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Hearing the voices of children in Canada's criminal justice system: recognising capacity and facilitating testimony

*Nicholas Bala, Angela Evans and Emily Bala**

This paper reviews common law and statutory developments in the treatment of children as witnesses in Canada's criminal justice system, where children who are victims of abuse testify with increasing frequency. Historically, children were regarded as inherently unreliable witnesses, and there were no provisions to accommodate their needs and vulnerabilities; this treatment by the justice system contributed to the abuse and exploitation of children. Reflecting a growing body of research on child development, and a better understanding of the effects of the court process on children, over the past quarter century there have been substantial reforms in the law and the administration of justice. The law now better reflects what is known about the competency of child witnesses, as well as about their vulnerabilities. The paper includes a review of legislation and leading precedents, and a summary of the responses of Canadian judges to a survey about the most recent legislative reforms. The case law and survey reveal that judges are generally supportive of the reforms.

INTRODUCTION: CHANGING UNDERSTANDINGS OF CHILD WITNESSES

Until the late 1980s, the justice system in Canada treated child witnesses as inherently unreliable, and very little effort was made to accommodate them. Over the past quarter century, there have been dramatic changes in the understanding and awareness of the nature and extent of child abuse, as well as large increases in the number of reported cases. Canada's justice system has responded both to this growing understanding and to increased psychological research on the reliability of child witnesses. Judges and legislators have introduced many substantive, evidentiary and procedural reforms, which have resulted in many more successful prosecutions in cases in which children are witnesses.

This article discusses some of the most significant psychological research on the experiences of children as witnesses, relating this research to major reforms in statutory and judge-made law in Canada. The focus of this article is on changes that facilitated children testifying in criminal prosecutions and having their out-of-court

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statements rendered admissible.¹ These reforms reflect the recognition that children can be reliable witnesses, and have made the justice system more sensitive to children's needs and more effective in dealing with child abuse.

A BRIEF HISTORY: ENDING THE MYTH OF THE UNRELIABLE CHILD WITNESS

The old laws about child witnesses were premised on the belief that children are inherently untrustworthy and prone to fantasy. At common law, a child was only permitted to testify if the child could be sworn, which required the child to demonstrate an understanding of the 'nature and consequences' of an oath.² This rule, which often effectively precluded younger children from testifying, was grounded on the assumption that children who could not explain the meaning of the oath and did not swear an oath were less likely to tell the truth, and hence should not be permitted to testify. The rule reflected attitudes towards children in the late nineteenth century, and reflected the medical and psychological opinions of that era. These opinions, based on biased clinical observations and methodologically unsound research, supported the prevailing social and legal myths that children were inherently unreliable witnesses and that sexual abuse of children was a rare occurrence.³

In 1893, around the time when the first child protection agencies were being established to help child victims of abuse or abandonment, Canada enacted its first legislation concerning child witnesses, permitting children to give unsworn evidence.⁴ However, children could only give unsworn testimony if they demonstrated their understanding of the 'duty to speak the truth', and such unsworn testimony required corroboration if there was to be a conviction. Further, as late as 1967, the Supreme Court of Canada cautioned that the common law required jurors to be warned of the 'inherent frailties' of a child's evidence, even if the child was sworn.⁵ No efforts were made to modify the court process to facilitate children's testimony. In this social and legal environment, the police and healthcare professionals continued to receive relatively few reports of child abuse.

The women's movement of the 1970s helped create an environment where adult survivors of childhood abuse began to feel sufficient support to come forward with first-person accounts of their experiences. Encouraged by media reports and growing professional sensitivity, by the 1980s larger numbers of adult survivors began to overcome their feelings of fear, guilt and shame to disclose what they had suffered in childhood. Awareness of child sexual abuse in Canada was substantially increased by the 1984 release of the Badgley Committee Report.⁶ This government-commissioned

¹ There have also been very significant developments in the civil justice system, with many adult survivors of child abuse obtaining compensation through civil suits; see N. Des Rosiers and L. Langevin, *Representing Victims of Sexual and Spousal Abuse* (Irwin Law, 2002). Additionally, there have been significant reforms in the receipt of evidence of children in separation and child welfare cases; see N. Bala, V. Talwar and J. Harris, 'The Voice of Children in Canadian Family Law Cases' (2005) 24 *Canadian Family Law Quarterly* 221.

² *R v Brazier* (1789) 168 E.R. 202.

³ C. Smart, 'A History of Ambivalence and Conflict in the Discursive Construction of the "Child Victim" of Sexual Abuse' (1999) 8 *Social and Legal Studies* 391.

⁴ Canada Evidence Act Vict. 56 (1893), c. 31, s 25. In the 1908 consolidation of the Act, this became s 16. In Canada, the federal Parliament has jurisdiction for the enactment of criminal laws – substantive, procedural and evidentiary – while the provinces have responsibility for the 'administration of justice.'

⁵ *R v Horsburgh* [1967] S.C.R. 746.

⁶ *Report of the Committee on Sexual Offences Against Children and Youths* (Minister of Supply and Services Canada, 1984), 2 vols (the 'Badgley Committee Report').

report documented the extent of child sexual abuse in Canada, revealed major failings in professional responses to abuse, and made many recommendations for legal and social reforms.

In the late 1980s the Canadian public was shocked by detailed disclosures from adult survivors of child abuse in schools, juvenile institutions and sporting organisations across the country. Many of the cases involved some of society's most vulnerable children, those without parents to protect them, placed by the state in child welfare institutions; there were also literally thousands of reports from adults who had been sent to the now-closed residential schools for Aboriginal children, where many children were victims of abuse at the hands of teachers and supervisors, many of whom were ministers, priests or nuns.⁷ There also came a growing awareness that much child abuse is perpetrated by family members, close family friends or trusted community figures.

As such disclosures became more commonplace, the experiences of children in the court system prompted new psychological research into the reliability of child witnesses. This research revealed that, when questioned in an appropriate way, children can be reliable witnesses, and that even young children can distinguish fantasy from reality.⁸ With the growing awareness of the realities of abuse, a more receptive environment for disclosures of abuse by children developed, and children were encouraged to report abuse, resulting in a dramatic increase of such reports. The justice system had to deal with many children being brought forward as witnesses. It became clear that fundamental legal reforms were required to permit children to testify effectively.

Canada's Parliament responded by enacting substantial reforms. The first major statutory reforms came into force in 1988,⁹ with further significant legislative changes in 1993¹⁰ and 2006.¹¹ At the same time, the courts were changing the common law rules applicable to children's out-of-court statements.

COMPETENCE TO TESTIFY: CANADA EVIDENCE ACT SECTION 16.1

Before a child can testify, the judge must be satisfied that the child is 'competent' to be a witness. For centuries the competency inquiry (or *voir dire*) was a critical initial barrier for witnesses. The provisions of the 1893 Canada Evidence Act allowed a child to testify if the judge was satisfied that the child understood the 'duty to speak the truth'; these inquiries were often confusing and intimidating, and sometimes resulted in children who were capable of giving important evidence being prevented from testifying. Although case law established that a child only had to appreciate the 'social consequences' of promising, and not the spiritual consequences of the oath, to be

⁷ There have been a number of deeply disturbing public inquiries into child abuse in children's institutions and schools in Canada; see Law Commission of Canada, *Restoring Dignity: Responding to Child Abuse in Canadian Institutions* (Minister of Public Works and Government Services, 2000).

⁸ See, eg J. Myers, K. Saywitz and G. Goodman, 'Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony' (1996) 28 *Pacific Law Journal* 3.

⁹ See discussion in N. Bala, 'Double Victims: Child Sexual Abuse and the Canadian Criminal Justice System' (1990) 15 *Queen's Law Journal* 3.

¹⁰ S.C. 1993, c. 45.

¹¹ S.C. 2005, c. 32; see discussion in N. Bala et al, 'Bill C-2: A New Law for Canada's Child Witnesses' (2005) 32 *Criminal Reports* (6th) 48.

permitted to testify,¹² a study of Canadian practices in the late 1990s revealed that many judges continued to ask children questions about their understanding of an oath, including questions about their religious beliefs and observance.¹³ Adults were not subjected to any of these intrusive, embarrassing questions before testifying, as it was presumed that they knew the significance of taking an oath.

In 1988, the Evidence Act was amended to abolish the requirement for corroboration of 'unsworn evidence'. Further, children who did not understand the nature of an oath could testify upon 'promising to tell the truth',¹⁴ provided they had the 'ability to communicate'. However, there continued to be a judicial inquiry into children's understanding of such concepts as 'truth', 'lie' and 'promise'.¹⁵ Inevitably, young children, who think in concrete terms, had difficulty in correctly answering questions about these abstract concepts, and inquiries tended to be longer and more confusing for young children, and sometimes resulted in children being ruled incompetent to testify.¹⁶

While the 1988 Evidence Act reforms were significant, there were still fundamental problems for child witnesses. A survey of judicial attitudes in the late 1990s revealed that many judges felt uncomfortable with the competency process, in particular regarding the intrusive nature of the questions posed to children.¹⁷ In another study, Canadian judges reported that they believed that children were significantly more likely to be *honest* than adult witnesses, though recognising that children, especially younger children, may be more prone to making errors due to poor memory or suggestibility.¹⁸ This type of research raised serious questions about precluding children from testifying on the basis that they were not able to answer questions demonstrating an appreciation of the need for honesty, when adults are never precluded from testifying on this basis.

There is now a growing body of psychological research into lying and lie detection.¹⁹ Children begin to lie starting around age 3. Almost as soon as they start to lie, children learn that it is morally wrong to do so. There is no evidence that younger children in general are more likely to lie than older children or adults. Further, a series of laboratory experiments carried out at the start of the millennium found no evidence to support the belief that children's ability to correctly answer cognitive questions about

¹² *R v Fletcher* (1982) 1 C.C.C. (3d) 370 (Ont. C.A.) at 380, leave to appeal to S.C.C. refused (1983) 48 N.R. 319 (S.C.C.). In *R v F (WJ)* [1999] 3 S.C.R. 569 McLachlin J commented (at para [42]) on the 'absurdity of subjecting children to examination on whether they understood the religious consequences of the oath.'

¹³ N. Bala, K. Lee, R.C.L. Lindsay and V. Talwar, 'A Legal & Psychological Critique of the Present Approach to the Assessment of the Competence of Child Witnesses' (2000) 38 *Osgoode Hall Law Journal* 409.

¹⁴ S.C. 1987, c. 24, s 18.

¹⁵ See, eg *R v Marquard* [1993] 4 S.C.R. 223.

¹⁶ See N. Bala, J. Lee and R.C.L. Lindsay, 'R v M (MA): Failing to Appreciate the Testimonial Capacity of Children' (2001) 40 *Criminal Reports* (4th) 93.

¹⁷ N. Bala, K. Lee, R. Lindsay and V. Talwar, 'A Legal and Psychological Critique of the Present Approach to the Assessment of the Competence of Child Witnesses' (2000) 38 *Osgoode Hall Law Journal* 409.

¹⁸ N. Bala, K. Ramakrishnan, R. Lindsay and K. Lee, 'Judicial Assessment of the Credibility of Child Witnesses' (2005) 42 *Alberta Law Review* 995.

¹⁹ See, eg A. Memon, A. Vrij and R. Bull, *Psychology and Law: Truthfulness, Accuracy and Credibility*, (John Wiley & Sons, 2nd ed, 2003); A. Vrij, *Detecting Lies and Deceit: Pitfalls and Opportunities*, (John Wiley & Sons, 2nd edn, 2008).

the meaning of 'truth' and 'promise' is related to whether or not they will actually lie.²⁰ On the other hand, in these experiments, having a child 'promise to tell the truth' before answering questions, even if the child could not correctly answer questions about the meaning of the concepts involved, significantly increased the likelihood that a child would tell the truth. The results of these experiments are consistent with child development theory and research, which establishes that young children have a great deal of difficulty in correctly answering abstract questions about the meaning of a complex concept like the 'promise to tell the truth'. It is, however, clear that young children have a good understanding of the social importance of truth telling and of promising well before they can answer questions about the concepts. Children (and often adults) may be able to understand and correctly use words without being able to define them.²¹ For both adults and children, the process of promising or swearing an oath is intended to impress on the witness and others in the court the social significance of the occasion and is a manifestation of a commitment to tell the truth. Accordingly, while having a child promise to tell the truth provides no guarantee of the honesty of the witness, it may well do some good.

In 2005, the Parliamentary Committee considering new legislation to govern child witnesses heard testimony about this psychological research,²² and introduced legislation consistent with it. The Canada Evidence Act, section 16.1, which came into force in January 2006, provides that there is a presumption that all children are competent to testify. While children are required to 'promise to tell the truth' before being permitted to testify, section 16.1(7) specifies that no child 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.' A party who is challenging the competence of a child to testify bears the onus of satisfying the judge that there is a genuine issue about the child's ability to communicate in the proceedings, and if there is an inquiry, the sole test for competence is whether the child is 'able to understand and respond to questions.'²³

Under the test of the 'ability to understand and respond to questions', the focus of the inquiry is on the child's basic cognitive and language abilities. This test is similar to the part of the inquiry under the 1988 provisions that focused on the child's capacity to meaningfully communicate evidence in court; as required by the Supreme Court in applying that test in *R v Marquard*,²⁴ there should now be relatively brief questioning to establish whether the child has the capacity to remember past events and answer questions about those events. The judge has a duty to ensure that the questions that

²⁰ V. Talwar, K. Lee, N. Bala and R.C.L. Lindsay, 'Children's Conceptual Knowledge of Lying and its Relation to Their Actual Behaviors: Implications for Court Competence Examinations' (2002) 26 *Law and Human Behavior* 395. For a fuller discussion of the psychological research, see N. Bala, K. Lee, R.C.L. Lindsay and V. Talwar, 'The Competency of Children to Testify: Psychological Research Informing Canadian Law Reform' (2010) 18 *International Journal of Children's Rights* 53.

²¹ M.E. Lamb et al, 'Enhancing Performance: Factors Affecting the Informativeness of Young Witnesses' in M.P. Toglia et al (eds), *The Handbook of Eyewitness Psychology* (Lawrence Erlbaum Associates, 2007).

²² *Hansard*, HC Deb, testimony of N. Bala, House of Commons Committee on Justice and Human Rights, 24 March 2005.

²³ R.S.C. 1985, c. C-5, as amended by S.C. 2005, c. 32, s 27.

²⁴ [1993] 4 S.C.R. 223, at paras [236]–[237].

are posed to the child during this inquiry, and later in the proceedings, are appropriate to the child's stage of development, with age-appropriate vocabulary and sentence structure.²⁵

The new provisions simplified and shortened the process for qualifying children to give evidence in criminal cases. A survey of judges in four Canadian jurisdictions about their experiences with the 2006 reforms revealed that 96% of the respondents agreed that the reform of the competency provision is 'useful'.²⁶ In a significant portion of cases, judges reported that a child witness was accepted as competent without inquiry, often based on video interview material disclosed to the defence before the hearing. Judges reported that there was a competency inquiry in about four fifths of cases with the youngest age group (3–5 years), falling to about one quarter with the older age group (10–13 years); the average time spent on a competency inquiry is now 12 minutes. Even in the youngest age group (3–5 years), almost half of the judges reported that they had never found a child incompetent under the new provision, although a few judges reported that a small number of children in all age groups were found incompetent.

In a number of decisions, the courts have upheld the constitutionality of the new section 16.1 of the Evidence Act, concluding that it is consistent with the Charter rights of an accused person to a fair trial to be conducted 'in accordance with the principles of fundamental justice'.²⁷ Interestingly, most of the reported constitutional decisions discussed the social science research about the soundness of the reform and its promotion of the search for the truth. The most complete and significant constitutional decision about section 16.1 is the British Columbia Court of Appeal in *R v JS*,²⁸ where the court concluded that section 16.1 reflects the procedural and evidentiary evolution of Canada's criminal justice system, in order to facilitate the testimony of children as a necessary step in its 'truth-seeking goal'. D.M. Smith J.A. wrote:

'I do not accept the . . . argument that if a moral obligation to tell the truth is not established, the testimony of the witness should be inadmissible. Parliament . . . has decided that a promise to tell the truth is sufficient to engage the child witness's moral obligation to tell the truth. Section 16.1 . . . discards the

²⁵ See J. Schuman, N. Bala and K. Lee, 'Developmentally Appropriate Questions for Child Witnesses' (1999) 25 *Queen's Law Journal* 251. In *R v L (DO)* [1993] 4 S.C.R. 419, L'Heureux-Dubé J advised that (at para [84]):

'the trial judge has a responsibility to ensure that the child understands the question being asked and that the evidence given by the child is clear and unambiguous. *To accomplish this end, the trial judge may be required to clarify and rephrase questions asked by counsel and to ask subsequent questions to the child to clarify the child's responses* . . . the judge should provide a suitable atmosphere to ease the tension so that the child is relaxed and calm' [emphasis added].

²⁶ The survey was completed by 34 judges in four jurisdictions. Responses to the survey were collected between 26 November 2007 and 15 January 2008. Judges in the following courts were surveyed: Alberta Queen's Bench and Provincial Court; British Columbia Provincial Court; Nova Scotia Supreme Court and Provincial Court; and Yukon Territorial Court. The survey was distributed electronically and the response rate is not known, but was likely in the range of 10%–20%. The survey was carried out as part of a study conducted by Canadian Research Institute for Law and the Family, funded by the Department of Justice. The full results and methodology of the survey are in the forthcoming publication of the Department of Justice, Canada: N. Bala, J. Paetsch, L. Bertrand and M. Thomas, *Testimonial Support Provisions for Children and Vulnerable Adults (Bill C-2): Case Law Review & Perceptions of the Judiciary* (Bala et al, 'Bill C-2 Review'). Discussion of the survey results is included here with the kind permission of the Department of Justice Canada.

²⁷ Other decisions upholding the constitutionality of this provision include *R v Persaud* [2007] O.J. 432 (Sup. Ct.) (QL), per Epstein J.; and *R v F(J)* [2006] A.J. 972 (Prov. Ct.).

²⁸ [2008] B.C.J. 1915 (C.A), aff'g *R v JS* [2007] B.C.J. No. 1374 (QL) (S.C.).

imposition of rigid pre-testimonial requirements which often prevented a child from testifying because of their inability to articulate an understanding of abstract concepts that many adults have difficulty explaining. It reflects the [research] findings . . . that the accuracy of a child's evidence is of paramount importance, not the ability of a child to articulate abstract concepts.²⁹

While accepting that children cannot be asked questions about their understanding of concepts such as 'truth' and 'promise' to be accepted as witnesses, the Court of Appeal did not totally preclude this type of questioning:

'A child witness's moral commitment to tell the truth, their understanding of the nature of a promise to tell the truth, and their cognitive ability to answer questions about "truth" and "lies" may still be challenged on cross-examination during their testimony; their credibility and reliability may still be challenged in the same manner as an adult's testimony may be challenged. These potential concerns, however, go to the weight of the evidence, not its admissibility.'³⁰

In commenting on this issue, Lisa Dufraimont argued that such questions should be permitted even in cross-examination:

'... if questions about abstract concepts like truth and promise are developmentally inappropriate and that is why they have been eliminated from the competency inquiry, one might wonder whether they have any real value when they are posed during cross-examination.'³¹

On 19 January 2010, the Supreme Court of Canada heard argument in *R v JS*,³² and in an unusual procedure, dismissed the appeal of the accused without even hearing from the respondent, summarily adopting the decision of the British Columbia Court of Appeal and upholding the constitutional validity of section 16.1 of the Canada Evidence Act.

The inquiry required by the former Canada Evidence Act was upsetting to children, a waste of court time and did nothing to promote the search for the truth. Some children who could have given honest, reliable evidence were prevented from testifying, resulting in miscarriages of justice. The present provision, focusing on a child witness's ability to understand and answer questions, creates a much more meaningful test to use to determine whether a child is competent to testify. Asking the child to promise to tell the truth but not expecting the child to explain the significance of this undertaking is the same as how adults who testify under oath are treated.

RECOGNISING THE RELIABILITY OF CHILD WITNESSES

Over the past quarter century, psychological research about the memory, suggestibility, and communication capacity of children has established that they can be reliable witnesses, though children's memories are less well developed than adult memories. Children as young as 4 years of age can provide accurate information about events that happened to them one or even two years earlier.³³ Interestingly, while adults can

²⁹ [2008] B.C.J. 1915(C.A.), at paras [52] and [53].

³⁰ 2008 BCCA 401, at para 53.

³¹ L. Dufraimont, 'S. (J.): Care in Cross-Examining Child Witnesses' (2007) 48 *Criminal Reports* (6th) 357.

³² *R v JZS* 2010 SCC 1.

³³ See, eg C. Peterson, 'Children's Long-Term Memory for Autobiographical Events' (2002) 22 *Developmental Review* 370.

give more information about an incident than children, adults are also more likely to provide inaccurate information about past events than children. All witnesses are more likely to consistently and accurately recall information about the core elements of their experiences, rather than about peripheral elements, such as the physical setting.

A significant concern with child witnesses is their potential suggestibility.³⁴ As a result of repeated or misleading questions, the memory of a witness may become distorted. A person who has been subjected to repeated, suggestive questioning may develop 'memories' of events that did not in fact occur. While children, especially very young children, are more suggestible than adults, there is great variation between individuals of the same age in their suggestibility. Although adults as well as children can have memories distorted or even created by suggestive questioning or interviews, in practice there is a greater likelihood that a child will be subjected to repeated questioning about an event, both by professional investigators³⁵ and sometimes by a parent.³⁶

The way that children are questioned can also affect how accurately they are able to communicate what they know about events.³⁷ Children, especially young children, have not developed clear concepts of time, distance or space. They will not, for example, be able to accurately answer questions about the number of times that an often-repeated event occurred, because they lack counting and computation skills. However, young children often feel socially compelled to attempt to respond to a question, and are likely to guess when they are unsure of the correct answer.³⁸ Further, children, especially young children, who are asked questions that they do not fully understand, will usually attempt to provide an answer based on the parts of the question that they did understand, so that a child's answer to a question may seem unresponsive and may even be misleading. There are questioning techniques that can increase the accuracy and completeness of the testimony of children, such as mimicking the vocabulary of the child, avoiding legal jargon, confirming meanings of words with children, using 'wh- questions' (what, when, where but not why), limiting use of yes/no questions, and avoidance of abstract conceptual questions.³⁹

Canadian law has come to recognise that children can be reliable witnesses, and that it is unfair and inappropriate to have general rules discounting their evidence. In 1988, Parliament abrogated the statutory rule that the unsworn testimony of a child needed to be corroborated,⁴⁰ though some judges continued to apply the common law warning rule, advising juries about the 'inherent frailty' of the testimony of children, whether sworn or unsworn. The Supreme Court revisited the issue in 1992 in *R v W(R)*, rejecting 'the stereotypical but suspect' views about child witnesses, and abolishing the 'common law' warning rule, with McLachlin J observing:

³⁴ See, eg M. Bruck and L. Melnyk, 'Individual Differences in Children's Suggestibility: A Review and Synthesis' (2004) 18 *Applied Cognitive Psychology* 947.

³⁵ An infamous Canadian example of false allegations resulting from highly suggestive police interviews of children occurred in Martensville, Saskatchewan in the early 1990s; see *R v S (T)* (1995) 102 C.C.C. (3d) 481 (Sask. C.A.).

³⁶ N. Bala, M. Mitnick, N. Trocmé and C. Houston, 'Sexual Abuse Allegations and Parental Separation: Smokescreen or Fire?' (2007) 13 *Journal of Family Studies* 1.

³⁷ See A.G. Walker, *Handbook on Questioning Children* (ABA Centre on Children and the Law, 2nd edn, 1999).

³⁸ V.H. Fritzeley and K. Lee, 'Do Young Children Always Say Yes to Yes-No Questions? A Metadevelopmental Study of the Affirmation Bias' (2003) 74 *Child Development* 1297.

³⁹ See, eg M.P. Togliola et al, *Handbook of Eyewitness Psychology: Memory for Events* (Lawrence Erlbaum Associates, 2007), vol 1; G.S. Goodman and A. Melinder, 'Child Witness Research and Forensic Interviews of Young Children: A Review' (2007) 12 *Legal and Criminological Psychology* 1.

⁴⁰ S.C. 1987, c. 24, s 15.

'The law affecting the evidence of children has undergone changes in recent years. The first is removal of the notion, found at common law and codified in [repealed] legislation, that the evidence of children was inherently unreliable and therefore to be treated with special caution . . . The repeal of provisions creating a legal requirement that children's evidence be corroborated does not prevent the judge or jury from treating a child's evidence with caution where such caution is merited in the circumstances of the case. But it does revoke the assumption formerly applied to all evidence of children, often unjustly, that children's evidence is always less reliable than the evidence of adults.'⁴¹

She also alluded to the growing body of psychological literature on the reliability and perceptions of children:

'The second change in the attitude of the law toward the evidence of children in recent years is a new appreciation that it may be wrong to apply adult tests for credibility to the evidence of children. One finds emerging a new sensitivity to the peculiar perspectives of children. Since children may experience the world differently from adults, it is hardly surprising that details important to adults, like time and place, may be missing from their recollection . . . Every person giving testimony in court, of whatever age, is an individual, whose credibility and evidence must be assessed by reference to criteria appropriate to her mental development, understanding and ability to communicate.'⁴²

Reinforcing the effect of this decision, in 1993 Parliament enacted section 659 of the Criminal Code, expressly abrogating the common law rule that it is 'mandatory for a court to give the jury a warning about convicting an accused on the evidence of a child.'⁴³ The need to fairly assess the evidence of children was again recognised by the Supreme Court of Canada in 1997, when Cory J acknowledged:

'... that the peculiar perspectives of children can affect their recollection of events and that the presence of inconsistencies, especially those related to peripheral matters, should be assessed in context. A skillful cross-examination is almost certain to confuse a child, even if she is telling the truth. That confusion can lead to inconsistencies in her testimony. Although the trier of fact must be wary of any evidence which has been contradicted, this is a matter which goes to the weight . . . and not to its admissibility.'⁴⁴

Section 659 and the Supreme Court jurisprudence reflect a recognition that children can be as reliable in what they recall about an incident as adults, even though they may not be able to describe events in as much detail as adults and may be unable to answer some kinds of questions that adults can. There is not, however, a presumption in favour of a child's testimony. Rather, a child's testimony is to be individually assessed in the context of all of the other evidence, just as is the testimony of an adult. A judge in a jury case, in summarising the evidence for the jury, may still express views to the jury about the frailties of the testimony of any witness, including a child witness. Although there is no legal requirement for corroboration, and it is possible to obtain a conviction solely on the basis of the testimony of a young child (or even on hearsay

⁴¹ *R v W(R)* [1992] 2 S.C.R. 122, at para [23].

⁴² *R v W(R)* [1992] 2 S.C.R. 122, at paras [24]–[26].

⁴³ S.C. 1993, c. 45, s 9.

⁴⁴ *R v F(C)* [1997] 3 S.C.R. 1183, at para [48].

evidence from a young child who is not competent to be a witness), it is clearly helpful to the Crown's case to have some form of independent evidence to 'support' the child's testimony. This could be medical testimony, 'similar fact evidence' (evidence of other acts of abuse by the accused),⁴⁵ or other evidence.

FACILITATING CHILDREN'S TESTIMONY

Until relatively recently, there were no services available to support children who came to court to testify, and no legal provisions for their accommodation in court. As a result, the experience of testifying was often deeply traumatic for children,⁴⁶ and their ability to participate in the proceedings was often compromised. Laws have now been enacted and services established that are intended to recognise the vulnerabilities of children, and allow them to participate more effectively in the criminal process.

One of the greatest fears that child victims have about testifying in court is of seeing the perpetrator of their abuse again.⁴⁷ Some children, especially younger ones, may fear physical harm, while for others there is psychological distress at the prospect of confronting the accused. In some cases, a perpetrator may subtly attempt to intimidate a witness with a facial expression or hand signal. A child may become completely silent on seeing the perpetrator again, or may start to cry or even become physically ill. For many children, it is not just the presence of the accused that is distressing; they may be intimidated into silence by the court room itself, for the child a very large and foreign room, filled with strangers. Adolescents can be just as upset as young children when testifying because they have a better understanding of sexual matters and feel more embarrassment and humiliation.

To address the problems that children experienced in court, and following the lead of a number of other countries, in 1988 and 1993 Canada's Parliament enacted provisions intended to facilitate testifying by children. In part because of statutory limitations, these provisions were relatively rarely used,⁴⁸ and in 2006 a new law came into effect that creates a presumption that, if requested by the prosecution, these accommodations 'shall' be provided to any child witness, defining 'child' as a person under the age of 18 years. The previous law had only provided these accommodations to children under the age of 14; the change in definition reflects an appreciation of the vulnerability of adolescents. Further, to permit the concerns of children to be allayed before they come to court and allow for appropriate arrangements to be made, the 2006 amendments specify that applications for the use of accommodations can be made to the presiding judge prior to the commencement of the trial.

The 2006 amendments also make clear that '[n]o adverse inferences may be drawn from the fact that an order is, or is not, made' to allow for any of these accommodations.⁴⁹ This codifies the common practice under the earlier provisions, of

⁴⁵ For a consideration of cases where such 'similar fact' evidence may be admissible, see *R v Thomas* (2004) 72 O.R. (3d) 401 (C.A.) (QL).

⁴⁶ For a study on the long-term emotional effects on children of participation in the criminal justice process, see J.A. Quas et al, 'Childhood Sexual Assault Victims: Long-term Outcomes After Testifying in Criminal Court' (2005) 70 *Monographs of the Society for Research in Child Development* 1.

⁴⁷ L. Sas et al, *Three Years After the Verdict: A Longitudinal Study of the Social and Psychological Adjustment of Child Witnesses Referred to the Child Witness Project* (London Family Court Clinic, 1993), at p xvi.

⁴⁸ N. Bala, R. Lindsay and E. McNamara, 'Testimonial Aids for Children: The Canadian Experience with Closed Circuit Television, Screens and Videotape' (2001) 44 *Criminal Law Quarterly* 461; and N. Bala, J. Lee and E. McNamara, 'Children as Witnesses: Understanding their Capacities, Needs and Experiences' (2001) 10 *Journal of Social Distress and the Homeless* 41.

⁴⁹ See Criminal Code, ss 486.1(6), 486.2(8) and 486.3(5), enacted in S.C. 2005, c. 32.

judges cautioning juries against drawing an adverse inference against the accused from the fact that, for example, the child is testifying from another room by closed circuit television. The courts have accepted that Parliament intended to increase the use of accommodations for child witnesses, by increasing the use of support persons, closed-circuit television and screens, and counsel appointed to cross-examine child witnesses where accused persons are self-represented. There are very few reported cases under the new law where use of an accommodation was requested and the accused satisfied the court that use of the accommodation would 'interfere with the administration of justice', and hence be precluded under these provisions. The courts, however, remain alive to the need to protect the rights of the accused; use of an accommodation may be denied if the appropriate equipment is not available, or the conduct of the witness or nature of the evidence would mean that use of the accommodation would render the trial unfair.

The 2006 amendments provide that the prosecutor or a child witness may make an application for use of any of the accommodations. This clearly suggests that Crown prosecutors should be consulting with children about whether they want to use any of the accommodations, but in practice it seems that prosecutors sometimes fail to consult with the child or parents; if the prosecutor decides not to make an application, the child may never learn of the right to do so.⁵⁰

Support persons: section 486.1

In addition to changes in the law, over the past two decades there have been very significant improvements in the training of police, prosecutors and social workers to better understand and support victims of family violence, especially child victims. Court-related support services for victims and witnesses have been established in many communities in Canada, a few with special focus on children. The workers in these services provide emotional support and information about the unfamiliar and often intimidating justice system, and can help prepare witnesses to testify. Children who are adequately prepared and supported during the court process are more likely to be effective witnesses, and less likely to be traumatised by the experience of testifying.

Section 486.1 creates a presumption that, if requested, a child may have a 'support person of the witness' choice . . . present and . . . close to the witness while the witness testifies.' A survey of judicial experiences suggests that applications under section 486.1 to allow a support person to sit near a child witness are made in a minority of cases involving children, though when an application is made under section 486.1 for a child, it is almost always successful.⁵¹ The most common support persons for child witnesses are family members and victim services workers. Some judges raised some concerns about the implementation of section 486.1, in particular that in some cases the support person, if not a trained professional, may improperly influence the witness,⁵² and a few judges even questioned the necessity of this provision for older children.

⁵⁰ See M. Hall, 'Children Giving Evidence Through Special Measures in the Criminal Courts: Progress and Problems' [2009] CFLQ 65 reporting that prosecutors in England often fail to consult with children about use of 'special measures'.

⁵¹ For a discussion of the survey methodology, see Bala et al, 'Bill C-2 Review', above, fn 26.

⁵² In *R v C(D)* [2008] NSCA 105, the Nova Scotia Court of Appeal upheld the decision of a trial judge to allow the mother of the child complainant to act as the support person, even though she was also a witness about the child's disclosure and the opportunity of the accused to commit the acts in question.

Closed circuit television and screens: section 486.2

The use of closed circuit television for child witnesses is now common in a number of countries. Since 1988, legislation in Canada has allowed a judge to permit a child to testify from behind a one-way screen that blocks the child's view of the accused, or from another room with testimony relayed to the court via closed circuit television (CCTV). However, after the law came into force in 1988, little use was made in Canada of CCTV or screens,⁵³ as the provision required a judge to be satisfied that use of such a device was 'necessary to obtain a full and candid account of the acts complained of' from the child. The Crown was obliged to establish an 'evidentiary basis' to justify the making of such an order, for example, with testimony from a parent or mental health professional who had worked with the child.⁵⁴ Judges had considerable discretion in deciding whether to allow this provision to be invoked, and the uncertainty about whether a child would be permitted to testify in this way resulted in many prosecutors being reluctant to make applications for its use for fear of raising false expectations with the child or slowing down the proceedings. A lack of proper equipment and trained staff also contributed to the limited use of screens and CCTV.

Section 486.2(1) of the Criminal Code, enacted in 2006, considerably expanded the scope for use of these accommodations, stipulating that if an application is made, the judge 'shall' make an order to allow the child to testify from behind a screen or via CCTV, 'unless the judge . . . is of the opinion that the order would interfere with the proper administration of justice.' This exception is narrow,⁵⁵ and might, for example, be invoked if the equipment available did not give the accused, judge and jury a good view of the child, or if there was inadequate provision for private communication between the accused and his counsel. Significantly, there is no longer a requirement for the Crown to establish that use of this provision is necessary for a child to give a 'full and candid account of the acts complained of.'⁵⁶

The survey of judicial experiences with the new provision reveals that applications under section 486.2 for screens or CCTV are most likely to be made at a pre-trial conference (or meeting) of the judge and counsel for the accused and Crown.⁵⁷ The survey suggests that an application under section 486.2 is still only made in a minority of cases involving child witnesses, and is more likely to be for use of a screen than CCTV, but when an application is made, it is almost always successful. The survey also indicates that there continue to be logistical concerns about the equipment, with half of the judges reporting that they had experienced problems in arranging for appropriate equipment, including problems with seeing or hearing the child.

⁵³ N. Bala, R. Lindsay and E. McNamara, 'Testimonial Aids for Children: The Canadian Experience with Closed Circuit Television, Screens and Videotapes' (2001) 44 *Criminal Law Quarterly* 461.

⁵⁴ *R v Levogiannis* [1993] 4 S.C.R. 475.

⁵⁵ A number of cases under the 2006 provision have emphasised that it is much easier to satisfy the test for use of closed circuit television or a screen than under the previous provision; eg in *R v Elmer* [2006] B.C.J. 585 (Prov. Ct.), Godfrey Prov Ct J observed that the previous provision set out a 'different and higher standard'. In *R v Flores* [2007] B.C.J. No. 1505 (S.C.), McEwan J permitted a child to testify from behind a screen with comfort items and a support person present in the witness box, and during her testimony, she was permitted to adopt the contents of a video-recorded statement.

⁵⁶ Although beyond the scope of this article, it should be noted that the 2006 provisions also allow for an adult to testify by closed circuit television, but for this to occur the Crown must satisfy the court that it is 'necessary to obtain a full and candid account' from the witness, as might, for example, occur in some domestic violence cases: see Criminal Code, s 486.2 (2).

⁵⁷ For a discussion of the survey methodology, see Bala et al, 'Bill C-2 Review', above, fn 26.

In *R v GAP*,⁵⁸ Simonsen J rejected an application made by the Crown for a child witness to testify outside the courtroom by CCTV, and instead ordered that the child testify from behind a screen in the courtroom. The primary reason for requiring use of the screen was that counsel for the defence planned on extensive cross-examination of the child, referring to certain documents that counsel was not prepared to present before questioning, and the judge could not properly observe the documents on CCTV. However, other cases have held that the Crown (or a witness) will ordinarily have the 'right' to determine what type of device (CCTV or a screen) to use.⁵⁹ The 'right' of a witness to determine what device will be used is subject to the judge being satisfied that the equipment is available and functioning appropriately, and to determine whether the nature of the proposed evidence or the 'administration of justice' require some other manner of testifying, as occurred in *GAP*.

In *R v Black*, the court initially allowed an application to permit a 14-year-old complainant in a sexual assault case to testify via CCTV; however, during her testimony the witness became uncooperative and consequently an order was made for her to complete her testimony from within the courtroom. The judge noted that while testifying by CCTV, the girl displayed 'disdain' for the judicial process, which was reflected in demeaning statements that she made towards counsel and in her refusal to answer questions about inconsistencies in her testimony, commenting:

'... the nature of her evidence and the difficulties which occurred during the course of it served to highlight the dangers in what I perceive to be a growing trend of the Crown . . . to rely on the provisions of . . . the Code to allow witnesses to testify remotely by closed circuit facilities. Such a process, while highly useful in appropriate cases, has, in my view, inherent and unacceptable dangers which are starkly emphasized in the present case.'⁶⁰

The judge concluded that the use of CCTV was interfering with the administration of justice and terminated its use for the girl. In contrast, the latter portion of her testimony, completed within the courtroom, was done with 'little apparent difficulty and with a good deal more recognition of the proper trial process.' The judge observed:

'In my view, the danger highlighted by this process in the present case serves to emphasize the importance of both the Crown and the court considering carefully the final . . . words of . . . [this provision]⁶¹ before giving such orders. The prospect of these events occurring before a jury is not one that would be easily dealt with.'

The constitutionality of the new screen and CCTV provision has been consistently upheld. The most detailed and significant constitutional decision about section 486.2 was made by the British Columbia Court of Appeal in *R v JS*, where Smith J.A. wrote:

'... s. 486.2 is merely the next step in the evolution of the rules of evidence. These rules seek to facilitate the admissibility of relevant and probative evidence from children . . . while maintaining the traditional safeguards for challenging the reliability of their evidence. Rules of evidence must be construed in light of a

⁵⁸ [2007] M.J. 194 (Q.B.).

⁵⁹ *R v JW* [2007] B.C.J. 468 (B.C. Prov. Ct.), per Tweedale Prov Ct J.

⁶⁰ *R v Black* [2007] B.C.J. 2035 (S.C.), at para [32].

⁶¹ The last words of s 486.2 (1) are: 'unless the judge . . . is of the opinion that the order would interfere with the proper administration of justice.'

criminal justice system that encourages the goal of 'attainment of truth'. Over the years, the use of testimonial aids has been subject to ongoing procedural and evidentiary changes, which may continue to evolve . . . The presumptive nature of s. 486.2 does not dispense with any of the traditional safeguards for ensuring that an accused receives a fair trial.⁶²

As mentioned above, on 19 January 2010, the Supreme Court of Canada heard argument in *R v JS*,⁶³ and in an unusual procedure, dismissed the appeal of the accused without even hearing from the respondent, summarily adopting the decision of the British Columbia Court of Appeal and upholding the constitutional validity of section 486.2 of the Criminal Code.

There has been research in a number of countries about the effects of using closed circuit television. One theme of the research is that children who testify via CCTV are less anxious and fearful, and as a consequence they tend to be more relaxed and audible when testifying.⁶⁴ While some simulation research found that mock jurors were *less likely* to convict an accused if a child testifies via CCTV,⁶⁵ perhaps because the children appear more emotionally distant from the jury or less emotional while testifying,⁶⁶ a Scottish study based on a review of actual court cases suggested the use of such devices had no effect on conviction rates.⁶⁷ Although there is clearly a need for further research into the use of testimonial aids, it seems that there is no basis for concerns that the use of such devices may result in wrongful convictions. While the existing research might afford some basis for prosecutors being a little cautious about the use of such aids in cases in which a child might be able to effectively testify without such an aid, as their use might negatively affect the perceptions of some jurors about a child's credibility, the child will usually be a less effective witness, or totally unable to testify, without a testimonial aid. In any event, it is clear that the present Canadian statute gives a child witness the choice about whether a testimonial aid will be used. The law makes clear that the emotional well-being of a child should not be jeopardised to increase the likelihood of a successful prosecution.

Accused not to personally cross-examine vulnerable witness: section 486.3

A statutory provision first introduced in 1993⁶⁸ restricts the opportunity of a self-represented accused to personally cross-examine vulnerable witnesses. That provision directed the judge in sexual and violent offence cases to make an order preventing an accused from personally cross-examining a child witness, 'unless the proper administration of justice' required it, and directed the judge to appoint counsel for the accused for the purpose of cross-examination of the child if such an order was made. This was intended to spare children from being directly confronted by an alleged abuser, which might both prove emotionally traumatic and render effective

⁶² 2008 BCCA 401, aff'g *R v JS* [2007] B.C.J. 1374 (QL) (B.C.S.C.).

⁶³ *R v JZS* 2010 SCC 1.

⁶⁴ S.R. Hall and B. Sales, *Courtroom Modifications for Child Witnesses Law and Science in Forensic Evaluations* (American Psychological Association, 2008).

⁶⁵ *Ibid.*

⁶⁶ H.K. Orcutt et al, 'Detecting Deception in Children's Testimony: Factfinders' Abilities to Reach the Truth in Open Court and Closed-Circuit Trials' (2001) 25 *Law & Human Behavior* 339.

⁶⁷ K. Murray, *Live Television Link: An Evaluation of its Use by Child Witnesses in Scottish Criminal Trial* (The Scottish Office, HMSO, 1995).

⁶⁸ Enacted as Criminal Code, s 486 (2.3), S.C. 1993, c. 45, s 7.

communication by the child virtually impossible. In 2006 this provision was amended, so that section 486.3(1) now applies to 'any proceeding' (not just sexual and violent offences) in which a child is a witness, and provides that if requested, an order 'shall' be made unless doing so would 'interfere with the proper administration of justice,' a condition that is only likely to be satisfied if the request came at a late stage in the proceedings.⁶⁹

The survey of judicial experiences with the new provision revealed that applications under section 486.3 are made most often at the pre-trial conference, and indicated that such applications are almost always successful.⁷⁰ The survey, case law⁷¹ and published commentary⁷² identify concerns about the implementation of section 486.3, in particular about how counsel is to be selected and paid, since these matters are not addressed in the legislation. The survey also reveals judicial concern about delay that may result when an order is made under section 486.3, especially if it is not clear how counsel is to be appointed and paid. There are also concerns about how counsel can effectively cross-examine only one witness without being involved in the entire trial. Despite the variation in the case law about how the courts are dealing with issues of payment and selection of counsel under section 486.3 orders, the survey and case law indicate that these issues are being adequately addressed, albeit in a variety of ways; there are no reports of cases in which proceedings have had to be stayed because counsel could not be appointed.

While section 486.3 clearly provides important protection for children, its application poses challenges for the bench and bar. A theme that runs through the case law and survey is that, since the legislation is silent about the method of appointment and payment of counsel in section 486.3, the court must assume implied powers in order to give this provision effect in a manner that accords with the principles of fundamental justice. Understandably, judges are reluctant to be involved in the relationship between the accused and counsel, and there are no reported cases in which the judge has directly selected counsel for an accused.⁷³ In some places the local bar or legal aid office have prepared a list of counsel willing to accept these appointments, which gives an accused some choice as to counsel; there are also provisions in these places for the appointment of specific counsel from the list if an accused is not willing to choose from the list. Counsel appointed for cross-examination must have sufficient time to prepare for the proceedings, including an opportunity to have Crown disclosure and to observe the child's examination-in-chief. Although practice is not uniform, often

⁶⁹ See discussion in *R v AM* [2000] O.J. 3774 (Sup. Ct.).

⁷⁰ For a discussion of the survey methodology, see Bala et al, 'Bill C-2 Review', above, fn 26.

⁷¹ In *R v BS* [2007] J.Q. 14092 (C.A.), the Quebec Court of Appeal held that while it is within the power of the court to select a specific lawyer to represent the accused for the purposes of cross-examination, it is not within its power to determine the fees to be paid by the government, as this would be an infringement on executive and legislative power. The Court of Appeal ruled that an order selecting legal counsel for a self-represented accused should be accompanied by a stay in proceedings in order for the Ministry to make payment arrangements.

⁷² J. Hughes, 'Peetooloot: Who Pays the Costs of Appointing Counsel to Cross-examine Complainants?' (2006) 42 *Criminal Reports* (6th) 57.

⁷³ In *R v Peetooloot* [2006] NWTJ 23 (Terr. Ct.), the court made an order for representation, but the accused failed to retain counsel. The judge directed the clerk of the court to make the necessary arrangements to retain counsel, and suggested that the fees would be paid at counsel's 'full private rate'. In *R v Civello*, Ont. Ct. J., (unreported) 9 June 2006, Jennis J requested that the local Criminal Lawyers Association provide a list of senior counsel willing and able to do this work to the accused. If the accused was unwilling to make a choice from this list, the judge indicated that he would make the selection for the accused. While it is preferable for the accused to have a role in the selection of counsel, his failure to do so should not result in a delay of the proceedings.

counsel attends and participates as counsel for the accused throughout the proceedings, until the child is examined and cross-examined.

It is not necessary to establish that the accused is indigent for an order to be made that counsel appointed under section 486.3 is to be paid by the government, as the purpose of the order is to minimise trauma to the child and promote the child's effectiveness as a witness. However, if the accused is indigent and lacking in sophistication, and has been unable to obtain legal aid, it may be more appropriate for the court to make a 'Rowbotham order' for representation for the accused throughout the proceedings in order to protect the right of the accused to a fair trial under the Charter.⁷⁴

Exclusion of the public: section 486(1)

Section 486(1) allows for an order to be made for the exclusion of some or all members of the public from the proceedings if their presence in the courtroom is not consistent with the 'proper administration of justice'.

Canadian judges are reluctant to clear the court because of the constitutional presumption in favour of public trial. The fact that a case involves a sexual offence or evidence that may be 'embarrassing' to a witness is not legally sufficient reason to exclude the public.⁷⁵ There is an onus on the Crown to satisfy the court that it will be 'more difficult' for a witness to testify in the presence of members of the public or that the presence of too many persons may cause the witness to be unable to testify. What is now section 486(2) was added in 1993 to specify that in an offence involving allegations of sexual abuse or violence, the judge must ensure that the 'interests of witnesses under the age of fourteen years are safeguarded' when deciding whether to exclude the public, for example, allowing exclusion of friends or supporters of the accused whose presence might intimidate a child; in 2006, this provision was broadened to apply to any type of offence and to consider the interests of witnesses under the age of 18. However, given the constitutional presumption in favour of trials open to the public,⁷⁶ courts are of the view that it is preferable to use CCTV or a screen than to have the courtroom cleared for a child witness. Even where these are not available, as may occur in trials held in relatively remote locales, there is an onus on the Crown to justify exclusion of the public when a child witness is testifying; that the child is 'apprehensive' or 'embarrassed' is not sufficient basis for exclusion of the public.⁷⁷

Video-recorded evidence: section 715.1

The practice of video-recording investigative interviews with children in sexual abuse cases was originally undertaken for the purpose of eliminating the need to subject the child to repeated interviews, by allowing the recording to be shared with investigators from different agencies as well as with therapists. Repeated interviewing is potentially

⁷⁴ Legal aid plans in Canada are administered by provincial governments, and have stringent criteria for providing representation; those who are poorest and charged with the most serious offences are eligible for legal aid. It has also been held that courts have the jurisdiction under the *Charter* to stay proceedings against accused persons unless counsel is provided, if the accused is of limited means and the charges sufficiently serious and complex. This *Rowbotham* order effectively results in legal representation for an indigent accused: *R v Rowbotham* (1988) 41 C.C.C. (3d)1 (Ont. C.A.).

⁷⁵ *R v Lefebvre* (1984) 17 C.C.C. (3d) 277 (Que. C.A.); *R v Vandeveld* (1994) 89 C.C.C. (3d) 161 (Sask. C.A.).

⁷⁶ See discussion in *French Estate v Ontario (Attorney General)* (1998) 38 O.R. (3d) 347 (C.A.).

⁷⁷ *R v McDonald* [2006] S.J. 213 (Q.B.) (QL).

traumatic, and may affect the reliability of a child's memory.⁷⁸ Additional support for the practice of video-recording interviews is found in research that suggests that persons accused of abusing children may be more likely to plead guilty, and save the child the trauma of a trial, if there is a video-recorded statement of the child, which the accused will be shown as part of pre-trial disclosure.⁷⁹

The evidentiary value of video-recordings of interviews with children has been recognised in many countries. In Canada, section 715.1 of the Criminal Code was enacted in 1988 to allow for the admission in evidence of video-recordings of interviews with children under the age of 18 in regard to specified sexual offences, provided that the recording was made within a 'reasonable time' of the events in question, and that the child testified and 'adopted' the contents of the recording while on the stand. In its 1993 decision in *R v DOL*, the Supreme Court of Canada upheld the constitutional validity of section 715.1, with Lamer C.J. observing:

'By allowing for the videotaping of evidence under certain express conditions, 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.'⁸⁰

The rights of the accused are adequately protected because the child must be a witness, 'adopt' the contents of the videotape while testifying, and be available for cross-examination about its contents.

The 1997 decision of the Supreme Court of Canada in *R v F (CC)*⁸¹ reflected psychological research on children's memories (although the Court did not refer to any specific studies), with Cory J stating that a video-recording 'will almost inevitably reflect a more accurate recollection of the events than will testimony given later at a trial.' He ruled that a child who was testifying 'adopted' the videotape if she 'recalled giving the statement and testified that she was then attempting to be honest and truthful.' It is not necessary for the child to have a recollection of the events while testifying; it is sufficient for her to recollect having made the videotaped statement. In the case being appealed, the 6-year-old child had some recollection of the acts of sexual abuse committed by her father, but there were some inconsistencies between the videotape and her trial testimony. The trial judge admitted the videotape and convicted the accused. In upholding the conviction, Cory J accepted that these were 'minor inconsistencies regarding peripheral details' and commented:

'Obviously a contradicted videotape may well be given less weight in the final determination of the issues. However, the fact that the video is contradicted in cross-examination does not necessarily mean that the video is wrong or unreliable. The trial judge may still conclude . . . that the inconsistencies are insignificant and find the video more reliable than the evidence elicited at trial . . .

⁷⁸ L. Melnyk, A.M. Crossman, and M.H. Scullin, 'The Suggestibility of Children's Memory,' in M.P. Toglia et al (eds), *Handbook of Eyewitness Psychology: Memory for Events* (Lawrence Erlbaum Associates, 2007), vol 1.

⁷⁹ See F. Vandervort, 'Videotaping Investigative Interviews of Child Sexual Abuse: One Community's Approach' (2006) 96 *Journal of Criminal Law and Criminology* 1353, at p 1390.

⁸⁰ [1993] 4 S.C.R. 419, 85 C.C.C. (3d) 289, at para [1].

⁸¹ *R v F (CC)* [1997] 3 S.C.R. 1183; see also, eg *R v MG* [2007] O.J. No. 4691 (C.A.).

Although the trier of fact must be wary of any evidence which has been contradicted, this is a matter which goes to the weight . . . and not to its admissibility.⁸²

Judges have accepted that if there are inconsistencies between what a young child says on a video-recording made shortly after the events in question and what is said at trial many months, and even years after the events in question, the video may be regarded as 'more reliable.'⁸³ However, if the child on the stand has virtually no recollection of the events in question, it may be appropriate to acquit the accused, despite the existence of a video-recording of the child that implicates him.⁸⁴ Further, if the child has been subject to inappropriate, suggestive questions during the video-recorded interview, this may also be captured on the recording and available to protect an accused from unreliable allegations.

It is common practice for a child to be shown the videotape by the prosecutor prior to the child taking the witness stand in order to prepare the child for testifying. The video is usually shown again at the start of examination-in-chief, and the child is asked to 'adopt' the contents. If the child acknowledges the truth of the statement in examination-in-chief, but then in cross-examination makes inconsistent statements or partially recants, courts have generally relied on section 715.1 of the Criminal Code to rule the statement admissible for the truth of its contents. In *R v BGB*, Dunnet J observed that 'the test for "adoption" is not stringent', and upheld a conviction where a 5-year-old child adopted his statement during examination-in-chief, but during cross-examination made some statements inconsistent and contradictory to the statements on the video.⁸⁵

The 2006 amendments extended section 715.1 by allowing video recordings to be used in any proceeding, not just a list of specified abuse-related offences. Further, the amendments clarified that, provided the recording was made within a reasonable time of the alleged offence and is adopted by the vulnerable witness, it 'shall' be admitted into evidence 'unless the judge is of the opinion that admission of the video recording in evidence would interfere with the proper administration of justice.' This creates a strong presumption of admissibility.⁸⁶ It might, for example, be appropriate to exclude a video-recording made by a potentially biased person, such as, in a case of sexual abuse allegations against a parent involved in a custody dispute, a recording of a child's statement made by the other parent.

The survey of Canadian judges reveals that applications under section 715.1 to have a video-recorded interview with the child admitted in evidence are almost never denied, and that applications for the video-recorded evidence provision are made most often during the pre-trial hearing conference.⁸⁷ However, the Crown only seeks to have a video-recorded interview admitted in less than half of cases involving witnesses under the age of 18. When asked if they have had any difficulties with the implementation of section 715.1, only one judge commented, stating that:

'The witness was less persuasive at the trial months after the event, and after the giving of the statement. I suspected the prosecutor wanted to embellish the viva

⁸² [1997] 3 S.C.R. 1183, at paras [47]–[48].

⁸³ *R v Vanderwerff* [2006] A.J. 620 (Q.B.).

⁸⁴ *R v CLP* [2006] B.C.J. 1925 (Prov. Ct.), at para [22].

⁸⁵ [2005] O.J. 5402 (Sup. Ct.). See also *R v JR* [2006] O.J. 121 (C.A.) (QL).

⁸⁶ See, eg *R v Ortiz* [2006] ONCJ 72.

⁸⁷ For methodology of study, see Bala et al, 'Bill C-2 Review', above, fn 26.

voce evidence of the witness by use of the videotape, but I could not be certain about this until I saw it. It took time to set it up and play the taped statement. In the end, it was not helpful. It is difficult or impossible to say [in advance] that playing the tape would interfere with the proper administration of justice when deciding an application in these circumstances.'

There can be practical difficulties with videotapes, for example, with the quality of the picture or audio of the recording; if the quality of the recording is poor, this may be a reason for a judge to rule it inadmissible. As the comment above notes, another practical problem may arise in obtaining appropriate equipment to play the recording in court. Despite these difficulties, it is now a common practice of police in Canada to video-record interviews with child victims, and these recordings are often a significant part of the prosecution's case.

CHILDREN'S HEARSAY

As a general rule of Canadian evidence law, the previous out-of-court statements of a witness or victim are not to be the subject of testimony in court. In regard to statements by a child who is not called as a witness, any statements made by the child to others would normally be regarded as hearsay and therefore inadmissible. Although the general rules about the exclusion of previous consistent statements and hearsay are basically sound, they can be problematic when applied to cases involving children who are victims of abuse. Not infrequently in child abuse cases, the initial disclosures of abuse by the child to a parent or another trusted person are graphic and highly revealing. Conversely, if the accused argues that a child has been subject to improper coaching or interviewing to make the allegations, inquiry into the circumstances in which the allegations were first made can be vitally important. As a result of these types of concerns Canadian judges have significantly liberalised the rules about admitting this type of evidence, making changes to the common law that in some other countries have been achieved by legislative reforms.⁸⁸

In its 1990 decision in *R v Khan*, the Supreme Court of Canada ruled that a mother could testify about a statement made to her by her then 3-year-old daughter about 15 minutes after an alleged sexual assault by a doctor, even though the child was ruled incompetent to testify at the trial and these statements were hearsay. The Supreme Court accepted that the statement was admissible, establishing a broad and principled approach to the admissibility of this type of hearsay statement. Justice McLachlin observed that there is a 'need for increased flexibility in the interpretation of the hearsay rule to permit the admission in evidence of statements made by children to others about sexual abuse', and ruled that hearsay statements are admissible if they meet the test of 'necessity and reliability':

'Necessity for these purposes must be interpreted as "reasonably necessary." The inadmissibility of the child's evidence might be one basis for a finding of necessity. But sound evidence based on psychological assessments that testimony in court might be traumatic for the child or harm the child might also serve ...

The next question should be whether the evidence is reliable. Many considerations such as timing, demeanour, the personality of the child, the intelligence and understanding of the child, and the absence of any reason to

⁸⁸ K.M. Gregoire, 'A Survey of International Hearsay Exceptions in Child Sex Abuse Cases: Balancing the Equities in Search of a More Pragmatic Rule' (2002) 17 *Connecticut Journal of International Law* 361.

expect fabrication in the statement may be relevant on the issue of reliability. I would not wish to draw up a strict list of considerations for reliability, nor to suggest that certain categories of evidence (for example the evidence of young children on sexual encounters) should be always regarded as reliable.⁸⁹

Since *Khan* a significant body of jurisprudence has developed on the admissibility of children's out-of-court statements in criminal trials. This type of hearsay evidence is admitted not just for the purposes of supporting the credibility of a child who testifies, but also for the 'truth of its contents'.

Canadian courts are prepared to enter convictions on the basis of a child's hearsay statements about abuse, even if the child does not testify. For example, in its brief 1993 decision, *R v JP*,⁹⁰ the Supreme Court of Canada applied *Khan* to uphold the conviction of a man charged with sexually abusing his daughter, aged 2 years at the time of the alleged offense, and 3½ years at the time of the trial. The child was not called as a witness, but her mother testified about her disclosures of abuse. The Supreme Court affirmed lower court rulings that, given the child's young age, the 'necessity' requirement was satisfied without the Crown adducing expert or other evidence about her incapacity to testify. The 'reliability' was established by the fact that so young a child would not normally fabricate a story showing knowledge of sexual activity unless she were abused. The allegations were corroborated by medical evidence, but the hearsay statement was critical to link the accused with the abuse. Generally, the court must hold a *voir dire*⁹¹ into the admissibility of this type of hearsay evidence before it is admitted, with the onus on the party seeking to have the evidence admitted, invariably the Crown, to satisfy the court of the 'necessity' to do so and the 'reliability' of the statement.

Consistent with McLachlin J's statement in *Khan*, 'necessity' has been interpreted to mean 'reasonably necessary' and 'must be given a flexible definition, capable of encompassing diverse situations'.⁹² Necessity is established if the child has tried to testify and has been ruled to be not 'testimonial competent' under the test of the Canada Evidence Act. However, it is not essential that the judge hear from the child, and in cases of children who were 3 years of age judges have taken 'judicial notice' of the fact that they are too young to testify.⁹³ With children age 4 or older, it is not sufficient for the Crown merely to decide not to call the child as a witness; rather, the 'necessity' should be established at the *voir dire*. Necessity as a result of testimonial incompetence might, for example, be established by testimony from a psychologist who has interviewed the child and can testify that the child does not have sufficient ability to understand and respond to questions in court. Necessity may also be established if it is shown the child will suffer emotional trauma from testifying. In considering the issue of 'emotional trauma' as a ground for 'necessity', as observed by McLachlin J in the Supreme Court of Canada in *R v Rockey*, the test is not one of proving actual psychological injury from testifying:

⁸⁹ [1990] 2 S.C.R. 531, at paras [29]–[30].

⁹⁰ [1993] 1 S.C.R. 469, aff'g 13 C.R. (4th) 79 (Que. C.A.).

⁹¹ The failure to hold a *voir dire* is not an automatic ground for a new trial if the appeal court concludes that the hearsay statement would have been ruled admissible if a *voir dire* had been held: *R v Rockey* [1996] 3 S.C.R. 829.

⁹² *R v Smith* [1992] 2 S.C.R. 915, at p 933.

⁹³ *R v Peterson* (1996) 27 O.R. (3d) 739 (C.A.), leave to appeal to S.C.C. denied, [1996] S.C.C.A No. 202; *R v F (RG)* [1997] A.J. 409 (C.A.).

'Mere discomfort is insufficient to establish necessity. But where there is evidence, as here, that an already traumatized child might be further traumatized by being questioned by strange men in a strange situation, that suffices. The Court is not required to wait for proof of actual harm to the child.'⁹⁴

When assessing the issues of emotional trauma and ability to communicate, the judge should take account of whether testifying from behind a screen or by closed circuit television would permit the child to testify.

In its 1999 decision in *R v F (WJ)*, the Supreme Court of Canada again displayed sensitivity to child witnesses in applying the concept of 'necessity'. The child was 5 years old at the time of the alleged sexual assaults, and 6½ years when called as a witness. At the competence inquiry she had considerable difficulty in communicating her evidence. To over 100 questions during the competence inquiry, the child gave no response, or only nodded or shook her head, or gave a hand gesture response. The trial judge ruled her competent to testify. When asked simple questions about her family or school, the child only answered in single words or simple phrases, and became totally silent in response to questions about the alleged assault. The child was excused from the witness stand and the Crown then tried to have the child's out-of-court statements to various persons admitted. The trial judge ruled that 'necessity' had not been established since there was no expert evidence to establish that the child was 'unable' to testify. The Crown presented no further evidence and the case against the accused was dismissed.

In ordering a new trial, the majority of the Supreme Court ruled that the trial judge erred in not admitting the hearsay evidence. Justice McLachlin recognised that the child was 'paralyzed by the court proceedings'. The child was emotionally overwhelmed by being in a large, unfamiliar room with 'imposing and intimidating strangers' and being asked questions about 'upsetting and highly personal events'; in this setting, some children will 'find themselves unable to respond [to questions] in any meaningful way'.⁹⁵ Testimony from a mental health professional to explain the child's inability to testify may be desirable, but it is not essential. The Supreme Court accepted that where it is 'self evident or evident from the proceedings' that a child cannot give her 'evidence in a meaningful way' the necessity for admission of a child's out-of-court statements is established.⁹⁶

In order for a child's hearsay statement to be admitted, it must also be found to be 'reliable'. The test of reliability is a 'threshold' test that establishes 'a circumstantial guarantee of trustworthiness'; to be admissible it is not necessary to establish 'ultimate or certain reliability', which can only be done at the end of the trial. An explicit hearsay statement of a young child about sexual abuse is generally considered sufficiently reliable to be admitted into evidence, because young children do not ordinarily have knowledge about sexual matters and hence are unlikely to fabricate allegations on their own.⁹⁷ However, if, for example, there is evidence that a girl engaged in sexual activities with an older brother and that she tended to lie to deny that such activity took place between them, a statement to her foster mother about alleged sexual abuse by

⁹⁴ [1996] 3 S.C.R. 829, at para [28].

⁹⁵ [1999] 3 S.C.R. 569, at para [43].

⁹⁶ [1999] 3 S.C.R. 569, at para [41].

⁹⁷ *R v Khan* [1990] 2 S.C.R. 531, at para [21] (S.C.C.).

her father is 'consistent with the hypothesis that she was protecting' her brother as it is with her having been sexually abused by her father, and hence unreliable hearsay and inadmissible.⁹⁸

CHILDREN'S PREVIOUS CONSISTENT STATEMENTS WHEN THE CHILD IS A WITNESS

Prior statements made by a witness consistent with the testimony offered in court are generally not admissible in Canada, as they are considered 'irrelevant and self-serving', but a more flexible approach has been taken by some courts to disclosures of child sexual abuse, if the statements are 'reasonably necessary in order to put a full and frank version' of the events before the court. If a child 'recants' an allegation of abuse, there is more scope for the admission of a previous inconsistent statement, one implicating the accused.

In cases where a child testifies against the accused, for example, describing an alleged assault, the dominant Canadian approach is that 'prior consistent statements', for instance the initial disclosure of abuse, are inadmissible. As discussed above, an important statutory exception is found in section 715.1 of the Criminal Code; a video-recorded interview, which is a highly reliable record, may be admitted if a child adopts the contents while testifying.

The dominant, narrow approach to the admissibility of oral testimony about a child's disclosure in cases where the child is a witness is illustrated by the Ontario Court of Appeal decision in *R v Fair*.⁹⁹ A 16-year-old girl testified about a series of sexual assaults allegedly committed by her mother's then partner over a 3 year period, starting when she was 9 years old. Both the child and her mother were also subjected to physical abuse by the man. An important issue in the Court of Appeal was whether the girl and other witnesses could testify about various statements that the girl made to her family, a friend, a teacher and a counsellor, in which she incrementally disclosed first the physical abuse and then the sexual abuse. Justice Finlayson ruled that evidence about disclosures of abuse should only be admissible as 'prior consistent statements' if: there were suggestions by the defence of recent fabrication, and the statements were made essentially contemporaneously with the alleged abuse and explaining the nature of the acts done (*res gestae*); or as narrative, if this is 'essential' so that the trier of fact will be in a position to understand what happened and how the matter came to the attention of the proper authorities. Even if admitted under one of these exceptions, the use of these statements is limited:

'The fact that the statements were made is admissible to assist the jury as to the sequence of events from the alleged offence to the prosecution so that they can understand the conduct of the complainant and assess her truthfulness. However, the jury must be instructed that they are not to look to the content of the statements as proof that a crime has been committed.'¹⁰⁰

While the approach of the Ontario Court of Appeal in *Fair* to the exclusion of previous consistent statements, and their limited use if admitted, is dominant in Canadian jurisprudence, some courts have taken a broader approach in cases involving children's disclosures of sexual abuse. A more flexible approach was adopted by the Manitoba Court of Appeal in its decision in *R v B (DC)*, which specifically addressed

⁹⁸ *R v DR* [1996] 2 S.C.R. 291, at para [35], per Major J.

⁹⁹ (1993) 16 O.R. (3d) 1 (Ont. C.A.).

¹⁰⁰ *Ibid*, at paras [20]–[21].

the context of child abuse cases.¹⁰¹ At issue was the admissibility of statements made by three girls, aged 9 and 10, to a school counsellor about sexual abuse by a man who was father to two of them and the stepfather of the third child. The statements were made after the counsellor interviewed one of the girls following an assault in the schoolyard by another child, which led to the initial disclosure. The Manitoba Court of Appeal upheld the trial judge's decision to admit the counsellor's testimony about the disclosures as support for the girls' allegations, even though the girls all testified and the admission of the statements might be precluded by the traditional rules about the exclusion of 'prior consistent statements'. The court recognised the value of psychological research for determining how to shape this area of common law:

'... the narrowly defined narrative exception to the rule against prior consistent statements is not an appropriate way to accommodate the special requirements of the evidence of young children in the criminal process . . . there is significant social science research that puts in doubt, in the case of child witnesses, the assumption that oral courtroom testimony is the best evidence. Studies have shown that a child's memory of an event is particularly fragile; and that the stress and trauma of repeated questioning, and the intimidating and often hostile courtroom environment, may seriously impair a child's ability to recount accurately the details of past events which the child may not even understand.'¹⁰²

Though limiting the use of the out-of-court statements to supporting the child's credibility, the court adopted a more realistic, contextual approach to children's out-of-court disclosures than that of the traditional approach. Although not all of the statements that the child makes out of court should be received, the initial and often graphic disclosures should be considered by the court. While this broader approach has much to commend it, and is occasionally followed, most Canadian jurisprudence follows the narrower traditional approach and excludes this type of evidence.¹⁰³

THE RECANTING CHILD WITNESS: PREVIOUS INCONSISTENT STATEMENTS

The reported case law and social science research on child abuse reveal that it is not unusual for abused children to recant allegations of abuse at some point in the time between initial disclosure and trial. In cases involving abuse by a parent or step-parent, a child may face enormous pressure from family members to retract the allegation, even if it is true. The courts have demonstrated increased sensitivity in the understanding of the evidence of these children, who may deny that abuse occurred because of feelings of fear, guilt or shame, or because of the pressure of family members. It is now possible, even if the child testifies that the abuse did not occur, for the court to convict the accused making use of the child's prior statements incriminating the accused, provided there is sufficient assurance of the reliability of the earlier statement.

¹⁰¹ (1994), 91 C.C.C. (3d) 357 (Man. C.A.).

¹⁰² (1994), 91 C.C.C. (3d) 357 (Man. C.A.), at 369.

¹⁰³ For a case adopting the approach of the Manitoba Court of Appeal, see *R v RWC* [2001] P.E.I.J. 14 (S.C.T.D.). Most courts have rejected this approach; see, eg *R v B (O)* (1995) 146 N.S.R. (2d) 265 (C.A.).

With adult witnesses who are recanting their previous statements at trial, Canadian courts generally impose a 'KGB requirement'¹⁰⁴ if the previous statement is to be admitted for the truth of its contents; the previous statement will only be admissible if the police conducting the interview had the witness make the statement under oath or a promise to tell the truth, and provided an explicit warning of the possibility of the legal consequences of making a false statement. More recently, however, especially in cases involving children who have recanted their allegations, it has been accepted that the critical question is the 'reliability' of the prior statement, and that there may be sufficient assurance of 'threshold reliability' arising from the circumstances that the statement may be admissible even if not made under oath or promise to tell the truth.

In *R v TR*,¹⁰⁵ the Ontario Court of Appeal ruled that although at trial, a 12-year-old girl recanted the allegations of sexual abuse that she made against her father in a video-recorded statement, and consequently had not 'adopted' the contents of the videotape under section 715.1 of the Code, the trial judge had not erred in finding that the statement met the reliability standard for admissibility under the common law test of *R v Khan*. While the complainant's recantation at trial was supported by further contradictory evidence, the appeal court ruled that the trial judge was correct in not considering the contradictory evidence within the framework of threshold reliability. The circumstances surrounding the recording of the statement suggested that while the statement was not made under oath, the child understood the importance of telling the truth, and did so. In addition, the ability of the defence to cross-examine the child at trial also supported the admission of the hearsay evidence. The Court of Appeal held that the contradictory recantation evidence did not render the video-recorded statement inadmissible under *Khan*, but related to the 'ultimate assessment of the actual probative of the evidence'. The recording was admissible for the truth of its contents, and could be the basis for a conviction.

CONCLUSION: REFORMING THE CRIMINAL JUSTICE SYSTEM TO ACCOMMODATE CHILDREN

The criminal justice system is not only concerned with ascertaining the truth but also with fairness and protection of the constitutional rights of the accused. There is a burden on the state to prove the guilt of an accused beyond a reasonable doubt, and inevitably there will be some true allegations of child abuse that cannot be proven in court. Further, while most disclosures of child abuse are true, there are also a relatively small number of unfounded allegations; a child may be mistaken about what occurred, have identified the wrong perpetrator, or have been induced by inappropriate questioning into making a false allegation; more rarely, children may fabricate allegations on their own.¹⁰⁶

The role of the criminal justice system, starting with the police investigation and ending in court, is to balance the rights of the accused with the desire to ascertain the truth. Over the past quarter century, there have been substantial increases in understanding of the capacities and needs of child witnesses and victims of child abuse, which have led to dramatic improvements in how the Canadian justice system

¹⁰⁴ The 'KGB requirement' for the admission of previous inconsistent statements and their use for establishing the truth of their contents (and not merely impeaching the credibility of the witness) was established by the Supreme Court of Canada in *R v KGB* [1993] 1 S.C.R. 740 (QL).

¹⁰⁴ The onus is on the Crown to establish reliability of the prior statement on balance of probabilities.

¹⁰⁵ (2007) 85 O.R. (3d) 481 (C.A.).

¹⁰⁶ N. Bala, M. Mitnick, N. Trocmé and C. Houston, 'Sexual Abuse Allegations and Parental Separation: Smokescreen or Fire?' (2007) 13 *Journal of Family Studies* 1.

treats children. Further, in many locales, programmes have been established to provide support for children and other vulnerable witnesses involved in the justice system. There remain, however, significant concerns with how children are treated in the courts.

Police, prosecutors and judges generally have a much better understanding of how to treat child victims and witnesses than 25 years ago, but there is still a need for more training and education for professionals in the justice system about child-related issues.¹⁰⁷ There are serious questions about whether the long-term welfare of a child should be compromised to obtain a conviction of an abuser; at the very least, child victims who testify should get all of the protections and support to which they are now entitled. There is a clear need for more resources to provide adequate services for child witnesses; such services include maintaining prosecutorial continuity in the carriage of cases and resolving cases within a reasonable time frame. Delay in the resolution of cases in the justice system may increase a child's emotional trauma, and result in a child's memory fading and being a less effective witness.¹⁰⁸ While the technology and access to equipment for video-recording of investigative interviews and closed circuit television for child witnesses have significantly improved, there are many locales where this type of equipment is not accessible, or there is a lack of adequate training in its use. In too many places there are long waiting lists for therapeutic services for victims of child abuse.

There are also areas in which legislative reform is still needed. For example, while the common law rules governing the admission of a child's disclosures of abuse have been significantly improved, there are still many cases in which the trier of fact may not hear evidence of the child's initial, often graphic, disclosures of abuse, and the court is left to hear only the statements that the child is able to make in court, months or even years after the events in question. Canada should follow the lead of many American states by enacting legislation to provide that in abuse cases involving child victims, out-of-court disclosures are admissible if they are 'reliable', whether or not the child is a witness.

Legal changes have both reflected and contributed to a better understanding of the nature and effects of child abuse; Canadian society now deals more effectively with this devastating problem. We must, however, continue to reform the justice system to find a better balance between the rights of the accused and the interests of children and society. Further improvements will require consideration of experiences in other countries,¹⁰⁹ as well as more empirical research in Canada about the experiences of children in court and the long-term effects of involvement in the justice system.

¹⁰⁷ There has been a major effort over the past two decades to educate and train judges, prosecutors and police to deal with cases involving child witnesses. The National Judicial Institute has worked with judges and academics to design and deliver many educational programs for judges that have dealt with child witness issues, and provides print and electronic resources for judges, including an Electronic Bench Book on Child Witnesses that judges can access while sitting on cases.

¹⁰⁸ See J.A. Quas et al, 'Childhood Sexual Assault Victims: Long-term Outcomes After Testifying in Criminal Court' (2005) 70 *Monographs of the Society for Research in Child Development* 1.

¹⁰⁹ England has undertaken a number of reforms, and proposed others, that are worthy of careful study in Canada and elsewhere; see, eg M. Hall, 'Giving Evidence at Age 4: Just Means to Just Ends' [2009] *Fam Law* 608.