

# Child Witnesses in the Criminal Courts: Legislation, Judicial Perceptions & Cases

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**CHILD ADVOCACY CENTRES  
KNOWLEDGE EXCHANGE 2011**



**CENTRES D'APPUI AUX ENFANTS  
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Building Better Services for Children and Youth who are Victims or Witnesses of Crime in Canada  
Prestation de services améliorés aux enfants et aux adolescents qui ont été victimes ou témoins d'actes criminels au Canada

# Outline

- Bill C-2 2006 Reforms
- Criminal Code provisions
  - Competence to testify
  - Videotapes
  - Support persons in court
  - CCTV or screen
  - Self- represented accused
- Case law & judicial perceptions survey
  - Funded by Department of Justice Canada



# Competency Inquiry

Canada Evidence Act s. 16.1

# Child Competency Inquiry – The old CEA s. 16

- Before testifying, child under 14 yrs had to “correctly” answer Q’s about
  - “oath”
  - “promise to tell the truth.”
- Intrusive questions on meaning of oath:
  - “Do you know what would happen if you lied to God?”
- Children have difficulty with abstract Q’s:
  - “What is truth?”

- Bill C-2 amended *Canada Evidence Act*
  - presumption of capacity to testify
  - Test: “able to understand & respond to questions”
  - child to “promise to tell the truth,”
  - BUT no questions about understanding of promise (adults face no questions about oath)

# Survey: Experience with CEA s. 16.1

- 96% of judges agree that CEA s. 16.1 is useful
- Is any inquiry held?
  - 3-5 year olds: 70% always
  - 6-9 year olds: 40% always
  - 10-13 year olds: 30% always
- IF inquiry held, kids usually found competent
- Average inquiry 12 minutes
- *“Disclosure of videotaped statements by a child witness before the trial usually satisfies opposing counsel as to competence.”*

## C.E.A. s. 16.1 - Cases

### **SCC upholds constitutionality**

- R v J.Z.S., 2010 SCC 1

### **Competency questions during testimony**

- Child may be asked questions about understanding of truth and lie during video-recorded police interview or cross-examination.
  - *R. v J.S.*, [2007] B.C.J. 1374 (BCSC), Metzger J.
- *R v. F.(J.)*, [2006] A.J. No. 972 (Prov. Ct.) (police asked questions in a video-recorded interview). Ho Prov. Ct. J.:
  - “not being able to provide a satisfactory definition of the difference between a truth and a lie does not negate the ability of C.S. [the complainant] to provide reliable evidence to the court.”



# Mentally challenged & 14 years +

- Still need to answer questions about “promise” and “truth telling”
  - R v D.I. ,2010 ONCA 133
- Concern that mentally challenged are especially vulnerable to sexual exploitation
- Need for law reform if SCC does not reverse R v DI

# Video-recording: s. 715.1



# Video-record of child interview: s. 715.1

- Video-recording of investigative interviews:
  - reduces stress on child - avoids multiple interviews
  - improve evidence before court  
(more complete & emotional reaction clearer)
    - See e.g *R v Rouschop*, [2006] OJ 121 (CA)
  - may induce more guilty pleas
- Good quality taping requires protocols, equipment & training.
- But child must still testify, view and “adopt”
  - Child may be “cold witness”

# Video-recording – Bill C-2 reforms

- s. 715.1 applies to any offence for which child is a witness (eg child witnesses murder of mother)
  - Under 18 at time of alleged offence, not trial
- For child under 18 years at time of offence, presumption of use;
- test for exclusion in s. 715.1(1) “diluted” by 2006 amendments
  - R v Ortiz, 2006 ONCJ 72 (OCJ), per Pugsley; no need to establish vulnerability for child
  - If over 18 years, need to establish vulnerability

# Survey: Use of videos limited

- Judges' survey report on s. 715.1 since 2006
  - Mostly “occasional” use in child cases
  - Only 1 “almost always” in child cases
  - 85% reported applications always successful
  - very little with disabled adults

# Survey: judicial comment on videos

- *“The witness was less persuasive at the trial months after the event, and after the giving of the statement. I suspected the prosecutor wanted to embellish the viva voce evidence of the witness by use of the videotape, but I could not be certain about this until I saw it. It took time to set it up and play the taped statement. In the end, it was not helpful. It is difficult or impossible to say that playing the tape would interfere with the proper administration of justice when deciding an application in these circumstances.”*

# CCTV & Screens: s. 486.2

- S. 486.2 permits the witness to testify behind a screen or via CCTV, provided that accused can see the witness.
- Presumptive use for child under 18
- Permissive use for adult with disability
- Query: Obligation on prosecutor to offer child choice



# Judicial Survey: CCTV or Screen

- Much more use for children than adults
  - Applications rarely unsuccessful
- Much less use for adults
  - Applications more likely to be unsuccessful



# Survey: concerns about s. 486.2

## Logistical problems:

- notice not provided by Crown/police that screen should be available;
- poor quality of screens;
- not enough screens available;
- poor lighting and sound in room;
- some courthouses not set up for CCTV;
- equipment needs to be booked ahead and the trial judge may not be sitting in the jurisdiction before trial;
- creates logistical problems in the courtroom;
- faces of witnesses not clear on CCTV.

# Judicial Concerns about CCTV

- *“The provision re: a witness testifying outside the courtroom, i.e., by closed circuit from a nearby room, can be problematic. The Code is not clear as to who can/should be in the same room as the testifying witness.....”*
- *“I will bet that none of the lawmakers who passed this legislation ever tried to assess credibility or even control a witness over a video link. Some judges have terminated the out of court testimony and required the witness to be in the courtroom when their conduct was unacceptable.”*

# Case law: s. 486.2(1)

- *R. v. J.W.*, [2007] B.C.J. No. 468 (B.C. Prov. Ct.), Tweeddale, Prov. Ct. J., Presumptively, the witness has the “right” to decide whether screen or CCTV, subject to “right” of a witness to determine what device will be used is subject to its availability and to the judge being satisfied that in a particular case, given the nature of the proposed evidence, the “administration of justice” requires some other mode.
- Constitutional challenges to s. 486.2 rejected:
  - *R. v. J.Z.S.* [2010] SCC 1

Support Person: s. 486.1

# Support Persons: s. 486.1

- If witness is under 18 or has disability
- Presumption of use unless shown by accused that it would “interfere with the proper administration of justice.”
- Application may be made before trial to presiding judge [s. 486.1(2.1)]
- Support person chosen by child, but not to be a witness unless “necessary for proper administration of justice” [s. 486.1(4)]
- Young children have been permitted to sit in the lap of a support person while testifying.

# Judicial Survey

- Applications under s. 486.1 for children
  - 60% report occasional
  - 30% often or almost always made when child
  - 80% report applications always successful for child
- Reasons for denial:
  - Person might be a witness
  - Inappropriate person
  - “not necessary”
- Most frequently mentioned support persons
  - family members
  - victim services workers
  - professionals/social workers

# Survey Comments

- *“There should be some minimum standard of evidence required to make the application such as affidavit or viva voce evidence.”*
- *“[There should be an] interview or cross of the support person to reduce or remove influence or bias.”*
- *“...Usually the provisions come under a judge’s discretion in any case. In my view, the section is redundant and serves no useful purpose.”*
- *“No difficulty. Our victim’s services program in Nova Scotia explains the role of support person to both the witness and support person, so I have not encountered a situation where the witness was being prompted by the support person.”*



# Restricting Cross-examination by Unrepresented accused: s. 486.3



# Unrepresented accused s. 486.3

- Presumption against personal cross-examination of child by unrepresented accused
  - s. 486.3 (1) for child : Counsel “shall” be appointed unless “proper administration of justice” requires cross-examination in person
  - S. 486.3(2) for adult witness court may disallow personal cross-examination and appoint counsel if “necessary for a full & candid account” (eg domestic violence cases)

# Issues for the court – form of order

## Who selects counsel?

Preferable for accused to select counsel willing to take this limited retainer, with direction that counsel is to be paid by the government

## What rate for lawyer? Differing judicial views

- *R. c. B.S.*, [2007] J.Q. 14092 (Que C.A.). While the judge may select a lawyer to represent the accused for the purposes of cross-examination, the judge cannot set the fees. An order for counsel should be accompanied by a stay in proceedings to allow the Ministry to make payment arrangements.
- Judge may direct time & rate of pay above legal aid rates
  - Wakefield J. in *R. v. S. (P.N.)*, 2010 ONCJ 244
  - Not just a “mouthpiece,” but lawyer needs to have time & information to develop “theory of case” to allow cross-examination

# Survey: Judicial concerns about s. 486.3

- *“I see a potential problem for counsel required to cross examine one witness in a trial or prelim when they do not have conduct of the whole trial or prelim. If I were counsel obliged to do it, I think I would want written instructions from the accused about the areas for cross examination and the purpose of it, and/or a list of questions they wanted asked.”*
- *“There is too much delay in getting counsel appointed.”*
- *“There should be a pre-hearing conference in all cases where the victim is under 18.”*

# Conclusions

- More children are testifying and more convictions are being obtained
- Apparent gradual reduction in child sexual abuse in Canada
  - Criminal justice system has had a role
- Still many challenges for children and professionals



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# References: Children Witness Issues

## Bill C-2 – The law

- Bala, Paetsch, Bertrand & Thomas, *Testimonial Support Provisions for Children and Vulnerable Adults (Bill C-2): Case Law Review & Perceptions of the Judiciary*, Department of Justice Canada (forthcoming 2011).
- Bala, Evans & E. Bala, Hearing the Voices of Children in Canada's Criminal Justice System: Recognizing Capacity and Facilitating Testimony (2010), 22 *Child & Family Law Quarterly* (U.K.) 21-45.

## Credibility Assessment

- Bala, Ramakrishnan, Lindsay & Lee, "Judicial Assessment of the Credibility of Child Witnesses" (April, 2005), 42:4 *Alberta Law Review* 995-1017.
- Leach, Lindsay, Beaudry, Bala, Lee & Talwar, "The Reliability of Lie Detection Performance" (2009) 23 *Law & Human Behavior* 96-109

## Questioning of Children

- Schuman, Bala & Lee, "Developmentally Appropriate Questions for Child Witnesses" (1999), 25 *Queen's Law Journal* 251 -304.
- Anne Graffam Walker, *Handbook on Questioning Children: A Linguistic Perspective*, 2d ed.(ABA Center on Children and the Law: Washington DC, 1999)

# Appendix: Legislative Provisions



# Bill C-2: in force 2006

## 16.1 CEA for children

16.1 (1) A person under fourteen years of age is presumed to have the capacity to testify.

(2) A proposed witness under fourteen years of age shall not take an oath or make a solemn affirmation...

(3) The evidence of a proposed witness under fourteen years of age shall be received if they are able to understand and respond to questions.

(4) A party who challenges the capacity of a proposed witness under fourteen years of age has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to understand and respond to questions.

- (5) If the court is satisfied that there is an issue as to the capacity of a proposed witness under 14 years of age to understand and respond to questions, it shall, before permitting them to give evidence, conduct an inquiry to determine whether they are able to understand and respond to questions.
- (6) The court shall, before permitting a proposed witness under 14 years of age to give evidence, require them to promise to tell the truth.
- (7) No proposed witness under fourteen years of age shall be asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court.
- (8) For greater certainty, if the evidence of a witness under fourteen years of age is received by the court, it shall have the same effect as if it were taken under oath.

# Code provision – video-recording

“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.”

# Support Person – Code provision

“**486.1** (1) In any proceedings against an accused, the judge or justice shall, on application of the prosecutor, of a witness who is under the age of eighteen years or of a witness who has a mental or physical disability, 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.”

# CCTV or screen: child or disabled adult

“486.2 (1) Despite section 650, in any proceedings against an accused, the judge or justice shall, on application of the prosecutor, of a witness who is under the age of eighteen years or of a witness who is able to communicate evidence but may have difficulty doing so by reason of a mental or physical disability, 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.”

# No cross-examination by self-rep

- 486.3 (1) In any proceedings against an accused, on application of the prosecutor or a witness who is under the age of eighteen years, the accused shall not personally cross-examine the witness, unless the judge or justice is of the opinion that the proper administration of justice requires the accused to personally conduct the cross-examination. The judge or justice shall appoint counsel to conduct the cross-examination if the accused does not personally conduct the cross-examination.

(2) In any proceedings against an accused, on application of the prosecutor or a witness, the accused shall not personally cross-examine the witness if the judge or justice is of the opinion that, in order to obtain a full and candid account from the witness of the acts complained of, the accused should not personally cross-examine the witness. The judge or justice shall appoint counsel to conduct the cross-examination if the accused does not personally conduct the cross-examination.