EFFECTIVE LAW
IN AN EFFECTIVE STATE

Local conditions in the global context in the face of 21st century challenges of fighting crime.

Canadian Legislation Concerning Testimonial Support for Children and Vulnerable Adults

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The analysis was prepared as part of the project:

Effective law in an effective state. Local conditions in the global context, in the face of 21st century challenges of fighting crime.

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Preface

In 1988, the Canadian Parliament passed very significant legislative reforms to the Criminal Code and the Canada Evidence Act (hereinafter: 'Evidence Act') in order to facilitate, among others, the ability of children to appear in court and testify in criminal cases. Further reforms took place in 1993 and 1998. In 2005, the Parliament passed amendments[1] to the previous statutory reforms to further facilitate testimony for vulnerable persons, i.e. children and other vulnerable witnesses. These amendments came into force on 2 January 2006. The aim of all the legislative amendments was to facilitate the participation of certain groups of persons in the criminal process and thus the effective administration of criminal justice.

[1] *Bill C-2* (S.C. 2005), *Testimonial Support Provisions for Children and Vulnerable Adults*.

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1. Canadian legislation concerning testimonial support for children and vulnerable adults

The Evidence Act reforms that came into force in 2006 significantly changed the process and standard for assessing children's competency to testify in criminal proceedings. Prior to the Bill C-2, a child under the age of 14 could appear as a witness and testify under oath[2] only after confirming his or her ability to understand and respond to questions, as well as making a 'promise to tell the truth' to the court. The test for admission to testify was a two-stage process, verifying whether the minor possessed:

1. the ability to answer questions that demonstrate an understanding of the importance of telling the truth;
2. the ability to communicate meaningfully and logically with the court and other participants in the trial.

If a child lacked the maturity and mental capacity to successfully complete the test for testimony, such a child was incapable of testifying in any form and thus could not become a witness in a criminal trial[3].

Section 16.1(1) of the Evidence Act currently provides that a person under the age of 14 is presumed to have the capacity to testify. The criterion for admitting evidence from a child's testimony is defined in that the child is to be capable of "understanding and responding to questions". Due to their young age, a witness under the age of 14 cannot take the oath that adult witnesses take, but must declare that they will tell the truth. Evidence given by a child after a declaration to tell the truth shall have the same legal effect as if it were taken under oath (section 16.1(8) of the Evidence Act). Section 16.1(7) of the Evidence Act now specifies that a child should not be asked any questions regarding their understanding of the nature of a "promise to tell the truth" as part of the test of competence and capacity as a witness. The wording of the provision reflects the reality that children are frequently unable to do so and express the meaning of such abstract concepts as the 'truth' and 'lie', even though they may

[2] 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.).

[3] R. v Farley (1995), 23 O.R. (3d) 445(Ont. C.A.). The Ontario Court of Appeal, in its judgment, indicated that a witness proposed by a party does not have to make an actual commitment to tell the truth before being allowed to testify under section 16(3). Such an approach appears to be contrary to the clear wording of the prior wording of section 16(3) of the Evidence Act.

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well know the difference between the 'truth' and 'lie'. Psychological research has proven that there is no relationship between a child's ability to define the 'truth' and whether a child will tell the truth[4]. Taking these findings into account, the Canadian Parliament eliminated the possibility of testing children's knowledge of these abstract concepts - the 'truth', 'lie' or 'promise'.

Another provision concerning a specific group of witnesses relates to the possibility of video recording and recording testimony on video or storage media. Witnesses under the age of 18 who, immediately after the alleged act, have given testimony which has been video recorded, may be questioned as to the veracity of its contents, pursuant to section 715(1) of the Criminal Code of Canada (hereinafter: Criminal Code), if the witness is permitted to give such testimony in court. Once video testimony has been admitted, under section 715(1) of the Criminal Code, the inability to cross-examine a witness, e.g. due to a medical condition, only affects the gravity of the evidence and cannot be used to argue its admissibility. Section 715.1(1) of the Criminal Code, provides: "In any proceeding against an accused in which a victim or other witness was under the age of eighteen years at the time the offence is alleged to have been committed, a video recording made within a reasonable time after the alleged offence, in which the victim or witness describes the acts complained of, is admissible in evidence if the victim or witness, while testifying, adopts the contents of the video recording, unless the presiding judge or justice is of the opinion that admission of the video recording in evidence would interfere with the proper administration of justice". Statements under section 715.1(1) "are not properly characterised as a prior consistent statement. Instead, they are an integral part of their testimony in court[5]. However, they cannot be used to 'enhance' credibility[6].

[4] 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.

[5] R v Untinen, 2017 BCCA 320 (CanLII) - https://www.canlii.org/en/bc/bcca/doc/2017/2017bcca320/2017bcca320.html (accessed on: 20.07.2023, 10:00).

[6] R v RGB, 2012 MBCA 5 (CanLII) - https://www.canlii.org/en/mb/mbca/doc/2012/2012mbca5/2012mbca5.html (accessed on: 22.07.2023, 20:00).

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The pre-conditions for accepting a request to interview a witness under the age of 18 are[7]:

- the victim or witness on the video recording was under 18 years of age at the time of the act;
- the video recording was "made within a reasonable time after the alleged offence";
- the victim or witness "describes the acts that are complained of" in the video recording;
- the victim or witness can testify and "adopts the content of the video recording";
- the judge is not of the view that the admission of the video recording would "interfere with the proper administration of justice".

The condition for accepting and allowing such an application are developed and standardised guarantees of credibility and reliability[8]. They include the ability of the person examining the facts to observe the applicant's behaviour and to assess his or her personality and intelligence[9].

In the doctrine, examples referring to the title issue can also be found. In the case of R. v Bannerman[10], it was held that the investigation should be carried out by a judge. The nature and number of questions will depend on the particular circumstances of the case and the child's features. Questions should be age-appropriate and understandable. Appellate courts should rely on the discretion of the presiding judge in determining jurisdiction, unless such discretion has been diagnosed as clearly abused. The Manitoba Court of Appeal also acknowledged that it was quite appropriate for the Crown counsel, parent or other person to prepare the child to give evidence by providing guidance on the importance of telling the truth in court, before the child comes to court.

Since child witnesses can provide vital evidence for the criminal justice process, the Canadian Parliament has therefore recognised the need to treat children as an essential part of

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[7] R v GRS, 2020 ABCA 78 (CanLII) - https://www.canlii.org/en/ab/abca/doc/2020/2020abca78/2020abca78.html (accessed on: 23.07.2023, 21:00).

[8] R v F(CC), 1997 CanLII 306 (SCC) - https://www.canlii.org/en/ca/scc/doc/1997/1997canlii306/1997canlii306.html (accessed on: 19.07.2023, 11:00).

[9] R v RAH, 2017 PECA 5 (CanLII) - https://www.canlii.org/en/pe/pescad/doc/2017/2017peca5/2017peca5.html (accessed on: 22.07.2023, 19:00).

[10] [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.).

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the administration of justice with a different treatment compared to adults and tailored to their needs when they give evidence in court. Providing evidence in court can be an extremely traumatic experience for a child. It consists of a number of aspects that take place during testimony that can affect minor witnesses, including:

- the overwhelming and clerical ‘atmosphere’ of the courtroom;
- public presentation by a child of details of an incident that may be embarrassing or frightening for a minor;
- 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 offence is disclosed;
- physical separation from a parent or trusted adult.

Bearing the above considerations in mind, it is clear that a suitable place for a child to be when giving evidence is needed not only to reduce the trauma of testifying, but also to provide a comfortable space giving the opportunity to report accurately what the minor knows about in the case in question.

A separate group of legal provisions dedicated to supporting actions taken in the criminal process is the testimony of a disabled victim or witness. According to section 715.2 (1) of the Criminal Code, “In any proceeding against an accused in which a victim or other witness is able to communicate evidence but may have difficulty doing so by reason of a mental or physical disability, a video recording made within a reasonable time after the alleged offence, in which the victim or witness describes the acts complained of, is admissible in evidence if the victim or witness, while testifying, adopts the contents of the video recording, unless the presiding judge or justice is of the opinion that admission of the video recording in evidence would interfere with the proper administration of justice”.

Another facilitation for persons who require differential treatment is the presence of a so-called support person. For this purpose, the Canadian Parliament, primarily, enacted legislation in 1993 to allow the support person to stay close to the child witness when testifying in court. Originally, the legislation only applied to allegations of sexual or violent offences.

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Nowadays, section 486.1[11] of the Criminal Code provides that in criminal proceedings, the use of a support person is mandatory either at the request of the prosecutor or when the witness is under 18 years of age, unless the judge determines that the participation of such a support person would interfere with the due course of the trial and the provision of procedural safeguards. The support person may be a social worker. In some cases, a parent may also be a support person, although the judge may decide that this interferes with the proper administration of justice if the allegation concerns abuse by the other parent or relative. The judge must be convinced that the use of a support person "is necessary for the proper administration of justice". Judges have 'considerable discretion' in assessing the suitability of a support person[12]. The judge may allow the complainant's mother, who is also a witness, to provide support as long as it takes place after the mother has testified[13].

There has been a presumption in the case law that, under section 486.1(1) of the Criminal Code, enabling a support person to assist a witness applies to any case in which an adult witness suffers from a "mental impairment or physical disability" that would affect his or her ability to communicate. In the case R. v Bill[14], a discussion was held as to what constitutes a 'mental impairment' that would affect the ability to communicate and enable submission of an order for a disabled adult under section 486.1(1).

In the case of R. v C.(D.), the Nova Scotia Court of Appeal considered whether the judge had erred in allowing the mother of the complainant child to act as a support person as she had also witnessed the commission of the acts in question by the accused[15]. Although the mother had testified before the child entered the court, the accused objected that she was then a support person. The judge did not share the accused's position and allowed the mother to act as a support person. The Court of Appeal held that the judge's decision to allow the mother to act as a support person constituted a valid exercise of court functions. The accused lodged the

[11] "*In any proceedings against an accused, the judge or justice shall, on application of the prosecutor in respect of a witness who is under the age of 18 years or who has a mental or physical disability, or on application of such a witness, order that a support person of the witness' choice be permitted to be present and to be close to the witness while the witness testifies, unless the judge or justice is of the opinion that the order would interfere with the proper administration of justice.*"

[12] R v George, 1996 CanLII 626 (ON CA) https://www.canlii.org/en/on/onca/doc/1996/1996canlii626/1996canlii626.html (accessed on: 19.07.2023, 20:00).

[13] R v DC, 2008 NSCA 105 (CanLII) https://www.canlii.org/en/ns/nsca/doc/2008/2008nsca105/2008nsca105.html (accessed on: 21.07.2023, 20:00).

[14] [2006] B.C.J. No. 1139 (Prov. Ct.).

[15] [2008] NSCA 105.

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appeal, arguing that allowing the mother to sit next to her daughter and hearing her testimony effectively deprived him of the right to cross-examine the mother after the accused had testified in relation to his belief that the appellant's evidence may have been tainted by her elder sister who did not testify. The Court of Appeal found that the appellant seemed to "confuse the possibility of taint with the reality of taint. As long as the judge was aware of such possibility and addressed it appropriately, taking into account all the evidence, there is no reason to intervene". In the appeal, the accused stated that the presiding judge was "fully aware of the possibility of such tainting by the witness and addressed this directly in his decision". The Court of Appeal further noted that the accused was given full opportunity to examine the issue during the cross-examination.

Apart from a support person, other facilities are provided for those who require them. Under section 486.2(1) of the Criminal Code, if the child so requests, testimony through closed-circuit television or behind a screen is permitted unless the judge or justice is of the opinion that the order would interfere with the proper administration of justice[16].

Under section 486.2(2) of the Criminal Code, adults who are not disabled may testify behind a screen or via closed-circuit television, but only if the court is "of the opinion that the order would facilitate the giving of a full and candid account by the witness of the acts complained of". In the case of R. v Pal[17], the court pointed out that for section 486.2(2) to be used by an adult, it is not enough for a witness to state that he or she is 'timid'. It must additionally be shown that, due to the presence of such fear, the witness is unable to "give a full and frank account". In the case of R. v C.(A.W.)[18], the child testified from behind a screen which allowed the witness to avoid seeing the accused and, on the other hand, also prevented the accused from seeing the witness while testifying.

Another mechanism to streamline and safeguard the testimony of vulnerable persons is the recording of their statements. Section 715.1(1) of the Criminal Code, provides for the admission of video recorded statements by children. This provision applies to any offence, not

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[16] The presumption of permission to use a screen or closed-circuit television, pursuant to Article 486.2(1), also applies to any case in which an adult witness suffers from a mental or physical disability that would affect his or her ability to communicate.

[17] [2007] B.C.J. 2192 (S.C.).

[18] [2005] A.J. No. 308(Alta. C.A.).

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just an offence against sexual freedom or morality, and creates a presumption that the video recording of an interview involving any child witness may be admissible, provided that it was made "within a reasonable time" after the act. Moreover, as part of the legislative work, section 715.2 has been added, which provides that if a witness 'may have difficulty' in giving 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 after the alleged offence' is admissible if the witness adopts its contents. Under current sections 715.1 and 715.2, the burden of counter-evidence rests with the accused to show that the admission of a video recording that meets the above admission criteria should be excluded since its admission would "interfere with the proper administration of justice".

The Court of Appeal in the case of R. v Collura[19] held that a video-recorded conversation with the child, may be admitted instead of the child's direct testimony if the "necessity" for it and the "reliability" of the statement are established and certain. The common law standard for admitting video recording in cases where the child has not testified requires a more rigorous inquiry into the circumstances in which the video was recorded[20].

In the case of R. v Vaughn[21], an adult was accused of sexually assaulting two children. The prosecutor did not want to call the children as witnesses to testify at the preliminary hearing, and was particularly interested in avoiding their cross-examination. In order to avoid this, the prosecutor attempted to introduce a video recording of the children's conversation with the investigating officer into the trial. The accused, arguing that the video recordings were not admissible under section 540(7) as a matter of the law, claimed that if the prosecutor intended to rely solely on the video recorded statements of the child victims without calling them as witnesses, it must first show that the evidence was "credible or trustworthy" and therefore admissible under section 540(7) of the Canadian Criminal Code. As the accused pointed out, even if the video recordings are admissible under section 540(7) of the Criminal Code, the

[19] [1996] B.C.J. No. 2211(B.C.C.A.).
[20] R. v T.H., [2005] O.J. No. 4588(Ont. Sup. Ct.). In this case, the children did not testify, and the video recorded statements were found inadmissible due to the lack of credibility resulting from the circumstances in which they were made.
[21] 2009 Carswell BC 1249.

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accused may submit an application, under section 540(9), to interview the child as part of the preliminary investigation.

In addition to the Canadian Criminal Code, a separate group of provisions concerning the title issue is provided for in the Canada Evidence Act. Section 6 of the Evidence Act relates to disabled persons giving evidence. The first section 6(1)[22] concerns persons with physical disability, whereas section 6(2)[23] concerns persons with mental disability. Both provisions apply when a person is disabled and has difficulty communicating due to such disability.

[22] "*If a witness has difficulty communicating by reason of a physical disability, the court may order that the witness be permitted to give evidence by any means that enables the evidence to be intelligible*".

[23] "*If a witness with a mental disability is determined under section 16 to have the capacity to give evidence and has difficulty communicating by reason of a disability, the court may order that the witness be permitted to give evidence by any means that enables the evidence to be intelligible".*

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Summary

All victims of crime and witnesses to such acts, regardless of their vulnerability, should have an equal opportunity to participate in the criminal justice process. The Public Prosecution Service of Canada recognises that cases involving vulnerable victims and witnesses involve unique and complex issues, and that such cases should be identified at the earliest stages of the criminal proceedings so that such individuals can be appropriately dealt with. Where there is a reasonable probability that a person's effective participation in the administration of justice will be significantly impaired or even excluded unless facilities or support tailored to their unique personal characteristics or circumstances are provided, every effort should be made to enable such individuals to testify and be used in the criminal justice process.

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