

# Evidence Outside of the Courtroom Protecting Vulnerable Complainants

---

Elizabeth BENNETT\*

**I. CLOSED-CIRCUIT TELEVISION** ..... 96

**II. PROCEDURE** ..... 98

**III. CONSTITUTIONALITY** ..... 100

**IV. THE PRIOR INCONSISTENT STATEMENT** ..... 101

**IV. FUTURE** ..... 103

---

\* Advocate, Peck Tammen Bennett, Vancouver, British Columbia. Prepared in Conjunction with Michelle Fuerst, Advocate, Gold & Fuerst, Toronto, Ontario.

Much concern has been expressed in recent years about the method of introduction and the admissibility of evidence from child complainants in sexual assault crimes. Until recently, judges and lawyers held the view that children could not distinguish between fact and fantasy and were likely to invent false allegations of sexual assault:

*Modern psychiatrists have amply studied the behaviour of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by temporary psychological or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offences by men.<sup>1</sup>*

The Badgley Report<sup>2</sup> was commissioned to examine the problems in the justice system relating to these offenses, and make recommendations for change.

The Badgley Commission extensively reviewed the law, and the workings of the justice system, both nationally and internationally, and produced a lengthy study with many progressive suggestions for change. The thrust of the report was that the current law did not protect children who were victims of sexual assault.

As a result of this Commission, Bill C-15 was enacted, and came into force on January 1, 1988.<sup>3</sup>

The amendments were aimed at achieving the following :

- 1) providing better protection to child sexual abuse victims and witnesses;
- 2) enhancing successful prosecutions of child sexual abuse cases;
- 3) improving the experience of the child victim/witness;
- 4) bringing sentencing in line with the severity of the offence.<sup>4</sup>

In addition to creating new offenses, increasing sentences and revamping the old offenses, the Bill also introduced significant changes in the way the evidence of child witnesses could be admitted at trial. One of the changes permits the child to testify via closed-circuit television.

---

1. J.H. Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 3d ed., vol. 3 (Boston: Little Brown, 1940) para. 924a.

2. Canada, *Sexual Offenses Against Children: Report of the Committee on Sexual Offenses Against Children and Youths* (Ottawa: Queen's Printer, 1984) (Chairs, R.F. Badgley & P. Fraser).

3. *An Act to Amend the Criminal Code and the Canada Evidence Act*, R.S.C. 1985 3d Supp., c. 19.

4. Paper prepared by H. McCormick, Department of Justice, "Policy Issues Relating to Bill C-15 Research and Parliamentary Review".

## I. CLOSED-CIRCUIT TELEVISION

The research the Department of Justice relied on when preparing Bill C-15 indicated that many children were traumatized by the idea of going to court and by the actual court appearance. Children suffered difficulties such as behavioral problems at home and school, difficulty with concentration, depression, anxiety, sleeplessness and health problems.

There were particular worries about strangers in the courtroom, facing the alleged offender, a fear of re-victimization and cross-examination, to name a few. Extreme anxiety has an effect upon the ability of the child to accurately recount the events he or she is describing for the court. Indeed, in the judgment in *R. v. Levogiannis*,<sup>5</sup> the Court referred to several studies, including one prepared by the London Family Court Clinic (Ontario) entitled "Reducing the System Induced Trauma for Child Sexual Abuse Victims Through Court Preparation, Assessment and Follow-Up,"<sup>6</sup> and quotes from the report:

*The children who did have the benefit of the screen were assisted greatly in giving their evidence in court. All screen recipients were fearful of the accused, and felt unable to tell their story in court because of their anxieties and fears for their personal safety, as well as due to their great uncomfortableness at facing the accused.*

*Younger children seemed to experience the screen as providing a physical barrier between themselves and the accused which made them feel safe. Older children described not having to worry about making eye contact and being drawn to look at the accused out of fear.<sup>7</sup>*

In response to these concerns, Bill C-15 introduced what is now section 486(2.1):

*(2.1) Notwithstanding section 650, where an accused is charged with an offence under section 151, 152, 153, 155 or 159, subsection 160(2) or (3), or section 170, 171, 172, 173, 271, 272 or 273 and the complainant is, at the time of the trial or preliminary inquiry, under the age of eighteen years or is able to communicate evidence but may have difficulty doing so by reason of a mental or physical disability, the presiding judge or justice, as the case may be, may order that the complainant testify outside the court room or behind a screen or other device that would allow the complainant not to see the accused, if the judge or justice is of the opinion that the exclusion is necessary to obtain a full and candid account of the acts complained of from the complainant.*

---

5. *R. v. Levogiannis* (1994), 85 C.C.C. (3d) 327 (S.C.C.).

6. London Family Court Clinic (Ontario), "Reducing the System Induced Trauma for Child Sexual Abuse Victims Through Court Preparation, Assessment and Follow-Up" (January 1991) at 107 and 334.

7. *Supra* note 5 at 334.

*(2.2) A complainant shall not testify outside the court room pursuant to subsection (2.1) unless arrangements are made for the accused, the judge or justice and the jury to watch the testimony of the complainant by means of closed-circuit television or otherwise and the accused is permitted to communicate with counsel while watching the testimony.*

Section 650, which this section overrides, requires the accused to be present in the courtroom during proceedings, absent some extraordinary incident or reason for his or her absence. All of the offenses covered in section 486(2.1) are sexual offenses. There was no similar provision in the *Criminal Code* prior to the enactment of Bill C-15.

The section permits a child witness, who meets certain preconditions, to testify outside of the courtroom and not in the presence of the accused. This seemingly novel approach was first condoned in *R. v. Smellie*, when the appellant's daughter was permitted to testify out of his sight, as he was charged with beating her. Lord Coleridge stated:

*If the judge considers that the presence of the prisoner will intimidate a witness there is nothing to prevent him from securing the ends of justice by removing the former from the presence of the latter.*<sup>8</sup>

Not every child will be permitted to testify outside of the courtroom. There are a number of preconditions that must be met before a judge will exercise his or her discretion and make such an order. The preconditions are:

- The accused must be charged with one of the enumerated offenses, which includes sexual assault, sexual exploitation, sexual touching and invitation to sexual touching.
- The complainant must be under the age of eighteen years at the time of the trial or the preliminary inquiry.
- It may only be ordered with respect to the complainant and not with any other child witness.
- The exclusion of the complainant is necessary to obtain a full and candid account of the acts complained of from the complainant.
- The accused, judge and jury must be able to watch the testimony of the complainant.
- The accused is able to communicate with his or her lawyer while watching the testimony.

---

8. *R. v. Smellie* (1919), 14 C.A.R. 128 at 130.

## II. PROCEDURE

There is no procedure for an application for closed-circuit television set out in the *Criminal Code*. The Crown must establish that the closed-circuit television (or screen) is necessary to obtain a "full and candid account" of the complainant's evidence. The judge is required to determine if the alternate method of testifying is necessary. There must be evidence to support the opinion. In *R. v. Levogiannis*,<sup>9</sup> the Crown called a psychologist who testified that the child was fearful of the accused and feared for his own safety.

In *R. v. Levogiannis*,<sup>10</sup> the Court stressed that section 486 (2.1) does not require that "exceptional and inordinate stress be caused to the child complainant". The court has substantial latitude in deciding whether to permit a complainant to testify with a screen. The court has not considered the validity of closed-circuit television. The evidence called to establish the preconditions under section 486 (2.1) does not have to take any particular form. The trial judge may consider, but is not limited to, the capabilities and demeanour of the child, the nature of the allegations and the circumstances of the case. A general reluctance to testify is not enough to form an opinion that a special measure is necessary to obtain a full and candid account of the event.<sup>11</sup>

Witnesses called thus far in various Canadian cases have included the child's parents, social workers, play therapists, child psychologists, the Crown attorney, a pediatrician and a police officer. However in *R. v. R.(M.E.)*<sup>12</sup> Crown counsel outlined to the trial judge the reasons for requesting that the complainant testify via closed-circuit television.

The appropriate procedure, generally, is to hear evidence on a *voir dire* before ruling on the application. In *R. v. H.(B.C.)*<sup>13</sup> the Court stated that the trial judge is "entitled to hold a *voir dire* to ascertain the facts on which his opinion will be formed". Also in this decision, the Court held that non-experts should not be expressing an opinion as to whether the complainant's exclusion is necessary to obtain a full and candid account of the allegations. The Crown had adduced opinion evidence from a police officer, a social worker and the complainant's mother, none of whom were qualified as expert witnesses.

The following procedure was used in *R. v. Dick*<sup>14</sup> for the set up of the closed-circuit television<sup>15</sup> to permit the child to give evidence during the trial, but in another room, outside the view of the accused:

---

9. *R. v. Levogiannis* (1991), 62 C.C.C. (3d) 59 (Ont. C.A.), approved by S.C.C., *supra* note 5.

10. *Supra* note 5 at 340.

11. *R. v. M.(P.)* (1990), 1 O.R. (3d) 341 (C.A.).

12. *R. v. R.(M.E.)* (1989), 49 C.C.C. (3d) 475 (N.S.S.C.).

13. *R. v. H.(B.C.)* (1990), 58 C.C.C. (3d) 16 at 23 (Man. C.A.).

14. *R. v. Dick* (March 1989), Vancouver Registry CC880097 (B.C.S.C.).

15. W. Harvey & P. Dauns, *Sexual Offenses Against Children and the Criminal Process* (Canada: Butterworths, 1993) at 135.

- The persons present in the courtroom with the child included one counsel for the Crown, the other counsel staying in the courtroom; one counsel for the defence, the other counsel staying in the courtroom; the mother of the child who remained neutral throughout and the court reporter.
- The camera showed every person in the room except the court reporter.
- There was no need for telephone lines because there were two counsel for the Crown and defence, and so the accused was able to give instructions to her counsel, who remained in the courtroom.
- There was a video camera and a monitor in the room with the child and on the monitor the child was able to see the face of the judge.
- There was no videotape recording made of the proceedings.

There were two colour monitors situated in the courtroom, one for the benefit of the judge and the other for the benefit of the remainder of the courtroom, including the jury. The judge spoke to the child through the monitor and, after the child was qualified to swear on the Bible, the court clerk came into the interview room and had the child swear an oath.

Harvey and Dauns make the following suggestion for Crown counsel intending to make an application to have a child testify via closed-circuit television:

- Have the devices available in advance;
- Set up the courtroom in advance to test the device and dismantle in part before the jury enters. Show the set up to defense counsel in advance, and attempt to reach a consensus on its acceptability;
- Make the application at the trial's beginning in case time is required for set up;
- If a resistant child forces the use of this approach as a last resort, the jury will need to be excused because the closed-circuit takes at least three hours to set up;
- The equipment needed for closed-circuit includes two cameras, at least three monitors, lengthy cable and microphones. Some device is required to ensure communication between the accused and counsel. All of this equipment is available from video rental stores, most R.C.M.P. or other police special divisions, military stations and training facilities; and
- Have the child try the devices and set up in advance. Make sure the child is audible, visible and can be brought to the stand without seeing the accused. The set up should include an easel, support person chair, coloured felt pens, Bible (optional) and dolls (optional).

A difficulty arises when an accused is unrepresented and the Crown makes application to have the child testify via closed-circuit television. The court may appoint counsel pursuant to section 486 (2.3). However, in *R. v. H.(B.C.)*,<sup>16</sup> the court ordered the accused to put his questions to the witness through an intermediary. The Court of Appeal for Manitoba reversed, finding that the trial judge failed to inquire into whether it was necessary to restrict the cross-examination in this way.

### III. CONSTITUTIONALITY

The constitutional validity of section 486 (2.1) was challenged with respect to the use of a screen in the courtroom.<sup>17</sup> An argument was made that the accused was deprived of his right to a fair trial as he could not face his accuser and his cross-examination was hampered. The Supreme Court of Canada upheld the legislation. Relying on a decision of the U.S. Supreme Court, *Maryland v. Craig*,<sup>18</sup> the Court adopted the following :

[We likewise conclude today that] [a] *State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court.*

In upholding the legislation as constitutionally valid, the Court commented that in no way was the accused's ability to cross-examine the complainant impaired or restricted. Although it appears much of the reasoning in the judgment applies to both screens and closed-circuit television, there is a window left open to argue that the closed-circuit television is too far removed to enable the accused to make full answer and defence.<sup>19</sup>

The accused also argued that his right to a fair trial was violated because the jury might draw an inference adverse to the accused because the child was testifying behind a screen. The Court finds that with a proper charge to the jury that the purpose is to protect a child from a stressful situation, and that they are to draw no inference from the presence of the screen with respect to the guilt of the accused, will adequately answer this concern.

The decision of the Supreme Court of Canada comes as no surprise when considering other recent decisions of that Court which recognized that the child witness was not necessarily an untruthful witness, and that children need to be treated somewhat differently when giving evidence in court, particularly when someone they know and love has abused them. The law is developing in a way that removes barriers and impediments to ascertaining the truth. The thrust of the decisions is that courts should be searching for

---

16. *Supra* note 13.

17. *Supra* note 5.

18. *Maryland v. Craig*, 110 S. Ct. 3157 at 3159 (1990).

19. See also *R. v. L.(D.O.)* (1993), 85 C.C.C. (3d) 289 (S.C.C.).

the truth.<sup>20</sup> These cases have changed the rules relating to hearsay evidence, videotaped evidence and the use of out of court statements to ensure relative and probative evidence comes before the court in the ultimate search for truth. Some commentators have expressed the opinion that the search for truth is occurring at the expense of the right to a fair trial of the accused. The Supreme Court did not hold this view and found, in *R. v. Levogiannis*, that:

*Parliament has devised s. 486(2.1) in such a way as to properly balance the goal of ascertaining the truth and the protection of children as well as the rights of accused to a fair trial by allowing cross-examination and by tailoring the use of screens to the complainants' age and confining their use to limited and specific types of crimes. Furthermore, s. 486(2.1) of the Criminal Code preserves the discretion of the trial judge to permit such use only when the "exclusion is necessary to obtain a full and candid account of the acts complained of from the complainant". Since there was no infringement of the principles of fundamental justice nor of the right to be presumed innocent or to a fair trial, s. 486(2.1) of the Criminal Code is constitutional.*<sup>21</sup>

#### IV. THE PRIOR INCONSISTENT STATEMENT

What can the Crown do if the child recants the statement prior to trial? The experts say that this is not an uncommon occurrence, due to family pressure, a fear of breaking up the family and a fear of sending a parent or other loved one to prison. The Supreme Court of Canada opened the door in *R. v. B.(K.G.)*. In this decision, the Supreme Court of Canada changed the orthodox rule relating to the admissibility of a prior inconsistent statement from a witness, other than the accused. The case involved a homicide, where the Crown witnesses retracted statements given to the police. The Court held that, if certain conditions determined in a *voir dire* were met, a prior inconsistent statement may be admissible at trial for the truth of its content.

The criteria that must be met before a prior inconsistent statement is admissible is as follows:

- The evidence contained in the prior statement must be otherwise admissible, that is, it must not be subject to any other exclusionary rule of evidence.
- The prior statement must have been made under oath, solemn affirmation, or solemn declaration.

---

20. *Supra* note 5 at 336. See also *R. v. Khan* (1990), 59 C.C.C. (3d) 92 (S.C.C.) *R. v. W.(R.)* (1992), 74 C.C.C. 134; *R. v. B.(G.)* (1990), 56 C.C.C. (3d) 200 *R. v. Marquard* (1994), 85 C.C.C. (3d) 193 *R. v. B.(K.G.)* (1993), 79 C.C.C. (3d) 257.

21. *Supra* note 5 at 342.



- The person taking the statement should have given the person a warning that her statement may be used as evidence at a subsequent trial if she recants and should specifically refer to the possibility of prosecution under sections 137, 139 and 140 of the *Criminal Code*.
- The prior statement should have been videotaped.

While these four criteria will normally be necessary before a prior statement is substantively admissible, the Supreme Court of Canada acknowledges that there may be certain unusual circumstances in which adequate substitutes for the oath or the warning or the videotape may be present.

The procedure to be followed is this. A party who wished to tender the prior inconsistent statement of a witness at trial will ask the trial judge to declare a *voir dire* pursuant to section 9 of the *Canada Evidence Act*.<sup>22</sup> The party will then state its intention in tendering the statement. If the party only wishes to impeach the credibility of the witness, then the *voir dire* and trial proceed as it did under the Orthodox Rule, with the trial judge instructing the jury accordingly. If the party wishes to make substantive use of the statement, however, then there will be a two-stage *voir dire*. During the first stage, the trial judge will determine if the conditions set out in section 9 of the *Canada Evidence Act* have been fulfilled. If they have, then the second state of the *voir dire* will determine whether the four preconditions to substantive use have been satisfied or if adequate substitutes have been established. The burden of proof is on the party tendering the statement on a balance of probabilities. Even if that burden is satisfied, the trial judge will still have discretion to refuse substantive use of the statement if the statement has been improperly obtained by a person in authority. The test for voluntariness would apply. Assuming that the statement has been given to a person in authority, the trial judge must be satisfied on a balance of probabilities that the statement was not the product of any form of coercion. The trial judge is not, however, required to find that the prior statement is in fact reliable and credible. That issue is for the jury to determine, assuming that the trial judge has found on the *voir dire* that the statement is substantively admissible.

Where a statement rule is substantively admissible, following a *voir dire*, the trial judge must instruct the jury that they may take the statement as substantive evidence of its contents, giving the evidence the appropriate weight after taking into account all the circumstances. The trial judge should direct the jury as to those factors which are relevant in assessing the credibility of the prior inconsistent statement.<sup>23</sup>

This is another way evidence of the truth may get before a trier of fact, which was previously excluded.

---

22. *Canada Evidence Act*, R.S.C. 1985, c. C-5.

23. I would like to acknowledge W.F. Ehrcke of the Criminal Appeals office in Vancouver as some of the analysis in *R. v. B.(K.G.)* is from a memorandum prepared by him March 9, 1993.

#### IV. FUTURE

There are indications that the Department of Justice would like to draft legislation that would apply to all child witnesses, regardless if they are complainants or witnesses, provided it could be demonstrated that the witness could not give a "full and candid" account of the event in open court.

The Ontario Law Reform Commission has recommended that all child witnesses should be allowed to testify behind a screen or closed-circuit television. The *Saskatchewan Evidence Act*<sup>24</sup> has been amended to allow any child witness under the age of eighteen to testify behind a screen or a closed-circuit television. The provision is not limited to child victims nor to proceedings involving allegations of sexual assault. British Columbia's legislation is similar, but restricts the provisions to children under the age of nineteen who have been victims of either physical or sexual abuse.

In New South Wales, it is mandatory in criminal proceedings for a child to give evidence by closed-circuit where the child is under ten and is the victim of abuse or sexual assault.

It is difficult to see why this should not be extended to any vulnerable witness who, it can be demonstrated, cannot give a "full and candid account" in open courtroom. If the Supreme Court of Canada continues to emphasize "truth-seeking" as a goal of the courts, then such a provision should serve to advance the search for truth.

---

24. *Saskatchewan Evidence Act*, R.S.S. c. S-16.