how the recantation is handled.
 14 If the child is -- is talked to, is provided with the
 15 right kind of counselling, then they may realize the
 16 inappropriateness of falsely recanting and a return to
 17 their original allegation. If all of the pressures remain
 18 and nothing is done to help the child, then the
 19 recantation may be held to.
 20 Q Dr. Yuille, it's been suggested that I -- I go into more
 21 detail on your previous dealing with Miss Poitras. Can
 22 you tell me, doctor, when you became involved with Miss
 23 Poitras and how, in fact, you became involved.
 24 A I left the file in your office, and I'm, as a memory
 25 expert, not going to claim to remember a date without the
 26 notes.
 27 Q All right.
 28 A I can, though, reconstruct how I became involved. I was
 29 approached by the Ministry of Social Services and Housing
 30 to come to Prince George and conduct an interview. I did
 31 so, conducted an interview in the interview room here that
 32 the RCMP has set up. That interview was videotaped and
 33 audio taped, and there was a member -- or I should say a
 34 representative of Social Services present as well during
 35 that interview.
 36 Q How long, sir, did that interview with Miss Poitras go on
 37 for?
 38 A It lasted approximately an hour.
 39 MR. BATE: Is this the file?
 40 A Yes, it is, thank you. The interview was conducted on
 41 February the 5th, 1990.
 42 MS. POPE: My Lord, I have no further questions for Dr.
 43 Yuille. Thank you.
 44 THE COURT: Cross-examination.
 45
 46 CROSS-EXAMINATION ON VOIR DIRE BY MR. KENNEDY:
 4 Q Doctor, I'm -- I'm a little concerned by what appear to me

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 is-exam on voir dire by Mr. Kennedy

1 to be some semantically loaded phrases in what you say.
 2 You refer to "victims." Is that your assumption
 3 immediately a complaint is made, that this person is a
 4 victim, that the complaint is true?
 5 A I may have used the term "victim" occasionally, but I try
 6 to use the term "alleged victim."
 7 Q And then your expertise is in preparing this child for
 8 court; that is, to give evidence.
 9 A No, my expertise is in interviewing and assessing,
 10 training others to do that and assisting others who are
 11 involved in the process of preparing for court. I don't
 12 do the preparation myself.
 13 Q Well, what is that process? What's done?
 14 A Oh, what is done is it falls into several categories. One
 15 is providing the child with sufficient knowledge about the
 16 system, who plays what roles and -- and what to expect in
 17 the court and how to behave and so on. The second is
 18 emotional support in which the -- the child is -- is
 19 taught ways of recognizing nervousness, that it's okay to
 20 ask to go to the bathroom or have a drink of water, and
 21 ways of stress management. Those are the -- the two
 22 primary ways of -- of court preparation. Of course, the
 23 third way, that is the issue of reviewing testimony, but
 24 that's done by Crown.
 25 Q The purpose of all this preparation of the witness is to
 26 make the witness more credible so that the witness is a
 27 trained witness.
 28 A No, the purpose is to make the witness more comfortable.
 29 Q Are you not training this person as a witness?
 30 A No.
 31 Q With respect to their own case?
 32 A No, not -- not at all. The --
 33 Q I'm sorry, how --
 34 MR. BATE: Let --
 35 THE COURT: No, no, wait till he finishes, Mr. Kennedy.
 36 A The -- the preparation, at least as far as the -- as
 37 psychologists or victim assistance people and so on are
 38 involved in, is -- is strictly -- avoids anything to do
 39 with the witness' evidence. It's solely dealing with
 40 knowledge about the system so that the person will feel
 41 more comfortable in it, and emotional support so that --
 42 this is a pretty traumatic place for lots of people to be,
 43 but especially for children. And the desire is to help
 44 them so that they can function in that system and not be
 45 intimidated or frightened by it or debilitated by it.
 46 MR. KENNEDY:
 47 Q To get to the narrow issue, doctor, you said that it

Y LLE, J. C. (for the Crown) (Jury out)
 ss-exam on voir dire by Mr. Kennedy

1 wasn't unusual for a child to recant. It depends on how
 2 the recantation is handled. With the right kind of
 3 counselling, the false recantation can be reversed. Do
 4 you always assume that recantations are false --
 5 A No.
 6 Q -- and that -- I'm sorry, I haven't finished.
 7 A Okay.
 8 Q And that the right kind of counselling will turn this
 9 thing around?
 10 A That wasn't my assumption at all. I said that if the
 11 right kind of counselling is provided, the -- a false
 12 recantation may be reversed. I didn't say can be.
 13 Q Doctor, this is entirely within the area of sexual abuse
 14 that you're speaking of now. Are there any studies with
 15 respect to recantations generally by witnesses? Could
 16 you --
 17 A The only other -- the only other arena that I am aware of
 18 that this has been investigated is in the arena of
 19 domestic violence.
 20 Q Let us -- let us just deal with recantation by a witness
 21 on a robbery case, for example. As to identification,
 22 anything about that?
 23 A No, this has not been studied systematically.
 24 Q Recantations by child witnesses in any other case; that
 25 is, is there an individual study that -- with a -- a --
 26 recantations by child witnesses in instances which don't
 27 involve domestic --
 28 A No, there hasn't been.
 29 Q No studies?
 30 A No.
 31 Q So, really, you can't say, can you, how usual or unusual
 32 the recantations are with respect to a domestic situation
 33 such as you described and a non-domestic situation.
 34 A If I'm following your argument correctly here, the -- we
 35 do -- we have studied recantations in the area of child
 36 sexual abuse and the area of -- of domestic violence. And
 37 yes, we can say something about when recantations occur in
 38 those two contexts.
 39 Q Uh-hmm.
 40 A But as far as robberies or other sorts of crimes, that
 41 hasn't been studied.
 42 Q What I'm getting at, doctor, I guess, is that you don't
 43 have any alternative studies, do you, to show that this
 44 applies specifically to the area of child abuse?
 45 A We know it does apply to the area of child abuse, yes.
 46 Q But -- okay. Excuse me. When you are only studying child
 47 abuse, you aren't studying the area of recantation. You

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1 follow my --
2 A Yes, we're studying recantation in the context of child
3 abuse cases.
4 Q But not in any other context.
5 A Not -- except domestic violence, yes.
6 Q I see. But what I'm getting at, doctor, is you have no
7 studies which show whether recantation is more common or
8 less common with respect to child abuse as against any
9 other area.
10 A That's correct.
11 Q You have no such studies.
12 A No. In fact, of course, children aren't appearing in
13 court very often for other kinds of cases, and that's the
14 reason for the focus on that particular issue.
15 Q Have you any studies on recantations in non-domestic
16 situations?
17 A Yes.
18 Q That is, recantations by children where there isn't any
19 domestic --
20 A You mean where there's -- it's extrafamilial abuse.
21 Q Extrafamilial.
22 A Yes, yes.
23 Q And what do those indicate to you?
24 A Recantations are less common in that context because there
25 isn't the same kind of pressure on the child.
26 Q How much less common in terms of percentages?
27 A Well, the percentages -- we have to talk about percentages
28 in varying -- depending on the type of case and whether
29 there is parental support or there isn't and so on. Also,
30 with extrafamilial abuse it depends again on the type of
31 case. For example, a seductive abuser -- that is, a
32 teacher or someone in the community who seduces
33 children -- there can be recantations in those cases
34 because of guilt or embarrassment that the witness feels
35 about the kinds of allegations that are made, especially
36 if the victims are male. While on the other hand, if
37 it's -- if the abuse is by a stranger or a force was used,
38 recantations may be relatively infrequent.
39 Q Yes, I know, doctor. But can you give us some sort -- as
40 an expert -- indication of how common this is? You say
41 it's not unusual. What proportion of domestic cases
42 recant? What proportion?
43 A What the -- what the studies have shown varies quite a
44 bit, as I said, as a function of the kind of case. For
45 example, in the London, Ontario, project where there was
4 a -- I think about a hundred and -- I'm not sure of the
4 exact number, but it's somewhere between one and two

YVILLE, J. C. (for the Crown) (Jury out)
 (is-exam on voir dire by Mr. Kennedy

1 hundred cases that were studied, these are all cases in
 2 which charges were laid, criminal charges were laid. The
 3 rate of recantation overall was 2 per cent.
 4 Q Uh-hmm.
 5 A That is all kinds of abuse, everything from institutional
 6 abuse to abuse by babysitters, by the neighbours, and so
 7 on. If we just focus on domestic where -- where
 8 stepfather or father is involved, almost all of those
 9 2 per cent of recantations were in that -- those
 10 particular kinds of cases. So, as a proportion, they
 11 jumped to about a third.
 12 In other words, if we take all the kinds of sexual
 13 abuse that are reported, we find that recantations may
 14 occur -- well, in that case 2 per cent of the time.
 15 Although I should note that that is with good court
 16 preparation, which in other jurisdictions the recantation
 17 rate overall is generally higher than that 2 per cent.
 18 But if we just look at cases where it's stepfather
 19 and father or boyfriend, all of those 2 per cent, in fact,
 20 or almost all of them, are in those -- that particular
 21 kind of case. So that -- and those constitute, I think,
 22 if I remember correctly, about 20, 25 per cent of the
 23 total cases. So now what we're looking at is -- is a
 24 quarter to a third of the time there is recantation or
 25 minimization or something taking place just within that
 26 particular context.
 27 Q All right. If the overall is 2 per cent --
 28 A Yes.
 29 Q -- and the familial situation you're speaking about is 25
 30 per cent --
 31 A Yes.
 32 Q -- then we will multiply by 4, right, and we will say that
 33 recantations occur in 8 per cent of domestic situations.
 34 A Yes, but I -- the reason I gave the higher figure is
 35 because of minimalization which is part of the -- it's not
 36 a full recantation but it's a -- it's a part of the whole
 37 pattern that takes place.
 38 Q We're dealing with a full recantation.
 39 A Okay.
 40 Q It occurs in about 8 per cent, so it's -- didn't occur in
 41 92 per cent of the cases?
 42 A In that one particular study. As I said, that's, in fact,
 43 one of the lowest rates so far that's been found
 44 because --
 45 Q Well, let's take a high rate study then.
 46 A Okay. The one that Roland Summit reported out of
 4 California was that he found that recantations occurred in

YUILLE, J. C. (for the Crown) (Jury out)
 cross-exam on voir dire by Mr. Kennedy
 re-exam on voir dire by Ms. Pope

- 1 two-thirds of the cases that he saw.
 2 Q And that, of course, all depends on design of the method,
 3 doesn't it?
 4 A It certainly does. And again, I emphasize, on the kind of
 5 case that we're looking at. In some types of abuse we
 6 would rarely see recantations, like, abduction by
 7 strangers and -- and so on. While in the domestic context
 8 we do see it and we see it regularly depending on the kind
 9 of -- depending on the support by the mother.
 10 Q Did you do any studies on what proportion of these people
 11 later retracted their recantations?
 12 A No, that's not been systematically studied at this point.
 13 There's so many factors involved in this that -- the
 14 complexities are so great that the -- the funds and -- and
 15 so on just haven't been available to look at that.
 16 Q So, you would agree with me, doctor, that this matter then
 17 has been imperfectly studied from the point of giving
 18 expert opinion; that is, the matter is so complex that
 19 it's very difficult to give expert opinion about it. You
 20 have indicated the factors are so great, the matter is so
 21 complex.
 22 A I'm not sure that that's a question that I can answer. I
 23 think that's a -- a decision for the Court. Now, I can
 24 offer expert opinion based on what we currently know.
 25 Whether that's thought to be appropriate or not is not my
 26 decision.
 27 MR. KENNEDY: Thank you, doctor.
 28 THE COURT: Do you have any re-examination?
 29 MS. POPE: Your Honour, I just have two points on terminology
 30 that was used that I am -- I'd just like a little
 31 clarification on.
 32
 33 RE-EXAMINATION ON VOIR DIRE BY MS. POPE:
 34 Q Dr. Yuille, in cross-examination by my friend you referred
 35 to a type of abuser being a seductive abuser.
 36 A Yes.
 37 Q What is a seductive abuser?
 38 A This is a term used to refer to a -- a person who's
 39 sexually oriented to children -- that is, prefers children
 40 as sexual partners -- and uses a process of seduction,
 41 bonding, being nice to the child, providing gifts, et
 42 cetera, to engage the child in the kind of sexual activity
 43 he's interested in. I say "he" 'cause it -- there are
 44 more men known that do this than women. And the seductive
 45 process is very effective at keeping the child quiet and
 4 making it unlikely that they will ever disclose, or if
 4 they do disclose that they will only disclose a little bit

YUILLE, J. C. (for the Crown) (Jury out)
 exam on voir dire by Ms. Pope
 ruling by the Court

- 1 rather than all -- everything that's happened to them.
 2 Q So, we're dealing with a seduction, if we could call it
 3 that, of a child over a period of time. They're not like
 4 a stranger situation?
 5 A That's right. These are always children that are known in
 6 some way or another to the abuser.
 7 Q All right. The other thing I would just like to clarify
 8 on, Dr. Yuille, is you referred to a study done by Roland
 9 Summit, and you indicated in that study there was
 10 recantation in approximately two-thirds of the cases that
 11 he saw?
 12 A Yes.
 13 Q We didn't get an indication, doctor -- at least I
 14 didn't -- of what type of sexual abuse cases those were as
 15 far as the type of abuse.
 16 A He -- he was reporting this from a clinical practice. In
 17 fact, he was suggesting that it -- he'd seen it so
 18 commonly that he thought it ought to be considered a
 19 regular feature for cases of intrafamilial abuse 'cause
 20 those were the cases that he was looking at; that is,
 21 where the abuse occurred within the family, and most of
 22 those cases were involving a boyfriend, husband, or a -- a
 23 boyfriend or husband of the mother.
 24 MS. POPE: My Lord, that's all the questions I have. Thank
 25 you, Dr. Yuille.
 26 THE COURT: Thank you. You may step down, doctor.
 27 A Thank you, My Lord.

28
 29 (WITNESS STOOD DOWN)
 30 (SUBMISSIONS BY COUNSEL)

31
 32 THE COURT: As I have already indicated to counsel, I am bound
 33 by the reasoning of Mr. Justice Anderson in R. v. Cook,
 34 Vancouver Registry CA010575, unreported. In the result,
 35 the evidence of Dr. Yuille will be admitted.

36 * * *

37
 38
 39 (EXCERPT CONCLUDED)

40 I hereby certify the foregoing to be
 41 a true and accurate transcript of
 42 these proceedings transcribed to the
 43 best of my skill and ability.

44
 45
 46
 Andrew Kemp
 Official Reporter



**APPENDIX X:
CHAPTER 5: EXAMPLE OF VOIR DIRE
RULING FOR ADMISSION OF AN EXPERT WITNESS**

Canada

PROVINCE OF BRITISH COLUMBIA

In the County Court of PRINCE RUPERT

**(BEFORE The Honourable Judge Errico and
a Jury)**

No. 5889-C

Smithers, B.C.
2nd December, 1987

HER MAJESTY THE QUEEN

against

LAWRENCE EARNEST WILSON

ATTORNEY GENERAL'S
LIBRARY

JUL 11 1988

VICTORIA, B.C.

PROCEEDINGS AT

RULING ON VOIR DIRE

APPEARANCES:

R. CLIMIE, Esq.

Appearing on behalf
of the Crown;

R. TOEWS, Esq.

Appearing on behalf
of the Accused.

* * * * *

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THE COURT: Finally, I shall deal with the admissibility of the evidence of the clinical psychologist, Mary Ann Carter.

This witness is tendered by the crown as an expert in the field of child sexual abuse and to give her opinion that at the time of her examination of her, that is in August of 1986, the child had been sexually abused by one or more persons.

This witness has extensive education and experience in the fields of clinical psychology and in particular in the field of child sexual abuse. It would appear from her evidence, which was not really challenged in this regard, that she is an expert in the field and acknowledged as such by other professionals in this regard.

In August, 1986, she was called upon to assess the complainant. She had two lengthy interviews of three hours each with the complainant. She interviewed the child and assessed her behavioural responses. She noted a significant number of physiological responses and other behavioural responses. The witness also had before her, at the time she testified today, the medical reports of the physicians who physically examined the child. At the time of her interviews she had also read the child's complaint to the police and the report of the social worker, which I gather also repeated the complaint. She also interviewed the child, of course, with respect to the question of the assault but did so, I find, with a view to conducting the psychological assessment. I think that this witness did take into account what the child said as well as the child's

1 behavioural responses and the results of the tests that the child
2 performed, as well as the other material that she had. However,
3 this witness testified that she would be just as confident in
4 her opinion that the child had been sexually abused by one or
5 more persons if she did not have access to the statements that
6 this child had made to others.

7 Her definition of child sexual abuse is very broad
8 and would include a number of activities far less serious than
9 the allegations that are the basis for this indictment.

10 The crown does not seek to have the witness testify
11 as to the truth of the child's story. Such evidence would be
12 clearly inadmissible. The witness is not tendered to testify
13 to prior statements made by the child. Although there may
14 be limited circumstances where that would be admissible, that
15 is not the situation in this trial.

16 I think it is clear that this witness is an expert
17 in the field of clinical psychology and in the field of child
18 sexual abuse. I rule that she is entitled to give the
19 opinion sought to be given by the crown. I think her opinion
20 is an opinion as to a condition of the child analogous to a physi-
21 cal condition and on that basis the opinion is an assessment
22 of the child and is not an assessment of the child's accusations.

23 The broadness of the witness' definition of child
24 sexual abuse I think goes to weight. The discretion of a trial
25 judge to exclude evidence otherwise admissible is very limited.
26 It is only when the evidence is gravely prejudicial to the accused,
27 admissibility of which is tenuous and its probative force is

1 trifling, should the judge exercise that discretion to exclude
2 evidence to prevent an unfairness to the accused. This is not
3 the case here.

4 I rule, then, that this witness has been qualified
5 as tendered by the crown and that she can give evidence of her
6 opinion and the basis therefor. Of course, it is clearly under-
7 stood she will not give evidence of those matters on which the
8 crown has expressly acknowledged she should not give opinion.

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26 Errico, C.C.J.
27 2nd December, 1987

**APPENDIX Y:
CHAPTER 6: HEARSAY/OUT-OF-COURT STATEMENTS
(EVIDENTIARY ISSUE NOT IN BILL C-15)**

Case _____ Date _____
 Preliminary _____ Trial _____
 Court _____ Jury _____
 Judge _____
 Crown _____ Defence _____
 Child Complainant/Witness _____ Age _____

1. Did Crown counsel seek to introduce out-of-court statements of a child?

Yes No

If yes, specify:

Parent _____ Type _____

Psychologist _____ Type _____

Psychiatrist _____ Type _____

Medical doctor _____ Type _____

Social worker _____ Type _____

Police _____ Type _____

Teacher _____ Type _____

Other _____ Type _____

2. Did Defence counsel object to the introduction of such evidence?

Yes No

If yes, specify _____

Crown arguments _____

3. Was a voir dire conducted?

Yes No

If no, reasons _____

4. Was the jury present?

Yes No

5. Judge's ruling:

Were out-of-court statements allowed?

Yes

No

Reasons _____

6. Did the Court make any comments concerning the interpretation or application of the exception to the hearsay rule?

Yes

No

If yes, specify _____

7. Were there any constitutional or Charter challenges made surrounding any aspect of this application?

Yes

No

If yes, specify _____

8. Judicially considered cases:

9. Statutes considered:

10. Authorities considered:

11. Rules considered:

12. Other:

13. Other comments, observations, unique considerations:

**APPENDIX Z:
CHAPTER 6: HEARSAY STATEMENTS OF CHILD
COMPLAINANTS - CASES**

ALLOWED	24
NOT ALLOWED	8
TOTAL	32

CASE*	AGE OF CHILD	MADE TO	TIME OF STATEMENT (after alleged offence)	TYPE	PURPOSE	ALLOWED	INTRO-DUCED BY	JUDICIAL COMMENTS
R. v. A.(S.) (Ont.C.A.) (1992)	3	<ul style="list-style-type: none"> Grandmother 	<ul style="list-style-type: none"> 2 weeks 	<ul style="list-style-type: none"> Disclosure of sexual assault 	<ul style="list-style-type: none"> Child incompetent to testify 	Yes	Crown	<ul style="list-style-type: none"> Khan (S.C.C.) applied
R. v. A.(S.J.) (Ont.S.C.) (1991)	3	<ul style="list-style-type: none"> Grandmother 	<ul style="list-style-type: none"> Shortly after assault 	<ul style="list-style-type: none"> Disclosure of sexual abuse 	<ul style="list-style-type: none"> Corroboration Complainant unable to testify 	Yes	Crown	<ul style="list-style-type: none"> Court held that the statements were not elicited through leading questions Complainant had no motive to fabricate Statement corroborated by medical evidence
R. v. Aguilar (Ont.C.A.) (1992)	8	<ul style="list-style-type: none"> Mother 	<ul style="list-style-type: none"> Shortly after 	<ul style="list-style-type: none"> Disclosure of sexual assault 	<ul style="list-style-type: none"> Child did not remember incident 	No	Crown	<ul style="list-style-type: none"> Statement not necessary under Khan (S.C.C.) Not a spontaneous declaration

* See Index of Cases for citations.

CASE*	AGE OF CHILD	MADE TO	TIME OF STATEMENT (after alleged offence)	TYPE	PURPOSE	ALLOWED	INTRO-DUCED BY	JUDICIAL COMMENTS
R. v. Bahinski (Ont. D.C.) (1989)		<ul style="list-style-type: none"> Mother 		<ul style="list-style-type: none"> Disclosure of sexual assault 	<ul style="list-style-type: none"> Corroboration 	Yes	Crown	<ul style="list-style-type: none"> Khan (Ont. C.A.) test applied Court allowed child's statements under the <i>res gestae</i> exception to the hearsay rule
R. v. Beliveau (B.C.C.A.) (1986)	5	<ul style="list-style-type: none"> Mother 		<ul style="list-style-type: none"> Allegations of the sexual abuse 	<ul style="list-style-type: none"> Corroboration To show the response of the accused when confronted with the allegation 	Yes	Crown	
R. v. Collins (Ont. C.A.) (1991)		<ul style="list-style-type: none"> Mother 	<ul style="list-style-type: none"> Shortly after 	<ul style="list-style-type: none"> Disclosure of sexual assault 	<ul style="list-style-type: none"> Corroboration 	Yes	Crown	<ul style="list-style-type: none"> Limited use to rebut cross-examination of child witness - not admissible as hearsay
R. v. Crowell (N.S.C.A.) (1989)		<ul style="list-style-type: none"> Witness 	<ul style="list-style-type: none"> Shortly after 	<ul style="list-style-type: none"> Disclosure of sexual abuse 	<ul style="list-style-type: none"> Corroboration 	No	Crown	<ul style="list-style-type: none"> Court held that the statements were self-serving Court held that the hearsay was a previous consistent statement Rule of recent complaint had been abrogated

* See Index of Cases for citations.

CASE*	AGE OF CHILD	MADE TO	TIME OF STATEMENT (after alleged offence)	TYPE	PURPOSE	ALLOWED	INTRO-DUCED BY	JUDICIAL COMMENTS
R. v. Crowell (N.S.C.A.) (1989)		<ul style="list-style-type: none"> Expert 		<ul style="list-style-type: none"> Disclosure of sexual abuse 	<ul style="list-style-type: none"> Corroboration 	Yes	Crown	<ul style="list-style-type: none"> Court held that the hearsay statement made to an expert was admissible because it formed a basis for the expert opinion Authority: R. v. Abbey
R. v. D.(G.N.) (Ont.P.C.) (1991)		<ul style="list-style-type: none"> Persons outside of court 		<ul style="list-style-type: none"> Disclosure of sexual abuse 	<ul style="list-style-type: none"> Corroboration Complainant not competent to testify 	Yes	Crown	<ul style="list-style-type: none"> Court prepared to accept outline of the evidence with the actual witness to the child's statement to be cross-examined by defence counsel If outline of evidence then met the Khan test of "necessity" and "reliability" the evidence would be admitted
R. v. D.(G.N.) (Ont.C.A.) (1993)	3	<ul style="list-style-type: none"> Child care workers Mother 	<ul style="list-style-type: none"> Next day 6 months 	<ul style="list-style-type: none"> Disclosure of sexual assault 	<ul style="list-style-type: none"> Child not competent to testify 	Yes	Crown	<ul style="list-style-type: none"> Khan (S.C.C.) applied
R. v. F.(G.) (Ont.G.D.) (1991)	8	<ul style="list-style-type: none"> Mother Social worker Expert in sexual abuse 	<ul style="list-style-type: none"> Shortly after Some weeks Some months 	<ul style="list-style-type: none"> Disclosure of sexual assault 	<ul style="list-style-type: none"> Child witness denied sexual abuse 	Yes	Crown	<ul style="list-style-type: none"> Child was traumatized in witness box and did not "give" evidence properly understood - met Khan reliability and necessity

* See Index of Cases for citations.

CASE*	AGE OF CHILD	MADE TO	TIME OF STATEMENT (after alleged offence)	TYPE	PURPOSE	ALLOWED	INTRO-DUCED BY	JUDICIAL COMMENTS
R. v. F.(H.) (Alta.C.A.) (1990)		<ul style="list-style-type: none"> • Brother • Relatives • Physician 		<ul style="list-style-type: none"> • Disclosure of sexual abuse 	<ul style="list-style-type: none"> • Corroboration 	Yes	Crown	<ul style="list-style-type: none"> • Court ruled that the statements were admissible to rebut the allegation of recent fabrication
R. v. George (B.C.C.A.) (1985)		<ul style="list-style-type: none"> • Grandmother • Parents • Doctor 		<ul style="list-style-type: none"> • Disclosure of sexual abuse 	<ul style="list-style-type: none"> • Corroboration 	No	Crown	<ul style="list-style-type: none"> • Court held that hearsay statements were inadmissible but some of the evidence was admissible as part of the narrative
R. v. H.(E.L.) (N.S.C.A.) (1990)	11	<ul style="list-style-type: none"> • School Counsellor 	<ul style="list-style-type: none"> • Several years after 	<ul style="list-style-type: none"> • Disclosure of sexual abuse 	<ul style="list-style-type: none"> • Corroboration 	No	Crown	<ul style="list-style-type: none"> • Court held that school counsellor is competent to testify regarding the complainant's emotional state but not as to being told about sexual assaults committed by step-father

* See Index of Cases for citations.

CASE*	AGE OF CHILD	MADE TO	TIME OF STATEMENT (after alleged offence)	TYPE	PURPOSE	ALLOWED	INTRO-DUCED BY	JUDICIAL COMMENTS
R. v. Jones (Ont.C.A.) (1988)	8	<ul style="list-style-type: none"> Mother 	<ul style="list-style-type: none"> 4 days 	<ul style="list-style-type: none"> Disclosure of sexual abuse 	<ul style="list-style-type: none"> Corroboration 	No	Crown	<ul style="list-style-type: none"> Khan (Ont.C.A.) test applied Court held that the trial judge erred in admitting the child's hearsay statements Court held that the statement was not admissible as part of the <i>res gestae</i> exception to the hearsay rule (the complaint having been made 4 days after the event) Court held that there was no other common law exception to the rule against leading prior consistent statements which was applicable in this case
R. v. Khan (Ont.C.A.) (1988)	3½	<ul style="list-style-type: none"> Mother 	<ul style="list-style-type: none"> 15 minutes 	<ul style="list-style-type: none"> Spontaneous declaration of alleged sexual abuse 	<ul style="list-style-type: none"> Corroboration Complainant did not testify 	Yes	Crown	<ul style="list-style-type: none"> Court admitted the statements under the "spontaneous declaration" exception to the hearsay rule

* See Index of Cases for citations.

CASE*	AGE OF CHILD	MADE TO	TIME OF STATEMENT (after alleged offence)	TYPE	PURPOSE	ALLOWED	INTRODUCED BY	JUDICIAL COMMENTS
R. v. Khan (S.C.C.) (1990)	3½	<ul style="list-style-type: none"> Mother 	<ul style="list-style-type: none"> 15 minutes 	<ul style="list-style-type: none"> Spontaneous declaration of alleged sexual abuse 	<ul style="list-style-type: none"> Corroboration Complainant did not testify 	Yes	Crown	<ul style="list-style-type: none"> Affirmed Ontario Court of Appeal decision to admit the hearsay statement Not exception to hearsay rule of "spontaneous declaration" Admissible if "necessity" and "reliability" test met
R. v. Kozy (Ont.C.A.) (1990)		<ul style="list-style-type: none"> Police 	<ul style="list-style-type: none"> Sufficiently soon 	<ul style="list-style-type: none"> Spontaneous utterance 	<ul style="list-style-type: none"> Corroboration 	Yes	Crown	<ul style="list-style-type: none"> Khan (Ont.C.A.) test applied Trial judge did not err in admitting under the <i>res gestae</i> exception to the hearsay rule statement to police that the accused forced her into sexual act Trial judge had properly instructed the jury as to the use to be made of the statement
R. v. L.(J.) (Ont.C.A.) (1990)	<ul style="list-style-type: none"> 8 9 	<ul style="list-style-type: none"> Mother Brother 		<ul style="list-style-type: none"> Prior consistent out-of-court statements disclosing the sexual abuse 	<ul style="list-style-type: none"> Corroboration 	No	Crown	<ul style="list-style-type: none"> Court distinguished its earlier decision in R. v. Owens by stating that Owens was a case where it was admitted to rebut the defence allegation of "recent fabrication"

* See Index of Cases for citations.

CASE*	AGE OF CHILD	MADE TO	TIME OF STATEMENT (after alleged offence)	TYPE	PURPOSE	ALLOWED	INTRODUCED BY	JUDICIAL COMMENTS
R. v. Leonard (Ont.C.A.) (1986)				<ul style="list-style-type: none"> Complainant's prior statement about abuse 	<ul style="list-style-type: none"> Reply evidence to rebut defence allegations of recent fabrication 	Yes	Crown	
R. v. M.(G.W.) (Ont.C.A.) (1990)				<ul style="list-style-type: none"> Complainant's prior statement about abuse 	<ul style="list-style-type: none"> Reply evidence to rebut defence allegations of recent fabrication 	Yes	Crown	
R. v. Malette (Ont.D.C.) (1988)	3	<ul style="list-style-type: none"> Mother 	<ul style="list-style-type: none"> 9 hours 	<ul style="list-style-type: none"> Spontaneous declaration Disclosure of alleged act 	<ul style="list-style-type: none"> Corroboration 	Yes	Crown	<ul style="list-style-type: none"> Khan (Ont.C.A.) test applied Court admitted statement as a "spontaneous declaration" Weight to be given to the evidence for trier of fact to decide
R. v. McW.(C.) (Ont.D.C.) (1990)		<ul style="list-style-type: none"> Witness 	<ul style="list-style-type: none"> Day after 	<ul style="list-style-type: none"> Disclosure of sexual abuse 	<ul style="list-style-type: none"> Corroboration 	No	Crown	<ul style="list-style-type: none"> Court held that the statements were previous consistent statements and violate the rule against self-serving statements Court held that the doctrine of recent complaint had enshrined an exception but it had been abrogated

* See Index of Cases for citations.

CASE*	AGE OF CHILD	MADE TO	TIME OF STATEMENT (after alleged offence)	TYPE	PURPOSE	ALLOWED	INTRODUCED BY	JUDICIAL COMMENTS
R. v. Meacham (Sask.Q.B.) (1989)	5	<ul style="list-style-type: none"> Mother 	<ul style="list-style-type: none"> Immediately after 	<ul style="list-style-type: none"> Disclosure of sexual abuse 	<ul style="list-style-type: none"> Corroboration 	Yes	Crown	<ul style="list-style-type: none"> Khan (Ont.C.A.) test applied Court admitted statement as <i>res gestae</i> exception to hearsay rule Child had no motive to fabricate Child was too young to have been influenced
R. v. Owens (Ont.C.A.) (1986)		<ul style="list-style-type: none"> Parents 	<ul style="list-style-type: none"> Several hours 	<ul style="list-style-type: none"> Disclosure of sexual abuse Spontaneous declaration 	<ul style="list-style-type: none"> Corroboration To bolster the credibility of the complainants To rebut defence allegations of recent fabrication 	Yes	Crown	<ul style="list-style-type: none"> Prior consistent statements are admissible to rebut an allegation of recent fabrication but not admissible as "evidence of the facts stated"
R. v. P.(J.) (S.C.C.) (1993)	2	<ul style="list-style-type: none"> Mother 	<ul style="list-style-type: none"> Same day 	<ul style="list-style-type: none"> Disclosure of sexual assault 	<ul style="list-style-type: none"> Child not called as witness 	Yes	Crown	<ul style="list-style-type: none"> Trial judge did not inquire into child's capacity to testify, but if that was an error, the curative provision in the Criminal Code applies s 686(1)(b)(iii)
R. v. Pangilinan (B.C.C.A.) (1987)				<ul style="list-style-type: none"> Disclosure of sexual abuse 	<ul style="list-style-type: none"> Corroboration 	Yes	Crown	<ul style="list-style-type: none"> Court held that prior consistent statements are admissible to rebut an allegation of recent fabrication

* See Index of Cases for citations.

CASE*	AGE OF CHILD	MADE TO	TIME OF STATEMENT (after alleged offence)	TYPE	PURPOSE	ALLOWED	INTRO-DUCED BY	JUDICIAL COMMENTS
R. v. RUOCCO (Ont.C.A.) (1983)		<ul style="list-style-type: none"> Police 		<ul style="list-style-type: none"> Disclosure of sexual abuse 	<ul style="list-style-type: none"> Corroboration To explain conduct of police investigation 	Yes	Crown	
R. v. S.(K.O.) (B.C.S.C.) (1991)	3	<ul style="list-style-type: none"> Grandparents 	<ul style="list-style-type: none"> Night after offence 	<ul style="list-style-type: none"> Disclosure of sexual abuse 	<ul style="list-style-type: none"> Corroboration Complainant not competent to testify 	Yes	Crown	<ul style="list-style-type: none"> Khan (S.C.C.) test applied Court held that this was a situation of "necessity" for receiving the hearsay evidence Court requested expert evidence to assist in making "reliability" determination Court held that there was sufficient evidence of "reliability" of the statements to admit them Court held that the "ultimate reliability" of the statements must be weighed in light of the evidence at trial
R. v. S.(L.) (Sask.Q.B.) (1991)				<ul style="list-style-type: none"> Videotape statement of disclosure of sexual abuse 	<ul style="list-style-type: none"> Corroboration Complainant did not testify 	Yes	Crown	

* See Index of Cases for citations.

CASE*	AGE OF CHILD	MADE TO	TIME OF STATEMENT (after alleged offence)	TYPE	PURPOSE	ALLOWED	INTRO-DUCED BY	JUDICIAL COMMENTS
R. v. Scott (Ont. D.C.) (1990)	3	<ul style="list-style-type: none"> • Mother 	<ul style="list-style-type: none"> • 1½ days 	<ul style="list-style-type: none"> • Disclosure of sexual abuse 	<ul style="list-style-type: none"> • Corroboration 	Yes	Crown	<ul style="list-style-type: none"> • Court held that the trial judge did not err in admitting the statements ("excited utterances" as proof of the contents of the statements)
R. v. Turner (Ont. P.C.) (1991)	4	<ul style="list-style-type: none"> • Mother • Social Workers 	<ul style="list-style-type: none"> • 2 months 	<ul style="list-style-type: none"> • Disclosure of sexual assault 	<ul style="list-style-type: none"> • Corroboration could not testify because of emotional deterioration 	Yes (admitted videotapes of interview with Child Protection workers)	Crown	<ul style="list-style-type: none"> • Khan (S.C.C.) test applied • Court held that the court experience (if he testified) would cause him emotional harm • Court satisfied that this was "not an inhibition or reluctance...but a genuine emotional inability to respond to further questions about this occurrence"
R. v. W. (Ont. P.C.) (1990)	3½	<ul style="list-style-type: none"> • Mother • Step-sister • Social Worker 		<ul style="list-style-type: none"> • Allegations of sexual abuse by father 	<ul style="list-style-type: none"> • Corroboration • Statements to be admitted as hearsay so complainant would not have to testify 	No	Crown	<ul style="list-style-type: none"> • Khan (S.C.C.) test applied • Judge ruled that the "necessity" for receiving the statements was not satisfied and thus the Court did not have to consider the "reliability" criterion

* See Index of Cases for citations.

**APPENDIX AA:
CHAPTER 7: s. 486(3)(4) - ORDER RESTRICTING
PUBLICATION**

Case _____ Date _____
Preliminary _____ Trial _____
Court _____ Jury _____
Judge _____
Crown _____ Defence _____
Child Complainant/Witness _____ Age _____

1. **Did the Judge inform the complainant/witness of the right to make an application for an order to ban publication?**

Yes No

2. **Did Crown counsel request such an order?**

Yes No

If yes, specify _____

3. **Was a voir dire conducted?**

Yes No

If no, reasons _____

4. **Was the jury present?**

Yes No

5. Did Defence counsel make any objections to the application?

Yes

No

If yes, specify _____

Crown arguments _____

6. Judge's ruling:

Was there a ban on publication?

Yes

No

Reasons _____

7. Did the Court make any comments concerning this provision or application?

Yes

No

If yes, specify _____

8. Were there any constitutional or Charter challenges made surrounding any aspect of this provision?

Yes

No

If yes, specify _____

9. Judicially considered cases:

10. Statutes considered:

11. Authorities considered:

12. Rules considered:

13. Other:

14. Other comments, observations, unique considerations:

**APPENDIX BB:
CHAPTER 8: s. 486(1) - EXCLUSION OF PUBLIC**

Case _____ Date _____
Preliminary _____ Trial _____
Court _____ Jury _____
Judge _____
Crown _____ Defence _____
Child Complainant/Witness _____ Age _____

1. **Did the Crown make an application to exclude the public from the courtroom during the testimony of the child?**

Yes No

Reasons _____

2. **Was a voir dire conducted?**

Yes No

If no, reasons _____

3. **Was the jury present?**

Yes No

4. What evidence did the Crown call to support its application?

- | | |
|---|---|
| <input type="checkbox"/> Expert (psychological) | <input type="checkbox"/> Expert (medical) |
| <input type="checkbox"/> Social worker | <input type="checkbox"/> Police |
| <input type="checkbox"/> Parent | <input type="checkbox"/> Teacher |

Other _____

5. Did the child have to testify?

- | | |
|------------------------------|-----------------------------|
| <input type="checkbox"/> Yes | <input type="checkbox"/> No |
|------------------------------|-----------------------------|

Reasons _____

6. Did Defence counsel oppose the application?

- | | |
|------------------------------|-----------------------------|
| <input type="checkbox"/> Yes | <input type="checkbox"/> No |
|------------------------------|-----------------------------|

If yes, reasons _____

Charter/constitutional arguments _____

Crown arguments _____

7. Judge's ruling:

Was the public excluded?

Yes

No

Reasons _____

Other arrangements _____

8. Did the Court make any comments concerning the ability of the child to testify in an open courtroom?

Yes

No

If yes, specify _____

9. Did the judge make any comments concerning the interpretation or application of this section?

Yes

No

If yes, specify _____

10. Were there any constitutional or Charter challenges made surrounding any aspect of this provision?

Yes

No

If yes, specify _____

11. Judicially considered cases:

12. Statutes considered:

13. Authorities considered:

14. Rules considered:

15. Other:

16. Other comments, observations, unique considerations:

**APPENDIX CC:
CHAPTER 8: EXCLUSION OF PUBLIC
(CLOSED COURTROOM) CASES**

	<u>Allowed</u>	<u>Not Allowed</u>
CROWN DEFENCE	11	4 1
TOTAL	11	5

CASE*	AGE OF CHILD	EVIDENCE FROM	TYPE OF EVIDENCE	ALLOWED	APPLICATION BY	JUDICIAL COMMENTS/ PROCEDURE
R. v. Allan (B.C.C.A.) (1991)		<ul style="list-style-type: none"> Therapist - expert Mother 	<ul style="list-style-type: none"> Fear of testifying in public Emotional state of child 	Yes	Crown	<ul style="list-style-type: none"> 1. 2 Appeal Court upheld trial judge's exercise of discretion to close courtroom to the public Trial Court held that judges should take a more sensitive approach to the section, particularly in cases where expert opinion establishes the need for the exclusion
R. v. Avignon (B.C.P.C.) (1989)	7	<ul style="list-style-type: none"> Crown 	<ul style="list-style-type: none"> Fear of testifying in public Emotional state of child 	Yes	Crown	<ul style="list-style-type: none"> 1. 2
R. v. Ball (B.C.C.C.) (1989)	13	<ul style="list-style-type: none"> Crown 	<ul style="list-style-type: none"> Fear of testifying in public Emotional state of child 	No	Crown	<ul style="list-style-type: none"> 1. 2

* See Index of Cases for citations.

PROCEDURE:

1 - Voir Dire Held

2 - Application Opposed

CASE*	AGE OF CHILD	EVIDENCE FROM	TYPE OF EVIDENCE	ALLOWED	APPLICATION BY	JUDICIAL COMMENTS/ PROCEDURE
R. v. Bernard (B.C.P.C.) (1991)		<ul style="list-style-type: none"> • Crown 	<ul style="list-style-type: none"> • Fear of testifying in public • Emotional state of child 	Yes	Crown	<ul style="list-style-type: none"> • 1
R. v. Bianco (B.C.P.C.) (1990)	<ul style="list-style-type: none"> • 8 • 11 	<ul style="list-style-type: none"> • Crown 	<ul style="list-style-type: none"> • Fear of testifying in public • Emotional state of child 	Yes	Crown	<ul style="list-style-type: none"> • 1. 2
R. v. Brint (Alta.S.C., App.Div.) (1979)	15	<ul style="list-style-type: none"> • Crown 	<ul style="list-style-type: none"> • Fear of testifying in public • Emotional state of child 	Yes	Crown	<ul style="list-style-type: none"> • 1
R. v. Cote (B.C.P.C.) (1988)	7	<ul style="list-style-type: none"> • Crown 	<ul style="list-style-type: none"> • Fear of testifying in public • Emotional state of child 	Yes	Crown	<ul style="list-style-type: none"> • 1. 2 • Court held that the removal of the public from the courtroom depends on number and type of persons present in the courtroom (in this case, there were approximately 30 school children present in the courtroom for educational purposes)
R. v. Dempsey and Hartung (B.C.P.C.) (1989)	<ul style="list-style-type: none"> • 12 (accused) • 12 (accused) 	<ul style="list-style-type: none"> • Defence 	<ul style="list-style-type: none"> • Identity of young accuseds should not be disclosed 	No	Defence	<ul style="list-style-type: none"> • 1. 2 • Defence application to have courtroom closed because the two accused were 12-year-olds • Court held that the press was not present in the courtroom - denied order

* See Index of Cases for citations.

PROCEDURE:

1 - Voir Dire Held

2 - Application Opposed

CASE*	AGE OF CHILD	EVIDENCE FROM	TYPE OF EVIDENCE	ALLOWED	APPLICATION BY	JUDICIAL COMMENTS/PROCEDURE
R. v. Dick(S.) (B.C.S.C.) (1989)	11	<ul style="list-style-type: none"> • Crown 	<ul style="list-style-type: none"> • Fear of testifying in public • Emotional state of child 	Yes	Crown	<ul style="list-style-type: none"> • 1. 2 • Court held that the courtroom should be closed to the public • Court held that there is a need to protect children witnesses because of the sensitive nature of the evidence in sexual abuse cases
R. v. Dick(S.) (B.C.S.C.) (1989)	9	<ul style="list-style-type: none"> • Crown 	<ul style="list-style-type: none"> • Fear of testifying in public • Emotional state of child 	Yes	Crown	<ul style="list-style-type: none"> • 1. 2 • Court held that the courtroom should be closed to the public • Court held that there is a need to protect children witnesses because of the sensitive nature of the evidence in sexual abuse cases
R. v. Field (B.C.P.C.) (1989)		<ul style="list-style-type: none"> • Crown 	<ul style="list-style-type: none"> • Fear of testifying in public • Emotional state of child 	Yes	Crown	<ul style="list-style-type: none"> • 1. 2
R. v. Lamarre (B.C.P.C.) (1989)	12	<ul style="list-style-type: none"> • Crown 	<ul style="list-style-type: none"> • Fear of testifying in public • Emotional state of child 	No	Crown	<ul style="list-style-type: none"> • 1. 2 • Court held that the closing of a courtroom, should only be done as a last resort • Court held that it would reconsider the Crown's application if person(s) known to the complainant appear in the courtroom

* See Index of Cases for citations.

PROCEDURE:

1 - Voir Dire Held

2 - Application Opposed

CASE*	AGE OF CHILD	EVIDENCE FROM	TYPE OF EVIDENCE	ALLOWED	APPLICATION BY	JUDICIAL COMMENTS/PROCEDURE
R. v. Lefebvre (Que.C.A.) (1984)		• Crown	<ul style="list-style-type: none"> • Fear of testifying in public • Emotional state of child 	Yes	Crown	<ul style="list-style-type: none"> • Court held that a trial judge may exclude the public in the interests of the proper administration of justice where the circumstances of the case give rise to stress for the witness which would render the witness incapable of testifying
R. v. Quesnel and Quesnel (Ont.C.A.) (1979)	Four teenage girls	• Crown	<ul style="list-style-type: none"> • Embarrassment • Fear of testifying in public 	Yes (at trial) No (reversed on appeal)	Crown	<ul style="list-style-type: none"> • 1. 2 • Court of Appeal held that there were insufficient reasons for trial judge to make order to hold all or part of the Crown's case "in camera"
R. v. Shubert and Turgeon (B.C.P.C.) (1991)		• Crown	<ul style="list-style-type: none"> • Fear of testifying in public • Emotional state of child 	Yes	Crown	<ul style="list-style-type: none"> • 1. 2
R. v. Sock (B.C.P.C.) (1990)	6	• Crown	• Tender age of the child	No	Crown	<ul style="list-style-type: none"> • 1 • Court held that the public are entitled to be present in court, but cannot exclude persons if they are not present • Court ruled that Crown could renew its application if it became a problem (i.e. strangers in the courtroom)

* See Index of Cases for citations.

PROCEDURE:

1 - Voir Dire Held

2 - Application Opposed

APPENDIX TRANSCRIPT #1: R. v. LEONARD

The Court: You are K., is that right?
A: Yes.
The Court: What's your last name?
A: G.
The Court: How old are you K.?
A: Eight.
The Court: When is your birthday?
A: September 21st.
The Court: And you have got what, three brothers?
A: Yes.
The Court: What are their names?
A: R., R. and M.
The Court: And you go to school?
A: Yes.
The Court: Where do you go?
A: Avenue Road School.
The Court: What grade are you in there?
A: Three.
The Court: Now, you know where we are today?
A: Yes.
The Court: What am I doing here? What is my job?
A: I don't know.
The Court: You don't know what I do here?
A: No.
The Court: Is this a courtroom?
A: Yes.
The Court: Why are we all here?
A: Because of what J. did to me.
The Court: And you were in another courtroom at one time?
A: Yes.
The Court: Do you remember that?
A: Yes.
The Court: And these lawyers asked you, ...these men down here asked you some questions and you gave them some answers, right?
A: Yes.
The Court: Now this lady here is writing everything down. Do you see her?
A: Yes.

The Court: And before people tell us their stories and tell us what happened, before we start asking questions about what happened, what do we do with people who come to this court? Do you know?

A: No.

The Court: Well it's awfully important that I hear people like you and other people who come to court to tell me things, it's awfully important that they do what?

A: Tell the truth.

The Court: Why is that important?

A: Because if you tell a lie you could get other people in trouble.

The Court: What people would get in trouble if you tell a lie?

A: The people that are telling the truth.

The Court: If you tell lies the people that are telling the truth will get into trouble, is that what you mean?

A: Yes.

The Court: Do you ever tell lies?

A: Sometimes.

The Court: Like about what kind of things?

A: Like I say my brothers hit me.

The Court: You say your brother hit you?

A: Yes.

The Court: And that wasn't the truth. Did he get in trouble?

A: Sometimes.

The Court: Any other times that you don't tell the truth?

A: No.

The Court: What if you don't tell the truth and people get into trouble, what else? Anything else?

A: I don't think so.

The Court: Well maybe if I don't hear the truth maybe I'll do something wrong. Could that be possible?

A: Maybe.

The Court: Judges aren't supposed to do things wrong, are they?

A: No.

The Court: They could hurt a lot of people. Do you understand that?

A: Yes.

The Court: You go to Sunday School, don't you?

A: Yes.

The Court: Where do you go there?

A: The Temple Baptist Church.

The Court: How long have you been doing that?

A: The last two years.

The Court: An do you go every Sunday?
A: Every Sunday.
The Court: What do you learn there?
A: David killed Goliath and the giant came and he told lies and how King Saul and all these other people killed Kings. And about creating earth, having the stories about Adam and Eve.
The Court: You learn all about God, do you?
A: Yes.
The Court: So you know what it is to tell the truth?
A: Yes.
The Court: What do you think the truth is?
A: Doing the right thing.
The Court: Doing the right thing?
A: Yes.
The Court: Mr. Wilson, any questions to ask?
Mr. Wilson: No, thank you.
The Court: Mr. Parrott?
Mr. Parrott: If you don't tell the truth, how do you feel about that?
A: Not very happy.
Mr. Parrott: And why is that?
A: Because you get other people in trouble.
Mr. Parrott: Right, but as far as your own self is concerned, and don't worry about other people, ...how do you feel about yourself if you don't tell the truth?
A: Mad.
Mr. Parrott: Mad. When you sometimes say that your brother hit you and he didn't, would you feel mad at yourself for saying that?
A: Yes.
Mr. Parrott: But you would do it anyway?
A: I don't understand.
Mr. Parrott: Well when you say that you are mad at yourself, why would you be mad at yourself?
A: For telling a lie.
Mr. Parrott: Like would you be angry at yourself?
A: Yes.
Mr. Parrott: Because you got caught, or what?
A: Yes.
Mr. Parrott: Those are all my questions your Honour.
The Court: All right K., thank you dear. Would you just step outside the courtroom again please and I'll listen to these gentlemen. (at 228-231)

APPENDIX TRANSCRIPT #2: R. v. K.(M.O.)

- Q: All right. Thank you. How old are you, S.?
- A: Nine. Ten.
- Q: You can have a seat if you like. All right. Now don't worry too much about the mike. It records everything that's being said but it doesn't work as an amplifier, okay. Do you go to school?
- A: Yeah.
- Q: And where do you go to school?
- A: In Abbotsford at Alexander.
- Q: What grade are you in?
- A: Grade four.
- Q: Skip any grades, or --
- A: No.
- Q: -- repeated any grades?
- A: I've repeated grade one.
- Q: Grade one. That's a long time ago, though. Live with your family at home?
- A: No.
- Q: You don't. Where do you live?
- A: I live in a group home.
- Q: All right. And where does your family live, in Abbotsford or that area?
- A: Yeah, not around the house but --
- Q: In that general area?
- A: Yeah.
- Q: Do you go to church, S.?
- A: I used to, yeah.
- Q: Until when? When did you stop going to church?
- A: Um --
- Q: Just roughly, I don't need to know exactly.
- A: A couple of months ago.
- Q: Oh really. That recently. Do you know what it means to take an oath to tell the truth? Just in your own words, you don't have to know exactly what it means, the way I'd explain it, but do you have an idea of what it means to take an oath to tell the truth?
- A: Not to lie?
- Q: Do you have any idea what it means to swear that you won't lie? Do you know what that means? Using the Bible there?

A: That you won't lie to the judge or -- or God.
Q: And do you -- what do you think would happen to you if you swore an oath on that Bible and you did either tell a lie, or not tell the whole truth?
A: I don't know.
Q: Can you think of anything that would happen to you? No?
A: No.
Mr. Weber: I ask that S. be sworn as a witness, Your Honour. He has indicated that he appreciates the nature of an oath and that he must tell the truth and that is, in essence, the requirement of a person giving an oath. I appreciate that he has not been able to tell us specifically what would occur to him should he not tell the truth, but he is aware of the importance of telling the truth, period.
The Court: All right. Mr. Kincaid, any comments?
Mr. Kincaid: Your Honour, although I haven't had the opportunity to ask the young man any questions, it appears that -
-
The Court: You're certainly free to do so if you wish.
Mr. Kincaid: Okay.

EXAMINATION BY MR. KINCAID:

Q: S., before you came into court today, here, did anyone try to explain to you what an oath was?
A: Yes.
Q: Okay, and who was that?
The Court: The fellow over here?
A: Yeah.
Q: This gentleman to my right?
The Court: Indicating Crown counsel.
A: Yeah.
Q: Okay, did you have -- was it difficult to understand?
A: Um, I understood, but -- yeah, I understood.
Q: Okay, what did he tell you about an oath?
A: He told me that --
The Court: Incidentally S., there's no rush here, you take your time. If there's any question you want to think about, just think about it, okay?
A: Yeah.
Q: We're not in any hurry.
A: Um --
The Court: I think we've gone far enough with that, Mr.

Kincaid. He's having difficulty, there's a block there.

Q: Okay --

The Court: We could wait forever.

Q: So I take it you can't quite remember what my friend told you about what an oath was? Okay. I take it you didn't really understand what he was trying to explain?

A: Not really, no.

Q: You didn't really understand it? But you have an idea that when you say you're going to tell the truth, you're supposed to not lie, and that's about as far as it goes?

A: Yeah.

Q: Okay, and have you ever lied to your parents before?

A: Yes.

Q: You have, and what would happen if you lied?

A: Well, we'd get in trouble.

Q: Okay, would your parents do anything to you?

A: Well, we'd either get yelled at or sent to our bedrooms.

Q: Okay, and sometimes if you lied, would they ever find out?

A: Yeah.

Q: They'd always find out if you lied?

A: Not always, but sometimes, yes.

Q: Okay, and sometimes they wouldn't? So nothing would happen to you?

A: Right. When they never found out, nothing really would happen.

Q: Okay, and -- I have no other questions. Your Honour So the submission is that I don't believe the young man does understand the nature of an oath, although he has some education or some instructions about telling the truth.

The Court: Anything further, Mr. Weber?

Mr. Weber: No.

The Court: These proceedings are being conducted under section 16 of the *Canada Evidence Act*. It's a fairly new enactment and requires certain stages of inquiry of the proposed youthful witness. We've concentrated here on the oath, because it seems clear to me that this young man would understand the need to tell the

truth, and therefore would be in a position to make a solemn affirmation, I don't have any difficulty with that. However it's my view, although the law is still undeveloped, that the purpose of that subsection is to indicate the difference between a young person under the age of 14 years of age who understands the moral obligation to tell the truth, and for other reasons, has objections to taking an oath, just as an adult would, and therefore should be affirmed. I don't believe it's a choice in degree between if someone does not understand the oath, he should then be affirmed, if he does not understand the affirmation, then he should not testify, or rather, he should promise to tell the truth, which is the next step. In this case, I'm satisfied, because of his previous religious upbringing, to some extent, and because of his explanation about his obligation, both to me and to God to tell the truth on the stand, that this young man has no moral or other objection to making an affirmation, and he is, in fact, in my view, sufficiently apprised of the requirements of the oath to take it before he testifies. Would you please stand and take the Bible in your hand?

APPENDIX TRANSCRIPT #3: R. v. YOUNG

THE COURT QUESTIONS THE WITNESS:

- Q: What is your full name?
A: C.L.N.
Q: And how old are you?
A: Eleven.
Q: And when is your birthday?
A: June 28th.
Q: So you've just turned eleven. Do you go to school?
A: Yes.
Q: And what grade are you in?
A: Five. Well, I'm going into grade six.
Q: Do you know what it means to tell the truth?
A: Yes.
Q: How would you describe what it means to tell the truth?
A: Not to lie.
Q: Is it always a bad thing to tell a lie?
A: Yes.
Q: And would you say then that it's always a good thing to tell the truth?
A: Yes.
Q: When you tell a lie at home, or elsewhere, and your mom and dad find out, what happens to you?
A: I get yelled at.
Q: You get yelled at. Do you get punished in any other fashion?
A: No.
Q: Do you know what this room is that we're in today?
A: Yes, a courtroom.
Q: Do you know who I am?
A: A Judge.
Q: And do you know what I have to do when I'm sitting her?
A: Judge.
Q: And what does that mean to you?
A: It's hard to explain. Um -- um -- I can't explain it.
Q: Have you seen courtroom scenes on T.V.?
A: Yes.
Q: And what does the Judge do in those courtroom scenes?

A: He decides whether a person should go to jail or not, or something, if he's guilty or not guilty.

Q: And you think that's what I do?

A: Yes.

Q: Is it more important to you to tell the truth in court than it would be to tell the truth in school or at home?

A: Yes.

Q: And why do you say that?

A: Because if I didn't tell the truth in court, then I wouldn't be doing a very good thing at all, like, I'm not saying I would be doing a good thing at home or at school, but it's better to tell the truth here.

Q: Could it affect somebody rather badly if you told a lie in court?

A: Yes.

Q: Do you know what would happen to you if you were to tell a lie in court?

A: Not exactly.

Q: What do you think might happen to you if you were to tell a lie in court? Do you think you could be punished?

A: Probably, yes.

Q: You know why you're here today, do you?

A: Yes.

Q: And you know that you're going to be asked questions --

A: Yes.

Q: -- by this lady and by this gentleman over here?

A: Yes.

Q: And possibly by me in the manner that I'm asking questions now?

A: Yes.

Q: Will you tell the truth whenever you have to give an answer?

A: Yes.

Q: Do you go to church?

A: No.

Q: And you don't go to Sunday School then?

A: No.

Q: Do you know what the Bible is?

A: Yes.

Q: What is the Bible?

A: The Bible is a book that tells about God. It's a

Christian book, and everything.

Q: How is it that you know about the Bible?

A: Well, I used to be a Jehovah's Witness.

Q: And how long ago was that?

A: A couple -- I don't know. It was when I was ten.

Q: When you were ten?

A: Yeah.

Q: Did you go to church then?

A: I went to this one place, it was sort of like a meeting, though, and I watched film strips and everything.

Q: I see. And that's when you learned about the Bible, is it?

A: Yeah.

Q: Do you know what it means to swear on the Bible?

A: Yes.

Q: What does it mean?

A: It means to -- like, it means to tell the truth, like, tell the truth, like, you can't lie on the Bible.

Q: And why is that?

A: Because it belongs to God.

Q: And if I were to give you the Bible, that book in front of you, and ask you to put your hand on it and swear to tell the truth, what would that mean to you?

A: I don't know. It would mean I'd tell the truth.

Q: And how would you feel if you were to tell a lie after swearing on the Bible to tell the truth?

A: Guilty.

Q: Would it worry you?

A: Yeah.

The Court: Mr. Geselbracht, do you have any questions that you'd like me to put to this young lady?

Mr. Geselbracht: No, no questions, Your Honour.

The Court: Miss Porteous?

Ms. Porteous: No, Your Honour.

The Court: All right. In this case I'm not completely satisfied that this young lady has a complete understanding of the nature of the oath. However, I'm satisfied that she has the ability to communicate the evidence, and accordingly I will hear her evidence, but not on oath. [emphasis added]

R. v. Young (cont'd.)

The inquiry of the 9-year-old child witness was as follows:

The Court: L., I am going to ask you some questions, but don't bear on anything about the incident that you're going to testify about, but it's so that I can decide how best I should receive your evidence.

THE COURT QUESTIONS THE WITNESS

Q: What's your full name?
A: L.M.R.
Q: And how old are you?
A: Nine.
Q: When's your birthday?
A: December 13th.
Q: December the 13th? Do you go to school?
A: Yes.
Q: And what grade are you in?
A: I'm going into grade five.
Q: What does telling the truth mean to you?
A: Something that's happened and it's true.
Q: Is it always a bad thing to tell a lie?
A: No.
Q: What do you mean by that?
A: Sometimes it could be for a party, or something, like a surprise party or something.
Q: I see. Now, is it always a good thing to tell the truth?
A: Yes.
Q: When you tell a lie at home and your parents find out about it, what happens?
A: Trouble.
Q: Pardon?
A: Trouble.
Q: Do you know what room it is we're in today?
A: Courtroom number one.
Q: Pardon?
A: Courtroom number one.
Q: And do you know who I am?
A: Judge Conthon [sic].
Q: I'm a Judge, is that right?

A: Yes.

Q: And do you know what I have to do when I'm sitting here?

A: You have to listen to what the people say and try to decide if it's true or not.

Q: Now, is it more important to tell the truth in court than it would be to tell the truth at school, or at home, or in the presence of your friends?

A: I think it's important to tell the truth all the time.

Q: What would happen to you if you failed to tell the truth in court, do you have any idea?

A: No.

Q: Now, Mr. Geselbracht and Miss Porteous will be asking you questions, and I'll be asking you -- and I may be asking you other questions too, and when we do, are you prepared to tell the truth?

A: Yes.

Q: Do you go to church?

A: Yes.

Q: How often do you go to church?

A: About twice a month.

Q: Do you go to regular church services, or do you go to Sunday School?

A: I go to Sunday School.

Q: Do you know what the Bible is?

A: Yes.

Q: What is it?

A: It's a book of what happened to Jesus and how -- some of it tells you how to help others, and to do good.

Q: Do you know what it means to swear on the Bible?

A: Kind of.

Q: And why would we use the Bible rather than some other book, such as the book I have here on my bench?

A: Because it's truth.

Q: And is you're swearing on the Bible, who are you swearing to?

A: Jesus and God.

Q: Now, if I were to give you the Bible and ask you to put your hand on it and swear to tell the truth, what would that mean to you?

A: That during I'm in here I'd have to tell the truth.

Q: And how would you feel if you told a lie after

swearing on the Bible to tell the truth?
A: I'd feel bad.
Q: Would it worry you? Would it trouble you? I suppose if you felt bad it would trouble you. That question hardly needs an answer.
The Court: All right. Mr. Geselbracht, do you have any questions you'd like me to put to this young lady?
Mr. Geselbracht: No, Your Honour.
The Court: Miss Porteous?
Ms. Porteous: No, Your Honour.
The Court: All right. I'm not completely satisfied that this young lady understands the nature of an oath. She does understand what it means to tell the truth, but I'm not completely satisfied she understands what it means -- or understands the nature of an oath, I should say. Also I'm satisfied that of course she has the ability to communicate the evidence. Now, in the proceedings, while you're a witness, will you tell the truth, and the whole truth and nothing but the truth?
A: Yes, I will.
The Court: She won't be sworn, Madam Clerk.