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# Recent Canadian Developments in the Treatment of Children and Their Evidence in Criminal Sexual Abuse Cases

*Alison Harvison Young\**

## I. INTRODUCTION

In recent years, there has been an explosion of concern about children in society. On the international scene, this has been reflected most notably and recently by the *United Nation Convention on the Rights of the Child*.<sup>1</sup> In many less-developed parts of the world, attention has been focused on the plight of the millions of children who are without the most basic necessities of life such as food or shelter, and those who are relegated to lives of dire poverty and virtual slavery without any care-givers to look out for them at all. While it must be noted at the outset that there are, unfortunately, far too many cases of children suffering as a result of poverty-related ills such as poor housing, malnutrition, and inadequate health and medical care,<sup>2</sup> the explosion in the reporting of child abuse — particularly sexual abuse — has most shocked Canadians in the past few years.<sup>3</sup> By way of illustration:

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1. This convention was issued on May 24, 1990 and has been in force since September 2, 1990. It was signed by Canada on May 28, 1990, and ratified on December 11, 1991.

2. Recently, Canadians have been made more aware of the dire situation of many native peoples living in states of abject poverty, particularly on reserves, many of which are without water, electricity, or other modern amenities, and where indicators of serious social problems such as alcoholism and child abuse abound. Even in Canadian cities like Toronto, however, where housing costs have skyrocketed in recent years, and the gap between rich and poor has widened dramatically, social organizations such as food banks have been warning that there are large numbers of underfed children in Canadian cities.

3. A recent study by Statistics Canada regarding children as victims of violent crimes is evidence of the growing concern for the welfare of our country's children. Among other things, this report found that 41% of child sexual assault is committed by family members and that in 81% of the cases the child knew the assailant. This report also shows that, of the violent crimes committed against children under 11 years of age (other than homicide or infanticide), 78% are of a sexual nature. Sexual assault accounts for 50% and other sexual violations such as sexual interference, invitation to sexual touching, and sexual exploitation account for 28%. Statistics Canada, *Children as Victims of Violent Crime*, JURISTAT SERVICE BULLETIN, catalogue 85-002, vol. 11, no. 8 (Canadian Centre for Justice Statistics).

-A public inquiry was held into a series of allegations by former residents in the Roman Catholic Mount Cashel orphanage in Newfoundland that, as children, they had been sexually and physically abused by lay brothers in the orphanage. There have since been a number of criminal convictions of lay brothers.

-Since the Mount Cashel inquiry, a number of former residents of a similar orphanage near Ottawa made similar complaints, resulting in criminal proceedings.

-In the wake of the 1990 Oka crisis and the focus on native peoples and their concerns, many people have told of abuse and extraordinary mental cruelty while they were students in the residential schools to which all native children used to be sent.

-A highly publicized child protection investigation in Hamilton, Ontario revealed horrible abuses of children repeatedly involved in satanic and cannibalistic rituals.

-A current investigation continues into a suspected child sexual abuse "ring" in the sleepy, picturesque town of Prescott, Ontario on the banks of the St. Lawrence River.

This is by no means an exhaustive list. These are a few of the most publicized instances of a phenomenon that has rocked the complacency of Canadians. Canadians, like others elsewhere, have long denied, minimized, or just ignored the extent to which things like this happen to children. This denial was facilitated and reinforced by the tendency to disbelieve children (along with other vulnerable groups in society) and to discredit their stories. Some of the most heart-rending testimony in the Mount Cashel inquiry came from a witness who told of the time he managed to run away from the orphanage to the nearest police station where he told of the repeated abuse by one particular brother, only to be immediately delivered back to the orphanage, back to the very person he had just named as his abuser. The sheer numbers of people coming forward recently and telling consistent, credible stories of abuse by their care-givers has, at last, convinced main stream Canada that this sort of abuse cannot be peremptorily dismissed as something that children just dream up. In addition, the media has, in the past few years, devoted a considerable amount of attention to the issue. There have, for example, been a number of docu-dramas dealing with the attempts of adults who were abused as children to come to

terms with it.<sup>4</sup> Space simply does not permit an examination of the reasons for these changes in attitude, fascinating as they are, but one cannot leave the point without mentioning a few contributing and related factors. First, the sorts of issues raised by critical legal scholars and feminist scholars are pertinent to children; children have been disempowered members of society and the public/private distinction has often protected, reinforced, and institutionalized the power of the abusive parent while depriving the child of any protection.<sup>5</sup> Second, the Canadian Charter of Rights and Freedoms<sup>6</sup> has contributed to an increased “rights consciousness” in Canada, which in turn may be said to have helped legitimate and promote the notion that children, like some other individuals or groups, may need special protections in order to be “equal” in any meaningful way.<sup>7</sup> This has been reinforced at the international level by the latest Convention on the rights of children, or, more significantly, by the media coverage and discussion generated by it.<sup>8</sup>

But while the community at large has been recognizing the reality of child abuse, and especially sexual abuse, the legal system has been more tentative in establishing mechanisms for encouraging the reporting, detection, and prosecution of abusers.<sup>9</sup> Nevertheless, there have been some significant recent reforms. For example,

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4. An example of a compelling autobiographical account is SYLVIA FRASER, *MY FATHER'S HOUSE: A MEMOIR OF INCEST AND HEALING* (Toronto: Doubleday 1987).

5. See, e.g., Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1 (1986).

6. Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), c. 11 [hereinafter the Charter].

7. Although, this can be counter-productive. Rights discourse tends to produce competing, polarized claims such as fetal rights versus a woman's right to control her own body; parents' rights versus best interests of the child (e.g. in the custody context); a mother's right to mobility versus a father's right to access.

8. Also, in recent years, domestic legislation has been increasingly focused on the rights of children. Article 30 of the Quebec Civil Code, for example, states that in any decision concerning children, the child's interest and the respect of his or her rights must be the determining factors.

9. This article deals only with sexual abuse. Although there is no question that physical abuse may have long term consequences and has been associated with the “circle of abuse” pattern, sexual abuse raises some particularly difficult issues. The most obvious is the fact that in the case of sexual abuse, there is usually no one present other than the victim and the accused, and there is frequently no physical evidence. Thus, the question of the treatment given by the legal system to their stories of abuse is directly and critically raised. It is generally easier in the case of physical abuse to identify abused children (from reports by neighbors, teachers, doctors, etc.) and to come up with physical evidence. Seen from a broader social perspective, one might argue that the problem in physical abuse is not so much the *proof* of it, but the allocation of sufficient social resources to sufficiently protect children when such abuse is suspected or established.

most jurisdictions now have legislated reporting duties imposed at least on professionals such as teachers and doctors, which duties require them to report suspected abuse.<sup>10</sup> Ontario is considering amending its statute of limitations to allow sexual abuse victims to bring actions as adults.<sup>11</sup> In the criminal context, there have been recent reforms that deal both with the substance of sexual offenses<sup>12</sup> and with the evidentiary means by which they can be proved. The Canadian federal evidentiary reforms were set out in Bill C-15 in 1987.<sup>13</sup> All of these are important and long overdue reforms, and all could form the subject of papers in themselves.<sup>14</sup> This article looks at Canada's treatment of child witnesses and of the evidence they give. The network of rules, and their underlying assumptions, can be seen as a microcosm of society's attitudes toward children and child abuse, and thus as symptomatic of the larger issues.

The traditional rules on the testimonial competence of children and the admissibility of hearsay evidence when they cannot testify are important for a few reasons.<sup>15</sup> First, these rules are premised

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10. This is arguably symptomatic of a social and legal retreat from the traditional public/private distinction, which strongly discouraged interference or invasion of the family; "a man's home is his castle." For a thorough review of the obligations of educators to report, see William Foster, *Child Abuse in Schools: The Statutory and Common Law Obligations of Educators*, 4 EDUC. & L.J. 1 (1991).

11. See *Lift Limitations on Sex Lawsuits, Advisers Urge*, THE GLOBE AND MAIL, April 13, 1991, at A7. Under current law, the victim must commence a law suit for sexual assault as a child within four years of his or her 18th birthday. Psychiatrists are now suggesting that children often cope with the trauma of sexual abuse — especially by a parent — by forgetting what happened, and will only be able to remember after years of counselling.

12. S.C. 1987, c. 24. The old provisions prohibited sexual intercourse with a female under the age of 14, but did not address other forms of sexual activity. The new section 151 provides as follows:

Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of 14 years is guilty of an indictable offence and is liable to imprisonment for a term not exceeding ten years or is guilty of an offence punishable on summary conviction.

Section 152 prohibits a person from inciting, counselling, or inviting a person under 14 years from engaging in any of the activity proscribed by section 151. These reforms were based upon recommendations by the Committee on Sexual Offenses Against Children and Youths, *Report on Sexual Offenses Against Children in Canada* (Ottawa: Supply and Services Canada 1984) [hereinafter "*Badgley Report*"].

13. "An Act to Amend the Criminal Code and the Canada Evidence Act," S.C. 1987, c. 24, now R.S.C. 1985, c. 19 (3d Supp.), proclaimed in force in January, 1988 [hereinafter "Bill C-15"].

14. See Foster, *supra* note 10.

15. Time and space will not permit a thorough review of the history of the Canadian rules on the competency of children to testify. For an excellent discussion, see Ronda

upon traditional assumptions about the lack of a child's veracity, which assumptions have been widely attacked.<sup>16</sup> Second, they have operated so as to exclude children's stories of abuse from the legal arena, and to a large extent from public view as well. Third, the legal system's past failure to provide an effective forum for the redress of sexual abuse in most cases has reinforced the public reluctance to believe that sexual abuse of children is a reality, and has thus also fuelled the associated inclination to disbelieve a child who reports such abuse. Finally, these rules, and the attitudes that they reflect, are difficult to reconcile with the claim that children are valued members of society. Although all the recent reforms suggest that these views are under siege, these traditional notions are deeply embedded into our social and legal fabric, and real change is not likely to happen overnight.<sup>17</sup>

Another factor to be remembered is that these evidentiary rules have not developed in a vacuum; rather, they have developed as part of a legal system that, at least in the context of criminal law, insists on a high level of protection for the accused.<sup>18</sup> Although as discussed above the Charter of Rights has contributed to the increased level of awareness about the rights of children, it has also constitutionally entrenched protections of those accused of crimes, or indeed those subject to legal proceedings of any sort. Accordingly, one of the most difficult challenges facing Canadians in the coming years will be the reconciliation of potentially conflicting

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Bessner, *The Competence of the Child Witness: A Critical Analysis of Bill C-15*, 31 CRIM. L.Q. 481 (1988-89).

16. See Nicholas Bala, *Double Victims: Child Sexual Abuse and the Canadian Criminal Justice System*, 15 QUEEN'S L.J. 3 (1990); Heino Lilles, *Children as Witnesses: Some Legal and Psychological Viewpoints*, 5 CANADIAN J. FAM. L. 237 (1986); see also Bessner, *supra* note 15. For a recent summary of the empirical studies, see ONTARIO LAW REFORM COMMISSION, REPORT ON CHILD WITNESSES, 7-18 (1991) (hereinafter "CHILD WITNESSES").

17. Many experts now argue that Freud's fantasy-neurosis theory caused him to underestimate the incidence of child sexual abuse. For an attack on this theory, see J. MOUSSAIEFF MASSON, *THE ASSAULT ON TRUTH: FREUD'S SUPPRESSION OF THE SEDUCTION THEORY* (1984).

18. There are strong arguments to be made that non-criminal proceedings, and particularly protection hearings, do not require the same high level of procedural protection for the suspected perpetrator as do criminal proceedings. In criminal proceedings, the perpetrator risks prison; in protection proceedings, one is seeking a determination that a child is in need of protection in order to justify intervention to protect the child. While some courts seem to have recognized this distinction in practice (for example by relaxing the hearsay rule with respect to videotaped statements by the child in protection cases), the literature has tended not to make this distinction. It is interesting to note that Madam Justice McLachlin, in the course of her reasons in *R. v. Khan*, 2 S.C.R. 531, 79 C.R. (3d) 1 (1990), referred to some cases that had relaxed the hearsay rule without noting that they were protection proceedings rather than criminal cases.

goals: (i) that of providing an increased level of protection for children who are victims of abuse, which means, *inter alia*, rethinking many of the traditional rules that have operated to exclude or invalidate children's stories; and (ii) that of protecting the now constitutionally entrenched rights of the accused in a society that has, in our Charter of Rights era, become more highly sensitized to the notion of individual rights. These are not necessarily competing interests. As a society, we have identified the need for a more level playing field for child victims of abuse that adequately protects the legitimate rights of those accused of perpetrating such abuse. Some of the traditional rules cannot be justified on the basis that they are necessary to protect such legitimate rights, most notably the competency requirement. Similar arguments can be made with respect to other areas of the law of evidence, for example the admissibility of hearsay evidence and the use of special procedures such as videotaped evidence, closed circuit television, or in-court screens to keep the accused from the view of the child.

## II. LEVELLING THE PLAYING FIELD

The notion of "truth-seeking" has long been considered a fundamental goal of our system of justice and, accordingly, also of the law of evidence. A current analysis of the operation of the rules governing the evidence of children, however, suggests that the system has in practice too often been "truth-defeating." Many of the recent reforms reflect an attempt to realign particular aspects of the law of evidence with this goal, but the reforms for the most part fall short of the more systemic changes that will be necessary before the law of evidence is likely to really reflect the truth-seeking rationale generally in criminal cases involving child sexual abuse.

In Canada, the rules on competence have been substantially relaxed with the effect that a child may give evidence if he or she understands the duty to tell the truth.<sup>19</sup> Although the rules on the competency of children continue to give rise to a number of problems, they no longer operate to exclude large numbers of victims from the courtroom at the outset.<sup>20</sup> In addition, the court in *R. v. Khan* introduced a new hearsay exception that will make it

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19. *See id.*

20. One example of the difficulty in this area is the fact that Bill C-15 seems to maintain the distinction between sworn and unsworn testimony, although the reason for such a distinction is unclear. Justice McLachlin in *Khan* seemed to uphold the distinction, but without shedding any light on the reasons for doing so. For a very useful summary of these issues, see Bessner, *supra* note 15.

possible for a third person to relate the child's story to the court if the judge finds it "reliable and necessary." It is clear from the *Khan* case and its subsequent interpretation, however, that hearsay evidence will not be considered "necessary" just because a child would prefer not to appear in court. In one recent case, the judge refused to allow hearsay evidence in the absence of an actual psychological assessment of the child for the purpose of determining the possible trauma or harm.<sup>21</sup> Accordingly, the combined effect of the recent reforms to the competency and hearsay rules will be that increasing numbers of children will be called upon to testify in criminal proceedings. This is an important consideration as it is very common for children to become so terrified in court, particularly upon seeing the accused, that they are completely incapable of testifying, with the result that the accused is acquitted.<sup>22</sup> Clearly, such results may also be truth-defeating. Spencer & Flin related the following report:

At the age of seven I was indecently assaulted by a lad who was known to our family. Trying to explain to my parents was hard but to stand up in court and explain was impossible. He sat there watching me all the time. Of course he got away with it like so many others do.<sup>23</sup>

The effect of facing the accused and testifying can be devastating: "In a recent case when an accused exercised his right to question a small girl she appeared to realise his presence in court for the first time, and dived screaming under the clerk's desk where she remained for the rest of the proceedings."<sup>24</sup>

Even if the child is not actually too terrified to testify, there is some evidence that the experience of testifying can be traumatic and have lasting consequences, partly because of the presence of the accused and partly because of the ordeal of cross-examination:

I was accused of lying, fabrication and made to feel as though I was the accused and not an innocent nine-year-old victim. . . . The defence lawyer treated me roughly as though I was 19 in-

21. *R. v. W.*, 2 C.R. (4th) 204 (Ont. Prov. Ct. 1991). *But see R. v. K.O.S.*, 4 C.R. (4th) 37, 63 C.C.C. (3d) 90 (B.C.S.C. 1991) (Judge Wetmore held that the "reasonably necessary" test had been met in a situation where the child, having described the event in question to her grandparents, refused to discuss it with a social worker or other professionals).

22. See J.R. SPENCER & RHONA FLIN, *THE EVIDENCE OF CHILDREN: THE LAW AND THE PSYCHOLOGY* 72 (London: Blackstone Press Ltd. 1990). To some extent these concerns may also be alleviated by modifying court procedures for children, with the use of screens, closed circuit television, etc. See section A below.

23. *Id.*

24. *Id.*



stead of nine-years-old, shouting at me, muddling me, confusing me. I hated him and still do for the way he treated me. The trouble is that after 23 years I still have horrible dreams now and then — not about the incident at the cinema, but of the court appearance I made.<sup>25</sup>

It is obvious that one response to these difficulties would be to abandon the hearsay rule in cases involving allegations of child sexual abuse. However, it would be a mistake to encourage hearsay evidence to become the normal pillar of proof in such cases because it makes sense that an adjudicative, truth-seeking system should *generally* prefer direct evidence to hearsay.<sup>26</sup> The question then remains: how can we alleviate the fear children face in testifying without compromising the truth-seeking goals of our system of justice? Put this way, we can see that the answer is unlikely to lie in mere adjustments to our rules on competency or hearsay. The central focus must be on the creation or modification of forums for children to tell their stories directly in ways that are not threatening for them and that violate neither the truth-seeking goals nor our notions of fairness to those accused of child abuse. Such reforms, which include the use of courtroom screens, closed circuit television, and the use of videotaped statements, tend to have more systemic implications and thus require some re-analysis of the rights of those accused of such crimes. Recent Canadian reforms have provided for all of these “special measures” in cases of sexual assault involving children. All these developments have been challenged recently on the basis that they compromise the rights of the accused that are now constitutionally entrenched in the Charter of Rights.

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25. *Id.* Spencer & Flin also cite studies that show that falsely accusing a truthful child of telling lies is one of the most stressful things that can happen to him or her. *Id.* at 294.

26. The Ontario Law Reform Commission has recently recommended that the hearsay statements of a child should be admissible if, in the opinion of the judge, the statements are sufficiently reliable. As the Report notes, the support for this position is stronger with respect to protection cases than criminal cases:

Some judges subscribe to the view that child protection proceedings are not adversarial but rather are in the nature of an inquiry where the court is interested in hearing all relevant evidence, including hearsay, that may affect a child's future. As is stated in *Canadian Children's Law*, “the prospective and speculative nature of the proceedings makes them quite different from ordinary litigation.”

CHILD WITNESSES, *supra* note 16.

### A. *Making Testifying Less Terrifying: Recent Canadian Developments*

Bill C-15 authorized a number of "special measures" that a judge may order in the context of criminal prosecutions of alleged sexual offenses against children. These are responses to concerns about the documented distress often caused to children by the usual courtroom process. While these initiatives are welcome, they fall short of solving the problems, particularly with respect to the provisions dealing with videotaped evidence. If one adopts a principled rather than a formalistic, doctrinaire approach to the rights of the accused, reforms along these lines cannot be said to generally or necessarily violate the fundamental rights of the accused. Accordingly, the legislated reforms will depend on the spirit with which our courts apply them.

Bill C-15 contained the following amendment to the Criminal Code that applies if the accused is charged with one of the sexual offenses enumerated in the Act, and if the victim is under the age of 18 at the time of the trial or preliminary inquiry:

486(2.1) [T]he presiding judge or justice . . . 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.

It is important to note that this provision is exceptional. It clearly contemplates a norm that dictates that children testify in open court; this is arguably a norm that does not take the reality and psychology of children into account.<sup>27</sup> The exceptional nature of the provision was illustrated recently in the case of *R. v. Paul M.*, where the Ontario Court of Appeal found that the use of a screen had not been justified when it had been ordered at trial on the basis of the 12 year-old's statements to the trial judge that she did not like the accused and that she did not like to talk about the events in front of a lot of people. The conviction was overturned and a new trial ordered.<sup>28</sup>

#### (1) Screens

It seems that the screen is becoming a common device for

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27. For a recent discussion of the articulation of norms that may unwittingly exclude certain social groups and the articulation of norms that are contextually developed to address this, see *R. v. Lavallée*, 1 S.C.R. 852, 55 C.C.C. (3d) 97 (1990).

28. *R. v. Paul M.*, 1 O.R. (3d) 341 (1991).

dealing with the trauma of the child witness. In a recent Ontario Court of Appeal decision, *R. v. Levogiannis*,<sup>29</sup> Justice Morden writing for a unanimous court held that this provision does not violate the accused's rights under the Charter of Rights. The accused had argued that the provision violated two provisions of the Charter. First, he claimed that the principle of fundamental justice (section 7 of the Charter) required that he have the right to confront the complainant directly. Second, he argued that the use of the screen created an aura of "guilt" that deprived him of the right to a fair trial guaranteed by section 11(d) of the Charter. On the first issue, the Court held that while the accused normally has the right to have an unobstructed view of the accused, this does not constitute a fundamental or absolute right, but is rather very much one that is subject to qualification in the interests of justice.<sup>30</sup> In coming to this conclusion, Justice Morden sensibly looked to the truth-seeking rationale underlying the rule: the idea is that a witness is normally less likely to lie when the accused is present. But, he held, there may be situations when face-to-face contact is likely to frustrate rather than enhance the pursuit of truth.<sup>31</sup>

On the second point, the Court held that the use of a screen need not prejudice a jury, and that any concern in this regard may be dealt with by a judge's instructions to the jury to the effect that its use has nothing to do with the innocence or guilt of the accused and that it must not draw inferences from its use.<sup>32</sup>

I applaud the approach taken in *Levogiannis*. It undertakes a principled, contextualized, and functional analysis of the issue and the rights of the accused rather than a narrow and mechanical one. Rather than focussing on the narrow formulation of the common law rule that the accused has a literal right to face his or her accuser, the Court's more principled and contextualized approach revealed that a narrow and formalistic application of the rule would

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29. 1 O.R. (3d) 351 (1991), *appeal granted*.

30. So far, it seems that Canadian courts are less willing to see these provisions as constituting violations of the accused's constitutional rights than their American counterparts have been. In *Coy v. Iowa*, 487 U.S. 1012 (1988), the Supreme Court, with Justice Scalia writing for the majority, held that the use of a semi-opaque screen vitiated the presumption of innocence and violated due process rights. The court held that the right of confrontation required both a right to cross-examine and the right to confront a witness "face-to-face." But more recently, in *Maryland v. Craig*, 497 U.S. 836 (1990), the Supreme Court, Justice O'Connor writing for the majority and Justice Scalia dissenting, held that the use of closed circuit television, which preserved the right to cross-examine, was a reasonable exception to the Confrontation Clause.

31. 1 O.R. (3d) at 367.

32. *Id.* at 369-372.

have undermined the larger truth-seeking rationale, which it was designed to serve. In *Leviogannis*, the use of the screen in the particular circumstances was not in issue. But although the case is helpful from the perspective of a Charter analysis, the problem remains that courts generally seem to see the use of screens for child witnesses as justified only under exceptional circumstances. Accordingly, section 486(2.1) is subject to a narrow interpretation. In deciding when such a measure “is necessary to obtain a full and candid account of the acts complained of from the complainant,” judges should consider the witness’ status as a child as one that is likely to mean that some accommodation of the courtroom setting will be “necessary in order to gain a full and candid account of the acts complained of . . . .” Such a contextualized interpretation of these words might well have led to a result permitting the child to testify behind a screen in *R. v. Paul M.* Given the empirical evidence that is emerging about the trepidation that children typically experience in open court when they are required to face their abusers, the use of screens or other devices should be considered as norms not exceptions, and legislative provisions such as section 486(2.1), which preclude this, should be amended.<sup>33</sup> The implementation of some modifications to traditional courtroom set-up in such cases would on balance enhance the pursuit of truth.

The argument has been made that the use of a screen prejudices the jury by making the accused “look guilty,” thus violating the presumption of innocence. This argument, however, is highly dependent on the exceptional nature of the use of screens. If screens were automatically used in such cases, they would be less likely to create the aura of guilt, but would be understood as the norm in cases involving the sexual abuse of children.<sup>34</sup> Also, an instruction to this effect, that the use of screen in no way indicates or presumes guilt of the accused, would be curative.

At present then, the Criminal Code precludes the automatic use of screens in cases involving child victims. This provision should be amended to make such procedures available as of course or without the request of the child or her counsel. In the meantime, however, I hope that the courts will interpret section 442(2.1) broadly to take account of the particular psychology of children who are victims of abuse, without assuming that they are or should

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33. See SPENCER & FLIN, *supra* note 22, at 300-302; CHILD WITNESSES, *supra* note 16, at 77-78.

34. Of course, the same argument may be made about such procedures involving sexual offenses against adult women.

be as self-assured and confident as an adult testifying at a fraud trial.

## (2) Closed-circuit television

The use of closed-circuit television is somewhat more problematic than the use of screens. First, it requires a higher degree of technological sophistication than screens do in order that the accused can maintain contact with his lawyer, who will be in the same room as the child witness.<sup>35</sup> Second, while it raises the same issues as the use of screens, it also raises the possibility of distortion by the camera. In one California case, the court rejected the use of closed-circuit television, noting that "the lens or camera angle chosen can make a witness look small and weak or large and strong. Lighting can alter demeanor in a number of ways. . . . Variations in lens or angle may result in a failure to convey subtle nuances, including changes in witness demeanor."<sup>36</sup>

In Canada, the use of closed-circuit television pursuant to Bill C-15 has not yet received scrutiny by high level courts.<sup>37</sup> A more searching analysis of the issues raised by the use of closed-circuit television is beyond the scope of this paper. However, most of the issues can be addressed by a sensible interpretation of the rights of the accused, along with sensible standards for the use of closed-circuit television. For example, while the right to cross-examine a witness is basic, the right to confront (some say to intimidate<sup>38</sup>) is

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35. Section 486(2.2) of the Criminal Code provides that:

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.

36. *Hochheiser v. Superior Court*, 208 Cal. Rptr. 273, 278-279 (Cal. App. 2d Dist. Div. 1 1984) (citing James J. Armstrong, Note, *The Criminal Videotape Trial: Serious Constitutional Questions*, 55 OR. L. REV. 567, 574-576 (1976)).

37. The lines of argument were foreshadowed by the Quebec Court of Appeal in a pre-Bill C-15 case, in which Judge Mayrand allowed an appeal from a Youth Court decision where an 11 year-old girl had been allowed to testify via closed circuit television. First, he held that as the accused was in a room separate from the witness and the lawyers, he could not be said to have been present at his trial for which the Criminal Code provided. Second, he made the point that just ordering such a procedure might violate the presumption of innocence. Third, and most important, he held that such procedures constituted violations of both sections 7 and 11(d) of the Charter. Section 11(d) was compromised as the trial could not be said to have been "free and public" and the burden of proof had been displaced from the Crown to the accused. Section 7 was violated as the procedure was not in accordance with the principles of fundamental justice. *See Protection de la Jeunesse*, 226 R.J.Q. 326 (Q.C.A. 1987).

38. *See Grant Blowers*, Note, *Should a Two-Year-Old Take the Stand?*, 52 MO. L. REV. 207, 218 (1987). A number of American cases have upheld this view.

not, and should not be treated as such. While the right to cross-examine is important to any adversarial system that purports to value finding the truth, confrontation, as the Court in *Levogiannis* recognized, can be truth-defeating. Accordingly, we should be creative in our search for unthreatening ways to satisfy the truth-seeking gravamen of cross-examination. It is difficult to justify a right to confrontation as a right that exists independently of a truth-seeking rationale, especially as it is likely, in cases involving child victims and adult accuseds, to amount to intimidation. The fact that this may improve the chances of acquittal, as an intimidated witness may be unable to testify or to testify effectively, does not make it a legitimate right deserving of protection. Concerns about distortion may be legitimate, but these might surely be dealt with by the development of standard practices covering matters such as lighting and camera angles.

It is too early to predict with certainty just how section 486(2.1) will work. A few observations about it are in order, however. First, closed-circuit television, like the use of screens, is exceptional within the wording of section 486(2.1).<sup>39</sup> As I have argued above with respect to the use of screens, the truth-seeking rationale suggests that the general rule should be changed with respect to children who are required to testify in sexual abuse cases.

A second point is that these procedures are only available in sexual abuse cases, and only when the child witness is the alleged victim. One might well ask why they should not also be available in cases involving physical abuse of children, or indeed even more widely where a witness is likely to be intimidated by the sight of the witness and the strict application of the traditional rule is likely to be truth-defeating.

So far, experiments in other jurisdictions with the use of closed-circuit television has been very successful. New South Wales, Australia, has been using such a system for a number of years on an experimental basis for preliminary inquiries. Within this program, any child who has allegedly been the victim of sexual abuse gives his or her testimony via closed-circuit television. The child testifies from a room away from the courtroom in the company of a court attendant. The judge and both counsel have voice-activated monitors and there is a larger monitor so that others present in the courtroom may observe the proceedings. Under this system, the

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39. But the Manitoba Court of Appeal decision in *R. v. Laramée*, 6 C.R. (4th) 277 (Man. C.A. 1991), suggests that the best evidence principle means that such procedures are constitutionally required to be treated as exceptional.

child and the person questioning her can see each other, but the child cannot see the accused or the rest of the courtroom. One magistrate told me that after working with this system for a number of years, he is convinced that it is no more difficult to assess the credibility of the child witness, and also convinced that the children are much more at ease. Cross-examination takes place, and the trier of fact is quite able to assess the demeanor of the child.<sup>40</sup>

### (3) Videotaped Statements

The use of videotapes to record the evidence of children is a very promising avenue for reform although not under present Canadian law. It may eventually eliminate the need for the child to take the stand at trial. In addition, the use of videotapes may dramatically improve the reliability of children's evidence as they may be made very shortly after the abuse is reported. This is very important in light of some evidence that while young children may have very accurate memories, their recollection may fade more quickly.<sup>41</sup> Accordingly, a delay of months prior to a court hearing may well be fatal to the case.

Section 715.1 of the Criminal Code, which was also part of Bill C-15, provides that in any proceedings relating to enumerated offenses, which are sexual offenses when the complainant was under 18 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, [and] is admissible in evidence if the complainant adopts the contents of the videotape while testifying."

The videotaping of interviews with children has become a very common way of recording their statements. The out-of-court applications are numerous: they can minimize the need to conduct repeated interviews with a child; they can be used to help convince a parent of a child's veracity, and there is some evidence to suggest that they tend to elicit guilty pleas when viewed by an accused and

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40. I am very grateful to Magistrate Warren Nicholls, Canberra, N.S.W., who generously spent time showing me the system and allowed me to view some of their tapes. The main drawback with this program in N.S.W. is that it only applies to the committal (equivalent to the preliminary inquiry). If the case goes to trial, the child will probably be required to testify in open court. However, court officials report that there are higher rates of guilty pleas than used to be the case before this program was introduced.

41. See Rhona Flin & J.R. Spencer, *Do Children Forget Faster?*, 1991 CRIM. L. REV. 189, 190.

his lawyer.<sup>42</sup> The latter point is of great significance because it may eliminate the need for a child to appear in court at all.

The in-court applications of videotaped statements are more difficult to address. Bill C-15 appears to have taken as conservative a route as possible. While section 715.1 has facilitated the use of a statement made when close to the event where a child's memory is fresh, it still requires the child to testify in court and be subject to cross-examination. The Manitoba Court of Appeal has recently struck down section 715.1 as being an unconstitutional violation of sections 7 and 11(d) of the Charter of Rights.<sup>43</sup> Although the Court was unanimous in its view that the provision was not consistent with section 7's guarantee that liberty could only be compromised in accordance with the principles of fundamental justice, four judges out of five sitting wrote concurring decisions. A number of the judges were concerned that this section, unlike the screen and closed-circuit television provision, does not contain a necessity requirement, thus violating the best evidence principle. It is also clear that some members of the Court were concerned about the failure of the section to address the question of what sorts of questions may be put to the child or of who interviews the child. Interestingly, Judge Helper was of the view that holding the interview sooner and the cross-examination later was very prejudicial to the accused. This seems somewhat counter-intuitive, as the passage of time would seem to be likely to result in a more tentative performance by the child under cross-examination at trial. Judge Helper, with whom the other justices concurred on this point, stated that in order for such videotapes to be admitted, the accused must have had the opportunity to cross-examine at the time the statement was taken.

The Court's concern with the absence of the necessity requirement from the videotape provision is misplaced for a few reasons. First, the requirement that one would have to show necessity in each case to justify the admission of videotaped evidence would

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42. SPENCER & FLIN, *supra* note 22, at 162-63 (quoting DEBRA WHITCOMB ET AL., WHEN THE VICTIM IS A CHILD: ISSUES FOR JUDGES AND PROSECUTORS 60 (Washington D.C.: National Institute of Justice 1985)).

43. R. v. Laramée, 6 C.R. (4th) 277. So far, there is very little other Canadian case law on section 715.1, although the Alberta Queen's Bench, in a very brief decision, held that it "goes very, very far" and deviates from the general rule that a person will not be convicted except in accordance with fundamental principles of justice. With very few reasons, Judge Mackenzie ruled that use of videotaped evidence violated ones right to a fair and public hearing by an independent and impartial tribunal. R. v. Thompson, 68 C.R. (3d) 328 (1989). See also M. Naeem Rauf & Nicholas Bala, *Thompson: Charter Challenge to Videotaped Statements of Children — Two Views*, 68 C.R. 331 (1989).



once again force children to conform to adult norms, which were not developed with children in mind. One of the positive elements of the videotape provision over those dealing with screens and closed-circuit television is precisely the fact that it contemplates the particular realities of children and the fact that they may have trouble repeating or indeed recalling all the details in court.<sup>44</sup>

The second concern about the Manitoba Court of Appeal's insistence on a necessity requirement relates to the treatment of videotaped statements as hearsay. Of course, it is beyond dispute that a videotaped statement is hearsay in the sense that it is an out-of-court statement that is relied on as proof of the truth of its contents. It is less obvious, however, that a videotaped statement should be treated with the same degree of skepticism as the classic form of hearsay, which is the rendition of a third person (such as a parent) of the child's original version of the events. When the trier of fact looks at a videotaped statement, he or she can directly assess the credibility of the original maker of the statement, something that can never be done in the case of the classic form of hearsay. There are other issues that must be addressed in assessing the reliability of a videotaped statement, such as who is asking the questions and whether prior interviews with the child have taken place, but the point is that the trier of fact can assess the credibility of the original maker of the statement quite directly. This is a significant distinction, which challenges the treatment of videotaped statements like any other hearsay statement. If, on the other hand, one concedes that videotaped statements are of a rather different nature, it becomes less obvious why such statements should be only exceptionally admitted and why it should be necessary to meet a "necessity" test.

As of the writing of this article, *R. v. Laramée* was on appeal to the Supreme Court of Canada. In the meantime, one is left with the impression that section 715.1 was struck down partly because it did not go far enough. In his decision, Judge Twaddle spoke favorably of the Scottish Law Commission's recommendations:

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44. In *R. v. Meddoui*, 61 C.C.C. (3d) 345 (Alta. C.A. 1990), *aff'd*, [1991] S.C.J. 81, the court held that a witness adopts a videotape, whether he or she recalls the events discussed, provided he or she believes them to be true, having recalled giving the statement and attempted then to be honest and truthful. The videotape is then admissible as proof of the truth of its contents, but the weight is of course a matter for the trier of fact to assess in light all the circumstances. Some have argued that the witness must have an accurate memory of the events at issue before the videotape may be admitted. The obvious effect of this would be to undermine the purpose of the section, one of which is to preserve the child's story precisely in cases where his or her memory fades during the time preceding the trial. The *Meddoui* decision is welcome for its rejection of this view.

That proposal contemplated that the child's videotaped evidence would be taken in the presence of the accused (with him and his counsel behind a one-way glass screen) shortly after charges had been laid, and that counsel might direct questions to the witness through the examiner. In this way, it addressed the issue of reliability as well as the need to record the evidence as soon as possible.<sup>45</sup>

It seems that the Manitoba Court of Appeal would prefer such a scheme, subject to the trial judge's determination that such evidence meets the tests of necessity and reliability, as in *Khan*. The most surprising aspect of the *Laramée* decision is the willingness it shows to distinguish the right to cross-examine from the right to cross-examine *at trial by the accused or his or her lawyer personally*. Judge Twaddle at least seems prepared to endorse the Scottish Law Commission proposal that cross-examination be conducted through the child examiner. Most Canadian academics in this field are of the view that such an approach would be very controversial. Such a change would require a serious reanalysis of our assumptions about the nature and essence of cross-examination and its role in the criminal process when children are the primary, and often only, witnesses. Section 715.1, on the other hand, preserves the right to cross-examine in a traditional form. One could defend the constitutionality of a program such as that recommended by the Scottish Law Commission. Cross-examination in its traditional form — that is, in court, by the accused's counsel, some time after the alleged events — may be actually truth-defeating when young children are involved. If the gravamen of cross-examination has to do with the reliability of evidence used against an accused, then we may have to look for better ways. Perhaps this may mean simply taking evidence, with cross-examination, at an early stage when children's recollections are more reliable, as the Pigot Report recommends. Perhaps it might justify, at least in some cases, channeling the cross-examination through a trained interviewer as was also suggested by the Pigot Report. None of these possibilities is problem-free, especially in view of the Charter of Rights. But looking at other possibilities is vital, if only to help us shake the shackles of thinking that our accustomed practices constitute the only way, or the only fair way, of conducting such proceedings. In

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45. 6 C.R. (4th) 177 (citing the Scottish Law Commission's Discussion Paper No. 75, *The Evidence of Children and Other Potentially Vulnerable Witnesses*, (Her Majesty's Stationery Office, June 1988)). See also REPORT OF THE ADVISORY GROUP ON VIDEO EVIDENCE, (London, December, 1989) (hereinafter PIGOT REPORT); Flin & Spencer, *supra*, note 22.

any event, such reforms would also have to take account of the symbolic importance of traditional, cross-examination in our society.

In short, while section 715.1 is a helpful and welcome reform, it does not go far enough. The child is still exposed to cross-examination, possibly at a much later date than when the child gave the original statement.<sup>46</sup> The use of videotaped evidence, however, raises a number of problems that are not addressed by the section: the identity of the interviewer, the time of the interview, and the manner in which leading questions are avoided. While some writers see the failure of the section itself to address these questions as fatal to its constitutional validity,<sup>47</sup> the potential difficulties may be dealt with in other ways. For example, as the different professionals concerned become more acquainted with the technology and its implications, standards should emerge to regulate its use. For example, a videotaped statement that contains many leading questions and that has been taken only after the child has been interviewed numerous times is likely to be given little weight. Standards would have to be developed to cover issues such as whether all interviews should be recorded on videotape and what sorts of questions are appropriate. Police and other professionals are already developing standards for the order in which various professionals should interview children. In this regard, suggestions from other jurisdictions provide some useful ideas, some of which would not necessarily depend on further legislation for implementation. In addition, there is an increasing level of awareness among the various professionals involved about the importance of objective questioning techniques for the purpose of eliciting evidence that will be given significant weight in a court of law.

These practical difficulties have been addressed by some other jurisdictions. For example, the Pigot Report recommends that the questions of the various actors involved be channelled through one trained interviewer.<sup>48</sup> Such a scheme is presently in effect in Israel,<sup>49</sup> and although it begs the difficult cross-examination issues,

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46. However, the effect of this is mitigated by the fact that it seems that the practice is to play the tape in court where the child can see it prior to cross-examination. *R. v. K.O.S.*, 4 C.R. (4th) 37, 63 C.C.C. (3d) 91. Accordingly, the child's memory has been refreshed by the tape before being cross-examined.

47. See Rauf & Bala, *supra* note 43.

48. PIGOT REPORT, *supra* note 45.

49. See Eliahu Harnon, *Examination of Children in Sexual Offenses — The Israeli Law and Practice*, 1988 CRIM. L. REV. 263. The Israeli scheme simply dispenses with

such a scheme has tremendous potential for diminished repetitiveness and, assuming some legal training on the part of the interviewer, for improving the reliability and ultimately the credibility of such videotaped statements.

### III. CONCLUSION

As this survey of recent developments in the law concerning the evidence of children shows, Canadian society is trying to come to terms with the fact that more children are sexually abused than most of us could have imagined. The law of evidence on the subject may also be seen as a microcosm of our attitudes about children. If the law of evidence is any indication, we think of children as habitual, gratuitous, and highly skilled liars, to the extent that we do not even trust our triers of fact to tell the difference between a truthful and a non-truthful child witness. In addition to frequently depriving children of the protection of the criminal justice system, these rules have often been truth-defeating. It is only the combination of empirical studies showing that children are not generally prone to lie about sexual abuse, and massive and growing evidence that sexual abuse is more common than we have wanted to believe, that has forced the beginning of change.

As we have seen, the law tends to move in slow, incremental steps, and in Canada, this tendency is exacerbated by the recently enacted Charter of Rights and the entrenchment of rights that protect those accused of crimes. The protection of the rights of children and the protection of the rights of the accused are both widely accepted as fundamental legal and social principles. Too often they are seen as rights that necessarily conflict with one another. But a look at the operation of the rules of evidence suggests that this conflict is overblown. A number of the obstacles to the fair and humane treatment of children in the legal system have been based on mistaken understandings of the psychology of children. While these obstacles, such as the competence rules, have generally operated in favor of defendants, it is wrong to suggest that an accused should have a right to the continued protection afforded by

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any right to cross-examine the child at any time. There, the "youth interrogator" is the exclusive interviewer of the child. One serious problem with this approach is that the youth interrogator is apparently placed in a significant conflict of interest. On one hand, his or her role is to comfort and counsel the child, on the other, to conduct all the interviews and testify in court instead of the child. It is also interesting to note that although it originally seems to have been intended that the interrogators would have some child care/social work training and some legal training, in practice they tend to have no legal training.

such rules simply because they have, erroneously, been offered such protection in the past.

Other obstacles to the fair treatment of children in the court system have developed as part of a formal and mechanical approach to the rules of evidence and the rights of the accused. The notion of a "right to confront" raises this issue. In such cases, the respective interests can be reconciled by looking carefully at the rationale behind these rights to see if other procedures, such as screens or closed-circuit television, can accommodate them. In addition, it should be noted that some of the most traumatic aspects for children giving evidence can be at least partly alleviated by a little common sense and compassion. For example, a child can be allowed to take a favorite toy or security blanket while testifying, or to give evidence while sitting on his or her parent's lap.

Our notion of a just society is one that values and protects children and that also insists upon basic rights of those accused of criminal offenses. The questions raised are complex and deserve balanced, constructive reflection if we are to resolve them in accordance with our aspirations.