

# Testimonial Aids

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# Canadian Victim's Bill of Rights - Background

Enacted on July 23rd, 2015, the Act creates clear rights for victims of crime, and requires said rights to be considered during each step of the criminal justice system. The *Canadian Victims Bill of Rights* provides 4 principal rights to victims: Information, Protection, Participation and Restitution.

## Identity protection

**Article 12** Every victim has the right to request that their identity be protected if they are a complainant to the offence or a witness in proceedings relating to the offence.

## Testimonial aids

**Article 13** Every victim has the right to request testimonial aids when appearing as a witness in proceedings relating to the offence.

# Protection of Children - Background

The U.N. convention on the Rights of the Child include at Article 16:

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
2. The child has the right to protection of the law against such interference or attacks.

# Criminal Code of Canada - Testimonial Aids

## Purposes:

1. Truth seeking function of the court - *R. v. Levogiannis*, [\[1993\] S.C.J. No. 70](#)
2. Special treatment of vulnerable witnesses - *R. v. L.(D.O.)*, [\[1993\] S.C.J. No. 72](#)
3. No absolute right by the accused to face the victim - *R. v. L.(D.O.)*, [\[1993\] S.C.J. No. 72](#)
4. A fair hearing is not “the most favourable” procedure - *R. v. L.(D.O.)*, [\[1993\] S.C.J. No. 72](#)

# Section 486.1: Support Person

- ▶ **486.1 (1)** In any proceedings against an accused, the judge or justice shall, on application of the prosecutor in respect of a witness who is under the age of 18 years or who has a mental or physical disability, or on application of such a witness, order that a support person of the witness' choice be permitted to be present and to be close to the witness while the witness testifies, unless the judge or justice is of the opinion that the order would interfere with the proper administration of justice.
- ▶ mandatory order upon request of the Prosecutor or the witness in a case of “a witness who is under the age of eighteen years or of a witness who has a mental or physical disability”.

## Section 486.1(2)

(2) In any proceedings against an accused, the judge or justice may, on application of the prosecutor in respect of a witness, or on application of a witness, order that a support person of the witness' choice be permitted to be present and to be close to the witness while the witness testifies if the judge or justice is of the opinion that the order would facilitate the giving of a full and candid account by the witness of the acts complained of or would otherwise be in the interest of the proper administration of justice.

# Discretionary Order considerations

- ▶ (a) the age of the witness;
- ▶ (b) the witness' mental or physical disabilities, if any;
- ▶ (c) the nature of the offence;
- ▶ (d) the nature of any relationship between the witness and the accused;
- ▶ (e) whether the witness needs the order for their security or to protect them from intimidation or retaliation;
- ▶ (f) society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process; and
- ▶ (g) any other factor that the judge or justice considers relevant.

# Amendments show a lower threshold

*R. v. Jimaleh*, [\[2016\] O.J. No. 5133](#)

*R. v. J.H.*, [2017 ONSC 3868](#)

*R. v. K.P.*, [\[2017\] N.J. No. 69](#)

*R. v. K.M.*, [2017 NWTSC 27](#)

*R. v. Turnbull*, [2017 ONCJ 309](#)



# Section 486.1(4) and (6)

(4) The judge or justice shall not permit a witness to be a support person unless the judge or justice is of the opinion that doing so is necessary for the proper administration of justice.

*R. v. D.C.*, [2008 NSCA 105](#) - mother was allowed to be a support person

(6) No adverse inference may be drawn from the fact that an order is, or is not, made under this section.

# Section 486.2: Screens and Closed Circuit Television

**486.2 (1)** Despite section 650, in any proceedings against an accused, the judge or justice shall, on application of the prosecutor in respect of a witness who is under the age of 18 years or who is able to communicate evidence but may have difficulty doing so by reason of a mental or physical disability, or on application of such a witness, order that the witness testify outside the court room or behind a screen or other device that would allow the witness not to see the accused, unless the judge or justice is of the opinion that the order would interfere with the proper administration of justice.

## Section 486.2(2.1)

(2.1) An application referred to in subsection (1) or (2) may be made, during the proceedings, to the presiding judge or justice or, before the proceedings begin, to the judge or justice who will preside at the proceedings or, if that judge or justice has not been determined, to any judge or justice having jurisdiction in the judicial district where the proceedings will take place.

# Discretionary order factors:

- ▶ (a) the age of the witness;
- ▶ (b) the witness' mental or physical disabilities, if any;
- ▶ (c) the nature of the offence;
- ▶ (d) the nature of any relationship between the witness and the accused;
- ▶ (e) whether the witness needs the order for their security or to protect them from intimidation or retaliation;
- ▶ (f) whether the order is needed to protect the identity of a peace officer who has acted, is acting or will be acting in an undercover capacity, or of a person who has acted, is acting or will be acting covertly under the direction of a peace officer;
- ▶ (f.1) whether the order is needed to protect the witness's identity if they have had, have or will have responsibilities relating to national security or intelligence;
- ▶ (g) society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process; and
- ▶ (h) any other factor that the judge or justice considers relevant

# Section 486.2 - Hearing

Expert evidence is not required before a testimonial aid can be ordered: *R. v. Turnbull*, [2017 ONCJ 309](#), and evidence is not always required: *R. v. Hoyles* [2018 NLCA 46](#) and *R. v. N.M.* [2019 NSCA 4](#)

*R. v. Clark*, [\[2007\] O.J. No. 1553](#) - police officer

*R. v. Buckingham*, [\[2009\] O.J. No. 2544](#) - police officer; friend; social worker

*R. v. K.P.*, [\[2017\] N.J. No. 69](#) - parent

*R. v. J.H.*, [2017 ONSC 3868](#) - doctor; affidavit from complainant

*R. v. Hoyles*, [2018 NLCA 46](#) - affidavit from VWAP

# CCTV or screen?

BC and Yukon - the complainant / witness chooses the testimonial aid. See: *R. v. S.B.T.*, [2008 BCSC 711](#)

Ontario, Manitoba and Saskatchewan - the trial judge chooses the testimonial aid. See: *R. v. G.W.*, [2014 ONSC 507](#); *R. v. C.D.*, [2013 ONSC 494](#); *R. v. Wight*, [2011 ONCJ 414](#); *C.J. R. v. C.T.L.*, [2009 MBQB 266](#); *R. v. Brown*, [2010 SKQB 420](#); *R. v. N.S.D.*, [2017 SKPC 71](#)

# Support Dogs

Judicial treatment supporting the use of support dogs as a testimonial aid:

*R. v. J.L.K.*, [\[2015\] B.C.J. No. 1055](#)

*R. v. Roper*, [2015 BCSC 2107](#)

*R. v. C.W.*, [2016 ONCJ 649](#)

*R. v. McKnight*, [2017 ABPC 250](#)

# S. 486(1): Exclusion of the Public

**486 (1)** Any proceedings against an accused shall be held in open court, but the presiding judge or justice may, on application of the prosecutor or a witness or on his or her own motion, order the exclusion of all or any members of the public from the court room for all or part of the proceedings, or order that the witness testify behind a screen or other device that would allow the witness not to be seen by members of the public, if the judge or justice is of the opinion that such an order is in the interest of public morals, the maintenance of order or the proper administration of justice or is necessary to prevent injury to international relations or national defence or national security.



# Factors on Application

- ▶ (a) society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process;
- ▶ (b) the safeguarding of the interests of witnesses under the age of 18 years in all proceedings;
- ▶ (c) the ability of the witness to give a full and candid account of the acts complained of if the order were not made;
- ▶ (d) whether the witness needs the order for their security or to protect them from intimidation or retaliation;
- ▶ (e) the protection of justice system participants who are involved in the proceedings;
- ▶ (f) whether effective alternatives to the making of the proposed order are available in the circumstances;
- ▶ (g) the salutary and deleterious effects of the proposed order; and
- ▶ (h) any other factor that the judge or justice considers relevant.

# Section 715.1 - Video Recorded Evidence

**715.1 (1)** In any proceeding against an accused in which a victim or other witness was under the age of eighteen years at the time the offence is alleged to have been committed, a video recording made within a reasonable time after the alleged offence, in which the victim or witness describes the acts complained of, is admissible in evidence if the victim or witness, while testifying, adopts the contents of the video recording, unless the presiding judge or justice is of the opinion that admission of the video recording in evidence would interfere with the proper administration of justice.

# Section 715.1 - Purpose

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.

*R. v. L.(D.O.)*, [\[1993\] S.C.J. No. 72](#)

# Section 715.1 - Requirements

1. a videotape made within a reasonable time after the alleged offence, in which the complainant describes the acts complained
2. the complainant, while testifying, adopts the contents of the videotape

*R. v. L. (D. O.)*, [\[1993\] S. C. J. No. 72](#)

# Reasonable time after the alleged offences

2 years - *R. v. P.S.*, [\[2000\] O.J. No. 1374](#) (C.A.) at paras. 71-75; *R. v. T.A.D.* [2012 ONCA 888](#) at para. 3.

3 years - *R. v. S.G.* [\[2007\] O.J. No. 2203](#) (S.C.)

See also: *R. v. Scott*, [\[1993\] O.J. No. 3040](#) (C.A.); *R. v. D.T.*, [2017 ONSC 1953](#) at paras. 6-7; *R. v. Lucas*, [2001 BCCA 361](#) at para. 15; *R. v. Archer*, [\[2005\] O.J. No. 4348](#) (C.A.) at para. 74.

# Meaning of “adoption” in this context

A witness “adopted” her statement within the meaning of s. 715.1 when she recalled giving the statement and testified that she was then attempting to be honest and truthful.

*See: R. v. L.O.*, [2015 ONCA 394](#)

# Effect of a statement being adopted - *R. v. L.O.*, 2015 ONCA 394

- ▶ When a child's video-recorded statement is admitted under s. 715.1, the statement becomes part of the child's in-court testimony "as if the child were giving the statements on the videotape in open court": *R. v. F. (C.C.)*, [1997] 3 S.C.R. 1183, at para. 45. It falls to the jury to assess the entirety of the child's evidence, which includes the video-recorded statement and her in-court testimony. In making that assessment, the jury will have regard to a variety of factors, including internal consistencies and inconsistencies in the child's testimony.

# Discretion to exclude

- ▶ If the admission of the video recording “would interfere with the proper administration of justice”, the Court can exclude the statement
- ▶ Discretion is limited to those cases where its admission would operate unfairly to the accused and those cases will be relatively rare: *R. v. C.C.F.*, [\[1997\] S.C.J. No. 89](#) (S.C.C.) at para. 51; *R. v. Mulder*, [\[2008\] O.J. No. 345](#) (S.C.J.) at para. 23; *R. v. L.(D.O.)*, [\[1993\] S.C.J. No. 72](#) (S.C.C.) at para. 65.



# Questions:

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