

ARTICLE

NO MATTER HOW SMALL: CHILD WITNESSES IN CANADIAN CRIMINAL TRIALS

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INTRODUCTION

After her conviction for witchcraft in the notorious Salem Witch Trials, but before her execution, Martha Carrier bemoaned that “[i]t is a shameful thing, that you should mind these folks that are out of their wits.”¹ Whether she was or was not impugning the testimony of her adolescent accusers, Carrier’s “out of their wits” remark accurately describes the way the Court would consider children and their testimony for centuries: that children were imaginative, and that the testimony of children was “often inaccurate because of their limited memory capacity” and “especially vulnerable to suggestive or ‘leading’ questions.”²

Parliament and the Supreme Court of Canada (“SCC”)—and Canada’s criminal jurists—endorsed those socio-legal attitudes until the judicial landscape began changing in the 1980s. Since then, Parliament and the SCC have provided substantial assistance to the children providing testimony in Canada’s courts. This assistance includes allowing video-recorded interviews to be admitted as testimonial evidence, child witnesses to testify behind witness protection screens or through closed-circuit television (“CCTV”), and child witnesses to be accompanied by trusted persons or support animals. Provisions like these in the *Criminal Code* and *Canada Evidence Act*, along with robust developments in case law, which emerged as a result of developments in the judicial and political landscape, made it easier for the court to consider evidence from child witnesses.³

With experience working in criminal investigations relating to child protection, I believe that the changes to the *Criminal Code* and *Canada Evidence Act* are consistent with the truth-seeking functions of the courts and a more realistic, responsive, and conscientious approach to the capacities of child witnesses. I also acknowledge, though, that there are some special vulnerabilities that can come with the accommodations that are made for child witnesses in Canada’s criminal trials. Criminal counsel must remain vigilant to some special vulnerabilities affecting the criminal process that may accompany these accommodations because of the significance of this evidence to criminal trials.

In this article, I address, analyze, and contextualize some of the statutory provisions aimed at accommodating child witnesses, and I critically assess the challenges confronting criminal counsel with child witnesses, particularly criminal counsel confronting video-recorded interviews of children.

In Part I, I review four fundamental statutory provisions pertaining to child witnesses in criminal trials. The aim of this part of the paper is two-fold: first, to put those statutory provisions in historical context, tracking the development of the law as a reflection of changing socio-legal attitudes towards the testimony of children; and second, to set out the current state of the law related to that child evidence in Canada. That historical context aids an understanding of those statutory provisions and the SCC and Parliament’s rationale in revising rules of evidence; and that allows for an in-depth assessment of the practices and procedures involved in the taking of video-recorded interviews of children (for their use at a trial).

In Part II, I focus on the use of video-recorded interviews as admissible hearsay evidence under section 715.1 of the *Criminal Code*.⁴ What best practices should be followed when

1 Charles W Upham, *Salem Witchcraft: With an Account of Salem Village, and a History of Opinions on Witchcraft and Kindred Subjects*, vol 2 (Boston: Wiggin and Lunt, 1867) at 236.

2 Stephen J Ceci, David F Ross & Michael P Toglia, “Suggestibility of Children’s Memory: Psycholegal Implications” (1987) 116:1 *J Experimental Psych: Genl* 38 at 39.

3 *Criminal Code*, RSC 1985, c C-46 [*Criminal Code*]; *Canada Evidence Act*, RSC 1985, c C-5 [*Canada Evidence Act*].

4 *Criminal Code*, *supra* note 3, s 715.1.

interviewing children, and how do those best practices change counsel’s approach to those video-recorded interviews at trial? What methods and protocols are used by the specially-trained police officers and social workers that conduct those video-recorded interviews? In this part of the paper, I analyze and assess those best practices and methodologies. Canada’s criminal law practitioners must understand the best practices and methodologies applied to the video-recorded interviews advanced at trial for the truth of their contents; and that understanding can contribute to the deft defence—or prosecution—of an accused.

I. THE STATUS AND DEVELOPMENT OF RELEVANT STATUTORY PROVISIONS

Sociologist Eugen Ehrlich, among other legal scholars and sociologists, has attributed the development of laws to social norms and beliefs.⁵ To examine the historical development of statutory provisions that relate to child witnesses, therefore, is to also examine the development of social attitudes towards child witnesses. The two are inextricably linked. A historical examination of provisions in the *Criminal Code* and *Canada Evidence Act* relating to child witnesses demonstrates how criminal law, as a reflection of our social values, has changed from regarding children to be unbelievable, to focusing on obtaining the best evidence from children in court, without unduly harming the interests of the child.

Each of the changes I describe in Part I were introduced as part of a larger movement for victim rights. In an adversarial criminal justice system, the rights of a victim and the rights of an accused are often at odds with one another. The overarching goal of these legislative reforms has been to advance the rights of victims of crime, while the overarching consideration of the courts in view of these legislative reforms has been to balance the rights of victims with the traditional rights of accused persons, as part of the truth-seeking function of the criminal justice process.

A. Repealing Section 659 of the *Criminal Code* and Abrogating the Doctrine of Corroboration

Perhaps no other provision of the *Criminal Code* is as telling of Canada’s treatment of child witnesses as section 659, which required that “[n]o person shall be convicted of an offence upon the unsworn evidence of a child unless the evidence of the child is corroborated in a material particular by evidence that implicates the accused.”⁶

Section 659 is the basis of the “doctrine of corroboration.” Constance Backhouse, an academic expert in sexual assault law, has explored the history and origins of the doctrine of corroboration in Canada.⁷ She has identified several respected jurists—including John Henry Wigmore, Sidney Phipson, and William Tremear—whose commentary on children as witnesses, while presently distasteful, reveals the pervasive socio-legal beliefs that viewed

5 Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (London: Routledge, 2001). Of law created by the state, Ehrlich said that “[t]he center of gravity of legal development [...] from time immemorial has not lain in the activity of the state but in society itself, and must be sought there at the present time. This may be said not only of the legal institutions but also of the norms for decision” (*Ibid* at 390).

6 *Criminal Code*, RSC 1970, c C-34, s 586 expresses the original wording of the section. Note that this section was briefly revised to *Criminal Code*, *supra* note 3, s 659 until it was repealed. The statutory revisions were taking place parallel to the law being reviewed. The current form of this section, which abrogates the need for corroboration, eventually replaced the earlier form of the same section that required corroboration (see *Criminal Code*, *infra* note 18 and accompanying text).

7 Constance Backhouse, *Carnal Crimes: Sexual Assault Law in Canada, 1900-1975* (Toronto: Irwin Law for the Osgoode Society for Canadian Legal History, 2008) at 171-173 [Backhouse, *Carnal Crimes*]; Constance Backhouse, “The Doctrine of Corroboration in Sexual Assault Trials in Early Twentieth Century Canada and Australia” (2001) 26:2 *Queen’s LJ* 297 at 302 [Backhouse, “Doctrine of Corroboration”].

child witnesses as uncontrollably creative creatures that simply could not harness their imaginative natures, even when in a courtroom.⁸

The need to corroborate child testimony was also confirmed by the SCC in 1962 in *Kendall v the Queen*, which held that evidence given by “children of immature years” must be handled cautiously and corroborated out of concern for the “frailty” of a child’s evidence.⁹

The law in this area began to change when Bill C-15, *An Act to Amend the Criminal Code and Canada Evidence Act*, came into force on January 1, 1988.¹⁰ Bill C-15 was the government’s response to several reported recommendations made by the Committee on Sexual Offences Against Children and Youths, chaired by Robin Badgley (and commonly referred as the “Badgley Report”).¹¹ In addition to criminalizing many offences against children that still exist, Bill C-15 updated Canada’s antiquated laws with respect to the evidence of children and repealed section 659 of the *Criminal Code*.¹²

The Canadian Bar Association (“CBA”), however, opposed the legislative action to repeal section 659, clinging to the belief that “children of younger ages have a tendency to fabricate.”¹³ The CBA representative, Joel Pink, cited “studies” that confirm these beliefs. When Svend Robinson requested copies of those studies, none were submitted to the Legislative Committee on Bill C-15. Subsequent witnesses disagreed strongly with these characterizations of children and child witnesses, and the CBA’s testimony was not well-received by either members or other witnesses to the Legislative Committee on Bill C-15, who characterized it as disappointing and poorly documented.¹⁴ Despite these objections, however, Bill C-15 was passed in to law with relative ease and little controversy in the House of Commons¹⁵ (though several amendments to the law were recommended by the committee, and accepted at the third reading).¹⁶

8 *Ibid.* These jurists are identified only to emphasize the ubiquity of these beliefs before the 1980s.

9 *Kendall v R*, [1962] SCR 469 [*Kendall*] emphasizes mental immaturity as an element of testimonial reliability. While this is consistent with Wigmore’s arguments, Backhouse characterizes Wigmore as a proponent of the doctrine of corroboration “without discernible justification” (Backhouse, *Carnal Crimes*, *supra* note 7 at 172). Without discrediting Wigmore or his rules of evidence, his views on women and children as witnesses are, at the very least, flagged for caution in this historical examination.

10 *An Act to Amend the Criminal Code and Canada Evidence Act*, SC 1987, c 24 [*Act to Amend the Criminal Code and Canada Evidence Act*].

11 House of Commons, Legislative Committee on Bill C-15 *An Act to Amend the Criminal Code and the Canada Evidence Act*, *Minutes of Proceedings and Evidence* (27 November 1986) (Chair: Marcel Danis) at 1:21-1:22 [Legislative Committee on Bill C-15]; see also Canada, Committee on Sexual Offences Against Children and Youths, *Sexual Offences Against Children in Canada: Summary of the Report of the Committee on Sexual Offences Against Children and Youths* (Ottawa: Supply and Services Canada, 1984) at 27-34 [Badgley Report].

12 *Act to Amend the Criminal Code and Canada Evidence Act*, *supra* note 10, s 15; see also Legislative Committee on Bill C-15, *supra* note 11; see also Badgley Report, *supra* note 11.

13 Legislative Committee on Bill C-15, *supra* note 11 at 2:17.

14 See *ibid* at 3:14 (for comments by the Canadian Institute of Child Health and members of the Legislative Committee).

15 See “Bill C-15, An Act to amend the Criminal Code and the Canada Evidence Act”, 2nd reading, *House of Commons Debates*, 33rd Parl, 2nd Sess, Vol I (4 November 1986) at 1073 (Sheila Copps) [Bill C-15, 2nd Reading, *House Debates*]; see also “Bill C-15, An Act to amend the Criminal Code and the Canada Evidence Act”, 3rd reading, *House of Commons Debates*, 33rd Parl, 2nd Sess, Vol VI (23 June 1987) at 7504-7509. All speakers from all parties supported the final bill. The most lukewarm support was from Hon. Bob Kaplan, who said “[w]hile the recommendations do not go as far as the Badgley Commission recommended, they are a tremendous improvement over the present law. Bill C-15 will result in more prosecutions than has been the case to date. Many of the obstacles to bringing cases forward have been disposed of as a result of the work of the committee” (*Ibid* at 7506).

16 House of Commons, *Journals*, 33rd Parl, 2nd Sess, vol 129 (28-29 April 1987) at 788-791. No rationale for the amendments are provided in *Hansard* or in the Committee Proceedings, but the amendments were not substantial and did not alter the original meaning of the provisions.

In 1993, Parliament acted again to amend section 659 in Bill C-126, *An Act to Amend the Criminal Code and Young Offenders Act*. With Bill C-126, section 659, which had sat empty since January 1, 1988, was made to read: “Any requirement whereby it is mandatory for a court to give the jury a warning about convicting an accused on the evidence of a child is abrogated.”¹⁷ The provisions in Bill C-126 were more commonly known at the time as “anti-stalking legislation” and, although there were no reasons put forward for amending section 659 in this way,¹⁸ section 659 was the least contentious of Bill C-126’s provisions.¹⁹ Even the CBA, which had recently opposed changes to the doctrine of corroboration’s statutory relic,²⁰ did not oppose this newest addition to the *Criminal Code* in Bill C-126.²¹ Section 659 has remained unchanged since that time.

The doctrine of corroboration has been put to rest and the focus instead has been shifted to evaluate the reliability of a child’s testimony.²² The importance of this evaluation will be discussed in detail in Part II.

B. Amending Section 16 of the *Canada Evidence Act* to Accommodate the Testimony of Children

The oath or solemn affirmation made in court, aside from being symbolic, is viewed by some as imbuing testimonial evidence with a greater veracity than if no oath or solemn affirmation were made.²³ Prior to Bill C-15, section 16 of the *Canada Evidence Act* required that

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

17 *Criminal Code*, *supra* note 3, s 659.

18 A review of Parliamentary records reveals little useful information that would suggest this amendment was necessary or strongly desired. See House of Commons, Legislative Committee on Bill C-126, *An Act to Amend the Criminal Code and the Young Offenders Act*, *Minutes of Proceedings and Evidence* (2 June 1993) (Chair: Gilbert Parent) at 5:28-29 [Legislative Committee on Bill C-126]. An exchange between Professor Nicholas Bala and Hon. Rob Nicholson at the Committee indicates that section 659 of the *Criminal Code* may have been updated because of some residual concern in the legal community that corroboration was being misunderstood by the courts, as *Kendall* had not been specifically addressed in the SCC decision of *R v W(R)*, [1992] 2 SCR 129 [RW]. Despite this, however, a complete reading of the exchange makes it clear that there was no urgent need to amend this section. See *R v K(V)*, [1991] BCJ No 3913 at paras 19-22 (The British Columbia Court of Appeal (“BCCA”) repeatedly refers to the use of the caution from *Kendall* as being a matter of “discretion” for the trial judge and “not a rule of practice”); see *R v Meddoui*, [1990] AWLD 827 at paras 51-54 [Meddoui] (regarding lower court commentary on the application of *Kendall* after the passage of Bill C-15).

19 “Bill C-126, An Act to Amend the Criminal Code and the Young Offenders Act”, 2nd reading, *Debates of the Senate*, 34th Parl, 3rd Sess, Vol 5 (17 June 1993) at 3576 (Hon Richard J Stanbury); see also generally *supra* note 15 and accompanying text.

20 See Legislative Committee on Bill C-15, *supra* note 11 and accompanying text.

21 Legislative Committee on Bill C-126, *supra* note 18 at 3:20.

22 While the doctrine of corroboration, as described by Backhouse, “Doctrine of Corroboration”, *supra* note 7, has been laid to rest, caution may still be necessary in evaluating the statements of children. As discussed in Part II, suggestibility in children is much better understood today.

23 See *R v B(KG)*, [1993] 1 SCR 740 [B(KG)]. “Originally the oath was grounded in a belief that divine retribution would visit those who lied under oath. Accordingly, witnesses were required to believe in this retribution if they were to be properly sworn and their evidence admissible” (*Ibid* at 788). *B(KG)* includes general commentary on the relaxation of the oath, especially in relation to children (*Ibid* at 789).

(2) No case shall be decided upon such evidence alone, and it must be corroborated by some other material evidence.²⁴

In 1988, Bill C-15 amended this section to read:

16(1) Where a proposed witness is a person under fourteen years of age or a person whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine

(a) whether the person understands the nature of an oath or a solemn affirmation; and

(b) whether the person is able to communicate the evidence.

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

(3) A person referred to in subsection (1) who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may testify on promise to tell the truth.

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

(5) A party who challenges the mental capacity of a proposed witness of fourteen years of age or more has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to testify under an oath or a solemn affirmation.²⁵

Comparing the two sections, this was a significant shift in the law. Together with the repeal of section 659 of the *Criminal Code*, the evidence of a child could be now taken on a promise to tell the truth if the child understood what telling the truth meant, even when they did not understand the nature of an oath or solemn affirmation.²⁶

Although a minor change to that procedure was made in 1994,²⁷ the next major change came in 2005, when section 16(1) of the *Canada Evidence Act* was amended to apply only to witnesses that were “fourteen years of age or older whose mental capacity is challenged.”²⁸ Children would now be included in section 16.1, which would eliminate entirely the requirement for witnesses under fourteen years to take an oath at all, and create the presumption of testimonial competence for all witnesses under fourteen years of age, shifting the burden in the criminal court to the defence to prove that a child lacks the capacity to testify.

24 *Canada Evidence Act*, RSC 1970, c 307, s 16.

25 *Canada Evidence Act*, *supra* note 3, s 16 (as it appeared 1 January 1989).

26 See *B(KG)*, *supra* note 23.

27 *An Act to Amend the Criminal Code and other Acts (miscellaneous matters)*, SC 1994, c 44, s 89.

28 *An Act to Amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, SC 2005, c 32, s 26 [*Act to amend the Criminal Code and Canada Evidence Act, 2005*].

Section 16.1, in force today, reads:

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

(2) A proposed witness under fourteen years of age shall not take an oath or make a solemn affirmation despite a provision of any Act that requires an oath or a solemn affirmation.

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

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

(5) If the court is satisfied that there is an issue as to the capacity of a proposed witness under fourteen years of age to understand and respond to questions, it shall, before permitting them to give evidence, conduct an inquiry to determine whether they are able to understand and respond to questions.

(6) The court shall, before permitting a proposed witness under fourteen years of age to give evidence, require them to promise to tell the truth.

(7) No proposed witness under fourteen years of age shall be asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court.

(8) For greater certainty, if the evidence of a witness under fourteen years of age is received by the court, it shall have the same effect as if it were taken under oath.²⁹

In 2010, the SCC endorsed a decision of the BCCA, which held section 16.1 of the *Canada Evidence Act* to be constitutional.³⁰ In *R v JZS* (“JZS”), at the BCCA, Justice Smith held that “a child’s presumed testimonial incompetence” is neither a fundamental principle of justice, nor a violation or diminishment of an accused’s right to a fair trial.³¹ This development in Canada’s criminal justice system was consistent with the truth-seeking goal of justice, and it respected the essential elements of an accused’s right to a fair trial.³²

This presumption of testimonial competence, now firmly entrenched in our rules of evidence, firmly establishes that child witnesses are more welcome than ever in the criminal courtroom.³³

29 *Ibid*, s 27.

30 *R v JZS*, 2010 SCC 1; *R v JZS*, 2008 BCCA 401 at para 54 [*JZS BCCA*].

31 *Ibid*. JZS was convicted of sexually assaulting his seven-year old son and ten-year old daughter (though they were, respectively, eight-years old and eleven-years old at the time of the trial); Crown Counsel applied for permission to have the children testify behind a screen, and that application was accepted (*JZS BCCA*, *supra* note 30 at para 1). JZS challenged the constitutionality of section 486.2 of the *Criminal Code* and section 16.1 of the *Canada Evidence Act* (*Criminal Code*, *supra* note 3, s 486.2; *Canada Evidence Act*, *supra* note 3, s 486.2; *JZS BCCA*, *supra* note 30 at para 2).

32 *JZS BCCA*, *supra* note 30 at para 55.

33 See *R v (D)*, 2012 SCC 5 (for a general discussion of testimonial competence and the SCC’s opinions on preventing vulnerable persons from testifying). Although this case addressed the testimonial competence of adult witnesses with mental disabilities, many of the court’s sentiments can be transposed for analysis when discussing the presumed testimonial competence of children.

C. Sections 486.1 and 486.2 of the *Criminal Code* and Testimonial Aids and Support Persons

In most criminal trials, the accused will have full view of the witness as they testify by themselves. However, sections 486.1 and 486.2 of the *Criminal Code* allow for testimonial aids and support persons for children. Section 486.1(1) indicates a 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.³⁴

Section 486.2 requires that a judge or justice, on the application of the prosecutor or the witness, make an order that witnesses who meet certain criteria testify outside the court room or “behind a screen or other device that would allow the witness not to see the accused.”³⁵ Section 486.2, in practice, generally allows for the use of witness privacy screens or allows a witness to testify through CCTV. As acknowledged by Justice Smith in *JZS* at the BCCA: “[t]he provision [...] mandates the court to grant such an application unless to do so would interfere with the proper administration of justice.”³⁶

The first iteration of the provision that permits the presence of a support person became law in 1993, through Bill C-126, as section 486(1.2) of the *Criminal Code*.³⁷ That provision differed from today's version in two important ways: (i) it made the order to allow a support person discretionary to the judge, whereas the current law creates a presumption for allowing a support person; and (ii) it limited the proceedings in which the order could be granted, whereas the current law permits support persons “in any proceedings.”³⁸

Despite these internal limitations, the provision to allow a support person was opposed by both the Criminal Lawyers Association (“CLA”) and the Criminal Justice Section of the Canadian Bar Association (“CJSCBA”) when it was first proposed in 1993. The CLA and CJSCBA opposed the provision for two reasons. The first was that having a support person “necessarily in very close proximity to a child who is testifying” would create the perception “that the child needs protection from the accused adult in the prisoner's dock,” thereby unfairly prejudicing the accused.³⁹ The second concern was that the child was not “best placed” to select an appropriate support person.⁴⁰ Both the CLA and CJSCBA argued that it should be the judge, and not the child witness, that selects the support person. Michelle Fuerst, representing the CJSCBA, said

[w]e also suggest that it shouldn't be a support person of that person's choosing. Obviously it has to be a support person, but there may well be support persons who are not appropriate. We should not control the discretion of the court to say no, that may not be an appropriate support

34 *Criminal Code*, *supra* note 3, s 486.1(1).

35 *Ibid*, s 486.2.

36 *JZS BCCA*, *supra* note 30.

37 *Criminal Code*, *supra* note 3, s 486(1.2) (as it appeared January 1995).

38 *Ibid*. Section 486(1.2) limited support persons for children to proceedings under sections 271 (sexual assault), 272 (sexual assault with a weapon or causing bodily harm) and 273 (aggravated sexual assault) or “in which violence against the person is alleged to have been used, threatened or attempted” (*Ibid*); section 486.1 as it is today allows support persons in “any proceedings” (*Criminal Code*, *supra* note 3, s 486.1).

39 Legislative Committee on Bill C-126, *supra* note 18 at 3:20.

40 *Ibid*.

person. The bill does that when it says we don't want a support person particularly to be a witness in the same case, but it seems to us important to establish not that the young person has the right to absolutely choose, but rather that the court should have the right to let there be a support person and that support person should have sufficient independence so the court is comfortable that they will not interfere with the witness.⁴¹

The concerns of the CJSCBA regarding section 486(1.2) of the *Criminal Code* appear to have been dismissed by the courts. The Nova Scotia Court of Appeal dealt with the appropriateness of the support person in *R v DC*.⁴² In that case, the mother of the child-complainant could be a support person because she had already testified and had been cross-examined.⁴³

The use of privacy screens and CCTV has also been held to be constitutional. In *R v Levogiannis* (“*Levogiannis*”), the SCC held that section 486(2.1) of the *Criminal Code* (dealing with testimony delivered by CCTV while the witness remains outside of the courtroom) did not violate the accused's rights either under section 7 or section 11(d) of the *Canadian Charter of Rights and Freedoms*, as it maintained the accused's right to cross-examine, his presumption of innocence, and his ability to observe the complainant as he testified.⁴⁴ Further, Justice L'Heureux-Dubé stressed “that the circumstances under which a judge may resort to an order under [section] 486(2.1) of the *Criminal Code* do not require that exceptional and inordinate stress be caused to the child complainant.”⁴⁵ When section 486(2.1) was both broadened and made presumptive in its wording, the appellant in *JZS* sought to have *Levogiannis* distinguished.⁴⁶ The SCC, in affirming the decision of the BCCA, dismissed this argument.⁴⁷

Children are, understandably, nervous and afraid of the courtroom experience that is central to a criminal prosecution.⁴⁸ Put simply, and maybe too obviously, testimonial aids and support persons are meant to make the courtroom experience easier for a child. Perhaps not as obvious, however, is that investigators and police officers can use these tools to comfort and calm a child complainant that is nervous or afraid of appearing in court in *anticipation* of court. This can make the investigative stages of an interview, particularly with older children who have preconceived notions of what court might look like, easier for children and for investigators.

D. Section 715.1 of the *Criminal Code* and Video-Recorded Interviews

Video-recorded interviews are conducted according to section 715.1 of the *Criminal Code*. They serve two primary purposes. First, they often provide investigators with the reasonable grounds required to contemplate and lay a criminal charge. Second, and more importantly for the purposes of this paper, these interviews are generally admissible later in court if the person giving the interview adopts the contents of the video-recording as part of their testimony.

41 *Ibid.*

42 *R v DC*, 2008 NSCA 105 [DC].

43 *Ibid.*

44 *R v Levogiannis*, [1993] 4 SCR 475 [*Levogiannis*].

45 *Ibid* at 492.

46 *JZS BCCA*, *supra* note 30.

47 *Ibid.*

48 See Larry C Wilson, “Child Victims of Sexual Assault—Re-Examining the Adversarial Process” (2017) 64 *Crim L Quarterly* 53.

i. Historical Development of the Statute

Section 715.1 of the *Criminal Code* currently reads:

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.⁴⁹

But, when it was introduced to the *Criminal Code* in 1988, section 715.1 was limited in its application to proceedings related to the prosecution of only listed offences, and videotapes could only be made for complainants.⁵⁰ Still, section 715.1 represented a radical development in Canadian criminal law because of its statutory exception to the rules against hearsay.⁵¹

In 1997, the section was broadened to add additional offences to the list and allow videotapes to be made where witnesses, who were not the complainants, were under 18 years of age.⁵² In 2005, section 715.1 was amended again to its current form: this removed the restrictions on video-recorded evidence for non-listed offences, and this changed the term “complainant” to “victim.”⁵³

49 *Criminal Code*, *supra* note 3, s 715.1.

50 *Criminal Code*, *supra* note 3, s 715.1 (as it appeared in 1988). In 1988, section 715.1 of the *Criminal Code* read:

715.1 In any proceeding relating to an offence under section 151 [sexual interference], 152 [invitation to sexual touching], 153 [sexual exploitation], 155 [incest] or 159 [anal intercourse], subsection 160(2) [compelling another person to commit bestiality] or (3) [committing bestiality in the presence of a person under the age of 16 years], or section 170 [parent or guardian procuring sexual activity], 171 [householder permitting sexual activity], 172 [corrupting children], 173 [indecent acts], 271 [sexual assault], 272 [sexual assault with a weapon, threats to a third party or causing bodily harm], or 273 [aggravated sexual assault], in which the complainant was under the age of eighteen years at the time the offence is alleged to have been committed, a videotape made within a reasonable time after the alleged offence, in which the complainant describes the acts complained of, is admissible in evidence if the complainant, while testifying, adopts the contents of the videotape.

51 Legislative Committee on Bill C-15, *supra* note 11 at 1:25-1:27.

52 *Act to amend the Criminal Code (child prostitution, child sex tourism, criminal harassment and female genital mutilation)*, SC 1997, c 16, s 7. With this amendment, *Criminal Code*, sections 210 (keeping common bawdy-house), 211 (transporting person to bawdy-house), 212 (procuring), 213 (offence in relation to prostitution), 266 (assault), 267 (assault with a weapon or causing bodily harm), and 268 (aggravated assault) were added to the list of applicable criminal charges. The section was also re-titled from “Evidence of complainant” to “Evidence of complainant or witness,” and references to “complainant” were replaced with “complainant or witness”.

53 *Act to amend the Criminal Code and Canada Evidence Act, 2005*, *supra* note 28, s 23. The section was re-titled from “Evidence of complainant or witness” to “Evidence of victim or witness under 18” and references to “complainant” were replaced with “victim.” The *Criminal Code* defines complainant as “the victim of an alleged offence,” while victim is defined as:

a person against whom an offence has been committed, or is alleged to have been committed, who has suffered, or is alleged to have suffered, physical or emotional harm, property damage or economic loss as the result of the commission or alleged commission of the offence and includes, for the purposes of sections 672.5, 722 and 745.63, a person who has suffered physical or emotional harm, property damage or economic loss as the result of the commission of an offence against any other person (*Criminal Code*, *supra* note 3, s 2).

A review of Parliamentary records does not show an obvious reason for this change, except that the change occurred in the context of a bill intended to advance victim's rights.

ii. Case Law Developments and the Elements of the Provision

Several SCC cases concluded section 715.1 of the *Criminal Code* is constitutional, making it virtually unassailable in substance by the defence at a criminal prosecution. These cases have expanded judicial discretion when it comes to considering hearsay evidence, such as video-recorded evidence, and shifted the focus from admissibility of video-recorded evidence to issues of reliability and weight.

Hearsay evidence is “an out-of-court statement that is offered to prove the truth of its contents” that is made without the opportunity for a contemporaneous cross-examination.⁵⁴ Hearsay evidence has always been, and continues to be, presumptively inadmissible.⁵⁵ However, Canadian criminal courts have evolved to take a principled approach to exceptions to the hearsay rule, through a lens that evaluates the necessity and reliability of that evidence to the proceeding before them.⁵⁶ Video-recorded interviews, meeting the definition of hearsay evidence, are admitted to trial on a statutory exception to the hearsay rule and are generally consistent with the principled approach to hearsay evidence now followed by the courts.

R v Khan (“*Khan*”) was the first ruling by the SCC to expand the admissibility of a child’s hearsay evidence, when it is both necessary and reliable. Justice McLachlin, as she then was, said:

I conclude that hearsay evidence of a child’s statement on crimes committed against the child should be received, provided that the guarantees of necessity and reliability are met, subject to such safeguards as the judge may consider necessary and subject always to considerations affecting the weight that should be accorded to such evidence.⁵⁷

But the next ruling by the SCC remains its most authoritative (and direct) ruling on video-recorded evidence and statements from witnesses other than the accused: *R v B(KG)* (“*B(KG)*”).⁵⁸ This case involved a statement provided to police by a witness that later recanted.⁵⁹ In *B(KG)*, Chief Justice Lamer (for the majority) accepted the principled approach to hearsay evidence first alluded to in *Khan*, holding that the prior inconsistent video-recorded statements could be admitted as evidence to trial as proof of the truth of their contents if they satisfied the test laid out in *Khan* (that is, the statement must be both necessary and reliable).⁶⁰

Only a few months after *B(KG)* was decided by the SCC, it was asked to decide on the fate of section 715.1 of the *Criminal Code*. Given its reasoning in *Khan*, and then later in *B(KG)*, it is hardly surprising that the SCC unanimously found the provision to be

54 David M Paciocco & Lee Stuesser, *The Law of Evidence*, 7th ed (Toronto: Irwin Law) at 113-115.

55 *R v Khelawon*, 2006 SCC 57 at para 42; see especially paras 42-45, 61-100 (for an overview of the development of the principled approach to hearsay evidence by Justice Charron) [*Khelawon*]. See Glen Crisp, “*Khelawon*” (2008) 39:2 *Ottawa L Rev* 213.

56 *B(KG)*, *supra* note 23; *R v Khan*, [1990] 2 SCR 531 [*Khan*].

57 *Khan*, *supra* note 56 at 548. In that instance, the statement made by the child to their mother was necessary and reliable:

[i]t was necessary, the child’s viva voce evidence having been rejected. It was also reliable. The child had no motive to falsify her story, which emerged naturally and without prompting. Moreover, the fact that she could not be expected to have knowledge of such sexual acts imbues her statement with its own peculiar stamp of reliability. Finally, her statement was corroborated by real evidence (*ibid*).

58 *B(KG)*, *supra* note 23.

59 *Ibid*.

60 *Ibid*.

both constitutional and consistent with the rules of evidence articulated in *R v L(DO)* (“*L(DO)*”).⁶¹ In finding that section 715.1 was constitutional, Chief Justice Lamer, again writing for the majority, held that section 715.1 “not only makes participation in the criminal justice system less stressful and traumatic for child and adolescent complainants, but also aids in the preservation of evidence and the discovery of truth.”⁶² The approach taken in *Khan, B(KG)*, and *L(DO)* indicates that courts should consider the most reliable testimonial evidence which, for children, the SCC has held, is a video-recorded statement made within a reasonable time of the event.

What does section 715.1 of the *Criminal Code* mean when it says that the statement must be made “within a reasonable time” after the alleged offence?⁶³ At the time it was enacted, Parliament likely intended this to mean “shortly after the offence.”⁶⁴ The majority in *L(DO)* did not treat the question of “reasonable time” with any great depth, but Justice L’Heureux-Dubé in her concurring opinion said that a “reasonable time” must be determined on a case-by-case basis, based on the circumstances of the case, and account for “social science data which makes clear that recollection decreases in accuracy with time.”⁶⁵

In *L(DO)*, five months had elapsed, and this was held to be a reasonable time in the circumstances of the case.⁶⁶ In *R v LRS* (“*LRS*”), the Court of Appeal for Saskatchewan held that ten months was a reasonable time in the circumstances of that case.⁶⁷ In *R v SM* (“*SM*”), the Court of Appeal of Alberta (“*ABCA*”) unanimously held that 17 months was a reasonable time in which to make the video recording in the circumstances of that case.⁶⁸ In both *LRS* and *SM*, the delay in making the video recording was due to a delay in reporting the allegations to authorities which, in *SM*, the *ABCA* recognized is “not unusual in the case of intrafamilial assault.”⁶⁹ In *R v Lucas*, the *BCCA* excluded a video-recorded interview taken 45 months after the alleged offence because it was, in the circumstances of that case, “outside of the time frame selected by Parliament when it enacted [section] 715.1 of the *Criminal Code*” as a result of the child passing through a number of developmental stages in the 45 months it took to take his statement.⁷⁰ Taken together, these cases demonstrate that while there are limits, there is considerable leeway given with respect to a “reasonable time” to make the video recording.

The test for adoption was laid out by the SCC in *R v F(CC)* (“*F(CC)*”), where Justice Cory required that, for a video-recorded interview to be admitted under section 715.1 of the *Criminal Code*, the person must view the video in court, recall the interview, affirm that they were attempting to be honest during the interview, and then adopt the contents of that video as their testimony.⁷¹ In adopting the testimony, it is not necessary that the person have an independent memory of the events that they describe on the video-recording, but it is recommended that the trier of fact be given a “special warning [...] of the dangers of convicting based on videotape alone” where there is no such independent memory.⁷² It

61 *R v L(DO)*, [1993] 4 SCR 419 [*L(DO)*].

62 *Ibid* at 429.

63 *Criminal Code*, *supra* note 3, s 715.1.

64 Bill C-15, 2nd Reading, *House Debates*, *supra* note 15 at 1077.

65 *L(DO)*, *supra* note 61 at 468.

66 *L(DO)*, *supra* note 61.

67 *R v LRS*, 2008 SKCA 138 [*LRS*].

68 *R v SM*, 1995 ABCA 198 at para 2 [*SM*].

69 *Ibid* at para 4; *LRS*, *supra* note 67.

70 *R v Lucas*, 2001 BCCA 361 at para 18 [*Lucas*].

71 *R v F(CC)*, [1997] 3 SCR 1183 at paras 30-44 [*F(CC)*].

72 *Ibid* at para 44. Justice Cory endorsed the approach to warning the trier of fact that was recommended in *R v Meddoui*, 1990 CanLII 2593 (ABCA), which was “similar to the one given in *R v Vetrovec*, [1982] 1 SCR 811 [at para 44].” Note that, traditionally, adoption requires that there be an independent memory.

is important in considering the adoption of the video-recorded interview, that there be a distinction made between the threshold for adoption in court, and the qualities that speak to the reliability or truthfulness of the statement. Given *F(CC)*, the reliability of a statement is an issue for the trier of fact to wrestle with after the statement has been adopted. *L(DO)* and *F(CC)*, however, do endorse the use of a *voir dire* “to review the contents of the tape to ensure that the statements within it conform to the rules of evidence.”⁷³ The failure to hold a *voir dire*, however, was not fatal to the prosecution in *F(CC)* because “no substantial wrong resulted” from it, and the SCC held that where a *voir dire* is held, the statement should generally be admitted “unless the trial judge is satisfied that it could interfere with the truth-finding process.”⁷⁴

Surprisingly, the courts have not thoroughly addressed what would qualify as interfering with “the proper administration of justice” in the context of section 715.1 of the *Criminal Code*. In *R v Ferreira*, only the first 30 minutes of the video-recording was recorded and presented to the court; the video thereafter inexplicably cut out.⁷⁵ The Ontario Superior Court of Justice held that admitting only the first 30 minutes of the interview and depriving the trier of fact of being able to evaluate the “personality and intelligence of the witness” throughout the interview interfered with the proper administration of justice.⁷⁶ Justice L’Heureux-Dubé, in *L(DO)*, identified ten factors that the trial judge “could take into account in exercising his or her discretion to exclude a videotaped statement,”⁷⁷ which have been regularly cited by trial judges in exercising said discretion. Those criteria can also be related broadly to the administration of justice, and include:

- (a) The form of questions used by any other person appearing in the videotaped statement;
- (b) any interest of anyone participating in the making of the statement;
- (c) the quality of the video and audio reproduction;
- (d) the presence or absence of inadmissible evidence in the statement;
- (e) the ability to eliminate inappropriate material by editing the tape;
- (f) whether other out-of-court statements by the complainant have been entered;
- (g) whether any visual information in the statement might tend to prejudice the accused (for example, unrelated injuries visible on the victim);
- (h) whether the prosecution has been allowed to use any other method to facilitate the giving of evidence by the complainant;
- (i) whether the trial is one by judge alone or by a jury; and
- (j) the amount of time which has passed since the making of the tape and the present ability of the witness to effectively relate to the events described.⁷⁸

73 *F(CC)*, *supra* note 71 at para 51.

74 *Ibid* at paras 52-54.

75 *R v Ferreira*, 2010 ONSC 6733 at para 7 [*Ferreira*].

76 *Ibid* at paras 32-36.

77 *L(DO)*, *supra* note 61 at 463.

78 *Ibid*.

Finding a video-recorded statement made under section 715.1 to be inadmissible is the exception to the general rule of *L(DO)*. The court is more likely to admit these video-recorded statements, and the arguments that occur thereafter are going to be focused on the weight and reliability of that statement because those are the criteria that must be evaluated by the trier of fact. By focusing on evaluating the testimonial evidence of children, rather than determining whether or not it should be admitted, courts become focused on considering the best evidence possible and subject that evidence to the same rigorous scrutiny and questions of reliability that other evidence faces.

II. STRUCTURED INVESTIGATIVE INTERVIEWS

Children can be capable witnesses, and they can provide highly accurate testimony regarding their autobiographical experiences if they are properly interviewed.⁷⁹ In other words, a good interview, conducted by a skilled interviewer, can result in high-quality testimonial narratives, while a bad interview will compromise the reliability of the child's interview, potentially casting whatever disclosure or details have been obtained into doubt.⁸⁰

As I discussed in Section D of Part I, it is highly likely that video-recorded interviews will be admitted, and there are few opportunities for defence counsel to prevent a trier of fact from viewing the video-recorded interview, especially in trials by judge alone. Once admitted, the questions for the trier of fact are focused on the reliability and weight of the statement. Whether before a judge alone or a judge and jury, the focus of an effective defence should be on the video-recorded interview that is presented in court; but defence counsel should not necessarily focus on impeaching a sympathetic child, who may or may not be lying. Defence counsel would fare better scrutinizing the “methods and expectations of the adults extracting, recording, and interpreting information.”⁸¹ Likewise, Crown counsel should focus on those elements of the interview that would promote reliability, reduce perceptions of suggestibility, and enhance the overall quality of the statement that is ultimately adopted by the witness.

Tomes of research have been published on the memories of children generally—and the memories of child witnesses specifically.⁸² Part II of this article cannot possibly review, in any comprehensive or meaningful way, the extensive body of knowledge that relates to child memories and testimony. Section A will provide an overview of the setting in which the video-recorded interview will take place and broadly survey the various interview protocols and methods used by interviewers. Section B will examine the phenomenon of suggestibility as it relates to the reliability and accuracy of a child witness' testimony and strategies for the counsel assessing those interviews. Section C will examine the reasonable time requirement that is imposed by section 715.1 of the *Criminal Code*. Altogether, Part II will probe the overall context in which a forensic interview is conducted and identify some key considerations for criminal practitioners as they assess or review these interviews in light of the fact that an interview is more likely than not to be admitted as evidence.

79 Deirdre A Brown & Michael E Lamb, “Can Children Be Useful Witnesses? It Depends How They Are Questioned” (2015) 9:4 *Child Dev Persp* 250; Michael E Lamb et al, “Use of a structured investigative protocol enhances the quality of investigative interviews with alleged victims of child sexual abuse in Britain” (2008) 23:4 *Appl Cognitive Psych* 449.

80 Maggie Bruck, “A Summary of an Affidavit Prepared for *Commonwealth of Massachusetts v Cheryl Amirault LeFave*” (1999) 3:2 *Appl Developmental Sci* 110 at 12.

81 Wendy van Tongeren Harvey & Paulah Edwards Dauns, *Sexual Offences Against Children and the Criminal Process*, 2nd ed (Markham: Butterworths, 2001) at 14.

82 *Ibid*; see also Michael E Lamb et al, *Tell Me What Happened: Structured Investigative Interviews of Child Victims and Witnesses* (London: John Wiley & Sons, 2008).

Balancing the rights of an accused person with the rights of a victim or witness of crime (and the truth-seeking function of the courts) requires that the evidence ultimately considered by courts be relevant, material, and trustworthy. The best way to do this is to be focused on evidence gathering practices—or interview practices—that are based in a scientific understanding of child memories.

A. The Setting and Structure of an Interview

i. Child Advocacy Centres

Where they are available, it is likely the forensic interview will be conducted at a Child Advocacy Centre (“CAC”). In Canada, CACs have developed from a model of the same name developed in the United States in the 1980s as “a response to the failure of traditional law enforcement and child protection practices in working with victims of child sexual abuse.”⁸³ Although they vary slightly in form, a CAC is usually a child-friendly facility with police, child protective services, prosecutors, medical staff, victim advocates, and trauma referral services accessible through a single point of intake.⁸⁴ These multi-disciplinary teams collaborate to refer children alleging physical or sexual abuse to additional community support and resources, such as counselling and medical treatment. There are as many as 25 CACs in Canada, across seven provinces and three territories.⁸⁵ These CACs are located in urban centres and, because they are operated as charities with deep roots in the community, are often well-known by the community at large. Rural communities often rely on the expertise of distant CACs in conducting major child abuse investigations.

The “non-intimidating and child-appropriate” environment of the interview rooms at the CAC is “critically important” for investigative quality and child-victim experience.⁸⁶ This child-friendly environment may vary, but will often include unobtrusive audio-video equipment and child-friendly furniture, lighting, and décor that conveys the impression that “other children have been in the room before.”⁸⁷ These interview rooms are sometimes called “soft rooms” and are intended to set a child at ease. Medical examinations are unlikely to take place in the CAC itself, but the CAC model allows for easy collaboration between medical staff, investigators, and other involved agencies. Because of the collaborative nature of a CAC, it is possible that the interviewer will be somebody other than a police officer.⁸⁸ This collaborative model makes it possible for the interviewer to conduct the interview on behalf of the primary police investigator with no other or prior involvement in the investigation, though this might not always be the case and is by no means required. This model allows for more highly skilled interviewers to conduct more challenging or

83 James Leslie Herbert & Leah Bromfield, “Evidence for the Efficacy of the Child Advocacy Center Model: A Systematic Review” (2016) 17:3 *Trauma Violence & Abuse* 341 at 341.

84 See Zebra Child Protection Centre, “About” (2016) online: <www.zebracentre.ca/about/> archived at <<https://perma.cc/VRQ5-QW7T>>; see also Sheldon Kennedy Child Advocacy Centre, “The Centre” (2018) online: <<http://sheldonkennedycac.ca/thecentre/>> archived at <<https://perma.cc/JEQ5-2YPK>>.

85 See Child Advocacy Centre Canada, “Organizations” (2014) online: <<http://cac-cae.ca/organizations/>> archived at <<https://perma.cc/TLB8-ZRZ9>>. This may not be an exhaustive list, and there may be other less formal CACs not identified by (or registered with) Child Advocacy Centre Canada.

86 Bernie Sue Newman, Paul L Dannenfels & Derek Pendleton, “Child Abuse Investigations: Reasons for Using Child Advocacy Centers and Suggestions for Improvement” (2005) 22:2 *Child & Adolescent Social Work J* 165 at 177.

87 Wendy Bourg et al, *A Child Interviewer's Guidebook* (Thousand Oaks: Sage Publications, 1999) [Bourg et al]. *A Child Interviewer's Guidebook* describes the “physical components of a neutral environment” that are still followed by CACs (*ibid* at 26-28).

88 See van Tongeren Harvey & Dauns, *supra* note 81 at 4-5; see also Herbert & Bromfield, *supra* note 83.

difficult interviews with especially young children, for example, and for a wider variety of perspectives and interview styles to be brought to bear on complex investigations.

Children are highly sensitive to the status and power of interviewers and observers, so it is a best practice for a police officer to wear something other than a police uniform.⁸⁹ Canadian police interviewers generally do not, with some exceptions, wear their uniform during the interview of a child for this reason. This sensitivity also makes it important that the child be interviewed separately from their parents or adult accompaniment.⁹⁰ To ensure high-quality forensic interviews, it is best practice that the child and interviewer be alone in the room.

ii. Interview Protocols and Methods

The interviewer is likely to be trained in a protocol or method specifically calibrated for conducting forensic interviews with children. Two protocols that may be used in Canada include the Step Wise Interview protocol⁹¹ and the National Institute of Child Health and Human Development (“NICHD”) protocol.⁹² There are numerous other protocols and methods for interviewing children, ranging from the simple and straightforward to the complex and highly prescriptive. Although they differ generally in form, they remain relatively similar in substance, mirroring the broader body of knowledge in the related sciences. Kathleen Faller has surveyed several protocols, finding that most structured interviews, the NICHD and Step Wise Interviews among them, follow a series of phases.⁹³ Faller has identified 13 phases that may be included in interview structures.⁹⁴ This article does not go into depth analyzing these phases or interview models, but discusses the best practices for application by criminal law practitioners in an assessment of statement reliability. For the purposes of this paper, the structure of an interview will be considered in three broad steps: the introduction, the interview, and the closure. Each stage has numerous phases that may or may not be present, but the overall structure of the interview is likely to follow these three general steps with different discrete phases involved.

It is important to note that a single mistake by an interviewer (or a failure to rigorously adhere to the chosen interview protocol) is unlikely to corrupt the entire interview.⁹⁵ A critical failure would likely occur where an error or compilation of errors by the interviewer compromises or is likely to have compromised the reliability of the statement. The structure of the interview protocol is reviewed here to provide counsel with a framework for reviewing child interviews for that reliability.

89 Maggie Bruck & Stephen J Ceci, “Amicus Brief for the Case of *State of New Jersey v Michaels* Presented by Committee of Concerned Social Scientists” (1995) 1:2 Psych Pub Pol & L 272 at 285-286; Kamala London, “Investigative Interviews of Children: A Review of Psychological Research and Implications for Police Practices” (2001) 4:1 Police Q 123 at 134 (for the characterization of the uniform as a distraction); Bourg et al, *supra* note 87 at 28.

90 *Ibid.*

91 John Yuille, “The Step Wise Interview—A Protocol for Interviewing Children” (2001), online: Law Society of Saskatchewan <<https://redengine.lawsociety.sk.ca/inmagicgenie/documentfolder/ac2062.pdf>> archived at <<https://perma.cc/E649-B3W9>>.

92 National Institute for Child Health and Human Development, “Revised Investigative Interview Protocol” (2014) online: <nichdprotocol.com/wp-content/uploads/2013/03/RevisedProtocolTMWH2final-1.pdf> archived at <<https://perma.cc/3YJL-WB7Q>> [NICHD].

93 See Kathleen Coulborn Faller, “Interview Structure, Protocol, and Guidelines” in Kathleen Coulborn Faller, ed, *Interviewing Children About Sexual Abuse* (New York: Oxford University Press, 2007) at 69.

94 *Ibid* at 66-68. See also van Tongeren Harvey & Dauns, *supra* note 81 at 15.

95 Bruck, *supra* note 80 at 110.

a. The Introductory Phases of an Interview

The introductory step of the interview can have several discrete phases. In her broad cross-protocol analysis, Faller fully identifies nine phases that may be included in the interview, depending on the protocol used by the interviewer. These include: (i) documenting people, time, and place for the video; (ii) informing the child about the interview; (iii) completing a competency assessment; (iv) building rapport; (v) doing a developmental assessment; (vi) assessing overall functioning; (vii) explaining the rules; (viii) conducting a practice interview; and (ix) introducing the topic of concern.⁹⁶ Every phase may not be included in the introduction.

The interview may begin with varying degrees of formality, as the interviewer documents the people, time and place for the video. As a practice, the video camera and microphone will be addressed, and the interviewer may even introduce the interview monitor (the person taking interview notes and watching the interview in real time from a different room). Following this, it is appropriate to introduce the child to the interview process. As the interviewer introduces him or herself, it is important that he or she not introduce an assumption of abuse. A skilled interviewer will introduce him or herself by saying something like: "I'm a police officer (or a social worker, or so on) and I talk to kids all the time about things that happen to them. Do you want to talk to me about anything that's happened to you?"⁹⁷ or "My name is _____ and my job is to talk to children about things that have happened to them."⁹⁸ An assumption of abuse in an introductory statement might sound like "I'm a police officer and I arrest bad guys that hurt kids like you. Is there anything you'd like to tell me about?" or "I'm a social worker and I help kids who have been hurt by their parents."

Rapport-building is, arguably, the most critical phase of the introductory step. It has two purposes: to put the child at ease, and to allow the interviewer to assess the oral and body language of the child. Studies have shown that a strong rapport, built through effective rapport building, can improve both the accuracy and completeness of the interview content, and build a resistance to misleading questions by the interviewer.⁹⁹ Good rapport-building may take the form of asking about the hobbies or interests of the child interviewee. For this process to be effective, however, the interviewer must show genuine interest in, and enthusiasm for, what is being said, being careful to avoid mechanical or lukewarm reactions.¹⁰⁰ A skilled interviewer may have already spoken with the parent or adult accompaniment to identify ice-breakers, and foreknowledge of an activity or interest is not necessarily evidence of having spoken with the child in advance.

96 Faller, *supra* note 93 at 69. These steps generally correspond with both the NICHD protocol and the Step Wise Interview.

97 Yuille, *supra* note 91 at 11.

98 NICHD, *supra* note 92 at 1.

99 Eleanor A Price, Elizabeth C Ahern & Michael E Lamb, "Rapport-Building in Investigative Interviews of Alleged Child Sexual Abuse Victims" (2016) 30:5 Appl Cognitive Psych 743 at 743 summarizing findings in Irit Hershkowitz, "Rapport Building in Investigative Interviews of Children" in Michael E Lamb et al, eds, *Children's Testimony: A Handbook of Psychological Research and Forensic Practice*, 2nd ed, (Malden: J. Wiley, 2011); James M Wood, Kimberley A McClure & Rebecca A Birch, "Suggestions for Improving Interviews in Child Protection Agencies" (1996) 1:3 Child Maltreatment 223. See Robert A Nash et al, "Does rapport-building boost the eyewitness eye closure effect in closed questioning?" (2015) 21:2 Leg & Criminological Psych 305.

100 Wood, McClure & Birch, *supra* note 99 at 223.

Best practice suggests that the interviewer should avoid questions or prompts that encourage children to use their imagination throughout the interview, including during rapport-building.¹⁰¹ This means avoiding imaginative topics, such as television, books, or comics, and ensures that the witness is not in a creative or imaginative state during the interview. Children should be focused on recalling and relating autobiographical information instead of fantasy. The rapport-building phase is also an excellent time in which to make active observations of the child and his or her language. In the Step Wise Interview protocol, John Yuille encourages the interviewer to “[n]ote the length of sentences the child uses, the type of words, and so on. Also, note the body language of the child, the nature of the child’s eye contact and [their] affect.”¹⁰² These observations can be invaluable tools for reading and accurately responding to the child witness later in the interview.¹⁰³

Rapport-building may blend in to (or be part of) the practice narrative¹⁰⁴ or episodic memory training.¹⁰⁵ At this stage, the interviewer will ask the child to narrate an event that is unrelated to the abuse being investigated. As with the child’s interests, the interviewer may discuss a possible event to be narrated with the caregiver or adult accompaniment. A birthday party or holiday might be appropriate,¹⁰⁶ but events that might encourage the child to be imaginative, such as a trip to the movie theatre or an amusement park, should not be explored.¹⁰⁷

b. The Informational and Conclusory Phases of an Interview

Practitioners reviewing the informational phase of an interview should survey whether the interviewer has or has not asked open-ended questions. In interviews of children, open ended question prompts will elicit the best and most accurate information.¹⁰⁸ Open-ended questions and prompts should use language that the child is comfortable with, and be focused on allowing the child to drive the conversation.

Best practices in the information-gathering phases of an interview will universally follow a single rule: ask open-ended questions. Of the many rules that an investigator can follow, the rule in favour of open-ended questions and prompts is the most important because it minimizes the risk that suggestibility will influence the interview.

B. Suggestibility

Stephen Ceci and Maggie Bruck provide the broadest definition of suggestibility, which “concerns the degree to which children’s encoding, storage, retrieval, and reporting of events can be influenced by a range of social and psychological factors.”¹⁰⁹ Suggestibility presents a danger that information received after the autobiographical event is interpreted

101 Lamb et al, *supra* note 82 at 96. There were no studies found that examine the use of imagination in the rapport-building phase specifically, but this is a general best practice to be exercised throughout the interview.

102 Yuille, *supra* note 91 at 8.

103 The interviewer can, for example, more accurately mirror the child’s vocabulary and affect from those things observed during rapport-building.

104 *Ibid.*

105 NICHD, *supra* note 92 at 5.

106 *Ibid.* See also Faller, *supra* note 93 at 70.

107 Lamb et al, *supra* note 82.

108 Brown & Lamb, *supra* note 79 at 251; Kirk Luther et al, “Child Interviewing Practices in Canada: A Box Score from Field Observations” (2015) 30:3 J Police & Crim Psych 204; Michael E Lamb et al, “Differences between accounts provided by witnesses and alleged victims of child sexual abuse” (2003) 27:9 Child Abuse & Neglect 1019.

109 Stephen J Ceci & Maggie Bruck, “The Suggestibility of the Child Witness: A Historical Review and Synthesis” (1993) 113:3 Psychol Bul 403 at 404.

by the child's memory, and consequently incorporated to become a part of that memory.¹¹⁰ Suggestibility can affect adults,¹¹¹ but receives special attention in the way that it affects children because of their enhanced vulnerability due to their developmental status¹¹² and the fact that the single biggest risk factor for eyewitness suggestibility is age, with younger children being more susceptible than older children.¹¹³ Although memory may be commonly thought of as permanent once formed, memory is in fact subject to subsequent modification by outside influences and suggestion, commonly referred to in literature as post-event suggestibility. This post-event suggestibility can affect the memory of children for a long time after the misinformation is first introduced.¹¹⁴

Children are susceptible to two forms of suggestibility: "demand characteristics" and "genuine memory confusions."¹¹⁵ Demand characteristics refer to those social influences that might cause the responses of interviewees to conform with the perceived expectations or wishes of the interviewer.¹¹⁶ "Genuine memory confusions" occur where a person has received post-event information, possibly related to the event itself, and then synthesized that post-event information with their own memory of the event.¹¹⁷ Poole and Lindsay have conducted several studies that have found misleading suggestions from a parent before an interview can cause the child-interviewee to describe fictitious events in response to open-ended questions by an interviewer.¹¹⁸ Determining whether any misleading suggestions might have affected a disclosure is important, and an investigator can skillfully do this on a background investigation. Having a clear understanding of the words and vocabulary that a trusted adult might have used in receiving the disclosure, for example, can help the investigator to explain and understand why a young child might be using advanced vocabulary to describe the incident. In these cases, it may be important to more thoroughly determine the precise nature of the disclosure made to that trusted adult in order to determine the accuracy of the video-recorded statement. It is preferable for all parties involved—prosecution, defence, victims, and families—that this be ascertained before trial.

Ensuring that an interview is free of any possible suggestibility is a priority for the skilled investigator. An investigator can avoid a perception of suggestibility by entering an interview of a child witness with an open mind (and adhering to a structured interview protocol, as asserted above), rather than preconceived opinions about what the child may discuss or disclose. These practices and the basis for them should, therefore, be of concern

110 *Ibid* at 404-405.

111 See Stefanie J Sharman & Martine B Powell, "A Comparison of Adult Witnesses' Suggestibility Across Various Types of Leading Questions" (2012) 26:1 *Appl Cognitive Psych* 48 at 48-53; see also, generally, Anne M Ridley, Fiona Gabbert & David J La Rooy, eds, *Suggestibility in Legal Contexts: Psychological Research and Forensic Implications* (London: John Wiley & Sons, 2013).

112 Jennifer A Ackil & Maria S Zaragoza, "Developmental Differences in Eyewitness Suggestibility and Memory for Source" (1995) 60:1 *J of Experimental Child Psych* 57. See also Robyn E Holliday, Karen M Douglas & Brett K Hayes, "Children's Eyewitness Suggestibility: Memory Trace Strength Revisited" (1999) 14:3 *Cognitive Development* 443.

113 Lamb et al, *supra* note 82 at 38-49. See also Henry Otgaar et al, "Abducted by a UFO: Prevalence Information Affects Young Children's False Memories for an Implausible Event" (2009) 23:1 *Appl Cognitive Psych* 115.

114 Kamala London, Maggie Bruck & Laura Melnyk, "Post-Event Information Affects Children's Autobiographical Memory after One Year" (2009) 33:4 *L & Hum Behav* 344 at 353.

115 Debra A Poole & D Stephen Lindsay, "Interviewing Preschoolers: Effects of Nonsuggestive Techniques, Parental Coaching, and Leading Questions on Reports of Nonexperienced Events" (1995) 60 *J Experimental Child Psych* 129 at 132 [Poole & Lindsay, "Interviewing Preschoolers"].

116 *Ibid*.

117 *Ibid* at 133.

118 See Debra Ann Poole & D Stephen Lindsay, "Children's Eyewitness Reports After Exposure to Misinformation from Parents" (2001) 7:1 *J Experimental Psych Appl* 27 [Poole & Lindsay, "Exposure to Misinformation from Parents"].

to criminal law practitioners as well because of the threat that suggestibility poses to the accuracy and reliability of the video-recorded interview.

i. Identifying Suggestibility

Suggestibility, with its corrupting influence on the truth, has no place in criminal proceedings, and members of the bar and bench alike should be alert to its signs and symptoms. While some manifestations of suggestibility might be observable to counsel through an assessment of the forensic interview, other instances may have occurred before the interview.

During the interview, practitioners should be alert to questions that either explicitly or implicitly introduce facts, assumptions, or beliefs that have not been disclosed or articulated by the child interviewee. These questions, at best, are suggestive and leading; at worst, they are indicative of interviewer bias. Interviewer bias “refers to interviewers who hold a priori beliefs about the occurrence of certain events and, as a result, shape the interview to produce allegations that are consistent with these beliefs.”¹¹⁹ To avoid real or perceived interviewer bias, one best practice for forensic interviewers is to mirror the language used by children and probe the use of that language to determine its meaning. As a result, probing the narrative of a child with language or assumptions that have not been introduced as part of that narrative should be avoided as they can encourage the child to provide testimonial evidence that supports the interviewer’s own presumptions and hypotheses about the crime.

An example of this might be where a child refers to the “water from his pee-pee.” A skilled and trained interviewer, knowing that more must be known about the “water from his pee-pee,” might ask the child: “Describe the water from his pee-pee.” This open-ended prompt mirrors the language used by the child (“water from his pee-pee”), encourages the child to continue using his or her own language, and introduces no subtle or implied assumptions aside from a curiosity about what the child has said, which may in turn emphasize a special interest by the interviewer. If the initial open-ended prompt fails to elicit any additional information from the child, the interviewer may pose a narrower, but still open-ended prompt, such as: “Describe what the water from his pee-pee looks like.”

An unskilled or inexperienced interviewer that has hypothesized—either before or during the interview with the child—how the crime occurred may assume that the “water from his pee-pee” is urine. Questions that might be asked by an unskilled or inexperienced interviewer would be closed or leading in supporting these assumptions. Questions like “Where did he pee?” or “What colour was his pee?” might create an implied expectation for the child that the “water from his pee-pee” is urine. The child may, in fact, be trying to describe semen or blood—things that, in the child’s short life to date, have gone unexperienced and are not, therefore, part of the child’s vocabulary or inventory of understood experiences.

Practitioners should also be alert to the responses of the interviewer when viewing these video-recorded interviews, as the interviewer’s reactions may reveal signs of bias. Even providing affirmative responses (such as saying “yes” repeatedly) can be suggestive to a child interviewee. Practitioners should watch those responses, and they should monitor the footage for the interviewer’s facial expressions (even though this may be counter-intuitive, as

119 Stephen Ceci, Amelia Hritz & Caisa Royer, “Chapter 8: Understanding Suggestibility” in William T O’Donohue & Matthew Fanetti, eds, *Forensic Interviews Regarding Child Sexual Abuse* (New York: Springer, 2016) 141 at 144.

the interviewer is not the focus of the interview). This video footage of the interviewer will usually be a “picture-in-picture” (though it may be a separate video-recording altogether), and it should be produced as part of standard disclosure practices.

The same principles of mirroring verbal language apply to the body language of a child during the interview—and practitioners should watch for that too, again, to ensure that there are no indications of suggestibility (or interviewer bias).¹²⁰ An interviewer that nods frequently, appears disinterested or overly interested at different times, or makes gestures and signs that have not been made by the child is communicating with the child. Practitioners should also watch for “minimal encouragers” when watching interviewers’ body language. Minimal encouragers, such as a head-nod, are commonly taught as components of active listening,¹²¹ which is taught as an occupational skill to the police officers and social workers who perform most forensic interviews.¹²² Police officers use these active listening skills, including minimal encouragers, as a tool for de-escalating conflict and avoiding the use of force except where necessary.¹²³ It may, therefore, be challenging for an experienced police officer who is unskilled in child forensic interviews to not use this skill in the interview room with a child as a means of encouraging additional information. Nevertheless, excessive head-nodding is a form of suggestibility that can change the form and substance of a witness’ interview.

For practitioners trying to determine the possibility of suggestion prior to the forensic interview, it is necessary to probe the initial disclosure (and the circumstances surrounding that initial disclosure). They should try to review the way the person who received that initial disclosure reacted. This is important because children’s memories can be, directly or indirectly, with or without deliberation, affected by interactions with other people between the time at which an event occurred and the time the forensic interview is conducted. The memory of children can be affected by post-event discussions with their peers¹²⁴ and parents or other adults.¹²⁵ Post-event interactions should, therefore, be probed as part of an interview protocol during the video-recorded interview.¹²⁶ As I discussed, these questions will help the investigator and practitioners determine whether additional witnesses should be interviewed, such as the person trusted by the child with the initial disclosure, to ensure that the court receives the most accurate information possible. This will also help to explain discrepancies between the initial disclosure and subsequent statements made by the child witness.

120 *Ibid* at 147.

121 See Michael J McMains “Active Listening: The Aspirin of Negotiations” (2002) 2:2 *J Police Crisis Negotiations* 69 at 69-70; see also Justice Institute of British Columbia Centre for Conflict Resolution, *Conflict Resolution*, 14th ed (New Westminster: Justice Institute of British Columbia, 2007) at 67-82.

122 See generally Janet R Oliva, Rhiannon Morgan & Michael T Compton, “A Practical Overview of De-Escalation Skills in Law Enforcement: Helping Individuals in Crisis While Reducing Police Liability and Injury” (2010) 10:1 *J Police Crisis Negotiations* 15; see also Justice Institute of British Columbia Centre for Conflict Resolution, *Dealing with Anger*, 9th ed (New Westminster: Justice Institute of British Columbia, 2010) at 73.

123 Oliva, Morgan & Compton, *supra* note 122.

124 Ingrid Candel, Amina Memon & Fatma Al-Harazi, “Peer discussion affects children’s memory reports” (2007) 21:9 *Appl Cognitive Psych* 1191; see also Gabrielle F Principe & Stephen J Ceci, “‘I saw it with my own ears’: The effect of peer conversation on preschoolers’ report of nonexperienced events” (2002) 83:1 *J Experimental Child Psych* 1.

125 Poole & Lindsay, “Interviewing Preschoolers”, *supra* note 115; Poole & Lindsay, “Exposure to Misinformation from Parents”, *supra* note 118.

126 NICH, *supra* note 92 at 12 (the interviewer should “explore the disclosure process, addressing the disclosure time, circumstances, recipients, potential discussions of the event, and reactions to disclosure by both the child and recipients. Use open-ended questions whenever possible”).

C. The “Reasonable Time” Requirement

Balancing feasibility with accuracy is a primary difficulty inherent to the “reasonable time” requirement. While its parameters have been shown to be flexible and contingent upon the circumstances of each case, its exclusions can still be problematic. However, a significant relaxation of the “reasonable time” requirement may corrode the testimonial trustworthiness of the video-recorded interview where it is not taken reasonably soon after the alleged crime.

Developments in the law regarding the reasonable time requirement must be informed by evidence-based best practices. Recalling Justice L’Heureux-Dubé’s concurring opinion in *L(DO)* (see above), the inference is that where recollection has decreased in accuracy with time, the reasonable time requirement would necessitate that the evidence be examined by the court and trier of fact on a first-hand basis, rather than by a video-recorded statement. It is also arguable that Parliament, in first enacting section 715.1 of the *Criminal Code*, intended, at least in part, for “reasonable time” to mean “shortly after the offence.”¹²⁷ Despite this, however, the courts have given great latitude to the prosecution which, it seems, can justify several years as being a “reasonable time” in the circumstances of the case.¹²⁸

The courts appear to be focused on examining the circumstances and timeline of the initial disclosure, and the reasons for a delay of that disclosure.¹²⁹ In the context of *L(DO)*, the question that the courts appear to be asking is whether a delay to be interviewed is justified or not. The key question should instead be whether the delay has compromised the testimonial trustworthiness of the video-recorded interview and statement. In other words: will a video-recorded statement, delayed as it is, provide the court with the best evidence possible? Or is it more appropriate for the witness to appear in court in person, where the witness can be contemporaneously cross-examined?

Justice L’Heureux-Dubé addresses this concern in the concurring decision of *L(DO)*. Justice L’Heureux-Dubé identifies several benefits to children providing most of their testimony on video-recording. Among these benefits are mitigating the trauma of courtroom testimony, and being able to “answer delicate questions about the abuse in a more controlled, less stressful and less hostile environment, a factor which, according to social science research, may drastically increase the likelihood of eliciting the truth about the events at hand.”¹³⁰ There might also be an argument that the statement obtained by skilled child forensic interviewers is generally of higher quality than cold, hard courtroom testimony would be, though this assertion is somewhat contentious.¹³¹ And in my experience, children are generally more comfortable where their interviews can be facilitated in the child-friendly facilities of a CAC than they are later in the harsh environment of a courtroom, softened as it might be by accompaniment (including a person or animal), witness screens or CCTV, and other *Criminal Code* accommodations. In being more comfortable, video-recorded statements might provide courts with better evidence than requiring children to testify without a video-recorded statement.

127 Bill C-15, 2nd Reading *House Debates*, *supra* note 15 at 1077.

128 *SM*, *supra* note 68 with accompanying text; see also *R v WEB*, 2012 MBCA 23.

129 See *SM*, *supra* note 68; *LRS*, *supra* note 67.

130 *L(DO)*, *supra* note 61 at 446-447, 449.

131 Emma Davies, Emily Henderson & Kirsten Hanna, “Facilitating children to give best evidence: Are there better ways to challenge children’s testimony?” (2010) 34 *Crim LJ* 347; *contra* Kimberlee S Burrows & Martine B Powell, “Prosecutors’ perspectives on using recorded child witness interviews about abuse as evidence-in-chief” (2014) 47:3 *Aust & NZ J Crim* 374.

On the whole, however, these more minor considerations do not negate the statutory requirement that the statement be taken within a “reasonable time.” The approach to interpreting section 715.1 of the *Criminal Code*, consistent with the principled approach to hearsay evidence, must be that it is an exception to the general preference that evidence from a witness be taken in the court room, under oath or affirmation, or after a promise to tell the truth. This commentary acknowledges the possibility that a video-recorded interview may make it easier for a child witness to testify in court; but does science really conclude that a video-recorded statement, taken years after the offence, will “drastically increase the likelihood of eliciting the truth about the events at hand”?¹³² Or does a video-recorded statement, taken potentially years after the fact, erode the testimonial trustworthiness of the evidence being provided for the consideration of the court because “recollection decreases in accuracy with time”?¹³³

Considering video-recorded statements as a tool to mitigate the stress or potential trauma of testifying in court should not be done in isolation, as it was in *L(DO)*, but instead be done in contemplation of all the *Criminal Code* provisions accommodating child witnesses. The use of screens or CCTV and support persons was not discussed in *L(DO)*, but they should be viewed as tools to accomplish these same ends while allowing contemporaneous cross-examination of the witness. With the help of testimonial aids and support persons, a child’s courtroom testimony will still be difficult, but need not be traumatic. Coupling a support person with CCTV testimony can create an environment comparable to the child-friendly environments in which video-recorded interviews are conducted, particularly because a support person is permitted to be present for court but would not be in a video-recorded interviews. Challenges in this approach still exist, and the state of the law is clear: the prosecution is given latitude as to what constitutes a “reasonable time.”¹³⁴

In light of these considerations, the reasonable time requirement should be viewed as having a dual purpose: first, as a safeguard to ensure that the fleeting autobiographical memories of a child are captured and recorded for evidentiary purposes before they are changed by time, experience, and mental development; second, as a tool allowing the judicial process to minimize any potential re-traumatization of the child witness. Neither should be considered entirely in isolation from the other.

CONCLUSION

After decades of progress, children are able to have their voices heard: a steady flow of legislative reforms, beginning in 1988 (and regularly affirmed by the SCC thereafter), have resulted in adaptations intended to blunt the pain of children participating in an adversarial criminal justice system.

The integrity of the criminal trial, however, is dependent on the capacity of the court to critically assess the accuracy and reliability of the evidence before it, and the testimony of children should be no different. In fact, those statutory adaptations, and the way the courts have interpreted them, have created important considerations for those prosecuting and defending an accused. Closely evaluating the video-recorded statement of a child witness and ensuring that the video-recorded statement has been made within a reasonable, though liberal, timeframe are unenviable tasks for practitioners.

Children’s suggestibility, and the suggestibility of young children especially, demand that investigative techniques and video-recorded interviews be closely scrutinized. Accused persons have an uphill battle in this regard with video-recorded interviews that are almost

132 *L(DO)*, *supra* note 61.

133 *Ibid.*

134 *Ibid.*

certain to be admitted as evidence, thereafter to be evaluated by the trier of fact for weight. It is up to criminal law practitioners to ensure that the trier of fact is presented with the most accurate and reliable evidence possible, and this can sometimes include challenging the forensic interviewer or even the child. Future developments in this area of law must ensure that courts continue to receive the best evidence possible. Extraordinary delays in making video-recorded statements may compromise the testimonial trustworthiness of the evidence itself and undermine the rationale for this rule.

Testifying in court is difficult enough for a professional, to say nothing of how difficult it likely is for a child. Justice L'Heureux-Dubé described the protection of children as one of the goals of video-recorded statements in *L(DO)*, but cautioned that protection is an assertion that the more controlled, less stressful, and less hostile environment of a video-recorded statement will improve the likelihood of eliciting a truthful autobiographical narrative.¹³⁵ Future developments in this area of law should be set around this stage: informed by social science, the courts stand to receive the best evidence where a child is interviewed at a CAC or other child-friendly environment, by trained professionals, in a transparent way consistent with the principles of fundamental justice.

This does not relieve the child witness of a duty to be cross-examined at trial, and the entirety of statutory child witness provisions must be considered together when contemplating ways of eliciting the best evidence from a child witness. The use of CCTV, witness screens, and support persons should be considered as tools to be used along with the video-recorded statement to provide courts with the best evidence possible.

135 *Ibid.*