



**TESTIMONIAL SUPPORT PROVISIONS FOR  
CHILDREN AND VULNERABLE ADULTS  
(BILL C-2): CASE LAW REVIEW AND  
PERCEPTIONS OF THE JUDICIARY**



# Testimonial Support Provisions for Children and Vulnerable Adults (Bill C-2): Case Law Review and Perceptions of the Judiciary

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rr10-vic03

*The views expressed in this report are those of the authors  
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the Government of Canada, or the Canadian Research Institute for Law and the Family.*

Catalogue No. J2-367/2011F

J2-367/2011F-PDF

ISBN 978-1-100-19247-5

ISBN 978-1-100-19247-2 (PDF)

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## Acknowledgements

This project could not have been conducted without the assistance and support of many individuals and organizations. First, we would like to acknowledge the financial support of Justice Canada and the guidance provided by the Project Authority, Dr. Susan McDonald, and A/Senior Counsel, Ms Jocelyn Sigouin.

We also appreciate the guidance provided by the Judicial Advisory Committee, namely: The Honourable R. Brian Gibson (Provincial Court of Nova Scotia); The Honourable Colleen Kenny (Court of Queen's Bench of Alberta); and the Honourable Heino Lilles (Territorial Court of the Yukon). We also thank Dr. Joseph Hornick, Executive Director of the Canadian Research Institute for Law and the Family (CRILF) for his consultation throughout the project.

We thank the Offices of the Chief Judges and Justices of the participating courts for facilitating distribution of the surveys to the judges in their jurisdictions.

We would also like to thank the survey respondents who completed the survey and provided us with information on their experiences with and opinions of Bill C-2. Their contributions were invaluable.

We also wish to acknowledge the assistance of Ms. Carrie McCarney (Queen's J.D. Candidate 2010) in updating the research for this report in the summer of 2009. Lastly, we thank Ms Linda Haggett of CRILF for her assistance with typing the tables for the report. The Canadian Research Institute for Law and the Family is supported by a grant from the Alberta Law Foundation.

## Executive Summary

### Background

Bill C-2, *An Act to Amend the Criminal Code (Protection of Children and Other Vulnerable Persons)* received royal assent on July 21, 2005 (S.C. 2005, c.32). The Bill contained a package of amendments to the *Criminal Code* and the *Canada Evidence Act* designed to facilitate testimony by child victims and vulnerable adults, which came into force on January 2, 2006. It changed the approach for determining if child witnesses are competent to testify, allowing them to testify if they are able to understand and respond to questions. In cases involving children and vulnerable adults, the amendments facilitate the use of testimonial aids, including screens, closed-circuit television, support persons, as well as the use of video-recorded statements. Under the new test, testimonial aids are available for all child victims and vulnerable adult witnesses, on application, unless it would interfere with the proper administration of justice.

The Bill also gave judges the authority to appoint counsel for self-represented accused persons for the purposes of preventing cross-examination of children and vulnerable adult witnesses, unless doing so would interfere with the proper administration of justice.

### Purpose of the Project

The Canadian Research Institute for Law and the Family (CRILF) was contracted by Justice Canada to conduct this project on testimonial support provisions for children and vulnerable adults in the criminal courts. The purpose of this research project was to explore judicial experiences with and opinions about the amendments to the *Criminal Code* and *Canada Evidence Act* introduced by Bill C-2 for children and vulnerable adult witnesses.

The project addressed the following research questions:

1. Since Bill C-2 came into effect, what does case law reveal about the new law and how has Canadian legal literature dealt with these legal reforms?
2. Are judges familiar with the amendments contained in Bill C-2? Have they had the opportunity to use them? Do they think they're useful?
3. How often are applications being made for testimonial supports? Are the applications generally successful? If not, why not?
4. Have judges had any difficulties with the implementation of any of the testimonial support provisions contained in Bill C-2?
5. How often are applications being made for appointment of counsel to self-represented accused for purposes of cross-examination? Are the applications generally successful? If not, why not?

6. Have the judges held competency inquiries? How often is the child witnesses' competence accepted without inquiry? How often is the child found incompetent to testify?
7. Do the judges have any concerns regarding any of the provisions contained in Bill C-2?

## **Methodology**

In order to address the research questions listed above, the project included two major components: (1) a review of relevant case law and Canadian legal literature; and (2) a survey of judges in four Canadian jurisdictions. The methodology used for these two components is described below.

### **Case Law and Canadian Literature Review**

The new legislation governing the testimony of children and vulnerable adults as witnesses has been interpreted and applied in a significant number of recent reported Canadian cases, and discussed in a few articles. This report includes an analysis and summary of the reported Canadian case law (to June 30, 2009) and legal literature dealing with the new provisions, and related issues concerning vulnerable witnesses.

### **Survey of Judges**

A survey of provincial and superior court judges in four jurisdictions in Canada was conducted to elicit their experiences with and opinions on the Bill C-2 amendments. Four jurisdictions agreed to participate in the project: Nova Scotia (both levels of court), Alberta (both levels of court), British Columbia (Provincial Court), and the Yukon (Territorial Court). Data collection occurred from November 26, 2007 to January 15, 2008. The judges' survey consists of 36 questions and contains the following sections: Background Information; Your Perceptions of Bill C-2; Your Experiences with the Provisions Contained in Bill C-2; Credibility Assessment and Questioning of Children; and General Comments.

## **Summary and Conclusions**

A review of the reported case law applying Bill C-2 and the survey of judges reveals that these legislative reforms have facilitated the giving of evidence by children in criminal proceedings, and that they are generally well received by the judiciary. In the survey, almost all of the judges indicated that they consider Bill C-2 to be useful, and a clear majority considered that the provisions continue to treat the accused fairly. In the reported case law, all of the Charter-based challenges to the new provisions have failed, and the courts are generally interpreting the new provisions in a way that has helped children to testify. One of the Charter cases has been appealed to the Supreme Court of Canada, and the question of the constitutional validity of the new provisions is likely to be resolved in 2010.

The new competency test in *Canada Evidence Act* s. 16.1 has clearly simplified and shortened the process of qualification for child witnesses. In a significant portion of cases, the child is

accepted as competent without inquiry, often based on interview material disclosed to the defence before the hearing. In the survey, judges reported that in about one-fifth of cases with the youngest age group (3-5 years), there was no competency inquiry, rising to almost three-quarters with the older age group (10-13 years). In the reported case law, there were no instances of judges writing decisions to explain why a child is incompetent to testify. In the survey, while some children in all age groups were found incompetent, even in the youngest age group (3-5 years) almost one-half of the judges reported that they had never found a child incompetent under the new provision. Judges reported that the average length of time spent on a competency inquiry is now 12 minutes. The case law reveals that judges may allow questions about the child's understanding of the concepts of truth and lie during cross-examination, though published commentary raises the appropriateness of such questions.

The courts have accepted that in enacting ss. 486.1, 486.2, and 486.3, Parliament intended to increase the use of accommodations for child witnesses, by increasing the use of support persons, closed-circuit television and screens, and counsel appointed to cross-examine child witnesses where accused persons are self-represented. There are very few reported cases in which use of an accommodation was requested and the accused satisfied the court that use of the accommodation would "interfere with the administration of justice." The courts, however, remain alive to the need to protect the rights of the accused; in the reported cases, use of an accommodation is denied if the appropriate equipment is not available, or the conduct of the witness or nature of the evidence would mean that use of the accommodation would render the trial unfair.

The survey suggests that applications under s. 486.1 to allow a support person to sit near a child or vulnerable adult witness are made in a minority of cases involving children and rarely in cases with adults. When an application is made under s. 486.1 for a child witness, it is almost always successful, and usually successful with a vulnerable adult. The survey results suggest that the most common support persons for child witnesses are family members and victim services workers. In the survey, some judges raised some concerns about the implementation of s. 486.1, in particular that in some cases the support person may influence the witness.

The case law review reveals that judges recognize that Bill C-2 establishes a "high standard" for the accused to satisfy if the court is to reject an application for the use of closed-circuit television or a screen with a child witness under s. 486.2. The survey reveals that applications under s. 486.2 for screens or closed-circuit televisions are most likely to be made at the pre-trial hearing conference. The survey suggests that an application under s. 486.2 is made in a minority of cases involving child witnesses, and is more likely to be for use of a screen than closed-circuit television, but when an application is made, it is almost always successful. The case law review and survey suggest that there continue to be logistical and technical concerns about the equipment and, in the survey, one-half of the judges reported that they had experienced problems in arranging for appropriate equipment.

The survey reports that appointment of counsel of s. 486.3 to question a vulnerable witness rather than allowing a self-represented accused to do this is more likely to occur in provincial court, perhaps because accused persons in superior court are more likely to have counsel. The survey also revealed that applications under s. 486.3 are made most often at the pre-trial hearing conference, and the survey and case law review indicate that such applications are almost always

successful. The survey, case law review, and published commentary reveal concerns about the implementation of s. 486.3, in particular about how counsel is to be paid. The survey also revealed some judicial concern about delay that may result when an order is made under s. 486.3, especially if it is not clear how counsel is to be paid, and about how counsel can cross-examine only one witness without being involved in the entire trial. Despite the variation in the reported case law about how the courts are dealing with issues of payment for counsel and how counsel is being selected for s. 486.3 orders, the survey and case law review indicate that these issues are being adequately addressed; there are no reports of cases in which proceedings have had to be stayed because counsel could not be appointed.

The case law review and survey showed that applications under s. 715.1 to have a video-recorded interview with the child admitted in evidence are almost never denied. The survey indicates that applications for the video-recorded evidence provision are made most often during the pre-trial hearing conference. The case law review suggests that judges recognize that the video-recorded interview may be given considerable weight, since it is made closer to the events in question when a child is likely to be able to give a fuller and more accurate description of the events at issue. The survey suggests that the Crown only seeks to have a video-recorded interview admitted in less than half of cases, and that s. 715.2 is in practice not being used with vulnerable adult witnesses.

When asked about the credibility of witnesses in general in the survey, judges reported that the younger the witness, the more likely they are to make an unintentional false statement, for example, due to their memory of events being imperfect. Conversely, in the survey, judges reported that they perceived adults and older children to be more likely to be dishonest and make intentionally false statements. Judges in the survey also reported concerns that children who are testifying are frequently asked overly complex or developmentally inappropriate questions, especially by defence counsel. The case law review revealed that even in cases where children have been afforded accommodation, there continue to be cases where the courts acquit persons charged with offences against children, even if the judge believed the child, if the court was satisfied that the Crown did not prove guilt beyond a reasonable doubt.

The vulnerable adult witness provisions have been the subject of very little reported case law, and the survey indicates that there have been relatively few applications for the use of testimonial aids for adults. When applications are made for the use of testimonial aids for adults, they are generally successful, but they are less likely to be granted than applications for child witnesses.

In line with the findings from the case law review, overall, the judges who completed the survey were very positive about the amendments contained in Bill C-2. The vast majority of judges were familiar with the amendments and a substantial proportion had used them. Almost all of the judges reported that the amendments are useful, and over three-quarters did not think they might render the trial unfair to the accused. Despite some concerns about implementation of these provisions as reflected in reported case law and survey comments, the amended provisions for child and vulnerable adult witnesses contained in Bill C-2 appear to be working well. Judges in both levels of court are familiar with the amendments and are using them.

# 1. Introduction

## 1.1 Background

Bill C-2, *An Act to Amend the Criminal Code (Protection of Children and Other Vulnerable Persons)* received royal assent on July 21, 2005.<sup>1</sup> The Bill contained a package of amendments to the *Criminal Code* and the *Canada Evidence Act* designed to facilitate testimony by child victims and vulnerable adults, which came into force on January 2, 2006.<sup>2</sup> It changed the approach for determining if child witnesses are competent to testify, allowing them to testify if they are able to understand and respond to questions. In cases involving children and vulnerable adults, the amendments facilitate the use of testimonial aids, including screens, closed-circuit television, support persons, as well as the use of video-recorded statements. Under the new test, testimonial aids are available for all child victims and vulnerable adult witnesses, on application, unless it would interfere with the proper administration of justice.

The Bill also gave judges the authority to appoint counsel for self-represented accused persons for the purposes of preventing cross-examination of children and vulnerable adult witnesses, unless doing so would interfere with the proper administration of justice.

## 1.2 Purpose of the Project

The Canadian Research Institute for Law and the Family (CRILF) was contracted by the Department of Justice Canada to conduct this project on testimonial support provisions for children and vulnerable adults in the criminal courts. The purpose of this research project was to explore judicial experiences with and opinions about the amendments to the *Criminal Code* and *Canada Evidence Act* introduced by Bill C-2 for children and vulnerable adult witnesses.

The project addressed the following research questions:

1. Since Bill C-2 came into effect, what does case law reveal about the new law and how has Canadian legal literature dealt with these legal reforms?
2. Are judges familiar with the amendments contained in Bill C-2? Have they had the opportunity to use them? Do they think they're useful?
3. How often are applications being made for testimonial supports? Are the applications generally successful? If not, why not?
4. Have judges had any difficulties with the implementation of any of the testimonial support provisions contained in Bill C-2?

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<sup>1</sup> S.C. 2005, c.32.

<sup>2</sup> Some of the other provisions of Bill C-2 amending offence provisions of the *Criminal Code*, came into effect on November 16, 2005.

5. How often are applications being made for appointment of counsel to self-represented accused for purposes of cross-examination? Are the applications generally successful? If not, why not?
6. Have judges held competency inquiries? How often is the child witnesses' competence accepted without inquiry? How often is the child found incompetent to testify?
7. Do judges have any concerns regarding any of the provisions contained in Bill C-2?

### **1.3 Methodology**

In order to address the research questions listed above, the project included two major components: (1) a review of relevant Canadian legal literature and case law; and (2) a survey of judges in four Canadian jurisdictions. The methodology used for these two components is described below.

CRILF established a Judicial Advisory Committee at the outset of the project to provide guidance to the research team throughout the project, including reviewing the survey, helping to facilitate participation of judges in their respective jurisdictions, and reviewing the draft final report. Members of this Committee were: The Honourable R. Brian Gibson, Provincial Court of Nova Scotia; The Honourable Colleen Kenny, Court of Queen's Bench of Alberta; and The Honourable Heino Lilles, Territorial Court of the Yukon.

#### **1.3.1 Case Law and Canadian Literature Review**

The new legislation governing the testimony of children and vulnerable adults as witnesses has been interpreted and applied in a significant number of recent reported Canadian cases, and discussed in a few articles. This report includes an analysis and summary of the Canadian case law and legal literature dealing with the new provisions, and related issues concerning vulnerable witnesses. The focus is on cases decided since the new law came into force on January 2, 2006 (and reported prior to June 30, 2009 the cut-off date for the review<sup>3</sup>).

#### **1.3.2 Survey of Judges**

A survey of provincial and superior court judges in four jurisdictions in Canada was conducted to elicit their experiences with and opinions on the Bill C-2 amendments. In a teleconference meeting held in September 2007 with representatives from Justice Canada and the research team, it was decided that five jurisdictions would be approached to participate in the study: Nova Scotia, Ontario, Alberta, British Columbia, and the Yukon. Justice Canada agreed to make the initial contact with the jurisdictions, and to provide a letter of information from the Senior Assistant Deputy Minister that could be sent by the contractors to the Chief Judge/Justice of the Provincial and Superior Court in each jurisdiction. CRILF would then follow-up with their offices to discuss implementation of the study. Once a jurisdiction's participation was confirmed, the Chief's Office was sent the survey and cover e-mail electronically for distribution to their judges. Four of the five jurisdictions approached agreed to participate in the project: Nova Scotia (both levels of court), Alberta (both levels of court), British Columbia (Provincial Court), and the

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<sup>3</sup> The original cut-off date was January 2, 2008, but an update was done in the summer of 2009 to bring the case law review up to June 30, 2009.

Yukon (Territorial Court). Data collection occurred from November 26, 2007 to January 15, 2008.

The cover e-mail used for the survey is contained in Appendix A. It includes a brief description of the study, as well as instructions for completing the survey and returning it to CRILF. The cover e-mail also contains an ethics statement indicating that the survey is being conducted in accordance with freedom of information and protection of privacy legislation and that data will only be presented in aggregate form and that individual respondents will not be identified.

The survey is contained in Appendix B. The survey was created using “Forms” in Word, allowing respondents to complete it electronically. The judges’ survey consists of 36 questions and contains the following sections: Background Information; Your Perceptions of Bill C-2; Your Experiences with the Provisions Contained in Bill C-2; Credibility Assessment and Questioning of Children; and General Comments.

## **1.4 Limitations**

Certain limitations to the data presented in this report affect the ability to generalize the findings to the judiciary as a whole. Specifically, it should be kept in mind that participants in the project do not represent a random sample of judges in Canada, nor do they represent a random sample of judges in their respective jurisdictions. Further, the sample was small, also limiting the ability to generalize the findings to the judiciary in Canada. While we were unable to calculate a response rate since we do not know how many surveys were actually distributed, we do know that the response rate was relatively low, likely in the range of 10% to 20% of the judges surveyed. Despite these limitations, the survey participants provided valuable information regarding the amendments contained in Bill C-2.

## 2. Review of Bill C-2 Case Law and Legal Literature

In 1988 Parliament enacted very significant legislative reforms to the *Criminal Code* and the *Canada Evidence Act* to facilitate children coming to court to testify in criminal cases, with further reforms in 1993 and 1998. In 2005, Parliament enacted amendments to the earlier statutory reforms to further facilitate the testimony of children and other vulnerable witnesses. These amendments came into effect on January 2, 2006.<sup>4</sup>

This chapter addresses the first research question outlined in Section 1.2:

Since Bill C-2 came into effect, what does case law reveal about the new law and how has Canadian legal literature dealt with these legal reforms?

The discussion which follows reviews the provisions of Bill C-2 that relate to child and adult vulnerable witnesses and the reported case law which has applied and interpreted those provisions, and considers the Canadian legal literature<sup>5</sup> which discusses those provisions and the case law. The focus is on cases decided since January 2, 2006 (and reported prior to June 30, 2009 the cut-off date for the review). In order to understand the significance of this recent case law, there is also limited discussion of the pre-2006 case law that interpreted the previous provisions, though the discussion of the older case law is not comprehensive.

### 2.1 The Competence of Child Witnesses: *Canada Evidence Act* s. 16.1

The reforms to the *Canada Evidence Act* that came into effect in 2006 significantly changed the process and standard for assessing the competence of children to testify in criminal proceedings. Prior to the Bill C-2 amendments, a child under the age of 14 offered as a witness could testify under oath, on affirmation or after promising to tell the truth. The test for testifying on a promise was twofold, requiring the child to have: (1) the ability to answer questions that demonstrate an understanding of the importance of truth telling, and (2) the ability to meaningfully communicate in court proceedings. If the child lacked the maturity and mental capacity to satisfy the test for giving testimony, the child was incompetent to testify in any form. This old test and the

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<sup>4</sup> Bill C-2, S.C. 2005, c. 32.

<sup>5</sup> Three recent articles were located in the Canadian legal literature discussing child witness issues and Bill C-2: Nicholas Bala, Katherine Duvall-Antonacouplos, R.C.L. Lindsay, Kang Lee & Victoria Talwar, "Bill C-2: A New Law for Canada's Child Witnesses" (2006), 32 C.R. (6<sup>th</sup>) 48-69; Julia Hughes, "*Peetooloot*: Who Pays the Costs of Appointing Counsel to Cross-examine Complainants?" (2006) 42 C.R. (6<sup>th</sup>) 57; Lisa Dufraimont, "S. (J.): Care in Cross-Examining Child Witnesses" (2007), 48 C.R. (6<sup>th</sup>) 357. Another recent article that deals with child witness issues but does not directly discuss Bill C-2 or the new provisions is: Timothy E. Moore & Cindy R. Wasser, "Social Science and Witness Reliability: Reliable Science Begets Reliable Evidence" (2006), 33 C.R. (6<sup>th</sup>) 316. Another recently published article deals with an analysis of reported Canadian cases from 1986 to 2002 dealing with prosecutions of historic child abuse cases; although a related topic, that paper is not discussed in this report: Deborah.A. Connolly, Heather L. Price & Heidi Gordon, "Judging the Credibility of Historic Child Sexual Abuse Complainants: How Judges Describe Their Decisions" (2009), 15 Psychology, Public Policy & Law 102.

jurisprudence concerning it will continue to apply to persons over 14 years of age whose mental capacity is challenged (s. 16(1) *Canada Evidence Act*, as amended).

Section 16.1(1) now provides that a person under 14 years of age is presumed to have the capacity to testify. The test for the receipt of a child's evidence is simply that the child is to be able to "understand and respond to questions." It is for the party challenging the child's capacity to establish that there is an issue as to capacity to understand and respond to questions (s. 16.1(4)). A child under the age of 14 is neither to take an oath nor make a solemn declaration, but must promise to tell the truth. No inquiry is permitted into a child's understanding of the meaning of a "promise," or the meaning of concepts like "truth" or "lie" (s. 16.1(7)). The evidence given by a child after a promise has the same legal effect as if it were taken under oath (section 16.1(8)).

### **2.1.1 Elements of Testimonial Competence under s. 16.1**

The competency provision of s. 16.1 of the *Canada Evidence Act* begins with the statement in s. 16.1(1) that children are "presumed to have the capacity to testify," while s. 16.1(4) places a burden on the "party who challenges the capacity" of a child to "satisfy the court that there is an issue as to the capacity" of the child "to understand and respond to questions." Subsection 16.1(4) might suggest that there is an onus on the party not calling the child as a witness (usually the accused) to raise the issue of competence. However, s. 16.1(5) also provides that if the judge "is satisfied that there is an issue" as to a child's capacity to "understand and respond to questions," then before permitting the child to testify, the judge "shall conduct an inquiry" to determine whether the child is "able to understand and respond to questions." Thus Bala et al.<sup>6</sup> argue that the words of s.16.1(5) allow the court itself or the party calling the child witness (usually the Crown) to also raise the issue of a child's competence, though the effect of ss. 16.1(1) and (4) is that there will be a presumption of competence at the inquiry.

Under the test in s. 16.1(5) the focus is now on whether the child is "able to understand and respond to questions," words that are similar to a part of the pre-2006 inquiry that focused on whether the child was "able to communicate the evidence." Most significantly, however, s. 16.1(7) makes clear that unlike under the pre-2006 provision, there is to be no inquiry into the child's understanding of the meaning of such abstract concepts as "truth," "lie" and "promise."

In *R. v. Marquard*,<sup>7</sup> McLachlin J. considered the interpretation of the phrase in the former s. 16 "able to communicate the evidence," and held that testimonial competence includes: (1) the capacity to observe (including interpretation); (2) the capacity to recollect; and (3) the capacity to communicate (at 219-220):

The threshold is not a high one. What is required is the basic ability to perceive, remember and communicate. This established, deficiencies of perception and recollection of the events at issue may be dealt with as matters going to the weight of the evidence.

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<sup>6</sup> Bala et al., *ibid.*

<sup>7</sup> (1993), 85 C.C.C. (3d) 193 (S.C.C.).

The former competence inquiry concerned the capacity of the child to communicate about past events in general. A child was required to be capable of giving more than “yes” or “no” responses to straightforward questions.<sup>8</sup> The courts also required that the child demonstrate an ability to distinguish between fact and fiction, and a capacity and a willingness to relate to the court the essence of what happened to her.<sup>9</sup> Bala et al. suggest that the new test requires that the same communication and memory criteria are to be satisfied, despite the change in wording, which now focuses on the “ability to understand and respond to questions.”<sup>10</sup> The issue is whether the child has the basic cognitive and language abilities, and sufficient social skills, to give meaningful answers to questions in the court setting. Whether a child witness is able to understand and respond to questions will be a matter for the judge to determine, and expert testimony will normally not be admissible about this issue.<sup>11</sup> In “exceptional circumstances,” where the child would be so traumatized by the experience of appearing in court even for the limited purpose of establishing the inability to understand and respond to questions, an expert might be called to establish that the child is not able to testify; if this is established to the satisfaction of the court, this may be a ground for establishing the “necessity” for the admission of hearsay evidence instead of having the child testify.

Bala et al.<sup>12</sup> suggest that in practice the application of the current test – the ability to understand and respond to questions – is likely to be very similar to that part of the old inquiry which focused on the child’s capacity to meaningfully communicate evidence in court. They argue that, as required by the Supreme Court in applying the provision in the former s. 16(1) in *R. v. Marquard*<sup>13</sup> there should be a relatively brief inquiry into whether the child has the capacity to remember events and answer questions about those events. The inquiry into the child’s capacity should be conducted by having the judge or counsel ask the child questions about a non-contentious past event.

In assessing the competence of children, it is important for judges to be mindful of the particularities of children’s cognitive and language abilities at various stages of development. For example, in *R. v. L.(D.O.)*,<sup>14</sup> L’Heureux-Dubé J. observed:

... social science data... makes clear that recollection decreases in accuracy with time... although children may have clear and accurate memories at the time of the occurrence, studies illustrate that children’s memories may fade faster than those of adults.

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<sup>8</sup> *R. v. Caron* (1994), 94 C.C.C. (3d) 466, at 471 (Ont. C.A.).

<sup>9</sup> *R. v. Parrott* (2001), 150 C.C.C. (3d) 449 (S.C.C.): expert testimony was not normally required even when the test was more complex.

<sup>10</sup> Bala et al., *supra*, note 4.

<sup>11</sup> Although see, for example, *R. v. Sheridan*, [2004] O.J. No. 4011 (Ont. C.A.), leave denied [2004] S.C.C.A. No. 537 where the Ontario Court of Appeal found ample reason to doubt the reliability of the complainant’s estimate of physical dimensions. She was 11 years at time of alleged event and 15 years at time of trial.

<sup>12</sup> Bala et al., *supra*, note 4.

<sup>13</sup> *Supra*, note 6.

<sup>14</sup> [1993] 4 S.C.R. 419, 1985 C.C.C. (3d) 289 (S.C.C.) (QL) at 323.

Likewise, McLachlin J. noted in *R. v. W.(R.)*<sup>15</sup> that 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. Wilson J., in *R. v. B.(G.)*,<sup>16</sup> held that 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.<sup>17</sup>

Therefore, a competence inquiry which focuses on abstract concepts or expects a child to be able to provide detailed information about past events may not fairly assess the child’s basic ability to “understand and respond to questions.” The test now simply requires that a child be able to cognitively process a question and to verbally respond to that question. Of course, if a party has not raised the issue of competence, and the court itself is not satisfied there is an issue, a competence inquiry will not be held at all.

In *R. v. Prue*,<sup>18</sup> Bovard J. noted the presumption of competence in [section 16.1\(1\)](#) and explained the process that he followed with an 11-year-old complainant who had learning disabilities and could not remember the name of his school or what grade he was in “at first” (i.e., during the qualification process).

Out of an abundance of caution, I questioned him on various things such as his schooling, his friends, what was the last movie that he went to see and other such matters. I found that he understood my questions and that his responses were coherent and reasonable. He demonstrated to my satisfaction that he could understand and respond to questions adequately and that his memory was fine. He promised to tell the truth, therefore I allowed him to testify. Later, while giving his evidence, he remembered that he was in grade six.

Overall, the required capacity under the new [section 16.1](#) is a more concrete and focused inquiry. The new test for child witnesses prohibits any questions regarding the meaning of such abstract concepts as “truth”, “lie” and “promise” during the competency inquiry for a child witness.

In *R. v. D.I.*,<sup>19</sup> the court ruled on whether to admit the hearsay statement of a 22-year-old woman with a mental age of 3 years. In holding that she was not competent to testify, the court found that she had not met the criteria required by s.16 of the *Canada Evidence Act*: “she had no concept of truth or lies, nor the consequences of telling a lie.” (For persons age 14 or older at the time of testifying, the old test of section 16 of the *Canada Evidence Act* continues to apply, and the court must be satisfied that the witness “understands the nature of an oath or solemn affirmation.”)

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<sup>15</sup> (1992), 74 C.C.C. (3d) 134 (S.C.C.).

<sup>16</sup> (1990), 56 C.C.C. (3d) 200 (S.C.C.).

<sup>17</sup> *R. v. Bannerman* (1966), 55 W.W.R. No. 257 (Man. C.A.) (aff’d [1966] S.C.R. v); see also in *R. v. Ferguson* (1996), 112 C.C.C. (3d) 342 (B.C.C.A.); *R. v. F.(W.J.)* (1999), 138 C.C.C. (3d) 1 (S.C.C.); and *R. v. Khan* (1990), 59 C.C.C. (3d) 92 (S.C.C.).

<sup>18</sup> [2008] O.J. 644 (Ont. Ct. J.).

<sup>19</sup> [2008] O.J. 1824 (Ont. Sup. Ct. J.).

### 2.1.2 The “Promise to Tell the Truth”

Section 16.1 of the *Canada Evidence Act* now requires that a child testify under a “promise to tell the truth.” Formerly, an inquiry was required as to every child’s ability to testify under oath, resulting in an often unhelpful focus on a child’s ability to understand the particular nature of an oath rather than on her ability to undertake to testify truthfully.<sup>20</sup>

Under the previous s. 16, where the child was able to communicate the evidence but did not understand the nature of an oath, she could give unsworn testimony upon promising to tell the truth. It was held that this required an actual commitment to tell the truth; an inference was insufficient,<sup>21</sup> although the commitment could be articulated in a variety of ways. Subsection 16.1(7) now makes it clear that no questions are to be asked regarding the child’s understanding of the nature of the “promise to tell the truth” as part of the competence inquiry. The present provision reflects the reality that children are often unable to articulate the meaning of such abstract concepts as “truth” and “lie,” even though they may well know the difference between the truth and a lie. Psychological research has established that there is no relationship between a child’s ability to define “truth” and whether a child will tell the truth.<sup>22</sup> Given these findings, Parliament eliminated the possibility of any questioning of children about such abstract concepts as “truth,” “lie” or “promise.”

As with adults who take the oath, a child who promises to tell the truth is to be accepted as having made a commitment to do so, though of course it is for the trier of fact to determine the veracity and reliability of the testimony. However, as further discussed below, in a number of cases, including *R. v. J.S.*,<sup>23</sup> Metzger J., the court held that while a child cannot be questioned about his or her understanding of the meaning of the “promise to tell the truth” at the competence inquiry, counsel for the defence can question a child witness’s understanding of truth-telling during cross-examination, with the answers possibly affecting the weight or credibility of the child’s evidence, but not its admissibility. Prof. Lisa Dufraimont commented on the decision in *R. v. J.S.*, questioning whether, in light of the psychological research and the enactment of s. 16.1(7) “there is any real value” to having such questions posed in cross-examination.<sup>24</sup>

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<sup>20</sup> *R. v. Farley* (1995), 23 O.R. (3d) 445 (Ont. C.A.). In this “very close case” the Ontario Court of Appeal went so far as to say that a proposed witness need not make an actual commitment to tell the truth before being allowed to testify under s.16(3). This approach appears to have conflicted with the clear wording of the old s.16(3). See also *R. v. G.(C.W.)* (1994), 88 C.C.C. (3d) 240 (B.C.C.A.) where the necessity of eliciting a promise is discussed. See also *R. v. Rockey* (1996), 110 C.C.C. (3d) 481 (S.C.C.) and *R. v. B.(R.J.)*, [2000] A.J. No. 363 (Alta. C.A.).

<sup>21</sup> *R. v. Peterson* (1996), 27 O.R. (3d) 739 (Ont. C.A.); *R. v. M.(M.A.)* (2001), 151 C.C.C. (3d) 22 (B.C.C.A.) (application for leave to appeal denied [2001] S.C.C.A. No. 62 (S.C.C.)).

<sup>22</sup> See Nicholas Bala, Victoria Talwar, Kang Lee & R.C.L. Lindsay, “A Legal & Psychological Critique of the Present Approach to the Assessment of the Competence of Child Witnesses” (2000) 38(3) *Osgoode Hall Law Journal* 409-451; Talwar, Lee, Bala and Lindsay, “Children’s Conceptual Knowledge of Lying and its Relation to their Actual Behaviors: Implications for the Court Competence Examination” (2002) 26 *Law and Human Behavior* 395-416; Bala, Lee, Lindsay, Talwar, “The Competency of Children to Testify: Psychological Research Informing Canadian Law Reform” (2009), 17 *International Journal of Children’s Rights* 1-25; and Lyon, Malloy, Quas & Talwar, “Coaching, Truth Induction and Young Children’s False Allegations and False Denials” (2008, forthcoming), *Child Development*.

<sup>23</sup> [2007] B.C.J. 1374 (S.C.).

<sup>24</sup> Dufraimont, *supra*, note 4.

In *R v. F.(J.)*,<sup>25</sup> [2006] A.J. No. 972 (Prov. Ct.) in a video-recorded interview that was admitted in evidence under s. 715.1, the 7-year-old complainant was asked questions by a police interviewer about her understanding of the difference between the truth and a lie. The court accepted the child's testimony and convicted the accused, with Ho Prov. Ct. J. commenting (at para. 39): "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."

Subsection 16.1(6) specifically requires a child to make a "promise to tell the truth" before testifying. *Bala et al.*<sup>26</sup> suggest that this is best done by having the child explicitly make the "promise," but it should suffice to obtain an affirmative answer to the question: "Do you promise to tell the truth?" In the rare event that a child refuses to make the promise, then like an adult refusing to be sworn or to affirm, the witness should be precluded from testifying.<sup>27</sup>

Section 16.1(8) now makes it clear that the fact that the child testifies on a promise rather than under oath does not mean the testimony should be afforded less weight, which position had been espoused by the courts prior to this amendment. However, it would seem that a judge still has the discretion to warn a jury about the dangers of convicting upon the basis of the unconfirmed and unsworn testimony of a child witness where warranted by the circumstances.<sup>28</sup>

### **2.1.3 Conduct of the Competency Examination**

In *R. v. Bannerman*,<sup>29</sup> it was held that the inquiry should be conducted by the trial judge; the nature and number of the questions will depend on the particular circumstances of the child; the questions should be age appropriate and intelligible; and the appellate courts should defer to the discretion of the trial judge in determining competency unless that discretion has been manifestly abused. The Manitoba Court of Appeal also accepted that it was quite appropriate for Crown Counsel, a parent, or another person to prepare the child for testifying by providing instruction about the importance of truth telling in court before the child comes to court.

In *R. v. Ferguson*,<sup>30</sup> Finch J.A. of the British Columbia Court of Appeal reviewed the case law and also concluded that the court has a discretion to permit counsel to ask questions on the inquiry and the standard of proof is on a balance of probabilities.<sup>31</sup>

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<sup>25</sup> [2007] B.C.J. 1374 (S.C.).

<sup>26</sup> *Bala et al.*, *supra*, note 4.

<sup>27</sup> In *R. v. Enuaraq*, [2005] Nu.J. No. 6, 2005 NUCJ 6 (Nu. Ct. J.), the judge described the 13-year-old complainant in a sexual assault case as a "frightened and reluctant witness." Her response to the question of whether she promised to tell the truth was: "I don't know." The trial judge ruled that the girl had not satisfied the standard of the *Evidence Act* for a "promise" and she could not testify.

<sup>28</sup> *R. v. Bannerman* (1966), 55 W.W.R. No. 257 (Man. C.A.) (aff'd [1966] S.C.R. v); and *R. v. Ferguson* (1996), 112 C.C.C. (3d) 342 (B.C.C.A.).

<sup>29</sup> (1966), 48 C.R. No. 110, 55 W.W.R. No. 257 (Man. C.A.); aff'd [1966] S.C.R. v, 50 C.R. 76n, 57 W.W.R. 736n (S.C.C.).

<sup>30</sup> *Ferguson*, *supra*, note 16.

<sup>31</sup> See also *R. v. F.(R.G.)*, [1997] 6 W.W.R. 273 (Alta. C.A.), at 283.

The Ontario Court of Appeal held in *R. v. Peterson*<sup>32</sup> that who asks the relevant questions is of little importance, provided the inquiry is fairly conducted under the control of the trial judge. *R. v. Leonard*<sup>33</sup> and *R. v. D.(R.R.)*<sup>34</sup> provide examples of instances where the court held that it was appropriate to let the Crown prosecutor ask questions to the child owing to his/her familiarity with the child. If the child is young and appears intimidated or is having difficulty in communicating, it may be preferable to have counsel who has called the child lead this questioning. Similarly, the Alberta Court of Appeal in *R. v. F.(R.G.)*<sup>35</sup> held that a trial judge is mandated only to control the interrogation and not necessarily to conduct it.

Bala et al.<sup>36</sup> argue that under the 2006 provision, if the issue of the child's competence to testify arises, it will generally be preferable for the trial judge to ask the child questions to ascertain the child's ability to respond to questions. If the judge asks the questions, this should tend to ensure an objective and optimal opportunity to assess the child's competence to answer questions both in examination-in-chief and on cross-examination. However, Bala et al. argue that the case law under the previous provision continues to apply, and that where a child is not responsive to the judge's questions, the trial judge may allow counsel who is calling the witness to ask the child questions that will establish the child's ability to understand and respond to questions. Before deciding whether to have counsel take the lead, however, the trial judge should invite comment from both counsel concerning the advisability of doing so.<sup>37</sup>

In *R. v. F.(R.G.)*,<sup>38</sup> the Alberta Court of Appeal held that the ability is to be assessed on the basis of age appropriate questions on matters about which the child might be familiar. The court stated as follows.

Here, it was apparent that R.F. was able to understand questions and recall and relate details concerning her age, school and its location, so that a minimal ability to communicate was established. She also responded when prompted by the Court to reply with a yes or no when asked if she knew why she was in Court. The questions which appeared to render the child mute were focused on her own perception of her ability to hear and speak, and an explanation for her attendance in Court. In our view, those questions were unnecessarily complex as a basis for determining the testimonial competency of a 5 year-old child, and may explain her ensuing silence. The ability to communicate should be assessed on the basis of age-appropriate questions on matters about which the child might be familiar. The child's inability or reluctance to explain her attendance in Court is hardly surprising...

These comments should continue to be applicable to an inquiry into a child's ability to understand questions and respond to them under the present s. 16.1.

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<sup>32</sup> [1996] 106 C.C.C. (3d) 64 (Ont. C.A.).

<sup>33</sup> [1990] O.J. No. 427 (Ont. C.A.).

<sup>34</sup> [1989] 47 C.C.C. (3d) 97 (Sask. C.A.).

<sup>35</sup> [1997] 6 W.W.R. 273 (Alta. C.A.).

<sup>36</sup> Bala et al., *supra*, note 4.

<sup>37</sup> *Supra*, note 30, at 282.

<sup>38</sup> *Supra*, note 34.

#### **2.1.4 Constitutionality of Section 16.1 of the *Canada Evidence Act***

Given the low standard and simple process for establishing the competence of child witnesses under the new s. 16.1, it is understandable that there is very little reported case law dealing with its interpretation or application. Almost all of the reported cases that mention this provision deal with its constitutionality, and all of these cases have held that it is constitutionally valid.

A *Charter* challenge to s. 16.1 of the *Canada Evidence Act* was rejected by Antifaev Prov. Ct. J. in *R. v. S.(M.)*<sup>39</sup> in a case involving proposed testimony by a 4-year-old child. The court held that the accused's right to a fair trial was not affected by the legislative reform. The court noted that social science research establishes that children's ability to answer questions about such abstract concepts as "truth" and "promise" is not related to whether or not they will in fact tell the truth. The court accepted that while children cannot be asked questions about their understanding of the nature of a promise as a precondition of being allowed to testify, they may still be asked questions about this later in their testimony, with a witness, with their answers going to the weight of their testimony rather than its admissibility. The court observed:

...even a gentle cross-examination will be sufficient to disclose that a child who is mature enough to understand and respond to questions may still not have understood and accepted the duty to tell the truth. The question really is not whether the child understands the duty of telling the truth or can articulate that duty, but whether the child is in fact telling the truth.

The court noted that with very young witnesses with limited verbal abilities and memory, there may be a need for "caution" in relying on their evidence. Antifaev Prov. Ct. J. observed that an "apparent lack of knowledge of the concepts of truth and falsity and the duty to speak the truth will bring a heightened need for caution." However, she concluded that this need for "caution" if the child cannot demonstrate an understanding of the duty to speak the truth in cross-examination does not render the child's testimony inadmissible, but only affects its weight.

In *R. v. S.(M)* the defence also argued that because the accused was a young person, he was entitled to more procedural fairness with regards to s. 16.1 of the *Canada Evidence Act* than would be afforded an adult in his position. The defence argued that the *Youth Criminal Justice Act* s. 3 required a higher degree of procedural protection, and consequently a competence hearing should be held before determining that the child witness, who was age 4 at the time, was competent to testify. Judge Antifaev rejected this argument, observing that there was no case cited where "it was accepted that a youth charged with an offence is entitled to any more favorable interpretation of a law of general application than an adult who was similarly charged."

In *R. v. Persaud*,<sup>40</sup> the court also upheld the constitutional validity of s. 16.1 of the *Canada Evidence Act*, with Epstein J. noting that the "objective of Bill C-2 as a whole was to enhance the participation of and respect for, children in the justice system." She also observed that the accused is still afforded a full right to cross-examine a child, including asking questions at that

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<sup>39</sup> Unreported Aug. 31, 2006 (Port Coquitlam, File. No. 7740).

<sup>40</sup> [2007] O.J. 432 (Ont. Sup. Ct.).

time about whether a child knows the difference between the truth and a lie, and appreciates the importance of telling the truth.

In *R. v. J.S.*,<sup>41</sup> the Supreme Court of British Columbia followed the decision of Antifaev Prov. Ct. J. in *R. v. S.(M.)*, upholding the constitutionality of s. 16.1 of the *Canada Evidence Act*. The appellant was convicted of sexually assaulting both his son and daughter. Counsel for the defence submitted that his right to a fair trial was adversely affected by the reception of a child's testimony without any evidence that the child understands the duty to tell the truth, having promised to do so. Metzger J. cited the decision of Antifaev Prov. J. in *R. v. S.(M.)* and emphasized that what is important is not whether or not child witnesses comprehend the duty to tell the truth but rather whether in fact they are telling the truth. It is the trier of fact's job to make this determination, and counsel for the defence can question a child witness's understanding of truth-telling during cross examination, thus preserving the accused's rights to a fair trial.<sup>42</sup> Prof. Lisa Dufraimont commented that *R. v. J.S.* "represents a victory for children," though she questioned whether "there is any real value" to having questions about a child's understanding of the meaning of the "promise to tell the truth" posed in cross-examination.<sup>43</sup>

The ruling of Metzger J. in *R. v. J.S.* on the constitutionality of s. 16.1 of the *Canada Evidence Act* was upheld by the British Columbia Court of Appeal.<sup>44</sup> The Court of Appeal noted that s. 16.1 prohibits a pre-testimonial inquiry into the proposed child witness's understanding of a promise to tell the truth, unless the applicant demonstrates that there is an issue as to the child's capacity to testify. The Court of Appeal followed the trial level decisions in *R. v. S.(M.)* and *R. v. Persaud* and concluded that s. 16.1 is constitutionally valid and that s. 16.1 reflects the procedural and evidentiary evolution of our criminal justice system, in order to facilitate the testimony of children as a necessary step in its truth-seeking goal. D.M. Smith J.A. wrote:

52 I do not accept the appellant's argument that if a moral obligation to tell the truth is not established, the testimony of the witness should be inadmissible. Parliament, in enacting s. 16.1, has decided that a promise to tell the truth is sufficient to engage the child witness's moral obligation to tell the truth. Section 16.1 places child witnesses on a more equal footing to adult witnesses by presuming testimonial competence. A child witness's moral commitment to tell the truth, their understanding of the nature of a promise to tell the truth, and their cognitive ability to answer questions about "truth" and "lies" may still be challenged on cross-examination during their testimony; their credibility and reliability may still be challenged in the same manner as an adult's testimony may be challenged. These potential concerns, however, go to the weight of the evidence, not its admissibility.

53 Section 16.1 changes the focus of a child's evidence from one of admissibility to one of reliability. It discards the imposition of rigid pre-testimonial requirements, which often prevented a child from testifying because of their inability to articulate an understanding of abstract concepts that many adults have difficulty explaining.,,the accuracy of a child's

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<sup>41</sup> *Supra*, note 22.

<sup>42</sup> See also *R. v. Soos*, 2007 BCSC 900, where a constitutional challenge to s. 16.1 of the *Canada Evidence Act* was also dismissed.

<sup>43</sup> Lisa Dufraimont, "S. (J.): Care in Cross-Examining Child Witnesses" (2007), 48 C.R. (6th) 357.

<sup>44</sup> [2008] B.C.J. 1915, 2008 BCCA 401, (B.C.C.A.)

evidence is of paramount importance, not the ability of a child to articulate abstract concepts.

54 I do not accept that a child's presumed testimonial incompetence is a fundamental principle of justice, or that a child's presumed testimonial competence diminishes an accused's right to a fair trial.... I am satisfied s. 16.1 reflects the procedural and evidentiary evolution of our criminal justice system, in order to facilitate the testimony of children as a necessary step in its truth-seeking goal.

55 While enhancing the receipt of probative and relevant evidence, s. 16.1 does not restrict the traditional safeguards for ensuring an accused's right to a fair trial: the opportunity for the accused to see and cross-examine a child witness, to call evidence, to be presumed innocent until proven guilty, and to have the Crown prove the alleged offence beyond a reasonable doubt. Equally significant, the provision maintains a residual discretion with the trial judge to permit a pre-testimonial inquiry if it can be established that there is an issue as to the ability of a child witness to understand and respond to questions.

On May 5, 2009, the Supreme Court of Canada granted leave to appeal in *R v. J.S.*,<sup>45</sup> a decision is likely to be rendered by that Court before the end of 2010.

### **2.1.5 Inherent Authority to Instruct Child**

While s. 16.1(7) of the *Canada Evidence Act* makes clear that the answering of questions about the promise is not to be a condition of a child testifying, *Bala et al.*<sup>46</sup> suggest that the judge still may give the child simple instructions about the role of a witness in court. This might include brief instructions about the importance of telling the truth. The child could also be encouraged and instructed during this initial period about the need to give responses that are as detailed as possible. Children should also be reminded that if there are questions which they do not understand, they should indicate this to the court, and if there are questions that they cannot answer, they should not guess at answers, but rather should respond, "I don't know."

*R. v. Jim*<sup>47</sup> illustrates the kind of assistance that a judge can provide to a confused child witness. A 16-year-old witness hesitated to make a solemn affirmation to tell the truth as she indicated to the judge that she did not understand the meaning of the word "affirmation." The trial judge explained its definition by providing the synonym "promise." The British Columbia Court of Appeal ruled that this explanation of the word "affirmation" by the judge was an acceptable way to clarify to the witness what was needed from her in order to testify.

## **2.2 Accommodating Child Witnesses: Introduction**

While children can provide reliable evidence, Parliament has recognized the need to treat children differently than adults when they provide evidence in a court of law. There is now a realization that furnishing evidence in court can be extremely traumatic for a child. There are a number of the aspects of testifying which can affect child witnesses, including: the imposing atmosphere of the courtroom; the repetition by the child in public of details of an event that is

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<sup>45</sup> *R. v. J.Z.S.*, [2008] S.C.C.A. No. 542.

<sup>46</sup> *Bala et al.*, *supra*, note 4.

<sup>47</sup> [2006] B.C.J. 3227 (B.C.C.A.).

embarrassing or frightening; being in the presence of someone who may have abused the child and who may have threatened to harm the child or a family member if the abuse were disclosed; and the physical separation from a parent or trusted adult. The accommodation of children is needed not only to reduce the trauma of testifying, but also to ensure that they have a fair opportunity to communicate what they know about the matters in question.

### **2.2.1 Support Person: s. 486.1**

Parliament first enacted legislation in 1993 to allow a support person to be close to a child witness while he or she tenders evidence in court. The original legislation was applicable only to charges related to sexual or violent offences. Section 486.1 now makes an order for a support person mandatory on application by a prosecutor or witness under age 18 in any criminal proceeding, unless the judge concludes that the order would interfere with the proper administration of justice.

This provision appears from reported cases to be invoked fairly often,<sup>48</sup> but there are no reported cases that deal with the interpretation or application of s. 486.1 in regard to child witnesses.

The presumption for allowing a support person near a witness under s. 486.1(1) is also applicable to any case where an adult witness is suffering from “mental or physical disability” that would affect the ability to communicate. *R. v. Billy*<sup>49</sup> offers a discussion of what constitutes a “mental disability” that would affect the ability to communicate and allow for an order to be made under s. 486.1(1) for a disabled adult.

A support person might be a social worker or a victim witness worker. In some cases a parent may also be an appropriate support person, although a judge may decide that this interferes with the proper administration of justice if the allegation involves abuse by the other parent or a relative.

In *R. v. C.(D.)*, the Nova Scotia Court of Appeal considered whether the trial judge had erred in allowing the mother of the child complainant to act as the support person, as she was also a witness about the child’s disclosure and the opportunity of the accused to commit the acts in question.<sup>50</sup> Although the mother testified before the child entered the court, the accused objected to her being a support person as she might have been recalled after her daughter testified. The trial judge allowed the mother to act as a support person. The Court of Appeal concluded that the trial judge’s decision to allow the mother to be a support person represented a valid exercise of judicial discretion. The appellant argued that allowing the mother to sit next to her daughter and listen to her testimony effectively denied him the right to question the mother after the complainant testified in relation to his belief that the complainant’s evidence may have been tainted by the older sister, who did not testify.

The Court of Appeal concluded that the appellant seemed “to confuse the opportunity for tainting with the reality of tainting...So long as the judge was aware of this potential and appropriately addressed it when considering all the evidence, there is no cause to intervene”. The Court of

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<sup>48</sup> See e.g. *R. v. Flores*, [2007] B.C.J. 1505 (S.C.), per McEwan, J., no discussion of s. 486.1.

<sup>49</sup> [2006] B.C.J. No. 1139 (Prov. Ct.).

<sup>50</sup> [2008] NSCA 105.

Appeal held that the trial judge was “acutely aware of the possibility of witness tainting and addressed this directly in her decision”. The Court further noted that the appellant had the full opportunity to explore the issue of tainting with both the complainant and the mother during their respective cross-examinations. The Court of Appeal did, however, note that in making her decision the trial judge appeared to concentrate only on s. 486.1(1), which presumptively allows the witness to choose the support person and did not appear to address s. 486.1(4) which presumptively excludes a witness as a support person “unless necessary for the proper administration of justice”. The Court of Appeal suggested that the failure to address s. 486.1(4) might have been a “procedural irregularity” but did not prejudice the accused in this case as the mother was not in fact recalled as a witness.

### **2.2.2 Use of a Screen or Closed-circuit Television: s. 486.2**

If the Crown or child requests it, s. 486.2(1) now requires that a child “shall” be permitted to testify via closed circuit television or from behind a screen, unless the court is of the “opinion that the order would interfere with the proper administration of justice.”<sup>51</sup> The presumption of permission for use of a screen or closed-circuit television under s. 486.2(1) is also applicable to any case where an adult witness is suffering from “mental or physical disability” that would affect the ability to communicate.

Under s. 486.2(2) adults who are not disabled may be permitted to testify from behind a screen or via closed-circuit television but only if the court is “of the opinion that the order is necessary to obtain a full and candid account from the witness of the acts complained of.” As discussed in *R. v. Pal*,<sup>52</sup> per Joyce J., for s. 486.2(2) to be used by an adult, it is not sufficient for the witness to satisfy the court that he or she is “fearful,” it must be shown that the fear would render the witness unable to “give a full and candid account.”

It was held in *R. v. Levogiannis*<sup>53</sup> that use of a screen under former subsection 486.2(1) did not violate the rights of an accused under s. 7 or s. 11(d) of the *Charter*.

A constitutional challenge to the current subsection 486.2(1) was rejected in *R. v. S.(J.)*<sup>54</sup> by Metzger J. In that case a screen was set up so that the young complainants could testify without seeing the accused. Counsel for the accused submitted that the screen changed the entire dynamic of the court process which negatively affected his rights to be present at trial in the full sense of the word. The British Columbia Supreme Court followed *R. v. Levogiannis* and

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<sup>51</sup> The presumption of permission for use of a screen or closed circuit television under s. 486.2(1) is also applicable to any case where an adult witness is suffering from “mental or physical disability” that would affect the ability to communicate.

Under s. 486.2(2) adults who are not disabled may be permitted to testify from behind a screen or via closed circuit television, but only if the court is “of the opinion that the order is necessary to obtain a full and candid account from the witness of the acts complained of.” For this provision to be used by an adult, it is not sufficient for the witness to satisfy the court that he or she is “fearful,” it must be shown that the fear would render the witness unable to “give a full and candid account”, see *R v. Pal*, [2007] B.C.J. 2192 (S.C.), per Joyce J.

<sup>52</sup> [2007] B.C.J. 2192 (S.C.).

<sup>53</sup> (1993), 85 C.C.C. (3d) 327 (S.C.C.).

<sup>54</sup> [2007] B.C.J. 1374 (S.C.).

concluded that the absence of face to face testimony did not violate the accused's right to a fair trial.

The British Columbia Court of Appeal in upheld the trial decision *R. v. S.(J.)*,<sup>55</sup> and ruled that s.486.2 is constitutionally valid. The Court of Appeal held that *R. v. Levogiannis* could not be distinguished on the basis of the presumptive current wording of s. 486.2, noting that the unique position of child witnesses in the criminal justice context was also supported by the Supreme Court in *R. v. L.(D.O.)*.<sup>56</sup> The Court of Appeal noted that, as was discussed at length in *R. v. L.(D.O.)*, the "rules of evidence and procedure have evolved through the years in an effort to accommodate the truth-seeking functions of the courts, while at the same time ensuring the fairness of trial." [at para 35] The British Columbia Court of Appeal concluded (at para. 43):

s. 486.2 is merely the next step in the evolution of the rules of evidence. These rules seek to facilitate the admissibility of relevant and probative evidence from children and vulnerable witnesses while maintaining the traditional safeguards for challenging the reliability of their evidence. Rules of evidence must be construed in light of a criminal justice system that encourages the goal of "attainment of truth". Over the years, the use of testimonial aids has been subject to ongoing procedural and evidentiary changes, which may continue to evolve. In this case, the changes are not in conflict with constitutionally guaranteed principles of fundamental justice. The presumptive nature of s. 486.2 does not dispense with any of the traditional safeguards for ensuring that an accused receives a fair trial.

In *R. v. C.(A.W.)*,<sup>57</sup> the child complainant testified behind a screen that allowed her to avoid seeing the accused, but which also prevented the accused from hearing or seeing the complainant while she testified. Only after a substantial portion of her testimony was finished was the hearing problem rectified and only for the balance of the proceedings; the visual problem was never rectified. In convicting the accused, the trial judge relied heavily on the child complainant's evidence, and upon her demeanor in giving it. A new trial was ordered, with the Alberta Court of Appeal holding that an accused has a right to more than mere physical presence in the courtroom during the trial; the right extends to seeing and hearing the evidence and witnesses at trial. Given the improvements in child-friendly courtrooms in many jurisdictions, these types of problems should become less common over time. However, *R. v. C.(A.W.)* is a reminder that judges must be vigilant to ensure effective participation by the accused in his own trial, and should attempt to remedy any problems during the course of the trial.

In *R. v. Henry*,<sup>58</sup> the accused was charged with two counts of sexual assault and sexual interference against his step-daughter. The Crown applied for an order under the former s. 486.2(1) of the *Criminal Code*, to permit the 15-year-old step-daughter to testify from behind a screen. In dismissing the application, Quinn J. held that the Crown had not proven on a balance of probabilities that the screen was "necessary to obtain a full and candid account of the acts complained of from the complaint." The Crown had not demonstrated the child witness's "inability" to testify, but only her "unwillingness." The trial judge also refused to infer that she was traumatized by the alleged assaults, since no specific evidence on this subject was adduced.

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<sup>55</sup> 2008 BCCA 401.

<sup>56</sup> [1993] 4 S.C.R. 419.

<sup>57</sup> [2005] A.J. No. 308 (Alta. C.A.).

<sup>58</sup> [2005] O.J. No. 2771 (Ont. Sup. Ct. J.).

The decision in *Henry*, however, was made under the previous s. 486(2.1), and under the new provision, s. 486.2(1), the outcome of a similar case might well be different as it establishes a presumption that a child witness may use a screen, if it is requested, making clear that there is no evidentiary burden on the Crown to justify use of a screen. A number of cases under the new provision have emphasized that the test is now quite different, and the onus is now on the accused to demonstrate that use of a screen would “interfere with the proper administration of justice” (see, e.g., *R. v. McDonald*<sup>59</sup>).

In *R. v. Elmer*,<sup>60</sup> Godfrey Prov. Ct. J. permitted two adolescent complainants to testify from behind a screen, observing that the previous provision set out a “different and higher standard,” with the current s. 486.2(1) being “mandatory” due to the use of the word “shall.” In *R. v. McAllister*,<sup>61</sup> Taylor J. made an order permitting a child to testify from behind a screen with a support person close by, observing that change in wording in the provision that came into force in 2006 is “significant,” since the onus is now on the accused to establish that use of a screen would “interfere with the proper administration of justice,” which the judge characterized as a “very high standard.”

The fact that the Crown intends to subsequently apply under s. 715.1 to have the complainant adopt her video-taped statements is not relevant to the application for a screen or use of closed-circuit television.<sup>62</sup> It is clear that a combination of testimonial aids can be used along with a video-recorded statement. Thus in *R. v. Flores*,<sup>63</sup> per McEwan, J. the child witness testified from behind a screen with comfort items and a support person present in the witness box, and during her testimony, she adopted the contents of a video-recorded statement.

In *R. v. T.(M.)*,<sup>64</sup> the Crown was seeking an order pursuant to section 486.2(2) that the complainant be allowed to testify behind a screen. The accused was the grandfather of the complainant and was charged with sexual assault. An issue arose, however, because at the time of the trial the complainant was 18 years of age, with her birthday having been in the month previous. In making the order that a screen be used, the judge considered the age of the complainant, the nature of the offence and the relationship involved, the fact that the order was necessary to obtain a “full and candid account from the witness of the acts complained of” and that the complainant had testified behind a screen at the preliminary hearing and been told that the same would apply at the trial.

### **2.2.2.1 Closed-circuit Television**

Like the former s. 486.2(1), the new provision does not expressly refer to closed-circuit television, but it clearly is intended to allow for a child or other vulnerable witness to testify via closed-circuit television. As recognized in *R. v. J.W.*,<sup>65</sup> by Tweedale, J., who quoted extensively from the Parliamentary debates leading to the enactment of Bill C-2, the use of closed-circuit

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<sup>59</sup> 2006 SKQB 161.

<sup>60</sup> [2006] B.C.J. No. 585 (Prov. Ct.).

<sup>61</sup> [2006] O.J. No. 5492 (Ont. Ct. J.).

<sup>62</sup> *R. v. F.S.* [2007] O.J. 4677 (Sup. Ct.), Spies J.

<sup>63</sup> [2007] B.C.J. 1505 (S.C.).

<sup>64</sup> 2009 CarswellOnt 3306 (Ont. Sup. Ct.)

<sup>65</sup> [2007] B.C.J. No. 468 (B.C. Prov. Ct.).

television is intended “to make it easier for child and youth witnesses to testify.” A television link permits the child to be examined and cross-examined from outside the court, in a smaller, less intimidating setting.

In *R. v. E.D.*,<sup>66</sup> Thomas J. concluded that an order for use of closed-circuit television should only be made if evidence satisfied the court that use of a screen would not be sufficient to protect the child. He observed: “allowing a witness to testify outside the courtroom is an extraordinary event in the administration of justice but at times necessary to secure the proper administration of justice, the evidence considered must preclude a less intrusive option.” Bala et al.<sup>67</sup> argue that the presumption in favour of applications found in the new s. 486.2(1) means that if the Crown makes an application for use of closed-circuit television, it is generally not necessary to establish that use of a screen would provide the child with inadequate protection.

In *R. v. G.A.P.*,<sup>68</sup> Simonsen J. rejected an application made by the Crown for a child witness to testify outside the courtroom by closed-circuit television, and instead ordered that a screen be used. The primary reason for requiring use of the screen was that counsel for the defence planned on extensive cross-examination of the child, referring to certain documents that counsel was not prepared to present before questioning, and the court could not observe the documents on closed circuit-television. However, other cases have held that the Crown (or a witness) will ordinarily have the “right” to determine what type of device (closed-circuit television or a screen) to use: *R v. J.W.*,<sup>69</sup> per Tweedale Prov. Ct. J. The “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, as occurred in *G.A.P.*.

In *R. v. T. (S.B.)*,<sup>70</sup> the British Columbia Supreme Court considered a judicial review application brought by the Crown after the trial judge granted an application under section 486.2(1), but ruled that the witnesses should testify from behind a screen rather than via closed-circuit television despite the request from the Crown to allow the two 15 year old female complainants to testify via closed circuit television. In the Supreme Court, Smart J. commented that section 486.2(1) creates a presumption in favour of the testimonial accommodation requested by the Crown; a judge or justice hearing an application under section 486.2(1) does not have an independent discretion to determine which testimonial accommodation he or she prefers or believes is better in the circumstances. It is only when the judge or justice is determining whether the requested testimonial accommodation would interfere with the proper administration of justice that he or she may consider the nature of the testimonial nature accommodation. However, Smart J. did not make an order as, by the time that the application was heard, another judge was assigned to the trial. In *obiter dicta*, Smart J. suggested that the presumption in section 486.2(1) applied only if the Crown made an application; if a witness under the age of 18 years was making an application without the support of the Crown, then section 486.2(2) would apply and there would be no presumption of use but rather the witness

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<sup>66</sup> [2004] O.J. No. 207 (Ont. Ct. J.).

<sup>67</sup> Bala et al., *supra*, note 4.

<sup>68</sup> [2007] M.J. No. 194 (Man. Q.B.) (QL).

<sup>69</sup> [2007] B.C.J. No. 468 (B.C. Prov. Ct.).

<sup>70</sup> [2008] B.C.J. No. 1027 (S.C.)

would need to establish that the particular form of accommodation was needed to “obtain a full and candid account”. In making these *obiter* comments, Smart J. acknowledged that “most of the authorities” cited to the court took the position that the presumption would apply whether the application was made by the Crown, a witness under age 18 or a witness who has a disability.

In some cases children who are testifying outside of the courtroom may seem more “remote” or “distracted.” For example, in *R. v. P.(M.R.)*,<sup>71</sup> during the playing of a video-recording her interview by police, the 11 year old complainant was outside the courtroom in a child-friendly room observing the recording on a television monitor. The child-friendly room was linked via closed-circuit television to the courtroom. At the conclusion of the DVD recording the complainant was questioned by the Crown and, adopted the contents of the recording. Bascom Prov. J. commented:

During the period of time when the DVD was being played in court, Ms. S.S. was observed on the television monitor. The Court noted during this period of time she did not watch the monitor for long periods of time. Ms. S.S. looked out the window or looked down on a desk. Although this demeanour would have been of concern if Ms. S.S. was an adult, the Court cannot say that her actions while watching the DVD caused the Court to question her credibility or reliability based on her demeanour.

The accused in *R. v. P.(M.R.)* was acquitted, though not because the Court rejected reliability of the videotaped interview, but because of other inconsistencies in the Crown’s case.

In *R. v. Black*,<sup>72</sup> Parrett, J. initially allowed an application to allow a 14-year-old complainant in a sexual assault case to testify via closed-closed circuit television; however, during her testimony the witness became uncooperative and consequently an order was made for her to complete her testimony from within the courtroom. The judge noted that while testifying by closed-circuit television, the girl displayed “disdain” for the judicial process, which was reflected in demeaning statements that she made towards counsel and in her refusal to answer questions about inconsistencies in her testimony. Parrett J commented:

It is also necessary to state unequivocally that the nature of her evidence and the difficulties which occurred during the course of it served to highlight the dangers in what I perceive to be a growing trend of the Crown in this region to rely on the provisions of s. 486.1 [sic] of the Code to allow witnesses to testify remotely by closed circuit facilities. Such a process, while highly useful in appropriate cases, has, in my view, inherent and unacceptable dangers which are starkly emphasized in the present case.

Parrett J. concluded that the use of a closed-circuit television was interfering with the administration of justice and terminated its use for the girl. In contrast, the latter portion of her testimony, completed within the courtroom, was done with “little apparent difficulty and with a good deal more recognition of the proper trial process.” The judge concluded: “In my view, the danger highlighted by this process in the present case serves to emphasize the importance of both the Crown and the court considering carefully the final ten words of s. 486.1(1) before giving

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<sup>71</sup> 2008 ABPC 303

<sup>72</sup> [2007] B.C.J. 2035 (S.C.).

such orders. The prospect of these events occurring before a jury is not one that would be easily dealt with.”

### **2.2.2.2 Constitutionality of s. 486.2**

The constitutionality of s. 486.2, as enacted in 2005, was upheld in *R. v. C.N.H.*,<sup>73</sup> per Dhillon Prov. Ct.J.; *R. v. Dhixon*,<sup>74</sup> per Gould Prov. Ct.J.; and *R. v. Schindler*,<sup>75</sup> per Klinger Prov. Ct. J. The courts have held that this provision does not violate the Charter s. 7, with its guarantee that deprivations of liberty are to be “in accordance with the principles of fundamental justice” or s. 11(d), with its guarantee of the right of an accused to a “fair trial.” In *R v. C.N.H.*, Dhillon Prov J. reviewed some case law about the constitutionality of the pre-2006 provision and considered a submission made to the Parliamentary Committee about the need for the enactment of this provision, and concluded (at para. 33-41):

Parliament is entitled to undertake reform of the law of evidence and, in relation to s. 486.2, has consulted widely on how to improve the experience of child and other vulnerable witnesses in the criminal justice system. The Supreme Court of Canada has said that the rules of evidence have not been cast as constitutionally protected principles of fundamental justice. Additionally, as is well noted in *Levogiannis, supra*, an accused has no constitutional right to face-to-face confrontation of a witness. Although s. 486.2 provides a procedural directive as to the manner in which child testimony may be given, it does not preclude the accused from using the full arsenal of procedural and substantive rights at his disposal in the adversarial system.

In the case at bar, the use of CCTV affords the accused a right to a full cross-examination of the witness. This right is not compromised by having the witness out of the physical presence of the accused because the CCTV technology permits the “virtual presence” of the witness in the courtroom. As Crown has submitted, “a witness testifying via CCTV is still giving *viva voce*, real time, cross-examinable evidence the credibility of which can be contemporaneously assessed.”

As has been noted by courts which have received CCTV or video evidence, the quality of evidence can be equal to or better than *viva voce* in person testimony particularly if technological enhancement is available. If the technological quality proves to be substandard, the court retains an overriding discretion to require the personal attendance of the witness in court....

In my view, s. 486.2 does not place any burden on the accused which jeopardizes fair trial rights. It calls on the Crown to satisfy the prerequisites of age of the witness, and the remaining conditions under s. 486.2(7). The Court must be satisfied that proper arrangements have been made for the contemporaneous receipt by the judge and the accused of out-of-court testimony, and for the accused to communicate with counsel during the testimony.

The legislation creates a presumptive rule that witnesses under the age of 18, if they apply, will be granted the right to testify with the use of a testimonial aid unless the court

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<sup>73</sup> [2006] B.C.J. No. 782, 2006 BCPC 119.

<sup>74</sup> Unreported Sept. 12, 2006 (B.C. Prov. Ct.).

<sup>75</sup> 2007 BCPC 285.

is “of the opinion” that such an order will interfere with the proper administration of justice. As discussed above, there is a valid legislative basis for requiring the presumptive or mandatory order, given the lack of success in affording aids to child witnesses under the predecessor legislation.

In order to preclude the imposition of a testimonial aid, which is presumptive under s. 486.2, the judge must form the opinion that the order would interfere with the proper administration of justice. I am of the view that a judge who forms such an opinion becomes “satisfied” as to that particular state of affairs....

Section 486.2 preserves the trial judge’s discretion to refuse such an order if the judge forms the opinion, whether from her or his own enquiries or from matters raised by the Crown or the accused, that the proper administration of justice may be adversely affected. This, in my view, does not place any undue burden on the accused and does not affect the accused’s rights to a fair trial.

The decision of Dhillon Prov. Ct. J. in *R. v. C.N.H.* offers the most extensive discussion of the constitutionality of this provision, and her decision has been cited in all of the subsequent cases that have upheld the validity of s. 486.2.

### **2.2.3 Preventing Questioning by Self-represented Accused: s. 486.3**

The *Criminal Code* s. 486.3(1) now specifically provides that an application can be made by the prosecutor or a person acting on behalf of the child to prohibit a self-represented accused from personally cross-examining a witness under age 18 years. Further, s. 486.3(2) provides that an application may be made to prevent a self-represented accused from personally cross-examining an adult witness, and that the court shall grant an application if the judge is of the opinion that such an order is needed “to obtain a full and candid account from the witness of the acts complained of.” Under s. 486.3(4) there is a presumption that an order preventing in-person cross-examination of the complainant will be made in any case involving a charge of criminal harassment. If an order is made under s. 486.3 to prevent cross-examination by a self-represented accused, the court “shall appoint counsel” for the purposes of the cross-examination. No order shall be made under s. 486.3 if the court concludes that the “proper administration of justice” requires personal cross-examination.

Prior to the coming into force of this provision in January 2006, the accused could only be precluded from cross-examining in proceedings where the accused was charged with sexual or violent offences. This provision now applies to any criminal proceeding.

There is no reported case law on circumstances that would justify a finding that the “proper administration of justice” would “require” that the accused conduct cross-examination in person. Given the wording of the provision, Bala et al.<sup>76</sup> argue that it would be difficult for the accused to satisfy the test. There might be situations in which an application is made at a very late stage in the proceedings and an order would necessitate an adjournment that should not be granted due to prior delays.

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<sup>76</sup> Bala et al., *supra*, note 4.

In *R. v. Mohammed*<sup>77</sup> and *R. v. A.M.*,<sup>78</sup> the old provision (s. 486(2.3)) was used to prevent an accused parent from cross-examining his own child. In *R. v. A.M.*,<sup>79</sup> Feldman J., in interpreting the prior subsection 486(2.3), wrote as follows.

Its language is mandatory, subject to the evidence demonstrating a contrary requirement. In practical terms, for the Crown application to fail, the evidence must show that the right of this accused to cross-examine his own young children represents, in the circumstances, a higher value than Parliament's recognition of the vulnerability of children to be overwhelmed by the criminal process to the extent that the court receives less than a full and candid account of the complaint.

In *R. v. G. (D.P.)*<sup>80</sup> the accused opposed a request to appoint counsel as his "past experiences with lawyers ... left him without confidence that the questions he wishes to ask will be put the witnesses." The accused added that since he was the cousin of the four child witnesses, they would not have difficulty in communicating with him, and that they would be less intimidated by him than a lawyer. He also submitted that the judge should interview the children to ascertain their wishes. The judge noted that a judicial interview is not contemplated by the section, held that in light of the presumption in section 486.3, counsel should be appointed. Further, the court noted that it would entertain a motion from counsel appointed for the purposes of cross-examination to postpone the date of trial due to the uncertainty of whether appointed defence counsel would have sufficient time to prepare adequately given the close proximity between the Crown's application and the date the trial was scheduled to commence.

The legislation does not specify how the appointment of counsel is to be made or how payment is to be arranged. Prof. Jula Hughes has criticized s. 486.3 for being "extremely sparse on procedure" and advocated Parliamentary action to "fill the gap."<sup>81</sup> In the absence of legislative direction there has been some significant variation in the case law about the process for retaining and paying counsel.

The court in *R. v. Leon*<sup>82</sup> held that the former provision did not allow a judge to directly order that the provincial Legal Aid plan provide funding or counsel for purposes of cross-examining the child where the accused is unrepresented. However, the court held that the section allowed the court to appoint independent counsel for the purpose of cross-examining the child.

In *R. c. B.S.*,<sup>83</sup> Bellehumeur J. appointed counsel under the former provision to cross-examine child witnesses in place of the accused, despite the objection of the accused. The judge initially requested a legal aid staff lawyer to attend, but that counsel declined to act as the accused was financially ineligible for legal aid. The judge was of the view that two options were available: to grant a stay until the state provided funded counsel to cross-examine, or to immediately appoint a

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<sup>77</sup> [2000] O.J. No. 1058 (Ont. Sup. Ct. J.).

<sup>78</sup> [2000] O.J. No. 3774 (Ont. Sup. Ct. J.).

<sup>79</sup> *Ibid.*

<sup>80</sup> [2008] O.J. No. 767 (Ont. Sup. Ct.).

<sup>81</sup> Hughes, *supra*, note 4.

<sup>82</sup> [1998] B.C.J. No. 131 (B.C.S.C.).

<sup>83</sup> [2005], J.Q. no 18675 (Que. Ct.).

lawyer who was present, sent by the Barreau du Quebec (the equivalent of the Law Society) and ready to cross-examine. The Court noted that it was of prime importance to have counsel undertake the cross-examination in a timely manner, which required an order that the Attorney General of Quebec would pay the fees and expenses of counsel.<sup>84</sup> In *R. c. B.S.*,<sup>85</sup> the Quebec Court of Appeal dealt with an appeal of some aspects of the decision of Bellehumeur J. The Appeal Court held that while it is within the power of the court under this provision to select a lawyer to represent the accused for the purposes of cross-examination, it is not within its power to determine the fees to be paid by the Ministry of the Attorney General, as this would be an infringement on the executive and legislative power of the Ministry. The Court of Appeal stated that an order selecting legal counsel for a self-represented accused should be accompanied by a stay in proceedings in order for the Ministry to make payment arrangements.

In *R. v. Papequash*,<sup>86</sup> an order had been made for legal representation for the purpose of cross-examination of a child, and the accused had not contacted any lawyers. Gower J. directed the Crown Attorney to contact a prospective defence counsel in order to find someone available for the trial date (10 days away) and willing to accept the Crown's rate of pay.

In *R. v. Peetooloot*,<sup>87</sup> Gorin Terr. Ct. J. was also faced with a situation where an order for representation had been made but the accused failed to retain counsel. The judge directed the clerk of the court to make the necessary arrangements to retain counsel, and suggested that the fees would be paid at counsel's "full private rate." As noted by the judge, the court did not have the jurisdiction to order that a particular government department or board pay a lawyer's fees, so the court ordered that a transcript of the decision be sent to Legal Aid, the Territorial Department of Justice, Court Services, and the Federal Department of Justice. The judge continued: "However, I will point out the obvious, and that is that ultimately it will be the taxpayer who will be picking up the tab regardless of which department or board pays." Prof. Jula Hughes characterized this remedy as "both creative and eloquent on the absurdity caused by the legislative lacuna."<sup>88</sup>

In *R. v. Civello*,<sup>89</sup> per Jennis J made an order under s. 486.3 stipulating that remuneration of counsel was to be at the "reasonable private rate" of \$250/hr. The court requested that the local Criminal Lawyers Association provide a list of senior counsel willing and able to do this work to the accused. The accused was offered a choice from this list, and if he was unwilling to do so, the judges would make the selection for him. While it is preferable for the accused to have a role in the selection of counsel, his failure to do so should not result in a delay of the proceedings.

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<sup>84</sup> But see *R. v. Cai* (2002), 170 C.C.C. (3d) 1 (Alta. C.A.), leave denied [2003] S.C.C.A. No. 360 and *Procureur général du Québec v. R.C.*, [2003] J.Q. No. 7541 (Que. C.A.), leave denied [2005] C.S.C.R. no 355 regarding the limited jurisdiction of the courts in this area. Also, s. 486(2.3) does not confer jurisdiction to appoint counsel for the accused for the entire trial: *R. v. Leon*, [1998] B.C.J. No. 131 (S.C.); *R. v. K.(K.K.)* (1997), 159 N.S.R. (2d) No. 357 (N.S.C.A.).

<sup>85</sup> [2007] J.Q. 14092 (C.A.).

<sup>86</sup> [2006] Y.J. 15 (S.C.).

<sup>87</sup> [2006] N.W.T.J. 23 (Terr. Ct.).

<sup>88</sup> Hughes, *supra*, note 4.

<sup>89</sup> Ont. Ct. Just., June 9, 2006 (unreported).

A theme that runs through these cases is that, since the legislation is silent about the method of appointment and payment of counsel in s. 486.3, the court must assume implied powers in order to give this provision effect in a manner that accords with the principles of fundamental justice. Understandably, judges are reluctant to be involved in the relationship between the accused and counsel, and there are no reported cases in which the judge has directly selected counsel for an accused.

The limited representation of an accused solely for the purpose of cross-examination of a child witness is a challenging role for counsel. In *R. v. Qamaniq*,<sup>90</sup> Johnson J. observed that where appointment of counsel to cross-examine can be anticipated, it is preferable for counsel to be appointed well in advance of the trial in order that the accused's defence is not prejudiced or compromised by lack of adequate preparation. Subsection 486.3(4.1) provides that only the judge who will preside over the proceedings may hear the application, but it may be dealt with before the proceedings begin. The application should be on notice to the accused. If the application is only made at the time of trial, it may be necessary for there to be an adjournment to allow counsel to be retained and to have time to prepare.

Section 486.3 has not completely barred the cross-examination of a child witness by a self-represented accused. In *R. v. Varcoe*,<sup>91</sup> the Ontario Court of Appeal held that no substantial wrong or miscarriage of justice had occurred due to the trial judge's decision to not appoint counsel and to allow the accused to cross-examine the 16-year-old complainant. The court seemed to place significant weight on the complainant's age as well as the fact that she had consented to the cross-examination, though also noting that the way in which the trial judge had dealt with s. 486.3 was "less than satisfactory," and suggesting that counsel should have been appointed. (A new trial was ordered on other grounds.)

#### **2.2.4 Video-recorded Evidence: ss. 715.1 and 715.2**

The current s. 715.1(1), which governs the admission of video-recorded statements of children, is quite a bit broader than the provision that was in effect prior to January 2, 2006. The present provision applies to any offence, not just a sexual offence, and creates a presumption that a recording of an interview with any child witness will be admitted, provided that it was made "within a reasonable time" of the incident. Further, s. 715.2 was added and now provides that if a witness "may have difficulty" in communicating his or her evidence "by reason of a mental or physical disability," a video-recording of an interview with that person made within a reasonable time within the alleged offence shall be admitted if the witness adopts the contents. Under the present ss. 715.1 and 715.2 the onus is on the accused to establish that the admission of a video-recording that meets the criteria for admission should be excluded as its admission would "interfere with the proper administration of justice."

##### **2.2.4.1 The Presumption of Admissibility under Bill C-2**

In *R. v. Ortiz*,<sup>92</sup> Pugsley J. stated that where the video-recorded evidence meets the statutory framework for admission, it would be:

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<sup>90</sup> [2007] Nu.J. No. 6 (Nu. Ct. J.).

<sup>91</sup> [2007] O.J. 1009 (C.A.).

<sup>92</sup> [2006] O.J. No. 935, 2006 ONCJ 72 (Ct. J.).

incorrect to import into the plain meaning of the current version of s. 715.1 a requirement that the Crown establish that the witness would be traumatized by giving fully live evidence or that the witness is a vulnerable witness. Significantly, Parliament imported such pre-requisite into the wording of the newly amended companion section s. 715.2 dealing with adult complainants and witnesses. Clearly s. 715.1 recognizes that witnesses under age 18 are presumed to be capable of being traumatized and/or are vulnerable by virtue of their age alone. The Crown need not establish these as pre-requisites to admission under the section.

#### **2.2.4.2 “Adoption” by the Witness of the Contents**

In *R. v. F.(C.C.)*,<sup>93</sup> Cory J. considered the interpretation of the term “adopts” in s. 715.1 of the *Criminal Code*, holding that it suffices that the complainant recalls giving the statement and testifies that he or she was then attempting to be honest and truthful.<sup>94</sup> The complainant need not have a present recollection of the events discussed in the videotape, and the test of adoption should not be the final determination of reliability, but rather a means of ascertaining whether the videotape meets the threshold degree of reliability required to admit it for the truth of its contents.<sup>95</sup>

In the recent case of *R. v. Vanderwerff*,<sup>96</sup> Read J. summarized much of the previous jurisprudence on the concept of “adoption”:

a witness could be said to adopt the contents of the videotape where, whether or not she recalls the events discussed, she does believe them to be true because she recalls giving them and her attempt to be honest and truthful.

In *R. v. F.(L.W.)*,<sup>97</sup> O’Connor J. placed a “caveat” on the admission of a video-recorded statement, ruling that any portions of the statement that the child was not able to “verify... that are prejudicial to the accused... must be edited out.” The judge left it to counsel to do this, stipulating that if they could not agree he would hold a further *voir dire* to deal with this issue.

#### **2.2.4.3 “Made within a Reasonable Time after the Alleged Offence”**

In considering the meaning of the above phrase, L’Heureux-Dubé J. in *R. v. L.(D.O.)*,<sup>98</sup> provided the following guidance:

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<sup>93</sup> (1997), 120 C.C.C. (3d) 225.

<sup>94</sup> This approach was criticized by T.E. Moore in “Truth and the Reliability of Children’s Evidence” (2001) 30 C.R. (5th) 148 as confusing credibility with reliability since a child’s accounts can sometimes be both sincere and incorrect; this approach amounts to asking the witness to *appraise her own truthfulness*. For examples of a child witness adopting their videotaped statement see *R. v. Burton*, [2007] O.J. No. 1630 (S.C.C.), Pugsley, J., and *R. v. L.H.*, [2007] O.J. No. 1588 (Ont. Sup. Ct.), Hill, J.

<sup>95</sup> See *R. v. C.B.*, [2007] O.J. 4580 (Sup. Ct.), Wein J. for an example of a case where the court accepted a child witness’s videotaped statement and testimony as being “strong evidence” of the guilt of the accused, but ultimately acquitted the accused as the Crown had not proved guilt beyond a reasonable doubt.

<sup>96</sup> [2006] A.J. No. 620 (Alta. Q.B.).

<sup>97</sup> [2006] O.J. No. 1197 (Ont. Sup. Ct. J.).

<sup>98</sup> (1993), 85 C.C.C. (3d) 289 (S.C.C.).

... What is or is not “reasonable” depends entirely on the circumstances of a case... In reaching a conclusion as to the reasonableness of time, courts must be mindful of the fact that children, for a number of reasons, are often apt to delay disclosure. ...Further, depending on where the child resides and whether facilities are available, as well as the necessity of prior investigation to ensure the seriousness of the allegations, some delay will necessarily accrue. On the other hand, such determination must also take into account social science data which makes clear that recollection decreases in accuracy with time. ...The reasonableness of the delay in gathering such evidence may further depend on a number of factors which only a case-by-case analysis will be able to determine.<sup>99</sup>

Factors in assessing whether the tape was made within a “reasonable time” may include:

- the age of the witness;
- the nature of the offence;
- efforts made to obtain earlier statements;
- delay by the complainant in disclosing or reporting the offences;
- facilities available in the area where the complainant or witness resides; and
- whether prior investigation was necessary to determine the seriousness of the allegations.

In *R. v. Mulder*<sup>100</sup> statements from 3 complainants age 10 to 12 recorded approximately 11 months after the alleged incidents were held admissible. The boys did not disclose their alleged abuse until a few days before the interview. Miller J. observed that while it would be preferable to have recorded statements from the complainants closer in time to the alleged offences, but noted that 11 months was still much closer in time to the alleged offences than was the *viva voce* testimony of the complainants. The recorded statements are likely to be more accurate recollections of the events. The court held that none of the complainants were so young that the delay raised obvious concerns about their ability to accurately recall the incidents with the accused. Further, there was ample evidence from which reasons for a delay in disclosure could be inferred, relating to the fact that the accused was in a position of authority over the complainants.

In *R. v. Bortei*,<sup>101</sup> the accused argued that since the alleged assaults went on for eight years, the videotaped statements made by the complainants should not be admissible, as there was no way to determine whether they had been made within a “reasonable time” after the alleged events occurred. Justice R.J. Smith admitted the videotapes, ruling that they were made within a reasonable time of the last alleged acts (within 2 months), and stating that the probative value of the evidence outweighed any possible prejudice towards the accused. Further this case provides an example of videotaped statements which were admitted into evidence despite the fact the complainants were 16 and 20 years of age respectively at the time of trial. The complainants were minors when most of the alleged acts occurred.

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<sup>99</sup> *Ibid.* at 322-23. For a discussion of the factors establishing a “reasonable time,” see also, *R. v. S.G.*, [2007] O.J. No. 2203 (Ont. Sup. Ct.), Spies J. and *R. v. Bortei*, [2007] O.J. No. 1189 (Ont. Sup. Ct.). Smith J.

<sup>100</sup> [2008] O.J. No. 345 (Ont. Sup. Ct. J.)

<sup>101</sup> [2007] O.J. No. 1189 (Ont. S.C.).

#### **2.2.4.4 “Acts complained of”**

The phrase “the acts complained of” was already interpreted before 2006 to include a description given by the complainant of her alleged assailant and statements made by the attacker during the offence.<sup>102</sup> In *R. v. Ramasaroop*,<sup>103</sup> it was also held to be broad enough to be used to admit a video-recording of a statement from a youth who had not directly observed the alleged assault, but who described the actions of the accused shortly after the alleged assault and helped to place the accused at the scene of the alleged assault.

#### **2.2.4.5 *The Weight of a Video-recording***

In *R. v. F.(C.C.)*,<sup>104</sup> Cory J. provided guidance on the issue of how the videotaped evidence should be viewed by the courts.

... There are several factors present in s. 715.1 which provide the requisite reliability of the videotaped statement. They include: (a) the requirement that the statement be made within a reasonable time; (b) the trier of fact can watch the entire interview, which provides an opportunity to observe the demeanor, and assess the personality and intelligence of the child; (c) the requirement that the child attest that she was attempting to be truthful at the time that the statement was made. As well, the child can be cross-examined at trial as to whether he or she was actually being truthful when the statement was made. These *indicia* provide enough guarantees of reliability to compensate for the inability to cross-examine as to the forgotten events. Moreover, where the complainant has no independent memory of the events there is an obvious necessity for the videotaped evidence. In *Meddoui*, it was recommended that in such circumstances, the trier of fact should be given a special warning [...] of the dangers of convicting based on the videotape alone. In my view, this was sage advice that should be followed.

If, in the course of cross-examination, defence counsel elicits evidence which contradicts any part of the video, this does not render those parts inadmissible. Obviously a contradicted videotape may well be given less weight in the final determination of the issues. However, the fact that the video is contradicted in cross-examination does not necessarily mean that the video is wrong or unreliable. The trial judge may still conclude, as in this case, that the inconsistencies are insignificant and find the video more reliable than the evidence elicited at trial. In *R. v. B.(G.)*, [1990] 2 S.C.R. 30 at para 44 to 55..., Wilson J. stated 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. ... 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.*

*... Although the trier of fact must be wary of any evidence which has been contradicted, this is a matter which goes to the weight which should be attached to the videotape and not to its admissibility.*

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<sup>102</sup> *R. v. Scott* (1993), 87 C.C.C. (3d) 327 (Ont. C.A.).

<sup>103</sup> [2006] O.J. No. 1548 (Ont. Sup. Ct.).

<sup>104</sup> (1993), 85 C.C.C. (3d) 289 (S.C.C.).

In *R. v. J.R.*,<sup>105</sup> the Ontario Court of Appeal upheld a conviction based largely on the evidence in a video-recorded interview. The trial judge accepted that the video-recording of a 12-year-old complainant's statement to the police two days after the alleged assault was more "reliable and accurate" than her testimony at trial, which was considered to be "embellished somewhat," as her memory had been "effectively tainted" by conversations with her mother, who was "strongly hostile" to the accused, her former boyfriend.

In *R. v. Vanderwerff*,<sup>106</sup> the two complainants were 7 and 8 years of age at the time of the alleged incidents of sexual abuse, and videotaped interviews were conducted by the police within a week of the last incident. The trial occurred more than two years later and there were some inconsistencies between their testimony and the recorded statements. In convicting the accused, Read J. observed: "I attribute these inconsistencies to [their] youth and the passage of time."

In *R. v. M.G.*,<sup>107</sup> the Ontario Court of Appeal dealt with a case where there were significant inconsistencies between the videotaped statement of a girl and her testimony at trial. The accused was convicted of the physical and sexual assault of his daughter, and of physical assault on his son. A video-recorded statement was taken shortly after the girl's initial disclosure at the age of ten, some three or four years before the trial. The girl's allegations about the sexual abuse "evolved somewhat over time" and there were inconsistencies between the trial testimony and the video-recorded statements. The trial judge accepted that when she gave the video-recorded statement to the police the girl did not understand the term "sexual intercourse" when questioned in the interview. Accordingly, the judge accepted her testimony at trial that intercourse had occurred, even though it was not mentioned in the video. The trial judge accepted the complainant's explanation of inconsistencies and "odd features" of the statements, in part because of the girl's "immaturity" and relied on the fact that the girl offered detailed descriptions of the sexual acts. The Court of Appeal ruled that the trial judge made a proper assessment of the inconsistencies between the videotaped statement and the trial testimony, and did not consider them separately, and upheld the convictions.

After the videotaped evidence has been admitted, any questions which arise concerning the circumstances in which the video was made, the veracity of the witness' statements, or the overall reliability of the evidence, will be matters for the trier of fact to consider in determining how much weight the videotaped statement should be given.

In *R. v. Purdy*,<sup>108</sup> the British Columbia Court of Appeal upheld the trial judge's decision to admit a videotape of a suggestive police interview with a 9-year-old child, where the court concluded interview was "conducted with an objective other than being a careful inquiry into relevant evidence," rather to obtain an emotional plea from the child. The controversial interview was made to obtain an emotional plea by the child to her father that could be edited so as to appear that the child was begging him to say why he had killed her mother and then shown to the accused. The police had provided the girl with information about the killing, and the defence argued that this conduct was manipulative and affected her memory. In terms of

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<sup>105</sup> [2006] O.J. No. 121 (C.A.).

<sup>106</sup> [2006] A.J. No. 620 (Alta. Q.B.).

<sup>107</sup> [2007] O.J. 4691 (C.A.).

<sup>108</sup> [2008] B.C.J. No. 401 (C.A.)

assessing threshold reliability and deciding to admit the tape, the trial judge was satisfied that the girl was not manipulated into believing a particular set of facts, and could distinguish between what she had been told and what she had observed. The trial judge was satisfied that the jury was in a position to assess the probative value of the child's evidence. The Court of Appeal accepted the evidence was controversial, but concluded that the accused was able to explore the frailties of the child's evidence through cross-examination and that the jury was alerted to the significance of the procedure and the risk of suggestion that it presented.

In *R. v. B.(D.)*<sup>109</sup> where the Saskatchewan Court of Appeal upheld the trial judge's decision to admit the videotaped statement of the complainant into evidence at trial despite the concerns raised by the accused's counsel about the "friability" of the videotape evidence, including the fact that the interviewing police officer did not caution her about the importance of truth telling and asked some leading questions. The Court of Appeal found that the trial judge, in admitting the videotape, acknowledged that the concerns raised by counsel were to be taken into account when weighing the evidence presented, and ultimately did not give any weight to any aspect of the videotape that she did not clearly state in the affirmative and in response to an appropriate question.

In *R. v. Challu*<sup>110</sup> the Shaughnessy J. of the Ontario Superior Court upheld the conclusions of the trial judge about the admissibility and weight of video-recordings of statements made by two children, aged 10 and 12 at trial, about alleged physical abuse by their father. The trial judge was aware of the internal inconsistencies within the statements and the suggestibility of the children in finding the tapes sufficiently reliable to be admitted. The children in this case were hesitant when answering questions and had to be asked some leading questions, but their mother (the wife of the accused) had encouraged them not to tell the police what had happened to them prior to the interview.

It was emphasized in *R. v. Aksidan*<sup>111</sup> that a videotaped statement admitted under s. 715.1 becomes a part of the complainant's evidence-in-chief. Accordingly, the videotaped statement is not properly characterized as a prior consistent statement. As such, it cannot be used to "bolster the credibility" of the complainant or to "corroborate" her testimony. On the contrary, the video-recorded statement and the in-court testimony must be weighed and evaluated as a whole, and a new trial was ordered by the British Columbia Court of Appeal as a result of the trial judge convicting the accused and stating that the complainant's testimony in court was "materially corroborated by her own statement given to the police shortly after the events." In *R. v. K.P.S.*,<sup>112</sup> the British Columbia Court of Appeal also ordered a new trial as a result of the trial judge stating that one of the reasons for convicting the accused was that there was "consistency in the sexual assault allegations when one examines ... [the complainant's] *viva voce* evidence compared to her two videotaped statements." Kirkpatrick J.A. commented that a trial judge may use the videotaped statement to "supplement the evidence of a child who is inarticulate or forgetful at trial" in order to support a conviction. And the trial judge may use the video-recordings "to assess the credibility of the complainant when they are inconsistent with her *viva voce* evidence"

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<sup>109</sup> 2008 SKCA 150

<sup>110</sup> 2008 CarswellOnt 5355, [2008] O.J. 3576 (Sup. Ct.)

<sup>111</sup> [2006] B.C.J. No. 1172, 2006 BCCA 258.

<sup>112</sup> [2007] B.C.J. No. 1660 (B.C.C.A.).

in order to raise a reasonable doubt and acquit the accused. “However... the trier of fact may not use a s. 715.1 videotape to bolster the credibility of a complainant.”

In *R. v. B.(A.)*,<sup>113</sup> the Crown sought to have the complainant give the majority of her evidence-in-chief by way of video-recording admitted pursuant to section 715.1. The defence argued that the Crown had failed to satisfy the “necessity hurdle,” as it was not established that the child was incapable of giving her testimony in court. Gordon Prov. Ct J. recognized that section 715.1 creates a statutory exception to the hearsay rule, and it is *not* based on the decisions of the Supreme Court of Canada in *Khan* and *Smith*. The legislation does not require the Crown to establish the “necessity” for admission of a videotape. The court observed that the evidence

does not become super evidence, credible evidence or any other form of special evidence. It simply becomes evidence upon which counsel for a charged person is able to cross-examine, so the reliability issue is dealt with by virtue of the legislation.... It cannot be used by the Crown...in a manner to enhance the complainant’s credibility. All it does, if it is admitted, is permit the Crown to not ask the same questions in direct examination that were asked by a police officer at an earlier occasion.<sup>114</sup>

The court noted that s. 715.1 does not require consideration of the “necessity” for the admission of the recording, and for that reason, “while it may very well be that the complainant does not need the assistance of the videotape... that is not relevant to its admissibility into evidence.”

As noted above, Cory J., in *R. v. F.(C.C.)*<sup>115</sup> suggested that a trial judge should provide a special warning to the trier of fact relating to the danger of convicting solely on the strength of a videotaped statement; if the child no longer has any recollection of the events, or is unable to answer questions in cross examination, this may affect the weight to be given to the videotape, though not its admissibility. In *R. v. Wing*,<sup>116</sup> the Ontario Court of Appeal held that, absent special circumstances (such as a child being unable to answer questions about the alleged events during testimony), it is inappropriate for the trial judge to give “an instruction to the jury not to use the complainant’s s. 715.1 videotaped statement to bolster the other evidence she gave at trial.” The Court of Appeal wrote:

In our view, it was unnecessary for the trial judge to give an instruction to the jury,...not to use the complainant's s. 715.1 videotaped statement to bolster the other evidence she gave at trial eight months later. Importantly, the Criminal Code specifically takes a child's s. 715.1 statement out of the category of a prior consistent statement and makes it part of her trial evidence. In accordance with that provision, the trial judge specifically told the jury that the video statement would be "part of the evidence" before it was played. In his charge at the end of the trial, he again told the jury that the statement was "part of [the complainant's] evidence". In addition to other instructions given about assessing the complainant's evidence, the trial judge specifically explained that the procedure was designed to help young people to give evidence and that the jury could not use that procedure to conclude the accused was guilty of the offences charged.

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<sup>113</sup> [2008] B.C.J. No. 541.

<sup>114</sup> [2008] B.C.J. No. 541, at para. 5 (Prov. Ct.).

<sup>115</sup> (1997), 120 C.C.C. (3d) 225 (S.C.C.).

<sup>116</sup> 2008 ONCA 618.

In our view, there is nothing about the complainant's evidence in this case that would require the requested caution. Immediately after adopting her s. 715.1 statement as true, the complainant responded to the Crown's question at trial about "what else" the appellant did to her. In her response, the complainant repeated some aspects of the appellant's conduct. However, her repetition was no different than occurs in the usual trial where a witness is asked more than once, both in examination in chief and in cross-examination, about the event in light of the additional allegations against the appellant.

In *R. v. McLeod*,<sup>117</sup> the complainant, who was age 3 when she gave her video-recorded statement, adopted the statement at the time of the trial, a year later, only to recant critical aspects on the second day of her testimony (some 10 weeks after the first day). In the video the girl described being assaulted by her mother. In assessing the credibility of the complainant's section 715.1 statement, Brewer J. observed that the "video-taped statement possesses some circumstantial guarantees of trustworthiness," including the fact that it was made "very close in time to the events described," that it was given in a relaxed environment, there were no suggestive questions, and the child had no apparent motive to fabricate. However, the fact that the complainant had given different accounts of the events throughout her testimony meant that she was a witness whose evidence "must be viewed with a great deal of caution." Based on concerns about the complainant's credibility and reliability, the court was not prepared to place any weight on her section 715.1 statement "except where it was confirmed by other evidence." However, the confirmatory evidence "need not directly implicate the defendant or confirm the Crown witness' evidence in every respect", but it only needed to "touch a relevant or material aspect" of the child's testimony. In this case, medical evidence about the injuries of the complainant and testimony from a sibling about the mother's anger and yelling were sufficient for the court to convict the accused of assaulting her daughter.

It has been a common practice for some police to ask a child at the start of an investigative interview about their understanding of the concepts of truth and lie, and to have the child promise to tell the truth before answering questions. While a police discussion about the importance of truth telling and having the child promise to tell the truth is a useful practice (especially if an issue arises of the child recanting and the Crown wants the statement admitted as a "K.G.B. statement"), this procedure is clearly not necessary for admission under s. 715.1. In *R. v. F.(J.)*,<sup>118</sup> in a video-recorded interview that was admitted in evidence, the 7-year-old complainant was asked questions by a police interviewer about her understanding of the difference between the truth and a lie. The court accepted the child's testimony and convicted the accused, with Ho Prov. Ct. J. commenting: "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. to provide reliable evidence to the court."<sup>119</sup>

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<sup>117</sup> [2008] O.J. No. 1335

<sup>118</sup> *Supra*, note 24.

<sup>119</sup> *Ibid.*, at para. 39.

In *R. v. C.L.P.*,<sup>120</sup> a boy who was 5 years old disclosed abuse by a babysitter to his parents, and an interview with a police officer was video-recorded two weeks later. By the time of trial, more than a year later, the child recalled little of the incident, and he did not repeat the allegations while testifying. Although he testified that he told “the truth” when being interviewed by the police officer, in an interview with Crown counsel prior to the trial date the complainant had said that the video was “maybe not [true], I don’t know the truth.” Baird Ellan Prov. Ct. J. acquitted the accused, observing that “courts must use caution in relying upon the unsupported video evidence of a child,” especially if the child “does not articulate the complaint while testifying.”

#### **2.2.4.6 S. 715.1 in Jury Trials: Providing the Jury with a Copy**

A trial judge has discretion to permit the jury, during its deliberations, to view a videotaped statement admitted under s. 715.1 of the Code.<sup>121</sup> In *R. v. N.(R.W.)*,<sup>122</sup> the Ontario Court of Appeal held that the trial judge did not err in not providing the transcript of the cross-examination of the witness to the jury during its deliberations, though the witness’s videotaped statement had been provided. In that case, however, the cross-examination did not undermine the witness’s evidence. The appellant denied outright that the alleged events had occurred, rather than offering a contradictory version. As well, the trial judge had emphasized that the videotaped statements ought not to unduly influence the jury’s deliberations. As a matter of practice, if the judge decides that the jury will have a copy of the recording, it clearly would be preferable for the jury to also have a transcript of the cross-examination. If the jury requests the video and the judge decides not to provide them with this evidence, “the ideal response might... include... a reminder that the jury should be alive to other evidence from the complainant, including the cross-examination.”<sup>123</sup>

#### **2.2.4.7 Video-recordings as Hearsay**

The B.C. Court of Appeal in *R. v. Collura*<sup>124</sup> held that a videotaped interview with a child complainant adduced in conformity with the requirements of *R. v. Khan* may be admitted instead of the child testifying (i.e., outside of s. 715.1) if the “necessity” for this and the “reliability” of the statement are established. The common law standard for admission of a video-recording in cases where a child has not testified requires stricter scrutiny of the circumstances in which the videotape was made.<sup>125</sup>

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<sup>120</sup> [2006] B.C.J. No. 1925 (Prov. Ct.).

<sup>121</sup> *R. v. Toten* (1993), 14 O.R. (3d) 225 (Ont. C.A.); *R. v. N.(R.W.)*, [2004] O.J. No. 282 (Ont. C.A.), leave denied; *R. v. R.W.N.*, [2004] S.C.C.A. No. 297.

<sup>122</sup> [2004] O.J. No. 282 (Ont. C.A.), leave denied [2004] S.C.C.A. No. 297).

<sup>123</sup> *R. v. F.(R.)*, [2006] O.J. No. 4458 (C.A.).

<sup>124</sup> [1996] B.C.J. No. 2211 (B.C.C.A.). See also G. Renaud, “A Thematic Review of ‘Principled Hearsay’ in Child Sex Abuse Cases” (1995), 37 *Crim. L.Q.* 277 at 295; and *R. v. D.(D.)*, [1993] N.W.T.J. No. 59 (N.W.T. S.C.); *R. v. Stewart* (1991), 63 C.C.C. (3d) 91 (B.C.S.C.).

<sup>125</sup> See *R. v. T.H.*, [2005] O.J. No. 4588 (Ont. Sup. Ct.) per Trafford J. where children did not testify and videotaped statements ruled inadmissible hearsay due to lack of reliability arising out of circumstances in which they were made.

In *R. v. Vaughn*,<sup>126</sup> the accused was charged with sexually assaulting the two child complainants. The Crown did not wish to call the children as witnesses to give viva voce testimony at the preliminary hearing, in particular to avoid them being cross-examined; to avoid doing so, the Crown sought to introduce the videotaped recordings of the children's interview with the investigating officer under s. 540(7) of the *Criminal Code*. In holding that the videotaped recordings could not be admitted under s. 540(7) as of right, Skilnick, J. explained that, if the Crown wishes to rely solely on the video-taped statements of the complainants without calling the children as witnesses, a *voir dire* must first be held to determine the evidence is "credible and trustworthy" and hence admissible under s. 540 (7). Even if the video-recordings are admitted under s. 540(7), the accused can apply under s. 540(9) to cross-examine a child at the preliminary inquiry; this should not be permitted only for the purposes of challenging the child's credibility, but only if there is a distinct issue to be explored such as coaching, fabrication or the identity of the perpetrator.

In *R. v. G.(L.)*,<sup>127</sup> the Quebec Court of Appeal upheld the admissibility of a videotape of an interview of a child who was five at the time of trial, and on the stand briefly described the events but said that she did not remember making a statement to the police and hence did not "adopt" the video. While the video was not admissible under s. 715.1, the Court applied the Khan exception to the hearsay rule, concluding that the tape was "reliable" and that it was "necessary" to admit the tape. In *R. v. D.M.*,<sup>128</sup> the Nova Scotia Court of Appeal took the same approach, ruling that although the 5-year-old complainant did not adopt the contents of her previous videotaped statement, and hence s. 715.1 could not be used, the statement could be admitted under the Khan exception to the hearsay rule; the child testified, but did not answer any questions about the alleged assault, and stated that she did not have any recollection of having given a video-recorded statement to the police.

#### **2.2.4.8 Recantation**

In *R. v. T.R.*,<sup>129</sup> the Ontario Court of Appeal ruled that although at trial the complainant recanted the allegations of sexual abuse that she made against her father in a videotaped statement, and consequently had not "adopted" the contents of the videotape under s. 715.1 of the *Criminal Code*, the trial judge had not erred in finding that the statement met the reliability standard for admissibility under the common law test of *R. v. Khan*. While the complainant's recantation at trial was supported by further contradictory evidence, the court stated that the trial judge was correct in not considering the contradictory evidence within the framework of threshold reliability. The circumstances surrounding the taping of the statement suggested that while the statement was not made under oath, the complainant understood the importance of telling the truth, and did so. In addition, the ability of the defence to cross-examine the complainant at trial also supported the admission of the hearsay evidence. The Court of Appeal held that the trial judge was correct in determining that the contradictory recantation evidence did not render the video-recorded statement inadmissible under Khan, but related to the "ultimate assessment of the actual probative of the evidence," which was for the trier of fact to determine.

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<sup>126</sup> 2009 CarswellBC 1249

<sup>127</sup> (2005), 35 C.R. (6th) 115 (Que. C.A.), reversed on other grounds (2006), 207 C.C.C. (3d) 353, 2006 SCC 17.

<sup>128</sup> [2007] N.S.J. No. 296.

<sup>129</sup> (2007), 85 O.R. (3d) 481(C.A.).

In *R. v. T.H.*,<sup>130</sup> Trafford J. concluded that statements made by 3- and 9-year-old children to their mother and later in a video-recorded statement to the police were not admissible under the Khan rule as their reliability was not established. Some of the factors that led the court to conclude that the statements were not sufficiently reliable to be admitted were the use of leading questions, the fact that the view of the children during some critical parts of the interview was blocked by one of the officers, and the opportunity for “collusion between the children, innocent or otherwise” before the interview.<sup>131</sup> It is clear that in cases where the Crown wishes to introduce a video-recording of an interview with a child under the hearsay exception instead of the child testifying (e.g., because of emotional trauma), the interview will be more closely scrutinized for “reliability” than in cases where the Crown seeks to have the videotape under s. 715.1 of the *Code* in addition to having the child testify. This reflects the fact that the child is available for cross-examination when s. 715.1 is invoked, eliminating the hearsay concern about reliability.

#### ***2.2.4.9 The Quality of the Interview***

While the Bill C-2 amendments to s. 715.1 have clearly facilitated the admissibility of video-recordings of investigative interviews, there continue to be expressions of judicial concern about the quality of some of the interviews.

It was held under the prior provision that expert evidence is not admissible to challenge the forensic quality and investigative interview that has been videotaped.<sup>132</sup> If the requirements of s. 715.1 are otherwise satisfied, concerns about the quality and nature of the investigative interview, for example the use of leading questions, generally go to the weight accorded the videotape, not its admissibility. There is, however, a continuing judicial discretion to exclude all (or a portion) of a video-recorded interview if its admission would “interfere with the proper administration of justice.”

In *R. v. C.B.*,<sup>133</sup> Wein J. admitted a video-recording of an interview with a child, but expressed concern about the interview itself (at para. 11-14):

Ms. Divina B. adopted the evidence that she gave to the police in a videotaped statement on January 27, 2006. The statement was admitted into evidence pursuant to the provisions of s. 715.1 of the Criminal Code, and was adopted by Ms. Divina B. in her testimony given under oath.

Nothing in Ms. Divina B.’s demeanour on the videotape suggests that she was not telling the truth. She was obviously nervous, to the point of clear embarrassment. She was visibly reluctant to provide details to the male police interviewer. Some of the syntax used in her answers reflects the fact that English is her second language. Despite that her story is given in a relatively straightforward manner.

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<sup>130</sup> [2005] O.J. No. 4588 (Ont. Sup. Ct.).

<sup>131</sup> For a discussion of concerns about the lack of reliability of record of interviews that are not video or audio-recorded, see Moore & Wasser, *supra*, note 4.

<sup>132</sup> See, e.g., *R. v. M.*, [2005] O.J. No. 4590 (Ont. Sup. Ct.); and *R. v. S.W.S.*, [2005] O.J. No. 5118 (Ont. Sup. Ct.).

<sup>133</sup> [2007] O.J. 4580 (Ont. Sup. Ct.).

In assessing the video, it also must be acknowledged that the officer who conducted the interview - a male adult - never successfully put the witness fully at ease. It is undoubtedly regrettable that the police were not able to provide this young witness with an interviewer who would make the process more comfortable and, perhaps, the details more complete.

Additional confusion arises because of the language differences. For example, Ms. Divina B. often indicated that her father put his penis “on” her. Eventually in describing the degree of pain she felt, she acknowledged that it was “in” or “inside” of her and I accept that this variance in description arises from the fact that English is her second language, and the officer did not want to appear to be asking leading questions.

As a result of concerns about the interview as well as other aspects of the case, Wein J. acquitted the accused, even though the judge accepted that the child was an honest witness.

### 3. Results of the Survey of Judges

This chapter presents the results of the survey on judges’ perceptions of and experiences with Bill C-2 provisions. It addresses the following research questions outlined in Section 1.2:

- Are judges familiar with the amendments contained in Bill C-2? Have they had the opportunity to use them? Do they think they’re useful?
- How often are applications being made for testimonial supports? Are the applications generally successful? If not, why not?
- Have the judges had any difficulties with the implementation of any of the testimonial support provisions contained in Bill C-2?
- How often are applications being made for appointment of counsel to self-represented accused for purposes of cross-examination? Are the applications generally successful? If not, why not?
- Have the judges held competency inquiries? How often is the child witnesses’ competence accepted without inquiry? How often is the child found incompetent to testify?
- Do the judges have any concerns regarding any of the provisions contained in Bill C-2?

#### 3.1 Demographics of Survey Respondents

As described in the methodology section, four jurisdictions agreed to participate in this project: Nova Scotia (both levels of court), Alberta (both levels of court), British Columbia (Provincial Court), and the Yukon (Territorial Court). The breakdown of completed surveys returned by jurisdiction and level of court is presented in Table 3.1. The largest proportion of judges were from Alberta (50% of the sample), followed by British Columbia (26.5%), Nova Scotia (17.6%), and the Yukon (5.9%). Three-fifths of the judges (61.8%) sat in provincial court, while almost two-fifths (38.2%) sat in superior court.

**TABLE 3.1: NUMBER OF COMPLETED SURVEYS RETURNED BY JURISDICTION AND LEVEL OF COURT**

Jurisdiction	Provincial Court		Superior Court		Total	
	n	%	n	%	n	%
Alberta	8	47.1	9	52.9	17	50.0
Nova Scotia	2	33.3	4	66.7	6	17.6
British Columbia	9	100.0	--	--	9	26.5
Yukon	2	100.0	--	--	2	5.9
Total	21	61.8	13	38.2	34	100.0

In order to assess their experience, survey respondents were asked how often they hear criminal cases, as well as some characteristics about their criminal cases (Table 3.2). A six-point Likert scale was provided, using the following categories: never (0%); occasionally (1-25%); sometimes (26-50%); often (51-75%); almost always (76-99%); and always (100%). All of the

judges who completed the survey had heard criminal cases, with the largest proportions reporting the frequency of sometimes (29.4% of the sample) and almost always (26.5%). One-fifth of the sample reported hearing criminal cases often (20.6%), and one-fifth said they hear criminal cases occasionally (20.6%).

**TABLE 3.2: CHARACTERISTICS OF JUDGES' CRIMINAL CASES**

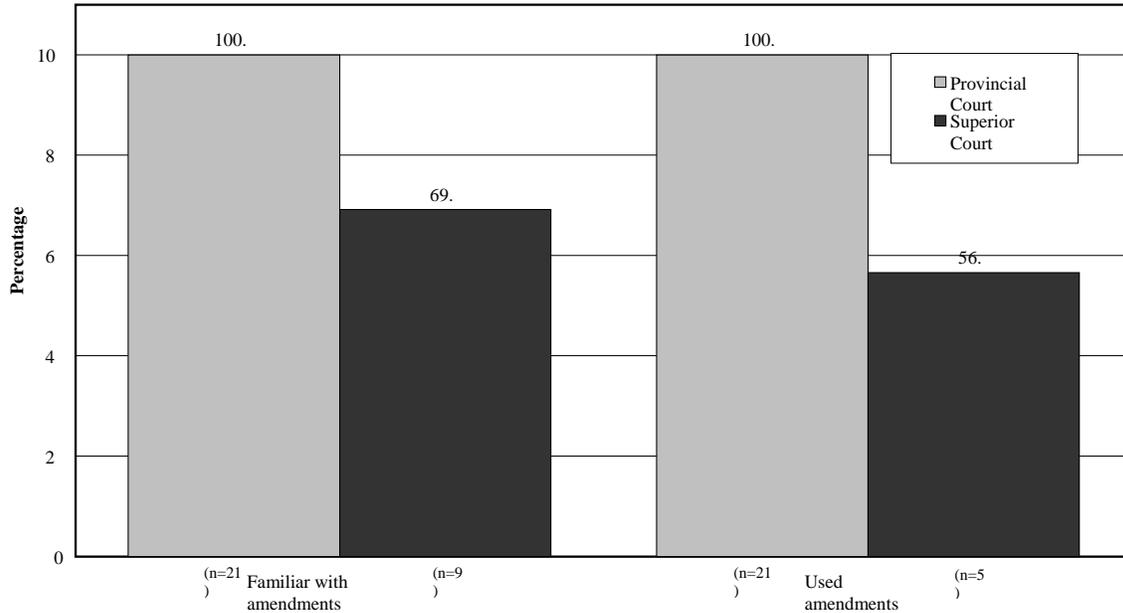
	Never		Occasionally		Sometimes		Often		Almost Always		Always		Total	
	n	%	n	%	n	%	n	%	n	%	n	%	n	%
Frequency of hearing criminal cases	0	0.0	7	20.6	10	29.4	7	20.6	9	26.5	1	2.9	34	100.0
Of criminal cases going to trial/preliminary inquiry, frequency that involved:														
Child witness	0	0.0	29	85.3	3	8.8	0	0.0	2	5.9	0	0.0	34	100.0
Domestic violence	2	5.9	21	61.8	5	14.7	6	17.6	0	0.0	0	0.0	34	100.0
Sexual assault with an adult complainant	1	2.9	23	67.6	9	26.5	1	2.9	0	0.0	0	0.0	34	100.0

In terms of the characteristics of their criminal cases going to trial/preliminary inquiry, the majority of survey respondents (85.3%) reported that their cases occasionally involved child witnesses, while 8.8% said they sometimes involve child witnesses, and 5.9% said they almost always involve child witnesses. When asked how often their cases involve domestic violence, the majority of respondents said occasionally (61.8%), followed by often (17.6%) and sometimes (14.7%). Two respondents said their criminal cases never involve domestic violence. Lastly, when asked how often their cases involve sexual assault with an adult complainant, over two-thirds (67.6%) said occasionally, and over one-quarter (26.5%) said sometimes. One respondent reported never having a criminal case involving sexual assault with an adult complainant.

### **3.2 Judges' Use and Perceptions of Bill C-2**

The second section of the survey asked judges if they were familiar with the amendments contained in Bill C-2. The vast majority of respondents (88.2%; n=30) said they were. When looking at responses by level of court, all of the provincial court judges reported being familiar with the Bill C-2 amendments, compared to 69.2% of the superior court judges (Figure 3.1). Similarly, over three-quarters of the sample (76.5%; n=26) said they have had the opportunity to use amendments contained in Bill C-2. When examining this question by level of court, all of the provincial court judges have used the amendments, compared to 56.6% of the superior court judges who were familiar with the amendments.

**FIGURE 3.1: PROPORTION OF JUDGES REPORTING FAMILIARITY WITH AND USE OF THE AMENDMENTS IN BILL C-2, BY LEVEL OF COURT**



Judges who reported being familiar with the amendments contained in Bill C-2 were asked the extent to which they agree or disagree that certain provisions amended in Bill C-2 are useful. The results are presented in Table 3.3. Overall, the vast majority of judges either agreed or strongly agreed that the provisions in Bill C-2 are useful. Over 96% of respondents agreed or strongly agreed that appointed counsel for self-represented accused and changes to the provisions governing competency inquiries are useful, while only 3-4% disagreed. Likewise, over 86% of respondents agreed or strongly agreed that the provisions involving support persons, screens and closed-circuit television, and video-recorded evidence are useful. Approximately 13% disagreed or strongly disagreed that these amended provisions are useful.

**TABLE 3.3: EXTENT TO WHICH THE JUDGES AGREE THAT THE PROVISIONS AMENDED IN BILL C-2 ARE USEFUL**

	Strongly Agree		Agree		Disagree		Strongly Disagree		Total	
	n	%	n	%	n	%	n	%	n	%
Competency inquiries	13	46.4	14	50.0	1	3.6	0	0.0	28	100.0
Support persons	10	33.3	16	53.3	3	10.0	1	3.3	30	100.0
Screens and closed-circuit television	11	37.9	14	48.3	3	10.3	1	3.4	29	100.0
Appointed counsel for self-represented accused	17	58.6	11	37.9	1	3.4	0	0.0	29	100.0
Video-recorded evidence	14	48.3	12	41.4	3	10.3	0	0.0	29	100.0

### 3.3 Judges' Experiences with the Provisions Contained in Bill C-2

#### 3.3.1 Competency Inquiries

When the 30 judges who stated that they were familiar with the provisions contained in Bill C-2 were asked if they had held competency inquiries (s. 16.1) since January 2006, 46.7% (n=14) stated that they had. Figure 3.2 presents the proportion of judges who reported using each of the provisions amended by Bill C-2 by level of court. As shown in the figure, over one-half (52.4%) of provincial court judges have held competency inquiries, while one-third (33.3) of superior court judges have held inquiries.

**FIGURE 3.2: PROPORTION OF JUDGES USING VARIOUS PROVISIONS AMENDED BY BILL C-2, BY LEVEL OF COURT**

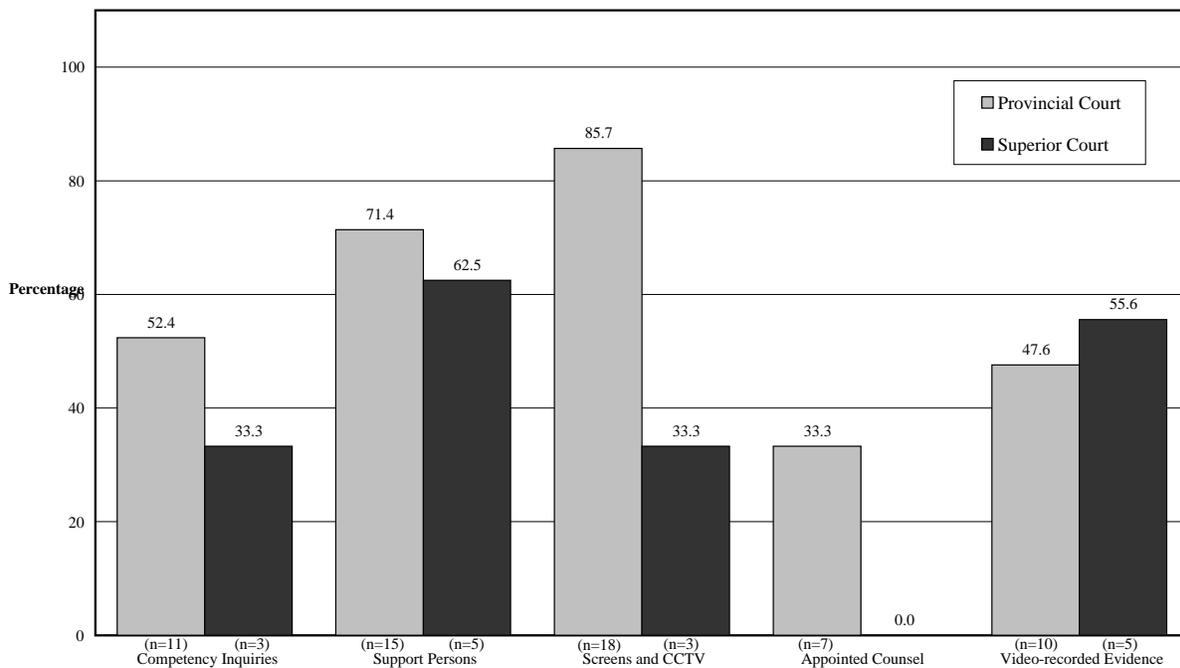


Table 3.4 presents the characteristics of judges' cases involving competency inquiries by age of the child witness. As might be expected, as the child's age increases, so does the likelihood that their competence will be accepted without an inquiry. For children 3-5 years of age, 81.8% of respondents indicated that they never accept their competence without an inquiry; this figure decreased to 50% for child witnesses aged 6-9 and to 27.3% for children aged 10-13.

**TABLE 3.4: CHARACTERISTICS OF JUDGES' COMPETENCY INQUIRIES BY AGE OF CHILD WITNESS**

	Never		Occasionally		Sometimes		Often		Almost Always		Always		Total	
	n	%	n	%	n	%	n	%	n	%	n	%	n	%
Frequency that witnesses' competence is accepted without inquiry:														
3-5 years	9	81.8	0	0.0	1	9.1	0	0.0	0	0.0	1	9.1	11	100.0
6-9 years	5	50.0	2	20.0	1	10.0	2	20.0	0	0.0	0	0.0	10	100.0
10-13 years	3	27.3	5	45.5	1	9.1	1	9.1	1	9.1	0	0.0	11	100.0
Frequency that an inquiry is held:														
3-5 years	1	10.0	1	10.0	0	0.0	1	10.0	0	0.0	7	70.0	10	100.0
6-9 years	0	0.0	1	10.0	1	10.0	1	10.0	3	30.0	4	40.0	10	100.0
10-13 years	0	0.0	2	20.0	1	10.0	1	10.0	3	30.0	3	30.0	10	100.0
Frequency that child is found incompetent to testify:														
3-5 years	5	45.5	1	9.1	2	18.2	2	18.2	1	9.1	0	0.0	11	100.0
6-9 years	3	33.3	3	33.3	0	0.0	2	22.2	1	11.1	0	0.0	9	100.0
10-13 years	5	45.5	3	27.3	0	0.0	1	9.1	2	18.2	0	0.0	11	100.0

When asked how often a competency inquiry is held for children of various age groups, respondents indicated that inquiries are most likely to be held with younger children: 70% of judges stated that they always hold an inquiry with children aged 3-5 years; this percentage decreased to 40% for children aged 6-9 and 30% for children aged 10-13. When asked the frequency with which children of various ages are found incompetent to testify, the pattern of findings was somewhat mixed. For children in the 3-5 and 10-13 age groups, approximately one-half of respondents (45.5%) indicated that they never find these children incompetent; the corresponding figure for children in the 6-9 age group was 33.3%.

When asked the average length of time spent on competency inquiries for child witnesses of various age groups, the results were quite similar and ranged from 11.7 minutes for cases involving child witnesses aged 10-13, to 12 minutes for children aged 6-9 and 12.5 minutes for children aged 3-5.

Respondents were asked if they have had any difficulties with the implementation of s. 16.1 or if they had any suggestions for further reform. One judge offered the following comment:

*Disclosure of videotaped statements by a child witness before the trial usually satisfies opposing counsel as to competence.*

### 3.3.2 Support Persons

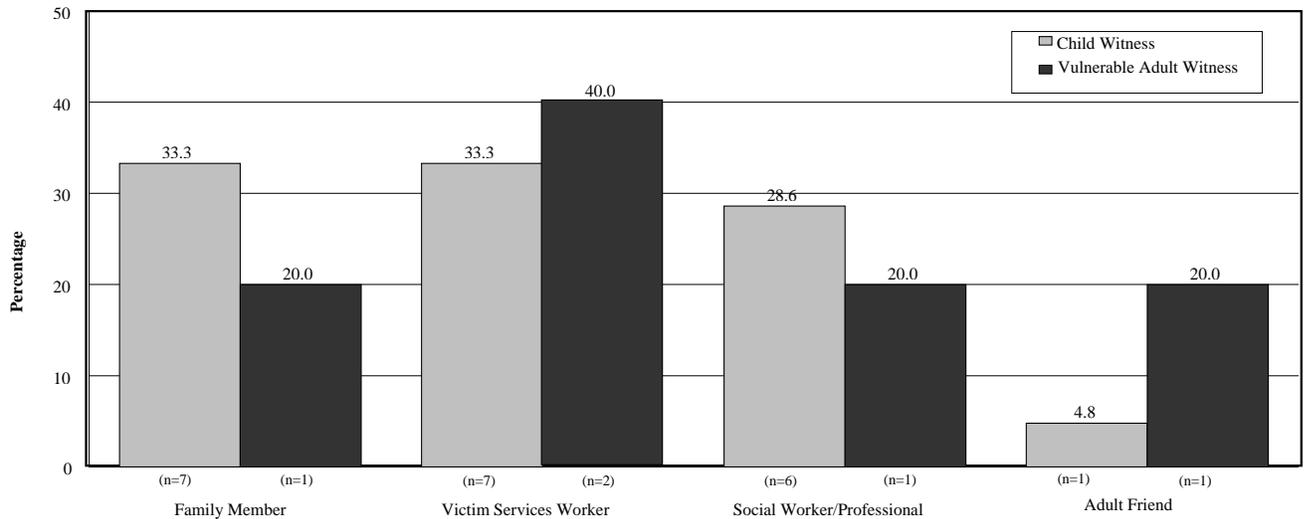
Participants were asked a series of questions regarding their experiences with and opinions of the support person provision (s. 486.1) of Bill C-2. Two-thirds of respondents (66.7%; n=20) who indicated that they were familiar with the amendments contained in Bill C-2 reported that they have used the support person provision since January 2006. As shown in Figure 3.2, almost three-quarters (71.4%) of provincial court judges indicated that they have used the support person provision, while almost two-thirds (62.5%) of superior court judges have used this provision.

Table 3.5 presents the characteristics of judges' cases in which the support person provision has been used. When asked how often an application for a support person is made in cases involving a child witness under the age of 18, most respondents said occasionally (60%), followed by often (15%) and almost always (15%). Judges indicated that applications for support persons in cases with child witnesses are likely to be successful: 80% said that they are never unsuccessful and 15% said that they are occasionally unsuccessful. When asked the most common reasons for denying an application for a support person, two judges stated that the support person might be a witness but that another support person was permitted, two judges said that the proposed support person was inappropriate and one stated that a support person was not shown to be necessary. When asked who the most common support persons were, 21 comments were provided by the judges, and their responses are presented in Figure 3.3. The most frequently mentioned support persons were family members (n=7), victim services workers (n=7), professionals/social workers (n=6), and adult friend (n=1).

**TABLE 3.5: CHARACTERISTICS OF JUDGES' CRIMINAL CASES INVOLVING THE SUPPORT PERSON PROVISION**

	Never		Occasionally		Sometimes		Often		Almost Always		Always		Total	
	n	%	n	%	n	%	n	%	n	%	n	%	n	%
Cases with child witnesses under the age of 18:														
How often application for support person is made	0	0.0	12	60.0	1	5.0	3	15.0	3	15.0	1	5.0	20	100.0
How often application is not successful	16	80.0	3	15.0	0	0.0	0	0.0	1	5.0	0	0.0	20	100.0
Cases with vulnerable adult witnesses:														
How often application for support person is made	11	64.7	5	29.4	0	0.0	0	0.0	0	0.0	1	5.9	17	100.0
How often application is not successful	3	50.0	0	0.0	1	16.7	0	0.0	1	16.7	1	16.7	6	100.0

**FIGURE 3.3: MOST COMMON SUPPORT PERSON USED IN CASES WITH CHILD WITNESS UNDER 18 AND VULNERABLE ADULT WITNESS**



In cases with vulnerable adult witnesses, applications for support persons are considerably less common: 11 respondents (64.7%) indicated that applications are never made in these cases and 5 respondents (29.4%) stated that they are occasionally made. Of the six respondents who stated that applications for support persons have been made in cases involving vulnerable adult witnesses, three stated that they are never unsuccessful, while one person each stated that they are sometimes, almost always, or always unsuccessful. Two judges indicated that the most common reason for denying an application for a support person in cases with a vulnerable adult witness was that there were concerns that the support person had an interest in the outcome of the case. When asked who the most common support persons were, five comments were provided, and are presented in Figure 3.3. The most common support persons were victim services workers (n=2).

As indicated in Table 3.6, applications for support persons are most likely to be made at the start of the trial/preliminary inquiry (50%), followed by at the pre-trial hearing conference (33.3%), and during the trial/preliminary inquiry (16.7%). When asked if they have had any difficulties with the implementation of the support persons provision or if they had any suggestions for further reform, judges provided the following comments:

*...Difficult to understand why support is required sometimes and when it seems inappropriate it has not assisted the Crown presenting the “vulnerable” witness..*

*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.*

**TABLE 3.6: POINT IN THE PROCEEDING WHEN APPLICATIONS FOR VARIOUS PROVISIONS IN BILL-C-2 ARE MOST COMMONLY MADE**

	Pre-trial Hearing Conference		Start of Trial/ Preliminary Inquiry		During Trial/ Preliminary Inquiry		Total	
	n	%	n	%	n	%	n	%
Support persons	6	33.3	9	50.0	3	16.7	18	100.0
Screens and closed-circuit television	11	55.0	5	25.0	4	20.0	20	100.0
Appointed counsel for self-represented accused	3	42.9	2	28.6	2	28.6	7	100.0
Video-recorded evidence	3	42.9	2	28.6	2	28.6	7	100.0

### 3.3.3 Screens and Closed-circuit Television

When the 30 judges who were familiar with the provisions contained in Bill C-2 were asked if they had used the screens or closed-circuit television (CCTV) provision (s. 486.2) of Bill C-2 since January 2006, 70% (n=21) stated that they have. As indicated in Figure 3.2, a substantial majority of provincial court judges (85.7%) have used the screens or CCTV provision; the proportion of superior court judges using this provision was considerably lower (33.3%).

As shown in Table 3.7, when asked how often applications for screens or CCTV are made in cases involving child witnesses under the age of 18, almost one-half of respondents (42.9%) said occasionally, while equal proportions (14.3%) said sometimes, often, and almost always. When asked how often these applications are not successful, the majority said never (85%), followed by occasionally (10%). Reasons given for denying an application included: complainant was not vulnerable; there was not enough evidence to support the application; the screen obstructed counsel's view of the witness; and credibility was very much an issue.

In cases with vulnerable adult witnesses, two-third of judges (66.7%) stated that applications for screens or CCTV are never made, while 16.7% said that they are occasionally made and 11.1% said that they are always made. The most common situations of vulnerability leading to these applications were mental handicap/deficiency, the nature of the charge itself, sexual assault victim, and age. When asked how often these applications are not successful, 50% of respondents said never, while 33.3% said occasionally. The most common reasons for granting the application for use of a screen or CCTV with a vulnerable adult were: never opposed/agreement; satisfied it was essential so the witness could testify; obvious fear and stress; nature of the charge; and to ensure a full and candid account.

**TABLE 3.7: CHARACTERISTICS OF JUDGES' CRIMINAL CASES INVOLVING THE PROVISIONS FOR SCREENS AND CLOSED CIRCUIT TELEVISION**

	Never		Occasionally		Sometimes		Often		Almost Always		Always		Total	
	n	%	n	%	n	%	n	%	n	%	n	%	n	%
Cases with child witnesses under the age of 18:														
How often application for screen or closed-circuit television is made	1	4.8	9	42.9	3	14.3	3	14.3	3	14.3	2	9.5	21	100.0
How often application is not successful	17	85.0	2	10.0	1	5.0	0	0.0	0	0.0	0	0.0	20	100.0
Cases with vulnerable adult witnesses:														
How often application for screen or closed-circuit television is made	12	66.7	3	16.7	0	0.0	1	5.6	0	0.0	2	11.1	18	100.0
How often application is not successful	3	50.0	2	33.3	1	16.7	0	0.0	0	0.0	0	0.0	6	100.0

Table 3.8 presents the frequency that successful applications involved screens or CCTV. Over one-third of respondents (36.8%) stated that successful applications in cases with child witnesses under the age of 18 always involved screens, while 15.8% each indicated that successful applications never, occasionally, or almost always involved screens. CCTV was used considerably less often in successful applications in cases involving child witnesses under the age of 18, with 37.5% stating that it was used occasionally and 31.3% stating that it was never used.

In successful applications in cases involving vulnerable adult witnesses, 50% of judges said that screens were always used, while 33.3% said that they were never used. Similarly, 40% of judges stated that CCTV was always used, while 40% stated that it was never used in these cases.

**TABLE 3.8: FREQUENCY OF PROVISIONS GRANTED IN SUCCESSFUL APPLICATIONS FOR SCREENS AND CLOSED-CIRCUIT TELEVISION**

	Never		Occasionally		Sometimes		Often		Almost Always		Always		Total	
	n	%	n	%	n	%	n	%	n	%	n	%	n	%
Cases with child witnesses under the age of 18:														
Screens	3	15.8	3	15.8	1	5.3	2	10.5	3	15.8	7	36.8	19	100.0
Closed-circuit television	5	31.3	6	37.5	1	6.3	1	6.3	1	6.3	2	12.5	16	100.0
Cases with vulnerable adult witnesses:														
Screens	2	33.3	0	0.0	1	16.7	0	0.0	0	0.0	3	50.0	6	100.0
Closed-circuit television	2	40.0	0	0.0	1	20.0	0	0.0	0	0.0	2	40.0	5	100.0

When asked if they had encountered problems in arranging for appropriate equipment for s. 486.2 applications, one-half of the respondents said yes and one-half said no. Specific problems mentioned by respondents included:

- notice not provided by Crown/police that screen should be available;
- 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;
- screen is cumbersome;
- screen requires time to warm up resulting in delays if no advance notice is given by counsel; and
- creates logistical problems in the courtroom.

Comments provided by respondents included the following:

*In BC, equipment is available for a region. Applications must be made at least two weeks before trial so equipment can be booked, and delivered to the courthouse in time for the trial. There is a theoretical risk the equipment could be required in two courts on the same day, but I have not encountered an actual problem with this. As long as the application is made early, which seems a reasonable expectation, there should be no problem arranging trial dates when the equipment is available.*

*We have a screen built for the purpose, but it is not that effective because it is designed to let the accused see the witness. It could be useful to exchange information regarding current technology.*

Table 3.6 presents the most common point in the proceedings that applications for screens or CCTV are made. According to 55% of respondents, the applications are most likely to be made during the pre-trial hearing conference, followed by at the start of the trial/preliminary inquiry (25%) and during the trial/preliminary inquiry (20%).

When asked if they have had any difficulties with the implementation of s. 486.2 or if they had any suggestions for further reform, one judge noted that cameras should be able to close in on the witness. Other specific comments included:

*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. Sometimes Crown join the witness in that room to pose the questions. Depending on courtroom facilities, the judge, the accused and the accused's lawyer may end up together in the courtroom and all other participants (Crown, clerk, court reporter, etc.) in a separate room where the witness is located, in order to accommodate the requirement that the accused be able to maintain contact with his/her counsel. This may place accused's counsel at a disadvantage with the witness. At the least, the Code should require that defence counsel be in the same room as the prosecutor when such a witness is testifying, to minimize the perception of isolating, and*

*thereby stigmatizing, the accused and/or his counsel. Perhaps the rule should be that ONLY the witness be in the separate room, i.e., that neither counsel join the witness in that room.*

*Why not have the accused in another room and have the witness in the courtroom? 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.*

### **3.3.4 Counsel Appointed for Self-represented Accused**

Of the 30 judges who indicated that they are familiar with the provisions of Bill C-2, 23.3% (n=7) stated that they have used the counsel for self-represented provision (s. 486.3) since January 2006. As shown in Figure 3.2, one-third (33.3%) of provincial court judges have used this provision, while no superior court judges reported using it.

Table 3.9 presents the characteristics of judges' cases involving the use of this provision. With respect to the frequency with which these applications are made in cases with witnesses under the age of 18, 57.1% of respondents stated that this occurs occasionally, 28.6% of respondents said that this occurs almost always, and only one respondent said that this never occurs. When asked how often these applications are not successful, all judges responded never.

**TABLE 3.9: CHARACTERISTICS OF JUDGES' CRIMINAL CASES INVOLVING THE APPOINTMENT OF COUNSEL FOR SELF-REPRESENTED ACCUSED**

	Never		Occasionally		Sometimes		Often		Almost Always		Always		Total	
	n	%	n	%	n	%	n	%	n	%	n	%	n	%
Cases with child witnesses under the age of 18:														
How often application for appointed counsel is made	1	14.3	4	57.1	0	0.0	0	0.0	2	28.6	0	0.0	7	100.0
How often application is not successful	6	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	6	100.0
Cases with vulnerable adult witnesses:														
How often application for appointed counsel is made	4	57.1	3	42.9	0	0.0	0	0.0	0	0.0	0	0.0	7	100.0
How often application is not successful	3	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	3	100.0

With respect to cases with vulnerable adult witnesses, 57.1% of judges stated that applications under s. 486.3 are never made and 42.9% said that they are occasionally made. When asked how often these applications are not successful, all judges responded never. When asked their reasons for granting the application in these vulnerable adult cases, the following comments were provided:

*Attitude of the accused was vengeful/angry.*

*To ensure a full and candid account and ensure no intimidation of the witness.*

*(1) Crown convinced court that witness was vulnerable and shouldn't, given the nature of the charge and the specifics of the allegation, be subjected to cross by the alleged perpetrator; (2) the accused was anxious to agree with the Crown's request because it gave him the opportunity to access legal advice that he could not otherwise gain because not eligible for Legal Aid program but not able to afford private counsel; (3) it was obvious to the court, based on exchanges with the accused in open court, that while his demeanour toward the court was appropriate, it was very questionable whether he was adequately equipped with skills to enable him to conduct an effective examination.*

Table 3.6 presents the most common point in the proceedings that applications for counsel for self-represented accused are made. According to 42.9% of respondents, these applications are most likely to be made during the pre-trial hearing conference. Equal proportions of judges stated that these applications are likely to be made at the start of the trial/preliminary inquiry (28.6%) and during the trial/preliminary inquiry (28.6%).

When asked if they had experienced any problems with the implementation of s. 486.3 or if they had any suggestions for further reforms, the following comments were offered:

*There is too much delay in getting counsel appointed.*

*In BC there is no provision for paying counsel appointed by the court.*

*There should be a pre-hearing conference in all cases where the victim is under 18.*

*The court should have full discretion/the court should be able to question for clarification.*

### **3.3.5 Video-recorded Evidence**

Of the 30 respondents who indicated that they were aware of the provisions contained in Bill C-2, 50% (n=15) stated that they have used the video-recorded evidence provisions (ss. 715.1 and 715.2) since January 2006. As presented in Figure 3.2, almost one-half (47.6%) of provincial court judges have used these provisions, while over one-half (55.6%) of superior court judges have used it.

Table 3.10 presents the characteristics of judges' cases involving the use of this provision. With regard to cases involving a child witness under the age of 18, 12 respondents (80%) stated that applications for the use of video-recorded evidence are made occasionally, while one judge each reported that this occurs sometimes, almost always, or always. When asked how often these applications are not successful, the substantial majority of respondents (85.7%) said never, while 14.3% said sometimes. Reasons given for denying these applications were that the video was problematic and that they were not necessary. In cases with vulnerable adult witnesses, no judge reported that an application for the use of video-taped evidence was made.

Table 3.6 presents the point in the proceedings at which an application for the admission of video-recorded evidence is likely to be made. Respondents were most likely to indicate that applications were made at the pre-trial hearing conference (42.9%). Applications were less likely to be made at the start of the trial/preliminary inquiry (28.6%) or during the trial/preliminary inquiry (28.6%).

**TABLE 3.10: CHARACTERISTICS OF JUDGES' CRIMINAL CASES INVOLVING THE PROVISION FOR VIDEO-RECORDED EVIDENCE**

	Never		Occasionally		Sometimes		Often		Almost Always		Always		Total	
	n	%	n	%	n	%	n	%	n	%	n	%	n	%
Cases with child witnesses under the age of 18:														
How often application for video-recorded evidence is made	0	0.0	12	80.0	1	6.7	0	0.0	1	6.7	1	6.7	15	100.0
How often application is not successful	12	85.7	0	0.0	2	14.3	0	0.0	0	0.0	0	0.0	14	100.0
Cases with vulnerable adult witnesses:														
How often application for video-recorded evidence is made	11	100.0	0	0.0	0	0.0	0	0.0	0	0.0	0	0.0	11	100.0
How often application is not successful	--	--	--	--	--	--	--	--	--	--	--	--	--	--

When asked if they have had any difficulties with the implementation of s. 715.1, only one judge commented, stating that:

*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.*

### 3.4 Questioning of Children

The survey included a section that asked judges about their experiences with the questioning of child witnesses, with a comparison to adult witnesses. Judges were asked how often, if at all, they have observed child witnesses (under 14 years of age) being asked questions by different professionals where they appear incapable of answering due to the complexity of the questions (or developmentally inappropriate questions) as revealed in court or on a video-recorded interview. The results are presented in Table 3.11.

**TABLE 3.11: JUDGES' PERCEPTIONS OF HOW OFTEN CHILD WITNESSES ARE ASKED QUESTIONS THEY ARE INCAPABLE OF ANSWERING BY VARIOUS PROFESSIONALS**

	Never		Occasionally		Sometimes		Often		Almost Always		Always		Total	
	n	%	n	%	n	%	n	%	n	%	n	%	n	%
By defence counsel	4	13.3	8	26.7	9	30.0	9	30.0	0	0.0	0	0.0	30	100.0
By Crown	3	10.0	14	46.7	9	30.0	3	10.0	1	3.3	0	0.0	30	100.0
By police (on video)	4	15.4	9	34.6	7	26.9	5	19.2	1	3.8	0	0.0	26	100.0
By child protection worker (on video)	4	15.4	15	57.7	4	15.4	1	3.8	2	7.7	0	0.0	26	100.0
By judge	5	20.8	13	54.2	4	16.7	2	8.3	0	0.0	0	0.0	24	100.0

The professionals that judges reported most often asked complex or developmentally inappropriate questions were defence counsel. Almost one-third of the survey respondents (30%) said defence counsel often or almost always ask complex questions, compared to 23% by the police, 13.3% by the Crown, 11.5% by the child protection workers, and 8.3% by the judges. Similarly, 20.8% of the judges reported that judges never ask overly complex questions, compared to 13.3% by defence counsel. The judges reported that the majority of all professionals occasionally or sometimes ask questions where children appear incapable of answering due to the complexity of the questions.

### 3.5 General Comments

The last section of the survey gave the judges the opportunity to comment on any of the Bill C-2 provisions. Judges were first asked if they think any of the new provisions may render the trial unfair to the accused. As shown in Figure 3.4, overall, over three-quarters of the survey respondents (77.4%; n=24) indicated that they did not consider the provisions unfair to the accused.

When examined by level of court, provincial court judges (28.6%) were more likely to report that the new provisions may render the trial unfair to the accused than were superior court judges (10%). When asked to explain why they thought the provisions might render the trial unfair to the accused, the majority of comments concerned the support person provision. Survey respondents made the following comments:

*The use of a “support person” causes me some concern that it opens the door to a witness being coached – intentionally or otherwise. This is particularly the case with less confident witnesses or those who are vulnerable to the influence of others.*

*The role of the support person is often inherently biased and it is difficult to separate what is support and what might be coaching or evidence according to the expectations of another who is present.*

*I feel the provisions for a support person have significant potential for unfairness, particularly if the support person is allowed to communicate with the witness during testimony, often while they are both in a separate room altogether. Who screens the*

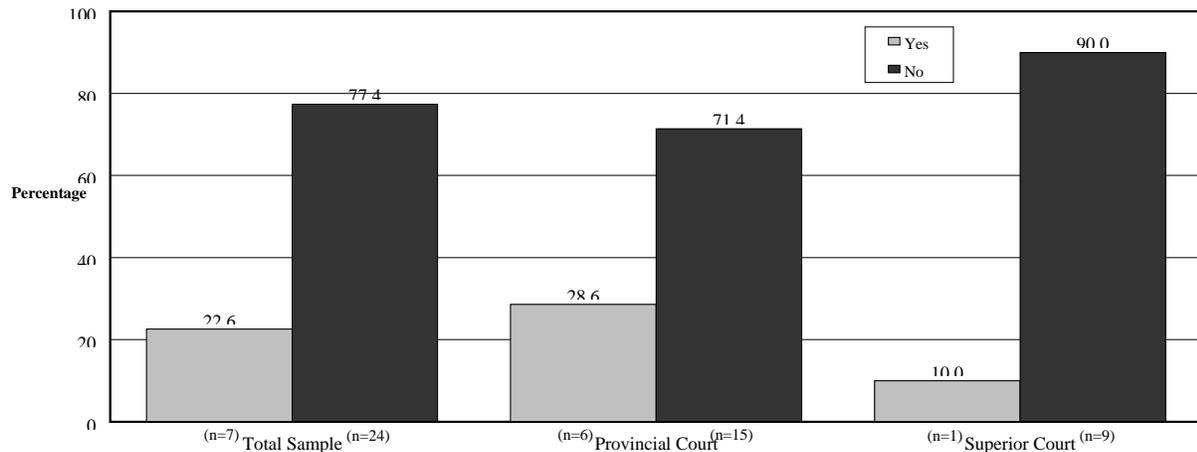
*appropriateness of the support person? The support person may be Mom in a custody battle where there are allegations of sexual impropriety by the father against the child witness, yet the judge may never know of the dynamic. The judge can disallow the support person only if the order for the support person WOULD interfere with the proper administration of justice – a very high standard with so little info on the background of the support person being compellable or screened by a truly independent observer. If the support person can NOT communicate with the witness, one wonders why they need to be next to the witness – at least a child witness – at all, as opposed to being in the body of the courtroom.*

*I also do not like the perception that can arise re: testifying in a separate room altogether, which can effectively isolate the accused and his counsel alone with the judge while the Crown and witness share the room from whence the witness testifies. The rule should arguably stipulate that both counsel be in the same room with the accused.*

*Video statements are powerful, but not under oath, not tested at time, so can be some unfairness to accused. Yet fairness of accused needs to be balanced with other elements in the justice system. On balance, while some unfairness, not so much as to render trial unfair so as to provide a remedy for that.*

*In judge alone trials, I think there is little if any difference. Juries can, I believe, be instructed to eliminate any problems.*

**FIGURE 3.4: JUDGES' PERCEPTIONS OF WHETHER THE NEW PROVISIONS MAY RENDER THE TRIAL UNFAIR TO THE ACCUSED**



The last question in the survey asked judges if they had any other comments about the bill c-2 provisions or other matters related to proceedings involving children or other vulnerable witnesses. respondents made the following comments:

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*Historically, things have improved!*

*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.*

*The legislation is redundant because so much is dependent upon the discretion of the court under the circumstances of the trial. The legislation seems to say all groups have the capacity to testify, but once on the record every word becomes evidence and the court's discretion is called upon to assign weight to that testimony – wouldn't it be better to have the court decide whether or not a witness can and should be heard?*

### **3.6 Summary of Survey Results**

- Four jurisdictions participated in this project: Nova Scotia (both levels of court); Alberta (both levels of court); British Columbia (Provincial Court); and the Yukon (Territorial Court). The largest proportion of survey respondents were from Alberta.
- Three-fifths of the 34 participants sat in provincial court, and two-fifths sat in superior court.
- All of the judges had experience hearing criminal cases.
- The vast majority of judges were familiar with the amendments contained in Bill C-2, and three-quarters had used them.
- Almost all the judges agreed that the amendments in Bill C-2 are useful.
- Over three-quarters of the judges did not think the amended provisions contained in Bill C-2 might render the trial unfair to the accused, i.e., they think that the provisions are fair.
- Almost one-half of the judges have held competency inquiries since January 2006.
- As child's age increases, so does the likelihood that their competence will be accepted without an inquiry; about one-fifth of judges reported that even with the youngest age group (3-5 years) there are no competency inquiries, rising to almost three-quarters with the oldest age group (10-13 years).
- While some children in all age groups were found incompetent to testify, even in the youngest age group (3-5 years), almost one-half the judges reported that they had never found a child incompetent under the new provision.
- Judges reported that the average length of time spent on a competency inquiry is 12 minutes.

- Two-thirds of the respondents had used the support person provision. Judges reported that the provision is used occasionally in cases involving child witnesses and, when applied for, the application is almost always successful.
- Judges reported that the most common support persons for child witnesses are family members and victim services workers.
- The support person provision is used less frequently for vulnerable adult witnesses, and the applications for adults are more likely to be unsuccessful.
- Survey respondents reported that the most common support persons for vulnerable adult witnesses are victim services workers.
- Applications for support persons are most likely to be made at the start of the trial/preliminary inquiry.
- Almost three-quarters of judges had used the screens and closed-circuit television provision. They reported that the provision is used occasionally in cases involving child witnesses and, when applied for, were almost always successful.
- Two-thirds of the survey respondents said that the provision is never used in cases involving vulnerable adult witnesses, and one-third reported that these applications are occasionally unsuccessful.
- Judges reported that when this provision is used, screens are applied for more often than closed-circuit television.
- Applications for screens or closed-circuit television are most likely to be made during the pre-trial hearing conference.
- Comments from judges indicated that there are difficulties in arranging for use of screens, and especially closed-circuit television.
- Almost one-quarter of the survey respondents said they have used the counsel for self-represented accused provision, and this provision is used occasionally for cases involving child witnesses and vulnerable adults.
- When applied for, judges reported that these applications are always successful.
- Applications for counsel for self-represented accused are made most often during the pre-trial hearing conference.
- One-half of the survey respondents reported using the video-recorded evidence provision of Bill C-2. Judges said this provision is occasionally used in cases involving child witnesses, but is never used in cases involving vulnerable adult witnesses. Applications are almost always successful.

- Applications for the video-recorded evidence provision are made most often during the pre-trial hearing conference.
- When asked about the credibility of witnesses, judges reported that, in general, the younger the witness, the more likely they are to make an unintentional false statement. Conversely, the older the witness, the more likely they are to make an intentionally false statement.
- Survey respondents reported that defence counsel were more likely than other professionals to ask children under 14 overly complex or developmentally inappropriate questions.

## 4. Discussion and Conclusions

A review of the reported case law applying Bill C-2 and the survey of judges reveals that these legislative reforms have facilitated the giving of evidence by children in criminal proceedings, and that they are generally well received by the judiciary. In the survey, almost all of the judges indicated that they consider Bill C-2 to be useful, and a clear majority considered that the provisions are not potentially unfair to accused persons. In the reported case law, all of the Charter-based challenges to the new provisions have failed, and the courts are generally interpreting the new provisions in a way that has helped children to testify. The Supreme Court will rule on the constitutionality of a number of the provisions in Bill C-2 in a decision that is likely to be rendered in 2010.

The new competency test in *Canada Evidence Act* s. 16.1 has clearly simplified and shortened the process of qualification for child witnesses. In a significant portion of cases, the child is accepted as competent without inquiry, often based on interview material disclosed to the defence before the hearing. In the survey, judges reported that in about one-fifth of cases with the youngest age group (3-5 years), there was no competency inquiry, rising to almost three-quarters with the older age group (10-13 years). In the reported case law, there were no instances of judges writing decisions to explain why a child is incompetent to testify. In the survey, while some children in all age groups were found incompetent, even in the youngest age group (3-5 years) almost one-half of the judges reported that they had never found a child incompetent under the new provision. Judges reported that the average length of time spent on a competency inquiry is now 12 minutes. The case law reveals that judges may allow questions about the child's understanding of the concepts of truth and lie during cross-examination, though published commentary raises the appropriateness of such questions.

The courts have accepted that in enacting ss. 486.1, 486.2, and 486.3, Parliament intended to increase the use of accommodations for child witnesses, by increasing the use of support persons, closed-circuit television and screens, and counsel appointed to cross-examine child witnesses where accused persons are self-represented. There are very few reported cases in which use of an accommodation was requested and the accused satisfied the court that use of the accommodation would "interfere with the administration of justice." The courts, however, remain alive to the need to protect the rights of the accused; in the reported cases, use of an accommodation is denied if the appropriate equipment is not available, or the conduct of the witness or nature of the evidence would mean that use of the accommodation would render the trial unfair.

The survey suggests that applications under s. 486.1 to allow a support person to sit near a child or vulnerable adult witness are made in a minority of cases involving children and rarely in cases with adults. When an application is made under s. 486.1 for a child witness, it is almost always successful, and usually successful with a vulnerable adult. The survey results suggest that the most common support persons for child witnesses are family members and victim services workers. In the survey, some judges raised some concerns about the implementation of s. 486.1, in particular that in some cases the support person may influence the witness.

The case law review reveals that judges recognize that Bill C-2 establishes a “high standard” for the accused to satisfy if the court is to reject an application for use of closed-circuit television or a screen with a child witness under s. 486.2. The survey reveals that applications under s. 486.2 for screens or closed-circuit televisions are most likely to be made at the pre-trial hearing conference. The survey suggests that an application under s. 486.2 is made in a minority of cases involving child witnesses, and is more likely to be for use of a screen than closed-circuit television, but when an application is made, it is almost always successful. The case law review and survey suggest that there continue to be logistical and technical concerns about the equipment and, in the survey, one-half of the judges reported that they had experienced problems in arranging for appropriate equipment.

The survey reports that appointment of counsel of s. 486.3 to question a vulnerable witness rather than allowing a self-represented accused to do this is more likely to occur in provincial court, perhaps because accused persons in superior court are more likely to have counsel. The survey also revealed that applications under s. 486.3 are made most often at the pre-trial hearing conference, and the survey and case law review indicate that such applications are almost always successful. The survey, case law review, and published commentary reveal concerns about the implementation of s. 486.3, in particular about how counsel is to be paid. The survey also reveals some judicial concern about delay that may result when an order is made under s. 486.3, especially if it is not clear how counsel is to be paid, and about how counsel can cross-examine only one witness without being involved in the entire trial. Despite the variation in the reported case law about how the courts are dealing with issues of payment for counsel and how counsel is being selected for s. 486.3 orders, the survey and case law review indicate that these issues are being adequately addressed; there are no reports of cases in which proceedings have had to be stayed because counsel could not be appointed.

The case law review and survey reveal that applications under s 715.1 to have a video-recorded interview with the child admitted in evidence are almost never denied. The survey indicates that applications for the video-recorded evidence provision are made most often during the pre-trial hearing conference. The case law review suggests that judges recognize that the video-recorded interview may be given considerable weight, since it is made closer to the events in question when a child is likely to be able to give a fuller and more accurate description of the events at issue. The survey suggests that the Crown only seeks to have a video-recorded interview admitted in less than half of cases, and that s. 715.2 is in practice not being used with vulnerable adult witnesses.

When asked about the credibility of witnesses in general in the survey, judges reported that the younger the witness, the more likely they are to make an unintentional false statement, for example, due to their memory of events being imperfect. Conversely, in the survey, judges reported that they perceived adults and older children to be more likely to be dishonest and make intentionally false statements. Judges in the survey also reported concerns that children who are testifying are frequently asked overly complex or developmentally inappropriate questions, especially by defence counsel. The case law review revealed that even in cases where children have been afforded accommodation, there continue to be cases where the courts acquit persons

charged with offences against children, even if the judge believed the child, if the court was satisfied that the Crown did not prove guilt beyond a reasonable doubt.<sup>134</sup>

There is very little case law pertaining to vulnerable adult witness provisions. The survey indicated that there have been relatively few applications for the use of testimonial aids for adults. When applications are made for the use of testimonial aids for adults, they are generally successful, but they are less likely to be granted than applications for child witnesses.

In line with the findings from the case law review, overall, the judges who completed the survey were very positive about the amendments contained in Bill C-2. The vast majority of judges were familiar with the amendments and a substantial proportion had used them. Almost all of the judges reported that the amendments are useful, and over three-quarters did not think they might render the trial unfair to the accused. Despite some concerns about implementation of these provisions as reflected in reported case law and survey comments, the amended provisions for child and vulnerable adult witnesses contained in Bill C-2 appear to be working well. Judges in both levels of court are familiar with the amendments and are using them.

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<sup>134</sup> While one might speculate that there have been more persons accused of offences against children who have been found guilty of offences against children since the new legislation on child witnesses came into effect in January 2006, there is not as yet any data to support this hypothesis. Statistics Canada Criminal Code convictions data, when reported, may allow some testing of this hypothesis. There are many examples of accused persons being acquitted despite accommodations afforded to child witnesses; for a few such decisions from the latter part of 2007, see *R. v. A.F.*, 2007 BCPC 345 per Skilnick Prov. J.; *R v. Black*, [2007] B.C.J. 2035 (S.C.) per Parrett J.; *R v. F.S.*, [2007] O.J. 4677 (S.C.) per Spies J.; *R v. Flores*, 2007 BCSC 1505 per McEwan J.; and *R v. C.B.*, [2007] O.J. 4580 (S.C) per Wein J.

## Appendix A

### Cover E-mail for Survey

## Cover E-mail for Judges' Survey

The Canadian Research Institute for Law and the Family (CRILF) has been contracted by Justice Canada to conduct a survey of provincial and superior court judges in five jurisdictions in Canada. The purpose of the survey is to obtain the views of judges about the amendments to the testimonial aid provisions of the *Criminal Code* and *Canada Evidence Act*, which came into force in January 2006 (Bill C-2, testimonial support provisions for children and vulnerable adults). Your willingness to share your views and experiences would be most helpful to Justice Canada in their review of this legislation.

Attached is a survey regarding the testimonial aid provisions contained in Bill C-2. Also attached is a file with the relevant legislation for your information. We would very much appreciate if you could take the time to complete the survey. In order to complete it, please save the attached Word file to your computer. The survey is designed to be completed in Word. The file can then be saved and emailed back to [crilf@ucalgary.ca](mailto:crilf@ucalgary.ca). If for some reason you cannot complete the survey electronically, please feel free to print a hard copy, complete it (using additional pages if necessary), and fax it back to CRILF at: (403) 289-4887 (Calgary) or toll-free at: 1-877-220-5114. If possible, please return the survey by [insert relevant date].

This survey was developed by the research team with the advice of a Judicial Advisory Committee composed of three judges from the jurisdictions being surveyed. This survey is being conducted in accordance with the *Freedom of Information and Protection of Privacy Act*. Responses will only be presented in aggregate form, and individual respondents will not be identified. Data will be password-protected and stored on a secure computer in CRILF's main office. If you have any questions regarding the project, please do not hesitate to contact us.

Thank you very much for your assistance with this project.

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## Appendix B

### Survey: Judges' Perceptions of and Experiences with Bill C-2 Provisions

## Judges' Perceptions of and Experiences with Bill C-2 Provisions

Thank you for taking the time to complete this survey about your perceptions of and experiences with the provisions contained in Bill C-2. Please note that the information you provide in this questionnaire will only be presented in aggregate form, and individual respondents will not be identified. Please note that for purposes of this survey, unless otherwise specified, "child" means under 18 years of age.

### Background Information

1. Where do you live?  
 Alberta  
 British Columbia  
 Ontario  
 Nova Scotia  
 Yukon
2. In which court do you sit?  
 Provincial Court  
 Superior Court
3. How often do you hear criminal cases? Options:
4. Among criminal cases going to trial/preliminary inquiry, how often do they involve:  
One or more witnesses who are children? Options:  
Domestic violence? Options:  
Sexual assault with an adult complainant? Options:

### Your Perceptions of Bill C-2

Bill C-2 introduced procedural and substantive amendments to provisions in the *Criminal Code* and *Canada Evidence Act* to facilitate the giving of testimony by children and other vulnerable witnesses. The following section asks about your opinions of the provisions of Bill C-2.

5. Are you familiar with the amendments contained in Bill C-2?  
 Yes  
 No. If no, please go to Question 32.
6. Have you had the opportunity to use any of the amendments contained in Bill C-2?  
 Yes       No
7. Please indicate the extent to which you agree or disagree that the following provisions amended in Bill C-2 are useful (even if you have not had the opportunity to use them):

	Strongly agree	Agree	Disagree	Strongly disagree
Competency inquiry (s. 16.1, <i>Canada Evidence Act</i> )	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Support persons (s. 486.1, <i>Criminal Code</i> )	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Screens and closed circuit television (s. 486.2)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

Counsel appointed for self-represented accused (s. 486.3)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Video-recorded evidence (ss. 715.1 and 715.2)	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

**Your Experiences with the Provisions Contained in Bill C-2**

The following section asks about your experiences with the provisions of Bill C-2. Please answer the following questions based on your experiences since Bill C-2 came into force January 2, 2006.

**Competency Inquiries (s. 16.1)**

8. *Have you held competency inquiries (s. 16.1) since January 2006?*

Yes                       No. *If no, please go to Question 11.*

9. For hearings involving child witnesses, please answer the following questions based on the three age categories provided. Please use the following scale: Never (0%); Occasionally (1-25%); Sometimes (26-50%); Often (51-75%); Almost Always (76-99%); Always (100%).

	3-5 yrs.	6-9 yrs.	10-13 yrs
How often is their competence accepted without inquiry?	Options:	Options:	Options:

How often is an inquiry held into their ability to "understand and respond to questions"?	Options:	Options:	Options:
---	----------	----------	----------

Of inquiries held, how often is the child found incompetent to testify?	Options:	Options:	Options:
---	----------	----------	----------

What is the average length of time spent on inquiries (in minutes)?

10. Have you had any difficulties with the implementation of these provisions of the *Canada Evidence Act*, or do you have any suggestions for further reform of these provisions?

**Support Persons (s. 486.1)**

11. *Have you used the support person provision (s. 486.1) since January 2006?*

Yes                       No. *If no, please go to Question 16.*

12. Among criminal cases going to trial/preliminary hearing with child witnesses **under the age of 18 years:**

How often was an application made under s. 486.1(1) for a support person to sit near the child? Options:

Of these applications, how often were they *not* successful? Options:

Of the applications that were not successful, what were the most common reasons for denying the application?

Of the applications that were successful, who was the most common support person for child witnesses under 18 years of age?

13. Among criminal cases going to trial/preliminary hearing with **vulnerable adult witnesses**:

How often was an application made under s. 486.1(1) for a support person to sit near the witness? Options:

Of these applications, how often were they *not* successful? Options:

Of the applications that were not successful, what were the most common reasons for denying the application?

Of the applications that were successful, who was the most common support person for vulnerable adults?

14. At what point in the proceedings is a s. 486.1 application most commonly made?

- Pre-trial hearing conference
- Start of trial/preliminary inquiry
- During trial/preliminary inquiry

15. Have you had any difficulties with the implementation of s. 486.1, or do you have any suggestions for further reform of these provisions?

**Screens and Closed Circuit Television (s. 486.2)**

16. *Have you used the screens or closed circuit television provision (s. 486.2) since January 2006?*

- Yes                       No. *If no, please go to Question 22.*

17. Among criminal cases going to trial/preliminary hearing with **child witnesses under the age of 18 years**:

How often was an application made under s. 486.2(1) for use of a screen or closed circuit television? Options:

Of these applications, how often were they *not* successful? Options:

Of the applications that were *not* successful, what were the most common reasons for *denying* the application?

Of the applications that were successful, how often did they involve:

Screens? Options:      Closed circuit television? Options:      Other device? Options:

18. Among criminal cases going to trial/preliminary hearing with **vulnerable adult witnesses**:

How often was an application made under s. 486.2(2) for use of a screen or closed circuit television? Options:

What were the most common situations of vulnerability in s. 486.2(2) applications?

Of these applications, how often were they *not* successful? Options:

Of the applications that were successful, what were the most common reasons for *granting* the application?

Of the applications that were successful, how often did they involve:

Screens? Options:      Closed circuit television? Options:      Other device? Options:

19. Have there been problems in arranging for appropriate equipment for s. 486.2 applications?  
 Yes                       No. *If yes, what problems have you encountered?*

20. At what point in the proceedings is a s. 486.2 application most commonly made?  
 Pre-trial hearing conference  
 Start of trial/preliminary inquiry  
 During trial/preliminary inquiry

21. Have you had any difficulties with the implementation of s. 486.2, or do you have any suggestions for further reform of these provisions?

**Counsel Appointed for Self-represented Accused (s. 486.3)**

22. *Have you used the counsel appointed for self-represented accused provision (s. 486.3) since January 2006?*  
 Yes                       No. *If no, please go to Question 27.*

23. Among criminal cases going to trial/preliminary hearing with a self-represented accused and a **child witness under the age of 18 years:**

How often was an application made under s. 486.3(1) for appointment of counsel for purposes of cross-examination? Options:

Of these applications, how often were they *not* successful? Options:

Of the applications that were *not* successful, what were the most common reasons for *denying* the application?

24. Among criminal cases going to trial/preliminary hearing with a self-represented accused and a **vulnerable adult witness:**

How often was an application made under s. 486.3(2) for appointment of counsel for purposes of cross-examination of a vulnerable adult? Options:

Of these applications, how often were they *not* successful? Options:

Of the applications that were successful, what were the most common reasons for *granting* the application?

25. At what point in the proceedings is a s. 486.3 application most commonly made?  
 Pre-trial hearing conference  
 Start of trial/preliminary inquiry  
 During trial/preliminary inquiry

26. Have you had any difficulties with the implementation of s. 486.3, or do you have any suggestions for further reform related to the appointment of counsel for an accused in proceedings involving children or other vulnerable witnesses?

**Video Recorded Evidence (ss. 715.1 and 715.2)**

27. Have you used the video recorded evidence provisions (ss. 715.1 and 715.2) since January 2006?  
 Yes  No. If no, please go to Question 32.

28. Among criminal cases going to trial/preliminary hearing with a **child witness under the age of 18 years:**

How often was an application made under s. 715.1 to admit a video recording of an interview with the child? Options:

Of these applications, how often were they *not* successful? Options:

Of the applications that were *not* successful, what were the most common reasons for *denying* the application?

29. Among criminal cases going to trial/preliminary hearing with an **adult witness who has a physical or mental disability:**

How often was an application made under s. 715.2 to admit a video recording of an interview with a vulnerable adult? Options:

What were the most common types of disability which caused difficulty communicating the evidence in s. 715.2 applications?

Of these applications, how often were they *not* successful? Options:

Of the applications that were *not* successful, what were the most common reasons for *denying* the application?

30. At what point in the proceedings are these applications most commonly made?

- Pre-trial hearing conference  
 Start of trial/preliminary inquiry  
 During trial/preliminary inquiry

31. Have you had any difficulties with the implementation of ss. 715.1 or 715.2, or do you have any suggestions for further reform of these provisions?

**Credibility Assessment and Questioning of Children**

The following section asks about your experiences with assessing the credibility and questioning child witnesses.

32. Approximately how often, if at all, has it appeared to you that witnesses in the following age groups, when properly questioned, *unintentionally* make false statements in court about

important elements of the events in question due to inaccurate memory?

3-5 years Options:

6-10 years Options:

11-13 years Options:

14-18 years Options:

Adults Options:

33. Approximately how often, if at all, has it appeared to you that witnesses in the following age groups have lied in court (*intentionally* make false statements)?

3-5 years Options:

6-10 years Options:

11-13 years Options:

14-18 years Options:

Adults Options:

34. Approximately how often, if at all, have you observed child witnesses (under 14 years of age) asked questions by different professionals where they appear incapable of answering, or you have concluded they're incapable of answering, due to complexity of the questions (i.e., are asked developmentally inappropriate questions) as revealed in court or on video-recorded interview?

By defence counsel Options:

By Crown Options:

By police (on video) Options:

By child protection worker (on video) Options:

By judge Options:

**General Comments**

35. Do you think that any of the new provisions may render the trial unfair to the accused?  
 Yes                       No. If yes, please explain.

36. Do you have any other comments about the Bill C-2 provisions or other matters related to proceedings involving children or other vulnerable witnesses?

*Thank you for taking the time to complete this survey.*

*Please save the file to your computer, and then attach it to your email to [crilf@ucalgary.ca](mailto:crilf@ucalgary.ca).*