5 Testimonial Aids

I. Introduction

> Children require special treatment to facilitate the attainment of truth in a judicial proceeding in which they are involved. These special requirements stem not so much from any disability of the child witness, but from the fact that our ordinary criminal and courtroom procedures have been developed in a time when the participation of children in criminal justice proceedings was neither contemplated nor plausible. A "court system, established with adult defendants and witnesses in mind, does not easily accommodate children's special needs."[1]

This chapter deals with those sections of the *Criminal Code* that allow for assistance to child witnesses during the course of their testimony, specifically section 486 (exclusion of the public), section 486.1 (support persons), section 486.2 (remote or obscured testimony), section 486.3 (appointment of counsel to conduct cross-examination), section 486.4 (publication bans), and section 715.1 (video-recorded evidence).[2] These sections were created to deal with the special needs of the child witness and other vulnerable individuals. In this regard, one ought to include adult witnesses who allege historical child abuse.

It is important that when reviewing the case law dealing with these sections, counsel keep in mind that the various sections discussed below have changed over time. When reviewing the relevant cases, counsel should be alert to which iteration of the statute was in force at the time of the decision.

II. The Testimonial Aids

A. Exclusion of the Public

1. Statutory Authority

> Exclusion of public
>
> 486(1) Any proceedings against an accused shall be held in open court, but the presiding judge or justice may, on application of the prosecutor or a witness or on his or her own motion, order the exclusion of all or any members of the public from the court room for all or part of the proceedings, or order that the witness testify behind a screen or other device that would allow the witness not to be seen by members of the public, if the judge or justice is of the opinion that such an order is in the interest of public morals, the maintenance of order or the proper administration of justice or is necessary to prevent injury to international relations or national defence or national security.

1 *R v L (DO)*, [1993] 4 SCR 419, [1993] SCJ No 72 (QL) at para 36.

2 RSC 1985, c C-46; the Ontario Ministry of the Attorney General's *Crown Prosecution Manual*, online: <http://www.ontario.ca/document/crown-prosecution-manual>, contains specific directives respecting testimonial aids that Ontario prosecutors are expected to follow. See directive 27, Offences Against Children, and directive 34, Testimonial Aids and Accessibility.

Application

(1.1) The application may be made, during the proceedings, to the presiding judge or justice or, before the proceedings begin, to the judge or justice who will preside at the proceedings or, if that judge or justice has not been determined, to any judge or justice having jurisdiction in the judicial district where the proceedings will take place.

Factors to be considered

(2) In determining whether the order is in the interest of the proper administration of justice, the judge or justice shall consider

(a) society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process;
(b) the safeguarding of the interests of witnesses under the age of 18 years in all proceedings;
(c) the ability of the witness to give a full and candid account of the acts complained of if the order were not made;
(d) whether the witness needs the order for their security or to protect them from intimidation or retaliation;
(e) the protection of justice system participants who are involved in the proceedings;
(f) whether effective alternatives to the making of the proposed order are available in the circumstances;
(g) the salutary and deleterious effects of the proposed order; and
(h) any other factor that the judge or justice considers relevant.

Reasons to be stated

(3) If an accused is charged with an offence under section 151, 152, 153, 153.1 or, 155 or 159, subsection 160(2) or (3) or section 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 286.1, 286.2 or 286.3 and the prosecutor or the accused applies for an order under subsection (1), the judge or justice shall, if no such order is made, state, by reference to the circumstances of the case, the reason for not making an order.[3]

No adverse inference

(4) No adverse inference may be drawn from the fact that an order is, or is not, made under this section. …

Powers of justice

537(1) A justice acting under this Part [Part XVIII Procedure on Preliminary Inquiry] may …

3 The list of enumerated sections was modified by RSC 2019, c 25, s 189.

(h) order that no person other than the prosecutor, the accused and their counsel shall have access to or remain in the room in which the inquiry is held, where it appears to him that the ends of justice will be best served by so doing.

2. Summary

Section 486 of the *Criminal Code* permits a judge to exclude members of the public from the courtroom for all or part of the proceedings against an accused person if the judge is of the opinion that such an order is in the interest of public morals; the maintenance of order; the proper administration of justice; or the prevention of injury to international relations, national defence, or national security. Alternatively, the section states that the judge may order a witness to "testify behind a screen or other device that would allow the witness not to be seen by members of the public."

Note that the "screen or other device" in section 486 would prevent any members of the public seated in the body of the court from viewing the witness. This differs from section 486.2, where the screen or closed-circuit television (CCTV) serves to prevent the witness from viewing the accused.

An application under section 486 may be brought by either the Crown or a witness.

In terms of procedure, the burden lies on the party making the application to prove that the order is necessary, that it is as limited as possible, and that its salutary effects will be proportionate to any deleterious effects. For the trial judge to make their determination, there must be a "sufficient evidentiary basis," and this evidence can be adduced through the submissions of counsel. However, where the facts are in dispute or insufficient, the applicant is required to have evidence heard as part of a *voir dire*, and the hearing is to be held *in camera*.[4]

The evidence upon which an order pursuant to this section can be based must show a greater justification for public exclusion than simple convenience or embarrassment.[5] The different considerations that arise in the contexts of "public morals," "the maintenance of order," and "the proper administration of justice" are discussed by the Saskatchewan Court of Appeal in *R v Vandevelde*.[6]

In determining whether the order is in the interest of the proper administration of justice, the judge shall consider the factors listed in section 486(2). Several factors listed explicitly engage the issue of crimes against children. It is also noteworthy that several specific crimes against children are listed in section 486(3).

4 *Canadian Broadcasting Corp v New Brunswick (AG)*, [1996] 3 SCR 480 at paras 71ff, [1996] SCJ No 38 (QL). See also *R v Vandevelde*, 1994 CanLII 3862, [1994] SJ No 156 (QL) (CA) [*R v Vandevelde* cited to SJ].

5 *R v Vandevelde*, *supra* note 4, and the cases cited therein. See also *R v GQ*, 1979 CanLII 2883, [1979] OJ No 1166 (QL) (CA); *R v Omar*, 2009 ONCJ 780.

6 *Supra* note 4 at paras 42-45.

Public access to exhibits is a corollary to the "open court" principle articulated in section 486(1).[7] For instance, a line of cases deals with the manner in which photographs and videos depicting sexual abuse can be adduced in cout. In *R v JJP*,[8] the Yukon Supreme Court reviewed the ways in which the public can be prevented from seeing such exhibits, stopping short of ordering exclusion of the public pursuant to section 486.

When a trial is held pursuant to the *Youth Criminal Justice Act*,[9] section 132 of that Act provides jurisdiction to the Youth Court to exclude "any person" from the courtroom.[10] It is to be noted that the YCJA does not allow for a closed courtroom.

3. Constitutionality

In *Canadian Broadcasting Corp v New Brunswick (AG)*, the Supreme Court of Canada found that *Criminal Code* section 486(1),[11] while in breach of section 2(b) of the *Canadian Charter of Rights and Freedoms*,[12] constituted a justifiable limit on freedom of expression and was thus saved by section 1 of the Charter.[13] La Forest J, for the unanimous court, articulated the appropriate test for an order under this section:

> The same directives are equally useful in assisting the trial judge in exercising his or her discretion within the boundaries of the *Charter* when exercising the judicial discretion to order exclusion of the public under s. 486(1). Stated in the context of such an order, the trial judge should, therefore, be guided by the following:
>
> (a) the judge must consider the available options and consider whether there are any other reasonable and effective alternatives;
> (b) the judge must consider whether the order is limited as much as possible; and
> (c) the judge must weigh the importance of the objectives of the particular order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate.[14]

7 *Canadian Broadcasting Corp v The Queen*, 2011 SCC 3.

8 2017 YKSC 66.

9 SC 2002, c 1 [YCJA].

10 See, for instance, *R v MGM*, 2018 ABPC 256; *R v KM*, 2017 NWTSC 27.

11 The wording of the subsection in 1996 was different from the present statute. However, the differences were not of a nature to render this decision obsolete.

12 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter].

13 *Canadian Broadcasting Corp v New Brunswick (AG)*, *supra* note 4. See also *Vancouver Sun (Re)*, 2004 SCC 43.

14 *Canadian Broadcasting Corp v New Brunswick (AG)*, *supra* note 4 at para 69.

B. Support Person

1. Statutory Authority

Support person—witnesses under 18 or who have a disability

486.1(1) In any proceedings against an accused, the judge or justice shall, on application of the prosecutor in respect of a witness who is under the age of 18 years or who has a mental or physical disability, or on application of such a witness, order that a support person of the witness' choice be permitted to be present and to be close to the witness while the witness testifies, unless the judge or justice is of the opinion that the order would interfere with the proper administration of justice.

Other witnesses

(2) In any proceedings against an accused, the judge or justice may, on application of the prosecutor in respect of a witness, or on application of a witness, order that a support person of the witness' choice be permitted to be present and to be close to the witness while the witness testifies if the judge or justice is of the opinion that the order would facilitate the giving of a full and candid account by the witness of the acts complained of or would otherwise be in the interest of the proper administration of justice.

Application

(2.1) An application referred to in subsection (1) or (2) may be made, during the proceedings, to the presiding judge or justice or, before the proceedings begin, to the judge or justice who will preside at the proceedings or, if that judge or justice has not been determined, to any judge or justice having jurisdiction in the judicial district where the proceedings will take place.

Factors to be considered

(3) In determining whether to make an order under subsection (2), the judge or justice shall consider

(a) the age of the witness;
(b) the witness' mental or physical disabilities, if any;
(c) the nature of the offence;
(d) the nature of any relationship between the witness and the accused;
(e) whether the witness needs the order for their security or to protect them from intimidation or retaliation;
(f) society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process; and
(g) any other factor that the judge or justice considers relevant.

Witness not to be a support person

(4) The judge or justice shall not permit a witness to be a support person unless the judge or justice is of the opinion that doing so is necessary for the proper administration of justice.

No communication while testifying

(5) The judge or justice may order that the support person and the witness not communicate with each other while the witness testifies.

No adverse inference

(6) No adverse inference may be drawn from the fact that an order is, or is not, made under this section.

2. Summary

Section 486.1(1) and (2) of the *Criminal Code* deal with two different scenarios where the court may allow a support person "to be present and to be close to" a witness while the witness testifies. The mere presence of the support person in the body of the court as opposed to being situated close to the witness is not governed by this section.[15]

Under section 486.1(1), the court is presumptively *required* to appoint a support person to be physically close to the witness while they testify if: (a) the witness in question is under the age of 18 years or has a mental or physical disability; and (b) there is an application for such an appointment made by the prosecutor or by the witness. The court *must* make the order unless the court forms the opinion that such an appointment would "interfere with the proper administration of justice."

Practically speaking, the defence would have the burden of convincing the court under section 486.1(1) that there was an interference with the administration of justice. This burden has been characterized as "a very high standard."[16] Absent an agreement between the parties, evidence may also be required to prove the age of a witness or the presence and extent of a disability.[17]

Section 486.1(2) deals with any other witness (i.e., a witness who is over 18 years of age and who does not have a mental or physical disability). In the context of offences against children, section 486.1(2) would be engaged where the witness has recently reached the age of majority since the time of the allegations or is an adult witness who alleges historical child abuse. The court may consider making a discretionary order pursuant to section 486.1(2) where the court is of the opinion that the presence of the support person would "facilitate the giving of a full and candid account by the witness of the acts complained of or would otherwise be in the interest of the proper administration of justice." The criteria upon which the court must make this determination are found in section 486.1(3), and evidence may be required.[18] However,

15 *R v Mbiandjeu*, [2018] OJ No 2866 (QL) (Ct J).

16 *R v McAllister*, [2006] OJ No 5492 (QL) at paras 11, 13 (Sup Ct J).

17 See *R v Land*, 2012 ONSC 4080; *R v Hoyles*, 2018 NLCA 46; *R v Giffin*, 2015 NSPC 24; *R v SLC*, 2020 ABQB 515.

18 See *R v Land*, *supra* note 17; *R v Hoyles*, *supra* note 17.

counsel should note the absence of statutory authority requiring the witness to testify on the *voir dire* as is found in section 486.2(4) in regard to an order seeking the use of a screen or remote testimony.

Prior to the present iteration of section 486.1(2), the presence of the support person had to be "necessary to obtain a full and candid account from the witness of the acts complained of." However, as mentioned above, the issue in the present statute is now one of facility and not necessity. While this is clearly a less onerous threshold for the Crown to meet, there still must be evidence that there is a need to facilitate the testimony of a witness by means of a support person.[19]

An application under section 486.1(1) or (2) may be brought by the Crown or the witness. The timing of the application for either order is dealt with in section 486.1(2.1).

Both sections 486.1(1) and (2) specify that the appointment is for "a support person of the witness' choice." However, it should be noted that problems can arise in this regard. A person who is a witness at the same proceeding cannot also be the support person unless the court is of the opinion that the appointment of that person is necessary for the proper administration of justice (see s 486.1(4)). Where a witness is appointed as the support person, it would appear that two factors are important. First of all, the person should have already testified. Secondly, it seems that the nature of the relationship between the proposed support person and the witness in need of support ought to be sufficiently close that the witness, absent the presence of the support person, might well not be able to testify.[20]

Furthermore, it is important that the appointed support person be as impartial as possible. See *R v Turnbull*,[21] where the Crown had put forth as a support person an individual who had been working with the victim as an advocate and counsellor and who was knowledgeable about some of the specific facts of the case. The Crown application was denied in part on the issue of the proposed support person's partiality and knowledge.[22]

Finally, communication between the support person and the witness is not prohibited unless the court so orders (s 486.1(5)).

19 See *R v Turnbull*, 2017 ONCJ 309; *R v KM*, *supra* note 10.

20 See *R v DC*, 2008 NSCA 105; *R v Piotrowski*, 2011 ONCJ 561.

21 *Supra* note 19.

22 *Ibid*. Two cases where seemingly non-impartial support persons were permitted do not, upon closer examination, expand this rule. In *R v Levac*, 2019 SKQB 322, the police officer who was permitted to serve in that role appears to have been present incidental to the presence of a support dog, as the officer was the dog's handler. In *R v DC*, *supra* note 20, where the mother of a child complainant was permitted to be the support person, the NSCA held that there had been no prejudice to the defence and denied the appeal pursuant to s 686(1)(iv).

3. Support Dogs

Section 486.1 authorizes the presence of support *persons*, but in recent years the courts have allowed dogs to play a role similar to that contemplated for humans under that section. However, the case law does not necessarily find authority in section 486.1 for ordering that a witness be allowed to testify in the presence of a dog (with a handler). So, in one case, *R v JLK*,[23] the Court found that the dog-handler was to be the support person and that the dog would merely come in with the support person, remarking that the presence of a support dog was "in accordance with what the spirit and intent of the testimonial accommodation legislation was meant to address"[24] and was within the Court's discretion to permit. The Court (a provincial court) did not refer to the source of this particular discretionary power.

In *R v Roper*,[25] the British Columbia Supreme Court commented with favour on the decision in *JLK* when allowing a witness's pet dog to sit in her owner's lap while she testified. (The animal in *JLK* had been a trained support dog, not the witness's untrained pet.) The Court found that it had the discretion to allow the dog into the courtroom "as part of the court's ability to manage the conduct of affairs in the courtroom."[26] In *Roper*, it is important to note that the Crown's application was unopposed by the defence.

Another approach was taken by Band J of the Ontario Court of Justice in *R v CW*.[27] The Crown sought to have a trained support dog (with handler) present for a witness at the preliminary hearing. Finding jurisdiction to allow the application under section 537(1)(i), the Court noted that the presence of the support dog as a testimonial aid was "consistent with the general thrust of the witness support sections found in Part XV of the *Criminal Code*."[28] But more broadly, Band J noted that section 13 of the *Canadian Victims Bill of Rights*[29] establishes the right of victims (as defined by the Bill) to request testimonial aids and stated that, in his view, the legislation provided the Court with the jurisdiction to allow the use of a support dog as a testimonial aid.

Justice Nakatsuru of the Ontario Superior Court of Justice perhaps summed up the law best when he remarked, "Well, I don't think dogs are persons, but I think there's more than adequate jurisdiction for me to allow the support dog to be present."[30]

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23 2015 BCPC 139 at para 6.

24 *Ibid*. See also *R v Levac*, *supra* note 22; *R c Donervil*, 2019 QCCQ 12867.

25 2015 BCSC 2107.

26 *Ibid* at para 8.

27 2016 ONCJ 649.

28 *Ibid* at para 10.

29 SC 2015, c 13, s 2.

30 *R v Pine*, [2018] OJ No 7249 (QL) at para 8 (Sup Ct J). See *R v Levac*, *supra* note 22 for a review of both American and Canadian research and jurisprudence.

C. Remote or Obscured Testimony (Witness Screens/CCTV)

1. Statutory Authority

Testimony outside court room—witnesses under 18 or who have a disability

486.2(1) Despite section 650, in any proceedings against an accused, the judge or justice shall, on application of the prosecutor in respect of a witness who is under the age of 18 years or who is able to communicate evidence but may have difficulty doing so by reason of a mental or physical disability, or on application of such a witness, order that the witness testify outside the court room or behind a screen or other device that would allow the witness not to see the accused, unless the judge or justice is of the opinion that the order would interfere with the proper administration of justice.

Other witnesses

(2) Despite section 650, in any proceedings against an accused, the judge or justice may, on application of the prosecutor in respect of a witness, or on application of a witness, order that the witness testify outside the court room or behind a screen or other device that would allow the witness not to see the accused if the judge or justice is of the opinion that the order would facilitate the giving of a full and candid account by the witness of the acts complained of or would otherwise be in the interest of the proper administration of justice.

Application

(2.1) An application referred to in subsection (1) or (2) may be made, during the proceedings, to the presiding judge or justice or, before the proceedings begin, to the judge or justice who will preside at the proceedings or, if that judge or justice has not been determined, to any judge or justice having jurisdiction in the judicial district where the proceedings will take place.

Factors to be considered

(3) In determining whether to make an order under subsection (2), the judge or justice shall consider

(a) the age of the witness;
(b) the witness' mental or physical disabilities, if any;
(c) the nature of the offence;
(d) the nature of any relationship between the witness and the accused;
(e) whether the witness needs the order for their security or to protect them from intimidation or retaliation;
(f) whether the order is needed to protect the identity of a peace officer who has acted, is acting or will be acting in an undercover capacity, or of a person who has acted, is acting or will be acting covertly under the direction of a peace officer;
(f.1) whether the order is needed to protect the witness's identity if they have had, have or will have responsibilities relating to national security or intelligence;

(g) society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process; and
(h) any other factor that the judge or justice considers relevant.

Same procedure for determination

(4) If the judge or justice is of the opinion that it is necessary for a witness to testify in order to determine whether an order under subsection (2) should be made in respect of that witness, the judge or justice shall order that the witness testify in accordance with that subsection.

Conditions of exclusion

(5) A witness shall not testify outside the court room in accordance with an order made under subsection (1) or (2) unless arrangements are made for the accused, the judge or justice and the jury to watch the testimony of the witness by means of closed-circuit television or otherwise and the accused is permitted to communicate with counsel while watching the testimony.

No adverse inference

(6) No adverse inference may be drawn from the fact that an order is, or is not, made under subsection (1) or (2).

2. Summary

Section 486.2 of the *Criminal Code* is structured in a fashion similar to section 486.1. Section 486.2(1) and (2) addresses when the court may allow a witness to testify from outside of the courtroom or behind a screen or other device. Note that there may be some overlap between this section and section 714.1.[31]

a. Presumptive Orders: Children and Persons with Disabilities

Section 486.2(1) mandates that a witness be allowed to testify from outside of the courtroom or behind a screen or other device where the witness is under the age of 18 years or may have difficulty otherwise testifying by reason of a mental or physical disability.[32] Once it has been established that the witness is under the age of 18 years or that their disability may cause them difficulty in testifying, the order is mandatory upon application by the prosecutor or the witness unless the court "is of the opinion that the order would interfere with the proper administration of justice."[33] There

31 See, for instance, the discussion in *R v Blake and Khabemba*, 2019 ONSC 6026.

32 For a discussion of the use of the term "disability" as opposed to "disorder" here and the evidentiary issues that might arise, see *R v Lanthier*, [1997] OJ No 4238 (QL) at paras 57ff (Ct J).

33 See *R v JZS*, 2008 BCCA 401, aff'd 2010 SCC 1.

"is no legal onus on the accused to establish that the use of a testimonial aid would interfere with the administration of justice. Rather, the court must simply be 'satisfied' that an order would have this effect."[34] The forming of the "opinion" does not seem to require evidence.

No guidance is provided in the statute as to what would constitute an interference with the proper administration of justice. However, the term "proper administration of justice" in the context of the provision has been interpreted as "requiring a proper balance between the societal interest in the attainment of the truth, including the protection of vulnerable witnesses to facilitate their full testimony, and the accused's fair trial interests, including the right to make full answer and defence."[35] Furthermore, the "proper administration of justice" entails a consideration of many different factors. As the Court stated in *R v SBT*:[36]

> The phrase "the proper administration of justice" is a phrase of wide import. In the context of this subsection it may induce many factors and considerations. When an application is made under s. 486.2(1), the judge or justice will likely consider the age of the witness, the nature of the charges, the relationship between the witness and the accused, the need to have the witness view exhibits while testifying, and whether the requested accommodation can be properly provided in the particular courtroom or courthouse. This is not an exhaustive list. What is central to the decision is whether the requested testimonial accommodation will enhance or undermine the truth-seeking function of our criminal trial process.[37]

In the event of a disagreement between the parties as to the applicability of section 486.2(1), the Crown may be required to provide evidence of the witness's age or the effect of any disability upon their ability to testify.[38] The onus in respect of such matters is on the Crown, which must demonstrate its claim on a balance of probabilities.[39] That being said, the Supreme Court has held that the evidence "need not take any particular form."[40]

34 *R v GAP*, 2007 MBQB 127 at para 18.

35 *R v Alam*, 2006 ONCJ 593 at para 29. See also *R v Levogiannis*, [1993] 4 SCR 475, 1993 CanLII 47 at paras 13, 30-32 for a discussion of a similar type of balancing exercise in the context of the earlier version of s 486.2. For a more recent case, see *R v SS*, [2021] NJ No 76 (QL) at paras 20ff (Prov Ct).

36 2008 BCSC 711.

37 *Ibid* at para 39.

38 *R v Alam*, *supra* note 35 at paras 20-21. See *R v Smith*, 1993 ABCA 167 for a brief discussion on the mode of providing the information to the court in this context.

39 *Her Majesty the Queen v Bemister*, 2016 ONSC 6374 at para 20.

40 *R v Levogiannis*, *supra* note 35 at para 35.

b. Discretionary Orders: All Other Witnesses

Section 486.2(2) deals with all other witnesses (i.e., witnesses who are over 18 years of age and who do not have a mental or physical disability). This section provides that the court has the discretion to allow a witness to testify from outside of the courtroom or behind a screen or other device where it is requested by the prosecutor or a witness and the court is of the opinion that granting the order would "facilitate the giving of a full and candid account" by the witness of the alleged acts or would otherwise be "in the interest of the proper administration of justice."

It is important to note that the current version of this subsection does not require that the testimonial aid be necessary to obtain the witness's evidence.[41] The version in effect as of July 22, 2015 is less onerous and merely requires that the use of the aid in question would "facilitate the giving of a full and candid account by the witness of the acts complained of or would otherwise be in the interest of the proper administration of justice." Nonetheless, the Crown may still be required to establish an evidentiary basis on a balance of probabilities for the making of any such order.[42] The form that the evidence takes is flexible so long as it is reliable.[43]

As Parliament has not amended the statute to require that the court shall grant any and all applications pursuant to section 486.2(2), the term "facilitate" must have some meaning in this context beyond merely making the process easier. Some guidance may be gained from section 486.2(3), where the courts are instructed to consider a series of enumerated factors. The term "facilitate" would then refer to a remedy for problems arising out of the enumerated factors listed in section 486.2(3).[44]

Section 486.2(3) mandates the factors that must be considered by the court upon an application under section 486.2(2). Of note, section 486.2(3)(h) refers to "any other factor that the judge or justice considers relevant" when determining whether to make an order under section 486.2(2). Examples of other such factors (admittedly from cases decided under previous versions of this section) would be the presence of a jury and the trial of the accused as a young person.[45]

Under section 486.2(4), the court can require a witness to testify on a *voir dire* to determine whether an order should be made pursuant to section 486.2(2). However, the words "shall order that the witness testify in accordance with that subsection"

41 It is important that when reading the case law, one must be alert to what version of this section was in effect at the time as changes have been made to other subsections.

42 *R v Turnbull*, *supra* note 19.

43 See, for instance, *R v FM*, 2021 BCSC 1867 at paras 20-21; *R v Hoyles*, *supra* note 17 at para 11; *R v NM*, 2019 NSCA 4 at paras 60ff; *R v RW*, 2021 CanLII 62450, [2021] NJ No 211 (QL) at paras 16-18 (Prov Ct); *R v SLC*, *supra* note 17 at paras 6ff.

44 See *R v KP*, [2017] NJ No 69 (QL) at paras 25-28 (Prov Ct); *R v George*, 2020 BCSC 212.

45 For the former example, see *R v Kerr*, 2011 ONSC 1231; for both, see *R v CD*, [2010] OJ No 4351 (QL) (Sup Ct J).

in section 486.2(4) have been taken to mean that it is mandatory that the witness be allowed to use either a screen or closed-circuit television during their testimony on the *voir dire*.[46]

c. Conditions Precedent for Granting an Order Under Section 486.2

No order can be made under section 486.2(1) or (2) unless:

- the accused, judge or justice, and jury are able to watch the testimony of the witness by means of closed-circuit television or otherwise; and
- the accused is permitted to communicate with counsel while watching the testimony (see s 486.2(5)).[47]

d. Procedure on Application

An application under section 486.2(1) or (2) may be brought by the Crown or the witness. The timing of any application pursuant to section 486.2 is dealt with in section 486.2(2.1).

e. Determining Which Aid Is Appropriate

While courts in Ontario, Manitoba, and Saskatchewan have held that the court should decide which aid is appropriate under this section,[48] there are cases from British Columbia and Yukon where the courts have held that it is the applicant, not the court, who chooses which aid will be used.[49]

Moreover, once the court has determined which testimonial aid will be used in a particular case, it still has an ongoing responsibility to ensure that the testimonial aid does not interfere with the proper administration of justice.[50] The issue can be revisited by the court and the order rescinded where the court observes that the actual use of the testimonial aid is interfering with the proper administration of justice.[51]

46 See *R v Quash*, 2021 YKTC 62 at para 2.

47 The decision in *R v Jimaleh*, [2016] OJ No 5133 (QL) (Sup Ct J) underlines the importance of ensuring the accused is able to communicate with counsel while watching the testimony.

48 See, for instance, *R v Wight*, 2011 ONCJ 414; *R v NHP*, 2011 MBQB 31; *R v CTL*, 2009 MBQB 266; *R v GAP*, *supra* note 34; *R v Brown*, 2010 SKQB 420 at para 19.

49 See the discussion in *R v WV*, 2016 ONSC 874. Examples of British Columbia and Yukon cases include *R v SBT*, *supra* note 36; *R v FM*, *supra* note 43; *R v Netro*, 2018 YKSC 11; *R v Etzel*, 2014 YKSC 50.

50 *R v Brown*, *supra* note 48.

51 *R v Black*, 2007 BCSC 1360 at paras 30-36. See also *R v SDL*, 2017 NSCA 58 for an analogous result in the context of s 714.1.

f. Section 486.2 Orders and the Location of Counsel

Should an order be made that a witness be allowed to testify outside of the courtroom, an issue can arise as to where the lawyers should be placed: in the courtroom, and thereby conducting their examinations of the witness by means of the closed-circuit television, or in a remote room with the witness.

In *HMTQ v GT*,[52] the Ontario Superior Court of Justice was concerned that given the size of the remote room, the child witness might be intimidated by the presence of three gowned lawyers and thus ordered that the child could testify remotely but with only a support person present in the room with her.[53] It was held that the positioning of counsel (as well as the accused and any witness) is at the sole discretion of the trial judge.[54]

Other logistical issues inherent in the setup of the remote testimony room have been found to be dispositive of the issue, such as the lack of a sufficient number of microphones.[55] One jurist has gone so far as to state:

> I bear in mind as well that, in our system, cross examination of a witness is not usually done by counsel in close proximity to the witness unless that counsel is showing the witness a document or other exhibit; otherwise a witness almost always has the benefit of the distance between the counsel table and the witness box. There is no reason why C.H., who is 16 years of age, should be in turn cross examined by a lawyer who is sitting feet away from her.[56]

Case law arising from court procedures used during the COVID-19 pandemic may well be relevant here. Yet it is this very same wealth of recent pandemic-induced experience that may militate against such views as expressed in *R v SLC* that "[o]nce a witness is testifying virtually, there is no practical difference in the trial setting arising from where the witness is physically located: same building, same city, another location."[57] Many practical differences have become apparent, especially where the location, device, and means of transmission are not located at the courthouse.

52 2013 ONSC 494.

53 In this situation, one might expect the impartiality of the support person in question would take on an even greater importance.

54 *Ibid* at para 9. See also *R v GW*, 2014 ONSC 507. The recent decision in *R v Belem*, 2017 ONSC 2213 at para 36 notes that "there does not appear to be a uniform practice about the location of cross-examining counsel."

55 *R v GW*, *supra* note 54 at para 6.

56 *Ibid* at para 6; *R v NH*, 2019 ONSC 4530. But see the discussion in *R v TMQ*, 2013 MBQB 289.

57 S*upra* note 17 at para 69.

3. Constitutionality

The constitutionality of a predecessor section to 486.2(1) was dealt with by the Supreme Court in *R v Levogiannis*.[58] That subsection (then numbered 486(2.1)) was found to comply with constitutional requirements at least insofar as the use of a screen was concerned. It read:

> 486(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, 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.

In the 2008 decision of *R v JZS*, the British Columbia Court of Appeal declared constitutional a version of section 486.2(1) that is virtually identical to the present subsection:

> [43] I am satisfied that s. 486.2 is merely the next step in the evolution of the rules of evidence. These rules seek to facilitate the admissibility of relevant and probative evidence from children and vulnerable witnesses while maintaining the traditional safeguards for challenging the reliability of their evidence. Rules of evidence must be construed in light of a criminal justice system that encourages the goal of "attainment of truth." Over the years, the use of testimonial aids has been subject to ongoing procedural and evidentiary changes, which may continue to evolve. In this case, the changes are not in conflict with constitutionally guaranteed principles of fundamental justice. The presumptive nature of s. 486.2 does not dispense with any of the traditional safeguards for ensuring that an accused receives a fair trial. In my view, the reasoning in *Levogiannis* and *L.(D.O.)* continues to apply to the current provision.[59]

Upon further appeal, the Supreme Court affirmed the constitutionality of the provision.[60]

D. Appointment of Counsel to Conduct Cross-Examination

1. Statutory Authority

> Accused not to cross-examine witness under 18
>
> 486.3(1) In any proceedings against an accused, the judge or justice shall, on application of the prosecutor in respect of a witness who is under the age of 18 years, or on

58 *Supra* note 35.

59 *Supra* note 33 at para 43.

60 *Ibid*.

application of such a witness, order that the accused not personally cross-examine the witness, unless the judge or justice is of the opinion that the proper administration of justice requires the accused to personally conduct the cross-examination. If such an order is made, the judge or justice shall appoint counsel to conduct the cross-examination.

Accused not to cross-examine complainant—certain offences

(2) In any proceedings against an accused in respect of an offence under any of sections 264, 271, 272 and 273, the judge or justice shall, on application of the prosecutor in respect of a witness who is a victim, or on application of such a witness, order that the accused not personally cross-examine the witness, unless the judge or justice is of the opinion that the proper administration of justice requires the accused to personally conduct the cross-examination. If such an order is made, the judge or justice shall appoint counsel to conduct the cross-examination.

Other witnesses

(3) In any proceedings against an accused, the judge or justice may, on application of the prosecutor in respect of a witness who is not entitled to make an application under subsection (1) or (2), or on application of such a witness, order that the accused not personally cross-examine the witness if the judge or justice is of the opinion that the order would allow the giving of a full and candid account from the witness of the acts complained of or would otherwise be in the interest of the proper administration of justice. If the order is made, the judge or justice shall appoint counsel to conduct the cross-examination.

Factors to be considered

(4) In determining whether to make an order under subsection (3), the judge or justice shall consider

(a) the age of the witness;
(b) the witness' mental or physical disabilities, if any;
(c) the nature of the offence;
(d) whether the witness needs the order for their security or to protect them from intimidation or retaliation;
(e) the nature of any relationship between the witness and the accused;
(f) society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process; and
(g) any other factor that the judge or justice considers relevant.

Application

(4.1) An application referred to in any of subsections (1) to (3) may be made during the proceedings to the presiding judge or justice or, before the proceedings begin, to the judge or justice who will preside at the proceedings or, if that judge or justice has not been determined, to any judge or justice having jurisdiction in the judicial district where the proceedings will take place.

No adverse inference

(5) No adverse inference may be drawn from the fact that counsel is, or is not, appointed under this section.

2. Summary

Section 486.3 of the *Criminal Code* sets out the circumstances under which an accused person who appears *pro se* (who is without counsel) will be prohibited from personally conducting a cross-examination of a child or other vulnerable witness. Where the court makes such an order, the court must appoint counsel to conduct the cross-examination.

Applications under section 486.3 may be brought by the Crown or the witness.

a. Sections 486.3(1) and (2)—Presumptive Orders of Prohibition

Section 486.3(1) and (2) permit the prosecutor or the witness to make an application to the court that an accused who is without counsel not be allowed to personally cross-examine the witness. Section 486.3(1) pertains to witnesses under the age of 18 years, and section 486.3(2) applies when an accused person has been charged with the offence of criminal harassment (s 264) or with an offence related to sexual assault (s 271, 272, or 273).

Under section 486.3(1) and (2), an order is presumptive, unless the judge "is of the opinion that the proper administration of justice requires the accused to personally conduct the cross-examination." As stated in *R v DPG*,[61] "[o]nce the Crown makes the application the presumption arises and the accused must satisfy the court that the proper administration of justice requires the accused to conduct the cross-examination personally."[62]

Under section 486.3(1), the presumption will be triggered where the witness is under the age of 18 years. When dealing with an application pursuant to section 486.3(1), courts usually find that the witness in question is under the age of 18 years on the basis of uncontroverted Crown submission,[63] but a scenario can be contemplated where an accused may challenge that submission by means of evidence. The onus on the accused in such a circumstance would be on the balance of probabilities.[64]

In the context of section 486.3(2), the presence of one of the enumerated offences on the information or indictment would be sufficient to establish the presumption. It is unclear what would form the basis for a successful challenge by an accused to

61 2008 CanLII 7747 (Ont Sup Ct J).

62 *Ibid* at para 5. As well, see *R v CGM*, 2015 ABCA 375.

63 See, for instance, *R v CM*, [2012] AJ No 517 (QL) at paras 30-32 (Prov Ct).

64 *Ibid* at para 36.

the presumption established under the current versions of either section 486.3(1) or (2).[65]

Once an order has been made under section 486.3(1) or (2) prohibiting the accused from personally cross-examining the witness, the court must appoint counsel to conduct the cross-examination for the accused.

b. Section 486.3(3)—Discretionary Orders of Prohibition

The more general section 486.3(3) allows for the appointment of counsel to conduct a cross-examination of a witness in any other case where the accused is without counsel and the judge is of the opinion that "the order would allow the giving of a full and candid account from the witness of the acts complained of or would otherwise be in the interest of the proper administration of justice." Some form of evidence may be required here.[66]

Unlike section 486.3(1) and (2), the language in section 486.3(3) does not prohibit the accused from personally cross-examining a witness merely upon the application of the prosecutor or the witness. The court must first form the opinion that either the prohibition "would allow the giving of a full and candid account" or "would otherwise be in the interest of the proper administration of justice." In that context, the court is directed by section 486.3(4) to consider certain factors when forming its opinion.[67]

c. Timing of Applications and Orders Under Section 486.3

Section 486.3(4.1) establishes a liberal regime. Effectively, an application under section 486.3 can be brought at *any* point prior to or during the proceedings.

If the application is brought prior to the proceedings, it need not be brought before the jurist who will preside at the proceedings. However, it is possible that the issue might first be raised at a point after a date has been set for the proceedings or even after the proceedings have commenced.

Clearly, the appointment would best be done prior to the setting of any dates for the criminal proceedings. In that way, the availability of potential counsel is less likely to become an issue.

65 By way of pure speculation: might a successful rebuttal by the accused occur where there is a late application by the Crown pursuant to these sections and an adjournment is not appropriate?

66 See *R v Young*, [2021] NJ No 293 (QL) at paras 7ff (Prov Ct).

67 Cases of interest include *R v Avadluk*, 2013 NWTSC 63; *R v Predie*, [2009] OJ No 2723 (QL) (Sup Ct J); *R v Tehrankari*, 2008 CanLII 74557, [2008] OJ No 5652 (QL) (Sup Ct J), which dealt with an earlier version of the statute. See also *R v Atzenberger*, 2018 BCCA 296.

d. Challenges and Ethical Considerations for the Appointed Counsel

Section 486.3 presents certain challenges and ethical considerations for the appointed counsel. Indeed, the situation facing the appointed counsel can be quite complex.

For the purposes of the present discussion, it is important to note that accused *pro se* come in two varieties: unrepresented accused and self-represented accused. In the former case, the accused is willing to be represented by counsel in the proceedings but has not retained one (e.g., for financial reasons). The unrepresented accused will cooperate with the appointed counsel in the preparation of the cross-examination. However, section 486.3 is drafted as if all accused persons who appear *pro se* are "unrepresented." This can be a problem.

The self-represented accused does not wish to be represented by counsel at all, including for the purpose of cross-examining Crown witnesses. Their reason for taking this position may be due to mental illness, a political or philosophical agenda, an irrational view of the trial process, or an intention to obstruct the proceeding. Whatever the reason, counsel should not assume that such an accused will be cooperative:

> If offered the free services of a member of the bar, this accused would turn him or her away or accept representation only under such terms that the counsel would not be able to accept due to ethical concerns. The self-represented accused believes that her case cannot be helped through proper legal representation and indeed may feel that it would be a hindrance. She may wish to micro-manage the participation of an appointed lawyer. In extreme cases, the self-represented accused may be hostile to the entire process and all its participants.[68]

In those cases where the accused does not assist in the preparation of the cross-examination or where their "assistance" would result in the conduct of an unethical cross-examination, what is the appointed counsel to do? Section 486.3(1) merely says that "the judge or justice shall appoint counsel to conduct the cross-examination" without explaining how that is to be done absent the cooperation of the accused.

Obviously, the focus of most cross-examinations derives from the defence theory, and the examining lawyer must have a good-faith basis for the questions they use to confront the witness.[69] Both the defence theory and the factual basis for questions will come from the accused person. It is here suggested that where the self-represented accused will not assist the lawyer in the preparation of their cross-examination, the lawyer may proceed with the cross-examination but only to the extent of testing the evidence adduced by the Crown (e.g., pointing out inconsistencies in the evidence-in-chief with a prior statement by that witness). They may not suggest a positive defence

68 David Berg, "An Inconvenient Right: An Overview of the Self-Represented Accused's Autonomy" (2015) 62 Crim LQ 503 at 507.

69 See *R v Lyttle*, 2004 SCC 5.

through the questioning. Of course, in some cases, this may result in *no* questions being asked in cross-examination.[70]

There will be cases where the accused will grudgingly accept the presence of appointed counsel but then instruct counsel to proceed in a manner that is not in keeping with counsel's professional or ethical responsibilities. For example, the accused may insist on counsel following a cross-examination scripted by the accused, in effect turning the lawyer into nothing more than an actor in a play written by the accused.[71] However, a lawyer who is appointed pursuant to section 486.3 is counsel to the accused, albeit for a limited and specific purpose. As such, and while a defence theory is to be developed by means of a dialogue between the appointed counsel and the accused, the actual questions asked in the cross-examination are to be chosen by counsel as in any other case where counsel has been retained in the normal course of affairs.[72]

Remember also that counsel appointed pursuant to section 486.3 is present for the sole purpose of conducting the cross-examination. Obviously, that will require counsel to meet with the accused to learn the defence theory and the factual information upon which that theory is based. This will require counsel to review the disclosure and, where relevant to the cross-examination, review potential exhibits or interview potential witnesses. Counsel might have to bring certain evidentiary applications relevant to the cross-examination.[73]

Outside of the cross-examination, the appointed counsel will probably also have to be present during other parts of the proceedings where evidence that might affect the cross-examination may be heard. An obvious example here would be the examination-in-chief of the witness in whose favour the section 486.3 order was granted.[74]

Appointed counsel to the accused must follow the accused's reasonable instructions and is bound by solicitor–client privilege. Appointed counsel must act only in the interests of that "client."[75] Nonetheless, an appointment pursuant to this section is not for counsel-at-large; it is only for the purposes of the specific cross-examination. It is understood that the instinct of defence counsel will be to wish to assist the accused *pro se* in many if not all aspects of the proceedings. Yet section 486.3 does not allow the counsel so appointed to become the trial lawyer. Moreover, accepting

70 For a more thorough analysis of the role of counsel appointed under this section, see *R v Farah*, 2021 YKSC 23; David Berg, "A Status Precarious and Perilous: The Lawyer, the Self-Represented Accused, and Section 486.3 Appointments" (2013) 34 For The Defence 27. See also *R v Hotte*, 2020 QCCS 2329; *R v Atzenberger*, *supra* note 67.

71 See, here, G Arthur Martin's admonition to lawyers not to allow themselves "to be a mere mouthpiece for the client" in "The Role and Responsibility of the Defence Advocate" (1970) 12 Crim LQ 376 at 382. As well, see *R v Faulkner*, 2013 ONSC 2373 at paras 35ff.

72 See *R v Shenker*, 2021 QCCQ 2376; *R v Jerace*, 2021 BCCA 94 at paras 99ff.

73 For example, *R v JS*, 2020 ONSC 8112 at para 46.

74 A discussion of this role can be found in *R v S (PN)*, 2010 ONCJ 244.

75 This relationship is discussed at length in *R v Faulkner*, *supra* note 71 at paras 35ff, 133.

the appointment to conduct the cross-examination does not allow that counsel to also conduct themself as *amicus curiae* in those proceedings. The lawyer is counsel to the accused, albeit for a limited purpose, and an *amicus* would play a completely different role.[76] It is important that the exact role of counsel appointed pursuant to this section be explained to the accused.[77]

E. Non-Disclosure of a Witness's Identity

1. Statutory Authority

Non-disclosure of witness' identity

486.31(1) In any proceedings against an accused, the judge or justice may, on application of the prosecutor in respect of a witness, or on application of a witness, make an order directing that any information that could identify the witness not be disclosed in the course of the proceedings if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

Hearing may be held

(2) The judge or justice may hold a hearing to determine whether the order should be made, and the hearing may be in private.

Factors to be considered

(3) In determining whether to make the order, the judge or justice shall consider

(a) the right to a fair and public hearing;
(b) the nature of the offence;
(c) whether the witness needs the order for their security or to protect them from intimidation or retaliation;
(d) whether the order is needed to protect the security of anyone known to the witness;
(e) whether the order is needed to protect the identity of a peace officer who has acted, is acting or will be acting in an undercover capacity, or of a person who has acted, is acting or will be acting covertly under the direction of a peace officer;
(e.1) whether the order is needed to protect the witness's identity if they have had, have or will have responsibilities relating to national security or intelligence;
(f) society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process;
(g) the importance of the witness' testimony to the case;
(h) whether effective alternatives to the making of the proposed order are available in the circumstances;
(i) the salutary and deleterious effects of the proposed order; and
(j) any other factor that the judge or justice considers relevant.

76 For this difference, see *Ontario v Criminal Lawyers' Association of Ontario*, 2013 SCC 43.

77 See, for instance, *R v Wapass*, 2014 SKCA 76.

No adverse inference

(4) No adverse inference may be drawn from the fact that an order is, or is not, made under this section.

2. Summary

Section 486.31 gives the court the discretionary power to order the non-disclosure of any information that could identify a witness during the proceedings where such an order would be in the interest of the proper administration of justice.

Section 486.31(1) allows the presiding jurist to make an order prohibiting the disclosure of any information that would identify a witness where that jurist is of the opinion that the order is in the interest of the proper administration of justice. This discretionary power may be engaged upon the application by the prosecutor in regard to a witness or by the witness themself. The onus on the applicant is on the balance of probabilities.[78]

Section 486.31(2) allows the jurist the discretion to hold a hearing in order to determine whether the order should be made. The hearing may be held *in camera*.

Section 486.31(3) requires that when determining whether to make an order pursuant to section 486.31, a jurist must consider a series of enumerated factors.

3. Constitutionality

The constitutionality of section 486.31 has not yet been litigated.[79]

F. Publication Bans

1. Statutory Authority

Order restricting publication—sexual offences

486.4(1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

78 *R v Seien*, 2021 ABPC 115 at para 12.

79 See *R v Stewart*, 2016 BCSC 2507 at para 5, where the trial judge, in *obiter*, expressed the opinion that the provision may not be Charter compliant. Note that this issue was not argued at the appeal; see *R v Stewart*, 2018 BCCA 76.

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

Mandatory order on application

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and

(b) on application made by the victim, the prosecutor or any such witness, make the order.

Victim under 18—other offences

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

Mandatory order on application

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, make the order.

Child pornography

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

Limitation

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.

2. Summary

Section 486.4 of the *Criminal Code* sets out the circumstances under which a publication ban may be ordered.[80]

Section 486.4(1) allows the presiding jurist to make an order prohibiting the publication of any information that would identify the victim or a witness where certain enumerated offences or their historical equivalents are alleged (s 486.4(1)(a)). The judge may also make such an order where a proceeding involves both an enumerated offence and one or more other offences (s 486.4(1)(b)).

Despite the discretionary wording of section 486.4(1), section 486.4(2) requires that in proceedings dealing with offences enumerated under section 486.4(1), the presiding jurist *must* inform any witness under the age of 18 years, as well as the alleged victim, of their right to apply for the publication ban. Furthermore, upon application by the Crown, the victim, or a witness, the making of an order for a publication ban under section 486.4(1) is mandatory.

The procedures articulated in section 486.4(1) and (2) are paralleled by section 486.4(2.1) and (2.2) and deal with child victims. Section 486.4(2.1) and (2.2) states that where proceedings pertain to an offence that is not enumerated in section 486.4(1) and the victim is under the age of 18 years, a publication ban is mandatory upon application by the Crown or the victim. Note that there is no mention here of "witnesses."

Section 486.4(3) deals with the specific issue of children who are depicted in child pornography. Here, the order is *mandatory*—no application is required. In child pornography cases, the judge *shall* make an order directing that any information that could identify a witness who is under the age of 18 years "or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of [section 163.1] shall not be published in any document or broadcast or transmitted in any way."[81]

3. Constitutionality

A discussion of publication bans in the context of Charter values can be found in *Vancouver Sun (Re)*[82] and the cases cited therein. In summary, the Supreme Court

80 For a broad discussion of this section, see *Her Majesty the Queen in Right of Ontario v Canadian Broadcasting Corporation*, 2019 ONSC 1079. Examples of its application in the context of child abuse include *R v Lawrence*, 2021 NLSC 7; *R v Khan*, 2020 ABCA 466. For an example in a non-child abuse context, see *R v Hersi*, 2019 ONCA 94.

81 In *R v KB*, 2014 NSPC 24, the Court dismissed an application by a media company for revocation of a publication ban made under s 486.4(3), despite the fact that the parents of the deceased young person had consented to the disclosure of their daughter's name as a means of raising public awareness about their daughter's case.

82 *Supra* note 13.

repeated what it had held in an earlier decision—that a publication ban should only be ordered when:

> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.[83]

G. Video-Recorded Evidence

1. Statutory Authority

Evidence of victim or witness under 18

715.1(1) In any proceeding against an accused in which a victim or other witness was under the age of eighteen years at the time the offence is alleged to have been committed, a video recording made within a reasonable time after the alleged offence, in which the victim or witness describes the acts complained of, is admissible in evidence if the victim or witness, while testifying, adopts the contents of the video recording, unless the presiding judge or justice is of the opinion that admission of the video recording in evidence would interfere with the proper administration of justice.

Order prohibiting use

(2) The presiding judge or justice may prohibit any other use of a video recording referred to in subsection (1).

2. Summary

Section 715.1 of the *Criminal Code* permits the admission of a video recording of a child witness in certain circumstances.

For a video recording to be admissible under section 715.1, the following conditions must be met:

1. the witness must have been under the age of 18 years at the time of the offence,
2. the video recording must have been made "within a reasonable period of time" after the alleged offence,
3. the video recording must depict the witness describing the alleged facts, and
4. the witness must adopt the contents of the video as having been truthful.[84]

83 *Ibid* at para 29, citing *R v Mentuck*, 2001 SCC 76. See, now, *R v Coban*, 2022 BCSC 14 for a trial judge's declaration that s 486.4(3) violates s 2(b) of the Charter and is of no force and effect.

84 *R v CCF*, [1997] 3 SCR 1183, 1997 CanLII 306 [*R v CCF* cited to SCR].

Counsel must remember that this test deals only with threshold reliability:

> After the videotaped evidence has been admitted, any questions which arise concerning the circumstances in which the video was made, the veracity of the witness' statements, or the overall reliability of the evidence, will be matters for the trier of fact to consider in determining how much weight the videotaped statement should be given.[85]

Whether or not a video recording has been made "within a reasonable time" after the alleged offence is to be decided on a case-by-case basis, having regard for the "totality of the circumstances."[86] This determination may involve many different factors, including the following:

- the fact that children often delay disclosure—"victims of abuse often in fact do not disclose it, and if they do, it may not be until a substantial length of time has passed";[87]
- the reasons for the delay;
- the impact of delay on the child's ability to accurately recall the events in issue—children's memories of events "may fade faster than those of adults";[88] and
- some delay may also "necessarily accrue," "depending on where the child resides and whether facilities are available, as well as the necessity of prior investigation to ensure the seriousness of the allegations."[89]

The onus is on the Crown, on a balance of probabilities, to prove that the time lapsed between the alleged offence and the recording of the statement was reasonable.[90] This issue is not a question of fact but, rather, one of law or mixed fact and law. The trial judge is thus required to ensure the conditions precedent for admissibility of such a recording even in the face of a defence admission.[91] The analysis is not merely quantitative or akin to what is done upon a section 11(b) Charter application.[92]

The Supreme Court held in *R v CCF* that where the Crown seeks to adduce a statement by means of section 715.1, "a *voir dire* must be held in order to review the

85 *Ibid* at para 46.

86 *R v L (DO)*, *supra* note 1 at paras 73-77; also *R v KDM*, 2021 MBQB 2; *R v RAH*, 2017 PECA 5; *R v WEB*, 2012 MBCA 23.

87 *R v W (R)*, [1992] 2 SCR 122 at 136, [1992] SCJ No 56 (QL).

88 *R v L (DO)*, *supra* note 1 at paras 73-77.

89 *Ibid*.

90 *R v JL*, 2021 ONCA 269 at para 12.

91 *R v PWM*, 2018 PECA 24 at para 14.

92 See, for instance, the discussion in *R v PS*, 2019 ONCA 637.

contents of the tape to ensure that the statements within it conform to the rules of evidence."[93] At that stage:

> Any statements which are in conflict with rules of evidence may be expunged from the tape. There are a number of factors which the trial judge could take into account in exercising his or her discretion to exclude a videotaped statement:
>
> (a) The form of questions used by any other person appearing in the videotaped statement;
> (b) any interest of anyone participating in the making of the statement;
> (c) the quality of the video and audio reproduction;
> (d) the presence or absence of inadmissible evidence in the statement;
> (e) the ability to eliminate inappropriate material by editing the tape;
> (f) whether other out-of-court statements by the complainant have been entered;
> (g) whether any visual information in the statement might tend to prejudice the accused (for example, unrelated injuries visible on the victim);
> (h) whether the prosecution has been allowed to use any other method to facilitate the giving of evidence by the complainant;
> (i) whether the trial is one by judge alone or by a jury; and
> (j) the amount of time which has passed since the making of the tape and the present ability of the witness to effectively relate to the events described.[94]

As stated in *CCF*:

> The discretion to exclude the videotape is limited to those cases where its admission would operate unfairly to the accused. Those cases will be relatively rare.[95]

Should the video recording be ruled admissible, it will be played in court and constitute part or all of the evidence-in-chief of the child witness. Cross-examination of that witness then follows. Counsel should remember that the recording does not belong to some special evidentiary category; it is part of the child's direct evidence and is subject to the usual form of analysis.[96]

93 *R v CCF*, *supra* note 84 at para 51.

94 *R v L (DO)*, *supra* note 1 at para 65; *R v CCF*, *supra* note 84 at para 51.

95 *R v CCF*, *ibid*. For an example, see *R v Walsom*, 2017 ONSC 2159.

96 See, for instance, *R v WDAZ*, 2018 BCCA 180 at para 55; *R v LO*, 2015 ONCA 394 at para 43.

3. Constitutionality

The constitutionality of an earlier version of this section was dealt with by the Supreme Court in *R v L (DO)*,[97] and was found to be in compliance with the Charter. At that time, the provision read:

> 715.1 In any proceeding relating to 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, in which the complainant was under the age of eighteen years at the time of the offence is alleged to have been committed, a videotape made within a reasonable time after the alleged offence, in which the complainant describes the acts complained of, is admissible in evidence if the complainant, while testifying, adopts the contents of the videotape.

97 *Supra* note 1.