Protecting Vulnerable Complainants in Criminal Court: The Use of Videotaping

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In recent years, offenses against children, particularly offenses of a sexual nature, have come to be recognized as a serious societal problem, and prosecutions of these offenses have increased. As a result, children, particularly young children, are appearing in court as witnesses more frequently than ever before. As one member of the judiciary has observed:

> *There is no doubt that as society shows a greater concern for the battered and sexually abused, and moves that concern into the area of criminal responsibility, it is placing more children in the witness box. Not only are more children being witnesses, but frequently their testimony is critical to the determination of guilt or innocence. It is for this reason that the method of dealing with and assessing the credibility of youthful witnesses has troubled jurists, child psychologists, social workers, and legislators.*[1]

Bill C-15, which came into force on January 1, 1988, introduced significant changes to the *Canada Evidence Act* and the *Criminal code*, in order to facilitate the giving of evidence by children in criminal cases, and the prosecution of sexual offenses against children.

I. VIDEOTAPED EVIDENCE: THE ELEMENTS OF SECTION 715.1

Section 715.1 of the *Criminal Code* provides that:

> *In any proceeding relating to an offense under section 151, 152, 153, 155 or 159, subsection 160(2) or (3), or section 180, 171, 172, 173, 271, 272 or 273, in which the complainant was under the age of eighteen years at the time the offense is alleged to have been committed, a videotape made within a reasonable time after the alleged offense, in which the complainant describes the acts complained of, is admissible in evidence if the complainant, while testifying, adopts the contents of the videotape.*

This provision came into effect, along with section 486(2.1), as part of Bill C-15. It has been lauded, on the one hand, as a long overdue mechanism for facilitating the prosecution of child sexual abuse cases,[2] and criticized, on the other, as "a poorly-thought-out response [...] to a legitimate concern".[3]

A. Preconditions

Before an order can be made under section 715.1, a number of preconditions must be met:

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1. *R.* v. *B.(G.) et al*. (1988), 65 Sask. R. 134 at 149, Wakeling J.A. (S.C.A.), aff'd (1990), 56 C.C.C. (3d) 161.
2. N. Bala, "Thompson: Charter Challenge to Videotaped Statements of Children — Two Views" 68 C.R. (3d) 331 at 336.
3. *Ibid.* at 331.

i) the offense must be one of those enumerated in the section;

ii) the complainant must be under the age of 18 years at the time of the commission of the offense;

iii) the provision may be resorted to only in the case of complainants and not other child witnesses;

v) the complainant must describe the acts complained of on the videotape; and

vi) the complainant must adopt the contents of the videotape while testifying.

Once admitted into evidence, the videotaped statement is proof of the truth of its contents: see *R*. v. *Toten*.[4]

B. What is "Within a Reasonable Time"?

The legislation does not attempt to delineate the time frame encompassed by the phrase "within a reasonable time". Rather, the issue has been left to the courts to determine on a case by case basis. In *R*. v. *L.(D.O.)*,[5] L'Heureux-Dubé J. in the majority judgment stated that what is or is not "reasonable" will depend entirely on the circumstances of the case. She asserted that judges should be mindful of the fact that children are apt to delay disclosure. In *R*. v. *B.(K.)*, Power J. adopted the proposition that "within a reasonable time" means such time as is fairly and reasonable involved, having regard to the subject matter and circumstances of the case. He concluded that:

> [In] *determining what is a reasonable time in any given case will involve the assessment of the age of the child, the relationship of the offender to the child, the nature of the sexual abuse, the seriousness of the sexual abuse, the length of time the abuse occurred, frequency of the abuse, and the period of time during which one could reasonably expect the child in question to have accurate recall.*[6]

In that case, a videotape was made within days of the complainant's disclosure of the alleged sexual abuse. There had been, however, a delay of several months in the disclosure of the activity. The trial judge found the delay justifiable and ruled that the videotape was made within a reasonable time after the alleged offense. However, in *R*. v. *Petrus*,[7] a videotape made a year after the alleged events was found not to have been made

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4. *R.* v. *Toten* (1993), 83 C.C.C. (3d) 5 at 22 (Ont. C.A.).

5. *R.* v. *L.(D.O.)* (1994), 85 C.C.C. (3d) 289 (S.C.C.) reversing (1991), 65 C.C.C. (3d) 465 (Man. C.A.) [also cited as *R.* v. *Laramee*].

6. *R.* v. *B.(K.)*, [1990] 10 W.C.B. (2d) 517 (Alta. Q.B.) (1990), 76 Alta. L. Rep. (2d) 129 at 136.

7. *R.* v. *Petrus*, [1994] 21 W.C.B. (2d) 346 (B.C.S.C.).

within a reasonable time. It has been suggested that in cases where there has been a delay in the disclosure of the alleged offense, such that the reasonableness of the time between the commission of the offense and the making of the videotape is in issue, expert evidence could be called to explain that the delay is a function of the sexual abuse.[8]

C. Adoption of the Contents of the Videotape

The section provides that the videotape is admissible in evidence if the complainant adopts the contents of it while testifying. Unfortunately, the legislation does not define the phrase "adopts the contents". It is clear that the complainant must testify, but it is not clear what he/she must say for adoption to occur. For example in *R.* v. *B.(K.)*,[9] it seems the complainant simply stated, after viewing the tape, that what was in the video was true. The first appellate court to consider this issue gave an arguably liberal interpretation to the requirement of adoption. In *R.* v. *Meddoui*[10] the Alberta Court of Appeal stated that the word "adopts" in section 715.1 is capable of several meanings:

> 1. *The witness might adopt the earlier statement in the strongest sense of recalling both it and the events discussed,* and *positively confirming the truth of what the statements say about the events.*
>
> 2. *The witness might adopt the statement in the less strong sense that, whether or not she recalls the events discussed, she does believe them to be true because she recalls giving the statement and her attempt then to be honest and truthful.*
>
> 3. *The witness might adopt that statement in the weak sense that, while she has no present recall of the events discussed, she does believe them to be true because she at least recalls giving the statement and her attempt then to be honest and truthful.*
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> 4. *The witness might adopt the statement in the weakest sense: she admits to having made the statement but will not admit to any attempt to be truthful and, indeed, might deny it.*[11]

The court concluded that the second proposition was the correct meaning of "adopts" for the purpose of this section of the Code. The court reasoned that when a witness can recall both the events discussed on the tape and the taping, the tape adds nothing to the testimony and the witness should simply recount the events, without resort to the videotape.

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8. *Supra* note 2 at 339.
9. See *Toten, supra* note 4.
10. *R.* v. *Meddoui* (1991), 61 C.C.C. (3d) 345.
11. *Ibid.* at 351.

The difficulty with the decision in *Meddoui* is that it appears to sanction the use of the videotape in court even though the complainant is not able to say that he/she recalls the event discussed on the tape, which forms the basis of the charge. In the absence of section 715.1, a child who could not recall the event would have no probative evidence to give. It is not clear whether the intent of the legislation was to remedy this scenario by making the videotape available to overcome the lack of *viva voce* evidence, or whether it was designed to facilitate prosecutions by reducing the amount of time a child would have to spend giving testimony and providing an opportunity for the child to describe the offense in a more relaxed setting which might lead to the giving of a fuller account.[12] It has been suggested that "adopts the contents" means the child "must indicate that the statements on the tape are a substantially accurate description of the events, though presumably in giving testimony the child may add to or qualify the statements on the tape".[13] This implies that the child must have some degree of recollection of the events themselves, as opposed to merely asserting that he/she was telling the truth at the time the tape was made.

The Ontario Court of Appeal rejected the *Meddoui* interpretation of "adopts" in favour of the more traditional meaning in *Toten*.[14] The court concluded that adoption requires that the complainant acknowledges making the videotaped statement and is able, based on a present memory of the events referred to in the videotape, to verify the accuracy and contents of the statement. The trial judge must be satisfied on a *voir dire* that there is a basis upon which the trier of fact could be satisfied these criteria were met.

D. Procedure

Although the section gives no guidance as to the procedure to be followed to obtain a ruling on the admissibility of the videotape, the Supreme Court of Canada has determined in *L.(D.O.)* that a *voir dire* should be held to review the contents of the tape and to ensure that any statements made in it conform to the rules of evidence. The applicable procedure was summarized by one commentator:

> *While section 715.1 does not expressly deal with the procedure to be followed before a videotape is admissible, it is evident that a* voir dire *must be held. At the* voir dire *the Crown bears the burden of proving that the tape was made "within a reasonable time" of the offenses. The issue of delay between the occurrence of the offense and disclosure by the child may be the subject of expert evidence, as children who are victims of abuse are frequently intimidated or afraid to disclose abuse. Everyone involved in the interviewing or production of the videotape should be available for the* voir dire, *and the circumstances in which the tape was made can be fully explored by defence counsel.*

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12. *Ibid.* at 357.

13. *Ibid.* at 359.

14. *Supra* note 4.

> *During the* voir dire *the child must "adopt the contents" of the videotape, which means that the child must indicate that the statements on the tape are a substantially accurate description of the events, though presumably in giving testimony, the child may add to or qualify the statements on the tape. The Crown has the discretion of basing the child's examination in chief solely on the tape or of asking further questions either before or after the tape is admitted.*[15]

In order to be admissible, the videotape must contain a description by the complainant of the acts complained of. As the Ontario Court of Appeal noted in *Toten*, references to other acts or conversations which do not form part of the "acts complained of" are not admissible merely because they are contained in the videotaped statements. However, the complainant is entitled to give his/her version of the events underlying the charge before the court and is not restricted to a description of the bare physical act(s).[16]

Matters such as whether or not the child was "coached" before or during the taping, and whether the child was questioned in a leading or otherwise improper manner, would seem to be appropriately explored on the *voir dire* (in addition to being matters which may go to weight and thus be considered on the trial proper.) In *R.* v. *B.(K.)*, it was held that in considering the admissibility of the videotape, the court "must be satisfied that safeguards are maintained so that the complainant is not induced by leading questions or suggestions by the interviewer before or during the actual preparation of the videotape".[17] However, the court found that it was quite proper for the child to make use of anatomically correct dolls in order to explain the event to the interviewer(s). Similarly in *R.* v. *Kilabuk*,[18] de Weerdt J. commented that "the greatest care will obviously have to be taken in preparing a videotape for use under section 715.1 so as to avoid imputations of coaching the witness through off-camera cues and so forth".[19]

The section applies whether the complainant is sworn or unsworn at trial, see *Meddoui*.[20] It also would seem to apply not only to a trial but also to a preliminary hearing or bail hearing where the complainant testifies, given the wording "in any proceeding relating to an offense".[21]

E. Discretion to Admit

15. *Supra* note 5.

16. *R.* v. *Scott,* [1994] 22 W.C.B. (2d) 109 (Ont. C.A.).

17. Alta L. Rep., *supra* note 6 at 132.

18. *R.* v. *Kilabuk* (1991), 60 C.C.C. (3d) 413 (N.W.T.S.C.).

19. *Ibid.* at 417.

20. *Meddoui, supra* note 10.

21. *Ibid.*

The section provides the videotape "is admissible" in the circumstances there set out. It was held, however, by the Supreme Court of Canada in *L.(D.O.)*[22] that the trial judge has a discretion to edit the tape to remove statements which are in conflict with the rules of evidence, or to refuse to admit the videotape in evidence, if its prejudicial effect outweighs its probative value. In deciding whether or not to exclude a videotaped statement, the trial judge could take into account:

a) the form of questions used by any other person appearing in the videotaped statement;

b) any interest of anyone participating in the making of the statement;

c) the quality of the video and audio reproduction;

d) the presence or absence of inadmissible evidence in the statement;

e) the ability to eliminate inappropriate material by editing the tape;

f) whether other out-of-control statements by the complainant have been entered;

g) whether any visual information in the statement might tend to prejudice the accused (for example, unrelated injuries visible on the victim);

h) whether the prosecution has been allowed to use any other method to facilitate the giving of evidence by the complainant;

i) whether the trial is one by judge alone or by a jury; and

j) the amount of time which has passed since the making of the tape and the present ability of the witness to effectively relate to the events described.

Circumstances where editing or exclusion of the videotape would be appropriate also were canvassed by the Ontario Court of Appeal in *Toten*[23] and *R.* v. *A.(J.F.)*.[24]

Although the section specifies that the tape becomes "admissible", it is doubtful that this means the tape is to be marked as an exhibit which then automatically goes to the jury. That in essence would provide the jury with a recitation of the Crown's case, a practice which was criticized in the context of an accomplice witness's police statement, in *R.* v. *Rowbotham*.[25] In *Kilabuk*,[26] the court suggested that there is no more reason to send

22. *Supra* note 5.

23. *Supra* note 4.

24. *R.* v. *A.(J.F.)* (1993), 82 C.C.C. (3d) 295.

25. *R.* v. *Rowbotham* (1988), 41 C.C.C. (3d) 1 (Ont. C.A.).

26. *Supra* note 18.

the videotape to the jury room once the jury retires to consider its verdict than there is to send a transcript of a witness's examination-in-chief without the corresponding portions of the cross-examination. However, in *Toten*, it was held that the jury properly was permitted to view the videotape in its jury room during deliberations, where it had requested that opportunity.

F. Constitutionality

The Supreme Court of Canada has held in *L.(D.O.)* that section 715.1 does not violate section 7 or section 11(d) of the Charter. The majority judgment reasoned that the section is designed to preserve an early account of a child's complaint to assist in the discovery of truth and to diminish the trauma suffered by child complainants. Strict adherence to rules of evidence is not constitutionally required, nor should the rules be interpreted in a restrictive manner. Moreover, the admission of videotaped evidence does not deny an accused a public hearing, nor does it render the court proceedings unfair.

II. CONCERNS OF THE CROWN

From the perspective of Crown counsel, the use of videotaping is a means of preserving the child's early (and, presumably, best) recollection of events. It has been suggested that a child's memory is prone to fade faster than an adult's, due to developmental and situational changes. In addition, the impact of an assault on a child and the experience of the alien environment of the courtroom may affect recall.[27] However, section 715.1 requires that the Crown produce as a witness a child who is able to attend at and testify in court. It alone will not assist the Crown if the child has left the jurisdiction or is otherwise unavailable to come to court. Perhaps more importantly, it alone will not assist the Crown if the child does not meet the criteria of section 16 of the *Canada Evidence Act*.[28] The child must, at a minimum, be able to communicate the evidence, in order to testify as an unsworn witness upon a promise to tell the truth. As a result of the Supreme Court of Canada's decision in *R.* v. *Marquard*,[29] it is clear that section 16 requires that the child be capable of perceiving, remembering and recounting events, in order to be "able to communicate".[30] This is a higher standard than merely the ability to respond to questions.

Where the child is unavailable, either in fact or testimonially, a videotaped interview of him/her will not be admissible under section 715.1, and likely would not be received under the necessity and reliability "exception" to the hearsay rule which the

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27. A. McGillivray, "R. v. Laramee: Forgetting Children, Forgetting Truth" 6 C.R. (4th) 325 at 338-339.

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

29. *R.* v. *Marquard* (1994), 85 C.C.C. (3d) 193.

30. *Ibid.* at 205.

Supreme Court of Canada identified in *R.* v. *Khan*.[31] While the necessity criterion would be satisfied, it could not be said of a videotaped interview that the child's statement had emerged without prompting, which McLachlin J. pointed to as one of the indicia of reliability in *Khan*. The irony is that a videotape will give a more graphic picture of the child's demeanour, personality and intelligence (all of which McLachlin J. identified in *Khan* as being relevant to the assessment of reliability), than could a third party's description. Section 715.1 is not a solution to the problem of the incompetent or otherwise unavailable child witness.

Moreover, in cases where section 715.1 is relied upon, which the child may spend less time in the witness box than is otherwise the case, he/she is not spared the experience of testifying in court. At a bare minimum, the child will be expected to respond to questions in cross-examination. There are at present no mechanisms by which cross-examination of a child can be controlled, other than the common sense of defence counsel, the ability of Crown counsel to object, and the discretion of the trial judge to prohibit particular questions or conduct. To the extent that the judicial process operates as a "re-victimization" of the child, section 715.1 offers limited protection.

From the perspective of the Crown, it is important that the videotaped session be conducted by an experienced interviewer, in accordance with established procedures, and with the prerequisites of the statutory provision in mind. Section 715.1 provides no guidelines at all as to the making of the videotape. As a result, various jurisdictions have attempted to develop protocols to be followed, in an attempt to avoid problems which will lead to the videotape being ruled inadmissible in court. Suggestive questioning, pre-taping coaching, and selective coverage of the underlying events can each lead to a determination that the tape cannot be admitted into evidence pursuant to section 715.1. Since Crown counsel generally do not oversee the making of the videotape, there is a risk that the ultimate product will be useless for prosecutorial purposes.

It also has been pointed out that a videotaped statement can be a two-edged sword. While it may facilitate the presentation of the evidence of a child complainant, it also may open up areas for cross-examination, if the child's evidence at trial varies from the information disclosed on the tape.[32] The tape can serve as a previous inconsistent statement at the behest of the defence.

Finally, it is worth noting that section 715.1 applies only to children who are complainants, and only in respect of the enumerated offenses. A child who is a primary Crown witness (but not a complainant), or who is a witness in respect of an offense not mentioned in section 715.1, will not derive the benefit of that provision. For example, there may be a persuasive argument that a child witness to a homicide is as equally at risk of memory deterioration, and as equally as deserving of protection, as a child complainant in a case of a sexual touching. Nonetheless, the option of using a videotaped statement on the basis of section 715.1 will not be open to the Crown in such a situation.

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31. *R.* v. *Khan* (1991), 59 C.C.C. (3d) 92.

32. *Supra* note 2 at 337.

III. CONCERNS OF THE DEFENCE

Defence counsel argue that section 715.1 represents a derogation from the rules of evidence. Unlike section 486(2.1), there is no precondition that the videotape be made and/or used in court only where it is "necessary to obtain a full and candid account of the acts complained of" by the child. Rather, a videotape can be made in any circumstances where a child protection worker, police officer or other prosecutorial authority considers it appropriate and, assuming the requirements of section 715.1 are met, will be admissible in court subject only to a probative value/prejudicial effect balancing. Moreover, the videotape is not made in the presence of a judge or other judicial officer, nor is the child required to give his/her videotaped account upon oath/affirmation or a promise to tell the truth. No provision is made for the child to be cross-examined at the time the videotape is created. Thus, some of the basic procedural and evidentiary safeguards of our system of justice are missing from section 715.1.

As noted above, no parameters have been placed upon the phrase "within a reasonable time". Assuming that the provision is intended to provide a mechanism by which the child's recollection can be preserved while it is relatively fresh, it is surprising that no temporal limitation was built into the provision. Arguably, this mechanism was not intended to apply in instances where disclosure has been delayed by months or years. Nonetheless, it is open to the Crown to attempt to resort to videotaped statements in such cases.

The legislation provides no guidance to those making the videotapes as to the procedure to be followed, nor does it impose conditions designed to preserve the integrity of the taping process. For example, the provision seems to extend to a videotape made of a therapeutic (as opposed to an investigative) purpose, without recognition of the fact that the manner in which the child is questioned may vary according to the objectives of the questioners. The provision is silent as to the setting in which the videotape should be made, and as to whether or not third persons such as parents can be present with the child during the taping. No mention is made as to the ability of those overseeing the taping to edit out those portions which they consider to be irrelevant, or even damaging to the child's disclosure. All of these matters have been left to judicial discretion.

Unlike section 486(2.1), which requires that the child be under the age of 18 at the time of the preliminary hearing or trial, section 715.1 is applicable in any instance where the child was under the age of 18 at the time the offense was alleged to have been committed. It is entirely possible that the provision could be invoked in a case where the complainant is in fact an adult at the time of the court proceedings. Moreover, it is peculiar that, pursuant to section 150.1 complainants who are 14 years of age or older can consent to sexual activity yet, pursuant to section 715.1, have resort to videotaping. Arguably, section 715.1 is unjustifiably broad in this respect.

IV. FUTURE DIRECTIONS

The Ontario Law Reform Commission has suggested the videotaping might be resorted to in place of the giving of any *viva voce* evidence. The child would be examined and cross-examined before a judge, but in an informal setting, in advance of trial. It has been suggested that a less formal and more congenial setting would minimize the child's anxiety and improve the quality of his/her testimony. Presumably safeguards such as the administration of an oath/affirmation, or to giving of a promise to tell the truth, would be observed. Once the videotaped "deposition" was completed, the child would be relieved if any further obligations to appear in court.[33] This procedure has been adopted in some U.S. states. It would appear to be in keeping with suggestions that, as an alternative to a preliminary inquiry, an out-of-court examination on oath akin to an examination for discovery should be permitted in appropriate cases.

33. "Report on Child Witnesses". Ontario Law Reform Commission (1991).

CONCLUSION

Legislative amendments such as the enactment of section 715.1 have made the prosecution of offenses against children somewhat easier. However, as the law moves away from traditional notions of the frailties of the evidence of children, it is important to remember that the rules of evidence and procedure play an important role in safeguarding the rights of accused persons. As Galligan J.A. noted in *R.* v. *J.(F.E.):*

> *While there is no scale upon which conflicting evils can be weighed, it should be remembered that revolting as child sexual abuse is, it would be horrible for an innocent person to be convicted of it. For that reason, I think the courts must be vigilant to ensure that the zeal to punish child sexual abusers does not erode the rules which the courts have developed over the centuries to prevent the conviction of the innocent.*[34]

34. *R.* v. *J.(F.E.)* (1990), 53 C.C.C. (3d) 64 at 67.