Testimonial Support for Vulnerable Adults (Bill C-2): Case Law Review (2009-2012)

Prepared by Mary T. Ainslie, Q.C.

for

Research and Statistics Division

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1.0 Introduction

Bill C-2, *An Act to Amend the Criminal Code (Protection of Children and Other Vulnerable Persons) and the Canada Evidence Act* received Royal Assent on July 21, 2005. The bill included amendments to facilitate witness testimony, which came into force on January 2, 2006. These amendments were intended to provide greater clarity and consistency for the use of testimonial aids and other measures for victims and witnesses under the age of eighteen years, and also made testimonial aids and other measures available to vulnerable adult witnesses for the first time. Testimonial aids include allowing a witness to testify behind a screen, outside the courtroom by closed-circuit television, and to be accompanied by a support person during their testimony.

The 2006 amendments made testimonial aids available for all victims and witnesses under the age of eighteen years and adult witnesses with a mental or physical disability upon application unless they would interfere with the proper administration of justice ("presumptive" orders). The 2006 amendments also made these testimonial aids available to other vulnerable adult witnesses on a discretionary basis if the judge believes they are necessary to obtain a full and candid account from the witness. When deciding whether to order a testimonial aid for an adult witness, the judge will take into account factors such as the nature of the offence, and the nature of the relationship between the witness and the accused.

The 2006 amendments also expanded the court's ability to appoint a lawyer to conduct the cross-examination of a victim when the accused is self-represented. In cases involving witnesses under the age of eighteen and adult victims of criminal harassment, an order appointing a lawyer to conduct the cross-examination will be granted upon application unless it would interfere with the proper administration of justice. The judge also has the discretion to appoint a lawyer to cross-examine any adult witness in any proceedings where the judge believes it is necessary to obtain a full and candid account from the witness.

In 2010, the Department of Justice Canada released a report, *Testimonial Support Provisions for Children and Vulnerable Adults (Bill C-2): Case Law Review and Perceptions of the Judiciary* (Bala et al. 2010) referred herein as the *2010 Bill C-2 Case Law Review*. This report included an analysis and summary of the reported Canadian case law decided since the enactment of Bill C-2 (January 2, 2006) up to June 30, 2009 and considered the question: Since Bill C-2 came into effect, what does case law reveal about the new law and how has Canadian legal literature dealt with these legal reforms? It deals most comprehensively with provisions relating to child witnesses, but also considers accommodations for adult vulnerable witnesses.

This review of case law from June 30, 2009 to December 31, 2012, is intended to supplement the *2010 Bill C-2 Case Law Review*; it deals only with how these provisions have impacted the experience of vulnerable adult victims and witnesses. In order to give context to this *2013 Bill C-2 Case Law Review*, there is some duplication of the discussion of cases considered in the *2010 Bill C-2 Case Law Review*, and occasionally limited reference to pre-2006 case law that interpreted the previous provisions.

There are two tables that can be found in the Appendices. These briefly describe some of the relevant cases that have considered the interpretation of the *Criminal Code* provisions relating to vulnerable witnesses, and which include a brief description of the basis upon which the application was or was not granted, and describes the evidence led in support of the application. It is hoped that these Charts permit the reader to quickly isolate the key principles for consideration when application for a Bill C-2 accommodation is made.

It was noted in the *2010 Bill C-2 Case Law Review*, that there is very little case law pertaining to vulnerable adult witness provisions. The review completed for this document also suggests that applications for the use of testimonial aids for adults are still relatively infrequent. Also, that when applications are made for the use of testimonial aids for adults, it continues to be that they are generally successful, but they are less likely to be granted than applications for child witnesses.

Readers are also encouraged to read the companion report entitled, *Vulnerable Adult Witnesses: The perceptions and experiences of Crown Prosecutors and Victim Services Providers in the use of testimonial support provisions* (2013) by Pamela Hurley. The findings in this report, from in-depth interviews with Crowns and victim services providers, add nuances to the case law.

2.0 Method

The focus of the legal research was on cases that were decided after June 30th, 2009 to December 31st, 2012. Some cases were considered from before this time period if they were considered relevant to the topic of the case law review. It was decided that a chart would be the best way to summarize the information and relevant principles from the cases for sections 486.1 - 486.3, with attention to the following factors: the level of court, kind of court proceeding, vulnerability of witness and relationship to accused, what material was used to support the application, whether it was opposed and what, if any, objections were raised, and the key rulings.

The student researcher used Westlaw "keycites" for sections 486.1, 486.2 and 486.3 both generally and according to the subsections. The cases considering these sections were reviewed. There were roughly 100 cases generated by these searches. It was quickly apparent that many of the decisions dealt with child witnesses, not adult witnesses, and that there was duplication of cases. The electronic search on Westlaw relating to s. 715.2 was abandoned as adult cases could not be readily isolated from cases decided under s. 715.1. The Quicklaw search followed a similar format, with more of a focus on searches of summaries, and using the legislation citator. Roughly the same number of cases were identified, and again, significant duplication. The search of s. 715.2 cases was conducted in Quicklaw, with the field narrowed using search terms such as "adult" and "vulnerable" proximate to videotape. It became apparent that there were very few actual rulings relating to the use of testimonial accommodations for vulnerable adults, although some cases referred to the fact that an accommodation had been ordered without explaining why.

The researchers also considered a list of cases and charts generated in 2009 by a B.C. Ministry of Justice lawyer who had tracked the application of Bill C-2 in British Columbia, and this included

some unreported decisions. The researchers also reviewed articles and a text, referred to in the case law review, to confirm that the relevant cases had been captured by the electronic research.

3.0 Accommodations for Vulnerable Adult Witnesses

3.1 The legislative scheme for support persons and testimony behind a screen or outside of the courtroom

The following is a summary of the *Criminal Code* provisions that provide for testimonial accommodations for vulnerable witnesses. The full text of the provisions can be found in the Appendices and should be reviewed for completeness. It is noteworthy that the provisions for a support person and a screen, CCTV or other device provide for both presumptive and discretionary accommodations. With respect to the discretionary applications, the factors to consider are enumerated, and are the same. Also, that in either instance, the judge retains a discretion to refuse to grant the order if it would "interfere with the proper administration of justice." Both provisions provide that an order can be made before the court proceedings.

The new regime established by Bill C-2 provides three different avenues for the Crown or a vulnerable witness to request an order for the use of a testimonial aid in any trial or preliminary hearing. Under subsection (1), the order is mandatory in relation to a child witness or a disabled witness unless the judge or justice is of the opinion that the order would interfere with the proper administration of justice. Under subsection (2), the order is discretionary in relation to any adult witness if the judge or justice is of the opinion that the use of a testimonial aid is necessary to obtain a full and candid account of the acts complained of, having regard to the criteria contained in subsection 486.1(3). Finally, under subsection (4), the order is discretionary and may be made at the court's initiative where the charges arise out of organized crime, terrorism or specified offences under the *Security of Information Act* and the judge or justice is of the opinion that the order is necessary to protect the safety of the witness or to obtain a full and candid account of the acts complained of.

The subsection creates a presumption that a child or "a witness who may have difficulty communicating evidence due to a physical or mental disability" can testify from behind a screen or outside the courtroom. Unless the order would prejudice the accused's right to a fair trial or otherwise interfere with the proper administration of justice, the court "shall" make the order where requested to do so by the Crown or the witness. The Crown may have an evidentiary burden if the existence of a mental or physical disability that may impact on the ability of a witness to testify is disputed. However, once the presumption is engaged, the respondents bear the burden of establishing that the use of a testimonial aid would interfere with the proper administration of justice.

As described in *R. v. Alam*, 2006 ONCJ 59, section 486.2(2) is new. It is intended to recognize and accommodate adult witnesses who may be vulnerable to intimidation. This section permits a court to make an order for the use of a testimonial aid for <u>any</u> witness, if the judge or justice considers it "necessary to obtain a full and candid account from the witness of the acts complained of." The test to be applied in the exercise of the court's discretion is typically considered to be the same test used in the old s. 486(2.1), allowing a child or disabled adult to

testify behind a screen or outside of the courtroom. The onus is on the Crown to establish an "evidentiary basis" for the making of the order concerning an adult witness, having regard to the age of the witness, the presence or absence of mental or physical disability, the nature of the offence, the nature of any relationship between the witness and the accused, and any other circumstances considered relevant (the same criteria in the new s. 486.1(3) that the court must consider when making an order to permit a support person to sit near an adult witness). The requisite evidentiary basis could be established through the testimony of a mental health professional or other expert or through the direct testimony of the witness, using the testimonial aid under consideration, as required by s. 486.2(6). In some cases, the submissions of counsel may suffice.

3.1.1 Support person – s. 486.1

[Presumptive] s. 486.1 (1) In any proceedings against an accused, the judge or justice shall, on application of the prosecutor, of a witness who is under the age of eighteen years or of a witness who has a mental or physical disability, 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.

[Discretionary] s. 486.1 (2) In any proceedings against the accused, the judge or justice may, on application of the a prosecutor or 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 is necessary to obtain a full and candid account from the witness of the acts complained of.

[Factors to Consider] s. 486.1 (3) In making a determination under subsection (2), the judge or justice shall take into account the age of the witness, whether the witness has a mental or physical disability, the nature of the offence, the nature of any relationship between the witness and the accused, and any other circumstance that the judge or justice considers relevant.

3.1.2 Testimony outside the court room or behind a screen – s. 486.2

[Presumptive] s. 486.2(1) Despite section 650 (accused to be present in the courtroom), in any proceedings against an accused, the judge or justice shall, on application of the prosecutor, of a witness who is under the age of eighteen years or of a witness who is able to communicate evidence but may have difficulty doing so by reason of a mental or physical disability, order that the witness testify outside of 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.

[Discretionary] s. 486.2(2) Despite section 650, in any proceedings against an accused, the judge or justice may, on application of the prosecutor or 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 is necessary to obtain a full and candid account from the witness of the acts complained of. Factors the Court takes into account

are: the nature of the offence; the relationship of the witness to the accused; whether the witness has a disability; the age of the witness; and any other circumstances the court might deem relevant.

The value of testimonial accommodations has been well documented (see Bala 1993; Bala et al. 2001; 2011) certainly with respect to children, and less frequently with adults. It is also established that there need not be any impact on trial proceedings by the use of accommodations. The Supreme Court of Canada recently upheld the constitutionality of the presumptive scheme for providing accommodations to children, by upholding B.C. Court of Appeal's decision in *R. v. J.Z.S.*, 2010 SCC 1, 2008 BCCA 401 where that Court said:

> [35] L'Heureux-Dubé J. identified the main objective of the judicial process as the attainment of truth. She acknowledged that, in order for a child to provide a full and candid account of alleged offences, there may be circumstances where testimonial accommodation is required. In that regard, she noted at 487:
>
> > One must recall that rules of evidence are not cast in stone, nor are they enacted in a vacuum. They evolve with time. As discussed at length in *L.(D.O.), supra*, the recent trend in courts has been to remove barriers to the truth-seeking process (*R. v. Khan*, [1990] 2 S.C.R. 531; *R. v. W.(R.)* and *R. v. Marquard*, [1993] 4 S.C.R. 223). Recent Supreme Court of Canada (*R. v. B.(K.G.)*, [1993] 1 S.C.R. 740; *R. v. Smith*, [1992] 2 S.C.R. 915; *R. v. Khan*; and most recently in *L.(D.O.))*, by relaxing certain rules of evidence, such as the hearsay rules, the use of videotaped evidence and out of court statements, have been a genuine attempt to bring the relevant and probative evidence before the trier of fact in order to foster the search for truth.
> >
> > Parliament, on the other hand, is free to enact or amend legislation in order to reflect its policies and priorities, taking into account societal values which it considers important at a given time. ... The only limit placed on Parliament is the obligation to respect the *Charter* rights of those affected by such legislation.
> >
> > As mentioned above and as discussed in the companion case [*L.(D.O.)*], rules of evidence and procedure have evolved through the years in an effort to accommodate the truth-seeking functions of the courts, while at the same time ensuring the fairness of the trial.

These same features, this balancing of interests, should animate the interpretation of provisions relating to adult witnesses. These witnesses should be encouraged to participate in the criminal justice system through the use of protective measures, as this assists in getting the best evidence from the witness, while minimizing the trauma to vulnerable witnesses, and ensuring that the rights of accused persons are protected. These are the very features that animate the interpretation and application of the legislation. These were features identified in the Preamble to the former Bill C-2.

4.0 The purpose of the Bill C-2 amendments

Under the former s. 486(2.1), the court was permitted, in the trial of most sexual or violent offences, to order a witness who was under the age of 18, or who had difficulty communicating evidence by reason of a mental or physical disability, to testify through the use of CCTV or from behind a screen, if the court considered it "necessary to obtain a full and candid account of the acts complained of." This discretionary accommodation was therefore limited:

a. by the two discrete categories of witnesses (*i.e.*, children under the age of 18 and adults who may have difficulty communicating evidence by reason of a disability); and

b. by the type of offence against which the witness was required to testify.

As a result of the amendments in Bill C-2, s. 486.2 now extends the benefit of accommodation to witnesses in <u>any</u> legal proceeding and, in particular, provides two ways by which adult witnesses can obtain testimonial accommodation presumptively.

The first way is under subsection (1). Adult witnesses who can use s. 486.2(1) are those who are "able to communicate evidence but may have difficulty doing so by reason of a mental or physical disability". Once the Crown has established that the witness may have difficulty testifying due to a disability, the judge or justice is required to make the order unless doing so would interfere with the administration of justice. Similarly, if an adult witness is able to communicate evidence but, because of a disability, may have difficulty doing so (and in this respect, may be considered "like a child"), then they too are presumptively allowed accommodation under the same section.

From this review of case law it appears that applications under the presumptive scheme are often blended with an application for a discretionary order, with the result that even in presumptive situations, the judges consider the factors enumerated in discretionary applications.
However, if an adult witness is vulnerable for some other reason, then the analysis shifts to s. 486.1(2) and s. 486.2(2) to determine whether accommodation is necessary to obtain <u>a full and candid account from that witness</u>. This discretionary procedure therefore imports the "full and candid account" test, and judges appear to consider the case law decided under the pre-Bill C-2 legislation to interpret this provision.

In order to assist with the application of this standard, factors are enumerated for the judge's consideration (referred to in s. 486.1(3)), namely:

i. the age of the witness;
ii. whether the witness has a physical or mental disability;
iii. the nature of the offence;
iv. the nature of the relationship between the accused person and the witness seeking accommodation; and
v. any other circumstances the court considers relevant.

The preamble of Bill C-2 sheds light on the legislative objective of the amended provisions. It reads, in part, that Parliament wished to "<u>encourage the participation of witnesses</u> in the criminal justice system through the use of protective measures that seek to facilitate the participation of

children and other vulnerable witnesses while ensuring that the rights of accused persons are respected" (emphasis added).

In February, 2005, Irwin Cotler, then Minister of Justice and Attorney General of Canada, explained the purpose of Bill C-2 to the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness. In Cotler's words,[1]

> … [T]here are also a lot of adult victims who are revictimized by the criminal justice system, particularly sexual assault victims and spousal abuse victims. Bill C-2 includes a set of reforms that are intended to benefit them as well, including in particular sexual assault victims, victims of criminal harassment, and domestic violence victims, who are, as I indicated, vulnerable to revictimization as a result of their experience as a witness, the nature of the offence, their relationship with the accused, or their own particular circumstances. …
>
> In other words, in this legislation we aim to extend the testimonial aid to adult victims in some circumstances that recognize how and when this balance must be struck.

It was recognized in the *2010 Bill C-2 Case Law Review* that applications are infrequent, and that continues to be the case. The following observations may be made from a consideration of the cases enumerated therein, regarding the circumstances of the witness and the case that influence whether an application for an accommodation is successful. In addition, consideration should be given to the *2010 Bill C-2 Case Law Review*.

Age of the Witness – It is apparent that adult witnesses who are closer in age to eighteen (the cutoff for a presumptive order) are more likely to be granted an accommodation under the discretionary scheme.

Type of Disability – It is arguably problematic that both the presumptive and discretionary schemes refer to adults with a "physical or mental disability" (as a precondition to the presumptive order, or as a factor to consider in the discretionary order). Also, this is a not a homogenous group and it is apparent that the criteria with respect to what constitutes a disability are inconsistent (See *R.* v. *Billy*, 2006 BCPC 203).

Nature of the Offence – It is apparent that the accommodations are most likely ordered when the victim or witness is testifying in a sexual assault case, although domestic violence and other crimes of violence are considered the kind of cases where an accommodation is "necessary". This may manifest a reluctance on judges to impose accommodations which impact the "conventional" way of receiving evidence, this being *viva voce* testimony in the courtroom.

Timing of Application – Applications for testimonial accommodations can be made before the court proceeding or during the court proceeding. This is an important change as applications brought well in advance allow the parties to properly set up the accommodation and otherwise

[1] Proceedings of the Standing Committee on Justice, Human Rights, Public Safety and Emergency Preparedness, First Session, 38th Parliament, 2004-05 (February 22, 2005).

govern the proceedings (such as arranging for a CCTV camera or screen). The problematic feature of the legislation is that the application must be brought before the trial judge. The practical fact is that a judge's rota changes, and it is sometimes difficult to arrange for the matter to be heard in advance. Similarly, if a witness testified at a preliminary inquiry with or without an accommodation is a factor that a judge will consider: *R. v. Buckingham*, [2009] O.J. No. 3546 (C.Jus.) at [6], *R. v. Clark*, [2007] O.J. No. 1553 (C.Jus.) at [5]-[7], *R. v. D.(C.)*, [2010] O.J. No. 4351 (C.Jus.) at [3]-[5], *R. v. Land*, 2012 ONSC 4080.

Evidentiary basis for testimonial accommodation – Presumptive – In *R. v. Alam*, 2006 ONCJ 593 the Court stated:

> [20] The subsection creates a presumption that a child or "a witness who *may* have difficulty communicating evidence due to a physical or mental disability" can testify from behind a screen or outside the courtroom. Unless the order would prejudice the accused's right to a fair trial or otherwise interfere with the proper administration of justice, the court "shall" make the order where requested to do so by the Crown or the witness. The Crown may have an evidentiary burden if the existence of a mental or physical disability that may impact on the ability of a witness to testify is disputed, as it was in this case. However, once the presumption is engaged, the Respondents bear the burden of establishing that the use of a testimonial aid would interfere with the proper administration of justice.

Evidentiary basis for testimonial accommodation – Discretionary - A "full and candid account"- Before allowing an application under s. 486.2(2), the judge or justice must be "of the opinion that the order is necessary to obtain a full and candid account from the witness of the acts complained of." The Crown bears the onus of establishing the necessity of the order. This necessity requirement is often considered to be the same threshold test that existed under the former s. 486(2.1), therefore the previous case law dealing with testimonial accommodation is instructive in this respect. The chart on case law in the Appendices assists in determining what is meant by a "full and candid account", and sheds light on the circumstances in which the court has allowed the accommodation.

In *Buckingham*, the judge noted that there must be an evidentiary basis that the accommodation is necessary: at [24]. There must be "something more" than a simple desire not to see the accused, as there must be an impact on the ability to testify fully and candidly: at [27], [29]. An application was refused in *R. v. D.(C.)* on the basis that it was based on fear of reprisal, not testimonial "necessity:"

> [17] A judicial decision to depart from the normal trial procedure must have a rational basis. There must be some evidence upon which the court could be satisfied that there is a legitimate foundation for the concern – one that would warrant intervention by the court. . . This "common and subjective concern" is not intended to be sufficient to provide a proper foundation for an order under s. 486.2. . . if that form of concern was sufficient, it would be a slippery slope.

The judge in *R. v. D.(C.)* noted that the witnesses did not need to testify in support of the application (had they needed to, accommodations would have had to have been made available:

s. 486.2(6)). With respect to allowing the detectives to testify instead of the witnesses, the judge indicated that if he needed to hear from witnesses he would have them called – but that would cause delays to get witnesses and in order to set up CCTV for the application and "the other reason is that given the concerns expressed by these witnesses, I thought that it was preferable not to subject them to yet another appearance in this proceeding if that could be avoided." at [3]. And see *R. v. Esford*, 2011 BCSC 1718 at [6], [7], R. v. Khreis, [2009] O.J. No. 5687 (Sup.Ct.) at [6]. This reasoning is consistent with a reluctance to embrace the positive features of accommodation, and resist change that could facilitate the participation of these witnesses, see for example, *R. v. Forster*, 2006 BCPC 237 at [6], [7].

Interference with the proper administration of justice – This residual discretion can be exercised to deny the use of an accommodation in the presumptive scheme. This discretion should be exercised only if the accommodation would interfere with the fair trial rights of an accused, *R. v. J.Z.S.*, 2010 SCC1, 2008 BCCA 401 and in a manner that is consistent with the purpose behind the provisions. It is established in the case law that there is no true impact from the use of a screen or CCTV (the witness is virtually present) and these are not unconstitutional (see also *R. v. C.N.H*, 2006 BCPC 119). As noted in *Alam*, "society's interest in accommodating a disabled witness to promote the truth-seeking objectives of a trial must be carefully balanced with the right to fair trial." at [34]. Despite this, there are cases where judges have denied applications because of residual concerns, or reluctance to use the technology because it may impact credibility: *R. v. D.(C.)* at [19], or because it may prejudice a jury*: R. v. Kerr*, 2011 ONSC 1231 at [16], *R. v. Salehi*, 2011 ONCJ 39 at [26]

5.0 Preventing Questioning by Self-represented Accused: Section 486.3

In 1993, the first provision relating to the protection of witnesses under 14 years of age from being cross-examined by a self-represented accused was enacted. It applied to proceedings involving offences of a sexual nature, those set out in sections 271, 272 of the *Criminal Code* or those in which violence is used, attempted, or threatened. The amendment recognized that many children who are victims of abuse remain terrified of the accused and that to allow that person to personally cross-examine the child can result in further victimization and affect the child's ability to testify (Barrett 2008, 3-87 citing Bala 1993, 368-69).[2]

In 1999, section 486 was amended again. It extended protection to witnesses under the age of eighteen at the time of the trial or the preliminary inquiry for certain designated offences. While this extension furthered the protection to young witnesses, there were "obvious gaps" to it,

[2] At the time, section 486(2.3) was worded as follows:

> **486** (2.3) In proceedings referred to in subsection (1.1), the accused shall not personally cross-examine a witness who at the time of the proceedings is under the age of fourteen years, unless the presiding judge, provincial court judge or justice is of the opinion that the proper administration of justice requires the accused to personally conduct the cross-examination and, if the accused is not personally conducting the cross-examination, the presiding judge, provincial court judge or justice shall appoint counsel for the purpose of conducting the cross examination.

including the failure to include the offence of criminal harassment and lack of protection to adult vulnerable witnesses, in particular victims of sexual or domestic violence (See Barrett 2008, at p.3-87*).*

The section was amended again in 2005, to fill these gaps, through Bill C-2. Parliament extended the protection once again, this time to include all stages of the proceeding without regard to the nature of the offence and, in some cases, for witnesses over the age of eighteen. Section 486.3 now reads as follows:

> **486.3** (1) In any proceedings against an accused, on application of the prosecutor or a witness who is under the age of eighteen years, the accused shall 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. The judge or justice shall appoint counsel to conduct the cross-examination if the accused does not personally conduct the cross-examination.
>
> (2) In any proceedings against an accused, on application of the prosecutor or a witness, the accused shall not personally cross-examine the witness if the judge or justice is of the opinion that, in order to obtain a full and candid account from the witness of the acts complained of, the accused should not personally cross-examine the witness. The judge or justice shall appoint counsel to conduct the cross-examination if the accused does not personally conduct the cross-examination.
>
> (3) In making a determination under subsection (2), the judge or justice shall take into account the factors referred to in subsection 486.1(3).
>
> (4) In any proceedings in respect of an offence under section 264, on application of the prosecutor or the victim of the offence, the accused shall not personally cross-examine the victim unless the judge or justice is of the opinion that the proper administration of justice requires the accused to personally conduct the cross-examination. The judge or justice shall appoint counsel to conduct the cross-examination if the accused does not personally conduct the cross-examination. Emphasis added.
>
> (4.1) An application referred to in subsection (1), (2) or (4) 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.
>
> (5) No adverse inference may be drawn from the fact that counsel is, or is not, appointed under this section.

Again, reference should be made to the chart in Appendix A that describes some of the relevant cases that have considered the interpretation of this section, with a brief description of the basis upon which the application was, or was not granted and describes the evidence led in support of the application.

The result is that counsel will be appointed *presumptively* upon application in some circumstances: when a witness is under eighteen years of age, or when the witness is an adult victim who is alleging that she or he was criminally harassed. A judge maintains a discretion to refuse the order appointing counsel to cross-examine, but only if the judge is of the opinion that the proper administration of justice requires the accused to personally conduct the cross-examination. The onus, in other words, is on the accused to show why the order would impact his fair trial right to cross-examine. The *2010 Bill C-2 Case Law Review* notes that "there is no reported case law on circumstances that would justify a finding that the "proper administration of justice" would "require" that the accused conduct cross-examination in person and that it would be difficult for an accused person to satisfy this test (Bala et al. 2010, 31). There is still no reported case law in which an accused person has met this test, although in one unreported case the judge permitted cross-examination as assigned counsel withdrew on the date of trial: *R*. v. *Agar*, 2007 BCPC #26636.

Counsel will also be appointed at the judge's *discretion* if the judge or justice is of the opinion that, in order to obtain a full and candid account from the witness of the acts complained of, the accused should not personally cross-examine the witness. If the order is opposed then the Crown must demonstrate how such an order would facilitate the ability of the adult witness to give a full and candid account. The judge should consider the factors set out in s. 486.1(3), these being the age of the witness, whether the witness has a physical or mental disability, the nature of the offence, the nature of the relationship with the accused (such as whether there is a power imbalance: *R.* v. *Jones*, 2011 NSPC 3 at [38], [40], [42]), and any other relevant circumstances.

One relevant circumstance that is often considered is whether the accused person consents to the order, as it can be problematic for a lawyer to cross-examine a witness without instructions from the accused and indeed, the ability to instruct counsel is often cited as a justification for the order: R. v. *R. v. S.(P.N.)*, [2010] O.J. No. 2782 (Ont.C.Jus.) at [20]. Another identified relevant circumstance is the anticipated "quality" of cross-examination were the accused to personally cross-examine (focused, or rambling?): *Jones* at [41], [42], *R. v. Predie*, [2009] O.J. No. 2723 (Ont.Sup.C.Jus.) at [25], *R. v. Fazekas*, 2010 ONSC 6603 at [22]-[23] (accused described as having trouble staying focused and had a tendency to get excited).

This provision may be of great assistance to prosecutions where a witness is testifying as a victim of domestic or sexual abuse. It is these discretionary applications that are typically the subject of reported case law, and often on the subject of the practicalities of the appointment (remuneration, for example). (see *Chart: S. 486.3*) In one case, the judge noted that "The test is not met simply by a witness expressing a wish. There must be reason to think that there is actual need for the requested order. The rationale is not to spare a witness some discomfort, but to prevent the injustice that would occur if the witness were unable to speak the whole truth." *R. v. Canning*, [2010] N.S.J. No. 497 (P.C.) – one witness said that the accused questioning him would not affect his answers - and see *R. v. Tehrankari*, 2008 CarswellOnt 8750, (2008), 246 C.C.C. (3d) 70 (Ont.C.Jus.) at [19].

The test for ordering the appointment of counsel for cross-examination was described in *Tehrankari* as:

> [19] Weighing the unfettered right of the accused to defend himself against the discretionary order that I might make to accommodate a witness, I believe I must be satisfied on a balance of probabilities that a full and candid account would be unachievable should the accused cross-examine an individual witness. The evidence on a *voir dire* must establish the "necessity" of making such an order.

The purpose of this provision was described more recently in *Jones (*and see *R.* v. *S.(P.N.)*, [2010] O.J. No. 2782 (Ont.C.Jus.) at [11] and[13] and *R.* v. *Fazekas*, 2010 ONSC 6603 at [17]):

> [27] The cases have noted that section 486.3(1) is found within that part of the *Criminal Code* that provides for certain kinds of aids to support witnesses in giving their testimony in court, such as screens and support persons. The objective is to facilitate a witness being able to provide full and candid testimony. In applications such as the ones I am dealing with, the term “legal screen” has been used to capture what Parliament intended: the use of a lawyer to conduct the cross-examination of a vulnerable witness on behalf of an accused. (*R.* v. *S.(P.N.)*, 2010 ONCJ 244 (CanLII), 2010 ONCJ 244, paragraph 11) There is a societal and administration of justice interest in protecting vulnerable witnesses so that they are facilitated in providing their evidence to the court.

The judge in *S.(P.N.)* noted the “lack of guidance as to how the process should work”: [14] and identified the following matters to be considered:

a) What, if any choice or even preference does the accused have in the choice of counsel;
b) What, if any, role does the Court have in appointing specific counsel, beyond merely signing an order that counsel be appointed;
c) What is the role of the appointed counsel which is limited to cross-examination of the qualifying witness, or more specifically, does cross-examination mean merely parroting questions put to counsel by the accused or does cross-examination include a preparatory element, and if so, to what extent;
d) What is the relationship between the appointed counsel and the accused; should the counsel give legal advice to the accused, can the accused instruct the appointed counsel; is there solicitor-client confidentiality;
e) For whose benefit is the counsel being appointed;
f) Is the appointed counsel to be remunerated and if so how should the quantum be calculated and what should be the source of such payment;
g) Does the presiding judge or justice have jurisdiction to order payment by the Crown, either by the wording of s. 486.3, or other statutory basis, if the Crown contests the manner of remuneration, or does the Crown have jurisdiction to set limits on remuneration and set limits on the preparation time of the appointed counsel.

In addressing these questions, the trial judge noted in paragraphs [68]-[74] as follows:

> 68. In order to prevent delay, especially should Crown Civil wish to make submissions, the prosecuting Crown needs to bring the application as soon as the trial date is set and trial judge can then case manage the application.

69. The accused should be advised of the ability to suggest the name of a lawyer. There is a clear responsibility on the accused to not delay in this decision.
70. Should the accused not suggest a preferred lawyer, an opportunity to meet the lawyer proffered by Legal Aid seems a minimal assurance that the two can work together. There would only be time for this if the s. 486.3 Application is brought promptly at the time of setting the trial date.
71. The Court's initial order should be restricted to the fact of the appointment of the chosen counsel and not predetermine remuneration. Appointed counsel and the Attorney General should have an opportunity to negotiate the appropriate remuneration and preparation time in the context of that particular matter. Some matters may be more complex than others, or some accused more difficult than others.
72. Should the Attorney General refuse to negotiate, as was the decision in this case, the matter can be returnable before the trial judge. At that time the Court will decide between a conditional stay or setting rates of remuneration.
73. While a conditional stay would better respect the power of the legislature to prioritize public spending, the community's interest in matters involving vulnerable witnesses (usually victims) will often justify the court setting remuneration rates in order to ensure the trial proceeds without delay.
74. In my view, I infer from s. 486.3 the ability to order remuneration as inherent in the process of retaining counsel's services. If I am wrong the power to order remuneration flows from the court's jurisdiction to control its own process, such as the appointment of *amicus.* In my view, the alternative would be conditional stays which would undermine the significant public interest in proceeding to a trial of the merits in cases and would indeed bring the administration of justice into disrepute. A stay of proceedings should be a remedy of last resort.

It is arguable that these are best described as persuasive guidelines. See further *R.* v. *Lloyd,* 2011 ONCJ 15 at [37]-[39], and see *R.* v. *S.(B.)* (2007), 240 C.C.C. (3d) 375 (Q.C.A), 2007 QCCA 1756 and see cases referred to in *2010 Case Law Review* at 2.2.3, p. 33.

The case law suggests that in many instances the actual mechanics of the appointment, such as who should be retained and the rate of remuneration, is a matter that is arranged or negotiated by provincial attorney general offices and legal aid delivery offices, with matters being brought to the trial judge only if an arrangement cannot be made.

The application can be made before or during the proceedings. It appears from this case law review that most applications are brought before the proceedings, which would allow the lawyer to prepare for the cross-examination. The witness does not need to testify on the application, and in fact compelling the witness to do so would defeat the purpose of the section: *R. v. C.M.*, 2012 ABpc 128 at [26]. The evidentiary foundation for the order can be based on hearsay, or on *viva voce* testimony of, for example, an investigating officer, or even from submissions of counsel, or consideration of the transcript of the preliminary inquiry. *Jones* at [7], *Predie* at [12]-[17], R. v. *Tehrankari* at [17], [19]

6.0 Video-recorded Evidence: Section 715.2

> **715.2** (1) In any proceeding against an accused in which a victim or other witness is able to communicate evidence but may have difficulty doing so by reason of a mental or physical disability, 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. Emphasis added.

This section provides that a video recording made within a reasonable time after the alleged offence and in which the witness describes the acts complained of is admissible in evidence if the witness adopts it while testifying, and if the witness would have difficulty communicating by reason of a physical or mental disability. The first time this accommodation was available was when the *Criminal Code* was amended in 1988 to allow for the admission of a prior videotaped statement of a complainant who was under the age of eighteen at the time of the offence, taken in certain circumstances and for particular offences. The *Code* was amended in 1997 so that a videotaped statement of any witness under the age of eighteen who met the statutory preconditions could be admitted. On June 30, 1998, the availability of this testimonial accommodation was further extended to any adult complainant or witness who would have difficulty communicating the evidence due to a mental or physical disability. (See Barrett 2008, 3-56)

In addition to the characteristics of the witness that support the application (under eighteen or an adult with a disability and communication difficulties), the criteria for admissibility was that:

1. the offence charged was one of the enumerated sexual or violent offences;
2. the videotaped statement was made within a reasonable time after the alleged offence;
3. the statement contained a description of the acts complained of; and
4. the witness adopted the statement while testifying.

Bill C-2 further amended this provision so that it is available in any proceeding, regardless of the charge. The test remains that the admission of video-recorded statements of adults is restricted to those adults who may have difficulty communicating the evidence because of a physical and mental disability. This accommodation is not therefore available for vulnerable witnesses generally, just to those who have a "testimonial challenge" in providing evidence to a trier of fact. It is also noteworthy that s. 715.1 provides for the admissibility of a videotaped statement of a witness under eighteen *regardless* of whether the witness would have "difficulty" communicating the evidence.

The videotaped statement is independent evidence and admitted for the truth of its contents once the witness adopts it. The statement becomes the complainant's testimony, considered with the *viva voce* testimony given by the witness. Both are considered "as a whole." The videotaped statement augments the witness's testimony, so it is available even when the witness is able to give the same details in court. The prior statement, combined with the in-court evidence, afford a more complete version of the witness's evidence: *R. v. T.(W.P).)* (1993), 83 C.C.C. (3d) 5 (Ont.C.A.) at p. 28.

The Crown must establish that the videotape was made within a "reasonable time" after the alleged offence. This is assessed considering the "totality of the circumstances", including the age of the witness, the nature of the offence, efforts made to obtain an earlier statement, any delay by the witness is disclosing or reporting the offence, the facilities available for taping in the community, and whether investigation prior to videotaping was necessary. *R.* v. *L. (D.O.)*, [1993] 4 S.C.R. 419

A judge is not permitted to use the videotaped statement as corroborative in the sense that the witness is "consistent" and therefore more likely to be telling the truth, although the judge can consider inconsistencies between the videotaped and in-court testimony. *R.* v. *Aksidan* (2006), 209 C.C.C. (3d) 423 (B.C.C.A.) at [43], [44], R. v. S.(K.P.) (2007), 224 C.C.C. (3d) 62 at [23]-[25], [29]. The witness is still cross-examined.

Admitting a prior videotaped statement is an exception to the usual rule of evidence that the prior statement of a witness is inadmissible for the truth of its contents (hearsay). The rationale for the use of a prior videotaped statement of a witness under eighteen was considered by the Supreme Court of Canada in *R.* v. *L. (D.O.)*, [1993] 4 S.C.R. 419; *R. v. F. (C.C.)*, [1997] 3 S.C.R. 1183. See also *R.* v. *Toten* (1993), 83 C.C.C. (3d) 5 (Ont. C.A.); and *R.* v. *Meddoui* (1990), 61 C.C.C. (3d) 345 (Alta. C.A.), leave to appeal dismissed [1991] 3 S.C.R. ix (Bala et al. 2001).

The admissibility of the statement enhances the truth seeking function of the court as it is often the "best" evidence of the child, as the statement is given when the memory of the incident is current, before the memory of the incident can be impacted by suggestion, and because the child is able to give the statement in a comfortable environment. In addition to furthering the truth-seeking goal of the courts, it therefore also minimizes the trauma to the child or witness.

Because the language of s. 715.2 is virtually identical to s. 715.1, it is typically interpreted in case law decided in applications for the admissibility of a child or young witness's videotaped statement. It is now common practice for investigators to take statements from witnesses under eighteen years of age for the purpose of having a record created and one that can be introduced as evidence at trial, and there are many cases that consider the admissibility of these statements. In contrast, investigators may take videotaped statements of adult witnesses, but they are rarely relied upon as evidence at trial.

The videotape is limited to the acts complained of and may include:

- the version of events underlying the charge;
- everything that happened during the commission of the offence, from the time the accused first came into contact with the witness until he/she left;
- the witness's description of the accused;
- identification of the accused;
- any statements the accused made, provided the statements are otherwise admissible.

The statement may have to be edited to remove parts that do not deal with the "acts complained of."

The witness has to "adopt" the statement. This means that the witness must recall giving the statement and testify that he or she was being honest and truthful when the statement was made.

The court has the discretion to refuse to admit the recording if it would interfere with the proper administration of justice. This residual discretion to exclude the statement was added by the Bill C-2 amendment in 2005, although the discretion always existed at common law. It was exercised when the probative value of the evidence was outweighed by the prejudicial effect of the evidence, such that admission would operate unfairly to the accused, or interfere with the truth finding process. It was contemplated that this discretion is to be rarely exercised: *F.(C.C.)* at [51], [52]. The trial judge conducts a *voir dire* to determine if the video recording should be admitted. See *R. v. Mulder*, [2008] O.J. No. 345 (Ont.S.C.J.) at [20]-[22] for a description of the relevant factors for a judge to consider on the issue of whether the statement should or should not be admitted. As a general proposition, the statement should conform to the rules of evidence.

A jury should be instructed that a witness is under 18 years of age and that the *Criminal Code* therefore allows him or her to adopt their previous video-recorded statement and how they should assess the weight of this statement. (Model Instructions found in CRIMJI, 4.68, Ontario Specimen Jury Instructions, "Final Charge 29-C". (and *F.(C.C.) at [47]*).

There is a significant body of case law that has developed with respect to the admissibility and use that can be made of videotaped statements from child witnesses. There is much less consideration of the use of a videotaped statement for adult witnesses pursuant to s. 715.2. The following are a few cases that consider the admissibility of a videotaped statement.

In *R.* v. *Anderson*, [2005] Q.J. No. 17488 (Sup.Ct.), the complainant was permitted to testify outside the courtroom and his videotaped statement was admitted. It is not apparent what the offence charged was. The evidence on the *voir dire* was testimony from the investigating officer and the videotaped statement was played. The complainant was described as a 33 year old with "mental problems." The nature of these problems was not medically analysed or treated, but as soon as kindergarten, he was identified as being in need of special attention and from then on, he has attended specialized schools that were equipped to address his particular needs. His mental level was described as that of a ten year old. He could express himself and he could communicate evidence, but obviously not like a 33 year old man. He was described as very agitated, having difficulty maintaining his concentration, is very repetitive and sometime drifts off on his own preoccupations that are not quite relevant to the situation he is in. The trial judge concluded that the tape should be admitted as there were no suggestive questions, no inadmissible portions, it was made within two weeks of the alleged offence, and there was no objection by the accused.

In *R. v. C.C.*, [2013] O.J. No. 24 (Sup.Ct.Jus.), 2013 ONSC 72, the accused was charged with sexually assaulting a 20 year old developmentally delayed woman who "functions cognitively at a mental age of a three to five year old child". The complainant adopted the statement she gave to the police "as true" ([2]). The defence took no issue with its admissibility: [125]. She testified with a support worker and behind a screen: [124]. The judge commented that "very little information was obtained from her during the course of her examination at trial": [126]. The

judge concluded that the statement she gave to the police "seemed the most reliable", in contrast to her trial testimony.

In *R. v. Charbonneau*, 2012 O.J. No. 2112 (C.A.), 2012 ONCA 314, the Court of Appeal noted that the complainant in the case was 49 years old at the time she was sexually assaulted. She suffered from paranoid schizophrenia. She reported the alleged assault to the police approximately three weeks after it occurred. Her videotaped statement to the police was admitted as evidence at the trial, on consent, under s. 715.2 of the *Criminal Code*. The complainant also gave oral evidence. There was no discussion by the Court on the videotaped statement as the main issue on appeal related to adequacy of the jury instructions.

In *R. v. Gomes*, [2010] O.J. No. 4337 (Sup.Ct.Jus.), 2010 ONCJ 461, the accused was charged with sexual assault of a hearing impaired twenty year old woman. The Crown applied to have her evidence-in-chief introduced through a video statement to the police on the basis that she was hearing impaired. She also testified at the trial. After watching the video she adopted its contents and said that she had told the police the truth to the best of her ability: [6]. It appears that she was quite extensively cross-examined on inconsistencies within it and between her in-court testimony.

In *R. v. Land*, [2012] O.J. No. 6006, the accused was charged with murder, and the Crown applied to admit two videotaped statements of interviews with a witness under eighteen years of age, and also to admit statements of adult witnesses suffering from mental disabilities. There was no issue that the statements were provided within a reasonable time of the death of the victim. The Crown's application was opposed on the basis that it was not established that the witnesses would be unable to communicate the evidence as a result of the mental disability, that these statements were not "of the acts complained of" and that the officer used leading questions during the interview.

The trial judge concluded that one of the adult witnesses would not have difficulty communicating her evidence, as follows:

> [26] As well, I cannot find that Ms. G. would have difficulty communicating her evidence by reason of a mental disability. Ms. G. was not called as a witness on this motion. In the Pre-trial Ruling #1 Regarding *Viva Voce* Evidence on *KGB* Application, I reviewed Ms. G.'s vulnerabilities and how well she functioned at the Preliminary Inquiry, despite her challenges. I concluded that Ms. G. could handle a further pre-trial court appearance in regard to a proposed *KGB* application, as long as she had a support person with her. Ms. G. will have a support person with her when she testifies at trial. There is inadequate evidence that Ms. G. will have difficulty communicating her evidence if, as would be normal, she is given the opportunity prior to trial to review her statement to the Detective. Ms. G. functioned well - both during her interview with the Detective and during her testimony at the Preliminary Inquiry. Although the passage of further time may make certain aspects of her evidence more difficult to remember, it will be open to counsel to refresh her memory in the normal course. Otherwise, there is no reason to believe that, at trial, Ms. G. would function any differently than she did during the Preliminary Inquiry.

With respect to the other adult witness, the trial judge said: "Ms. H. did not testify on this motion and, therefore, I have not had the benefit of observing her in the witness box. However, a review of her interview with the Detective, and her testimony at the Preliminary Inquiry, reveals that she does have difficulty remembering things and communicating effectively. Her inclination is to agree with virtually everything put to her - even if it contradicts something she might have said a few moments before. The Crown has satisfied this precondition to utilizing s. 715.2(1) of the *Code*." (at [30])

In *R. v. Osborne*, [2011] O.J. No. 6279 (Sup.Ct.Jus.), 2011 ONSC 4289, the accused was charged with first degree murder of a 31 year old woman with the mental capacity of an 11 year old child. The accused was also developmentally delayed and living in a townhouse with other individuals with challenges. The Crown sought to introduce the video-taped statement of one of these individuals, a 24 year old who suffered from a form of autism. The preliminary inquiry transcript was considered on the *voir dire*, where the father of the witness testified that his son had a mental capacity of a seven and a half year old child. The witness also testified at the preliminary and adopted the videotaped statement.

The accused accepted that the witness would have difficulty communicating the evidence by reason of a mental or physical disability, but argued against the admissibility of the statement on the basis that the video was not made within a reasonable time, the witness may not adopt it, and that it would interfere with the proper administration of justice. The judge notes that the statements were given within hours of the crime, and that the inconsistencies were not the product of lack of recall, but indicative of the mental disability of the witness. The purpose of the prerequisite that the statement be taken within a reasonable time is that this enhances the reliability of the statement and is a circumstantial guarantee of trustworthiness.

With respect to adoption of the statement, the witness adopted it at the preliminary. Because the witness has a short attention span, it was played to him in segments. After each segment he said he recalled making the statements and that he was trying to tell the truth. The trial judge rejected the accused's argument that the test for adoption should be different as between child witnesses (s. 715.1) and adult witnesses (s.715.2):

> [39] Based on the similarity of the language used in ss. 715.1 and 715.2 it is apparent that Parliament chose to treat these two groups in the same way for the purpose of admitting video recorded statements. In doing so Parliament must have been aware of the test for adoption of video recorded statements previously established by the Supreme Court of Canada in *C.C.F.* In these circumstances I take the enactment of s. 715.2 in virtually the same terms as s. 715.1 as an indication by Parliament that adoption should have the same meaning in both sections. Parliament could have chosen to specify a different test for adoption in s. 715.2 but did not do so. I conclude the test for adoption is the same under each section.

The judge concluded that the videotaped statements should be admitted, and that questions regarding the inconsistencies within it were matters for the jury to consider.

7.0 Section 16 of the Canada Evidence Act

Prior to January 2, 2006, the *Canada Evidence Act* required that a judge had to inquire into whether a witness under the age of fourteen or a person whose mental capacity was challenged was competent to testify. Bill C-2 amended the *Canada Evidence Act* as it applied to child witnesses. In a fundamental change to the rules of evidence, a child is now presumed to be capable of testifying.

Parliament had many good reasons to change the competency inquiry for children. In particular, this change was enacted to facilitate the ability of children to testify and the Court's recognition that reliable evidence was being excluded when children were not allowed to testify simply because they could not answer the abstract inquiry into what it means to "tell the truth". For a further description of the rationale for this legislative change and how to interpret this legislation, and for a discussion generally of changes relating to the way children's evidence is received in criminal courts see *R. v. J.Z.S.*, 2008 BCCA 401, upheld 2010 SCC 1 and as discussed in the *2010 Bill C-2 Case Law Review* at pages 14-23.

Bill C-2 did not amend the competency inquiry as it applies to witnesses whose mental capacity is challenged. Section 16 continues to read, for this group of witnesses, as follows:

Witness whose capacity is in question

> **16.** (1) If a proposed witness is a person of fourteen years of age or older whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine
>
> a) whether the person understands the nature of an oath or a solemn affirmation; and
> b) whether the person is able to communicate the evidence.
>
> *Testimony under oath or solemn affirmation:* (2) A person referred to in subsection (1) who understands the nature of an oath or a solemn affirmation and is able to communicate the evidence shall testify under oath or solemn affirmation.
>
> *Testimony on promise to tell truth:* (3) A person referred to in subsection (1) who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may, notwithstanding any provision of any Act requiring an oath or a solemn affirmation, testify on promising to tell the truth.
>
> *Inability to testify:* (4) A person referred to in subsection (1) who neither understands the nature of an oath or a solemn affirmation nor is able to communicate the evidence shall not testify.
>
> *Burden as to capacity of witness:* (5) A party who challenges the mental capacity of a proposed witness of fourteen years of age or more has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to testify under an oath or a solemn affirmation.

In contrast, child witnesses under fourteen years of age are guided by this presumption of capacity, and it is worth contrasting this section with s. 16:

Person under fourteen years of age

> **16.1** (1) A person under fourteen years of age is presumed to have the capacity to testify.
>
> *No oath or solemn affirmation:* (2) A proposed witness under fourteen years of age shall not take an oath or make a solemn affirmation despite a provision of any Act that requires an oath or a solemn affirmation.
>
> *Evidence shall be received:* (3) The evidence of a proposed witness under fourteen years of age shall be received if they are able to understand and respond to questions.
>
> *Burden as to capacity of witness:* (4) A party who challenges the capacity of a proposed witness under fourteen years of age has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to understand and respond to questions.
>
> *Court inquiry:* (5) If the court is satisfied that there is an issue as to the capacity of a proposed witness under fourteen years of age to understand and respond to questions, it shall, before permitting them to give evidence, conduct an inquiry to determine whether they are able to understand and respond to questions.
>
> *Promise to tell truth:* (6) The court shall, before permitting a proposed witness under fourteen years of age to give evidence, require them to promise to tell the truth.
>
> *Understanding of promise:* (7) No proposed witness under fourteen years of age shall be asked any questions regarding their understanding of the nature of the promise to tell the truth for the purpose of determining whether their evidence shall be received by the court.
>
> *Effect:* (8) For greater certainty, if the evidence of a witness under fourteen years of age is received by the court, it shall have the same effect as if it were taken under oath.

Section 16(1) sets out what a judge must do when a challenge is raised. The judge must first determine "whether the person understands the nature of an oath or a solemn declaration" and "whether the person is able to communicate the evidence" (s. 16(1)). If these requirements are met, the witness testifies under oath or affirmation, as other witnesses do (s. 16(2)). If these requirements are not met, the judge moves on to s. 16(3). Section 16(3) provides that "[a] person ... who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may ... testify on promising to tell the truth."

The Supreme Court of Canada recently had the opportunity to consider how a judge should assess the competency of a witness whose mental capacity is challenged, and what impact, if any, there is to this test in light of Bill C-2 changing the competency for child witnesses. *R. v. D.A.I.*, [2012] 1 S.C.R. 149, 2012 SCC 5. The complainant was a 22-year-old woman with the mental age of a three to six-year old. The trial judge held a *voir dire* to determine whether she was capable of testifying. He concluded that she was not competent to testify on a promise to tell the truth, because she had failed to demonstrate that she understood the duty to speak the truth. The Crown's examination of the witness demonstrated that she understood the difference between telling the truth and lying in concrete situations. However, the trial judge went beyond

this to question her on her understanding of the nature of truth and falsity, of moral and religious duties, and of the legal consequences of lying in court. She was unable to respond adequately to these more abstract questions, to which she frequently answered "I don't know". ([9])

Chief Justice McLachlin in the majority judgment noted the fundamental importance that there should not be unnecessary (and artificial) barriers to the admissibility of evidence from vulnerable witnesses:

> [27] . . . the history of s. 16 supports the view that Parliament intended to remove barriers that had prevented adults with mental disabilities from testifying prior to the 1987 amendments (S.C. 1987, c. 24). The amendments altered the common law rule, by virtue of which only witnesses under oath could testify. To take the oath or affirm, a witness must have an understanding of the duty to tell the truth: *R. v. Brasier* (1779), 1 Leach 199, 168 E.R. 202. Adults with mental disabilities might not be able to do this. To remove this barrier, Parliament provided an alternative basis for competence for this class of individuals. Section 16(1) of the 1987 provision continued to maintain the oath or affirmation as the first option for adults with mental disabilities, but s. 16(3) provided for competence based simply on the ability to communicate the evidence and a promise to tell the truth.
>
> [30] The historic background against which s. 16(3) was enacted explains why Parliament might have wished in 1987 to lower the requirements of testimonial competence for adults with mental disabilities, who are nonetheless capable of communicating the evidence. While adults with mental disabilities received little consideration in the pre-1987 case law, the inappropriateness of questioning children on abstract understandings of the truth had been noted and criticized. In *R. v. Bannerman* (1966), 48 C.R. 110 (Man. C.A.), Dickson J. *ad hoc* (as he then was) rejected the practice of examining child witnesses on their religious beliefs and the philosophical meaning of truth. Meanwhile, awareness of the sexual abuse of children and adults with mental disabilities was growing. To rule out the evidence of children and adults with mental disabilities at the stage of competence - the effect of the requirement of an abstract understanding of the nature of the obligation to tell the truth - meant their stories would never be told and their cases never prosecuted. These concerns explain why Parliament moved to simplify the competence test for adult witnesses with mental disabilities.
>
> Emphasis added.

The majority of the Court concluded that the correct interpretation of s. 16 does not require more than that the witness (1) was able to *communicate the evidence*, and (2) promised to tell the truth. On this basis, the witness should have been permitted to testify. Parliament intended to eliminate an understanding of the abstract nature of the oath or solemn affirmation as a prerequisite for testimonial capacity. The witness was not required to *demonstrate* an understanding of the obligation to tell the truth.

One of the arguments before the Court was what to make of the fact that Parliament amended the competency provisions with respect to children, but not adults. The submission that vulnerable

witnesses should be questioned in the same abstract and ultimately unnecessary manner regarding their understanding of a promise was rejected:

> [40] The argument is that if Parliament had intended adult witnesses with mental disabilities to be competent to testify simply on the basis of the ability to communicate and the making of a promise, it would have enacted a ban on questioning them on their understanding of the nature of the obligation to tell the truth, as it did for child witnesses under s. 16.1(7). The absence of such a provision, it is said, requires us to draw the inference that Parliament intended that *adult* witnesses with mental disabilities *must* be questioned on the obligation to tell the truth.
>
> * * * *
>
> [48] Fourth, the argument that the absence of the equivalent of s. 16.1(7) in s. 16(3) means that adult witnesses with mental disabilities must demonstrate an understanding of the nature of the duty to speak the truth is logically flawed. The argument rests on the premise that s. 16(3), unless amended, requires an inquiry into the witness's understanding of the obligation to tell the truth. On this basis, it asserts that, unless the ban on questioning in s. 16.1(7) dealing with children is read into s. 16(3), such questioning must be conducted. Thus, my colleague Binnie J. states that "[t]he Crown invites us, in effect, to apply the “don't ask” rule governing [page 177] children to adults whose mental capacity is challenged" (para. 127).

Finally, in summary, the Court recapped: s. 16(3) of the *Canada Evidence Act* imposes two conditions for the testimonial competence of adults with mental disabilities: 1. the witness must be able to communicate the evidence; and 2.the witness must promise to tell the truth. Inquiries into the witness's understanding of the nature of the obligation this promise imposes are neither necessary nor appropriate. It is appropriate to question the witness on her ability to tell the truth in concrete factual circumstances, in order to determine if she can communicate the evidence. It is also appropriate to ask the witness whether she in fact promises to tell the truth. However, s.16(3) does not require that an adult with mental disabilities demonstrate an understanding of the nature of the truth *in abstracto*, or an appreciation of the moral and religious concepts associated with truth telling. And, with respect to procedure the Court noted, at [75]-[83]:

1. the *voir dire* on the competence of a proposed witness is an independent inquiry: it may [page 187] not be combined with a *voir dire* on other issues, such as the admissibility of the proposed witness's out-of-court statements.
2. although the *voir dire* should be brief, it is preferable to hear all available relevant evidence that can be reasonably considered before preventing a witness to testify. A witness should not be found incompetent too hastily.
3. the primary source of evidence for a witness's competence is the witness herself. Her examination should be permitted. Questioning an adult with mental disabilities requires consideration and accommodation for her particular needs; questions should be phrased patiently in a clear, simple manner.

4. the members of the proposed witness's surrounding who are personally familiar with her are those who best understand her everyday situation. They may be called as fact witnesses to provide evidence on her development.
5. expert evidence may be adduced if it meets the criteria for admissibility, but preference should always be given to expert witnesses who have had personal and regular contact with the proposed witness.
6. the trial judge must make two inquiries during the *voir dire* on competence: (a) does the proposed witness understand the nature of an oath or affirmation, and (b) can she communicate the evidence?
7. the second inquiry into the witness's ability to communicate the evidence requires the trial judge to explore in a general way whether she can relate concrete events by understanding and responding to questions. It may be useful to ask if she can differentiate between true and false everyday factual statements.
8. the witness testifies under oath or affirmation if she passes both parts of the test, and on promising to tell the truth if she passes the second part only.

The Supreme Court of Canada made a number of significant statements regarding the treatment of vulnerable adult witnesses in the criminal justice system – statements which should resonate whenever consideration of accommodation for these witnesses is contemplated:

> [65] The discussion of the proper interpretation of s. 16(3) of the *Canada Evidence Act* would not be complete, however, without addressing the policy concerns underlying the issue. Two potentially conflicting policies are in play. The first is the social need to bring to justice those who sexually abuse people of limited mental capacity - a vulnerable group all too easily exploited. The second is to ensure a fair trial for the accused and to prevent wrongful convictions.
>
> [66] The first policy consideration is self-evident and requires little amplification. Those with mental disabilities are easy prey for sexual abusers. In the past, mentally challenged victims of sexual offences have been frequently precluded from testifying, not on the ground that they could not relate what happened, but on the ground that they lacked the capacity to articulate in abstract terms the difference between the truth and a lie and the nature of the obligation imposed by promising to tell the truth. As discussed earlier, such witnesses may well be capable of telling the truth and in fact understanding that when they do promise, they should tell the truth. To reject this evidence on the ground that they cannot explain the nature of the [page184] obligation to tell the truth in philosophical terms that even those possessed of normal intelligence may find challenging is to exclude reliable and relevant evidence and make it impossible to bring to justice those charged with crimes against the mentally disabled.
>
> [67] The inability to prosecute such crimes and see justice done, whatever the outcome, may be devastating to the family of the alleged victim, and to the victim herself. But the harm does not stop there. To set the bar too high for the testimonial competence of adults with mental disabilities is to permit violators to sexually abuse them with near impunity. It is to jeopardize one of the fundamental desiderata of the rule of law: that the law be enforceable. It is also to effectively immunize an entire category of offenders from

> criminal responsibility for their acts and to further marginalize the already vulnerable victims of sexual predators. Without a realistic prospect of prosecution, they become fair game for those inclined to abuse. Emphasis added.

8.0 Summary

Building on the case law that was reviewed for the *2010 Case Law Review* (Bala et al. 2010), this report examines cases dealing with testimonial aids and vulnerable adult witnesses from July 1, 2009 to December 31, 2012. It appears that applications for testimonial aids for vulnerable adults are relatively rare, particularly the "discretionary" applications, at least in comparison to applications for children, although the applications that are made are generally successful. Interpretations of the various legislative provisions by higher courts have also been generally favourable in terms of granting applications and removing unnecessary obstacles to testifying in court. There also appears to be growing awareness on the part of criminal justice system professionals of physical and mental disabilities, as well as other vulnerabilities (relationship of the witness to the accused, nature of the offence, etc.) that could make it difficult for a witness to provide a full and candid account while testifying. One of the barriers that does remain is that of resources, that is having the screens and the CCTV equipment available and all parties familiar with the different technology.

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Appendix A: Criminal Code: Sections 486.1 and 486.2

486.1

(1) In any proceedings against an accused, the judge or justice shall, on application of the prosecutor, of a witness who is under the age of eighteen years or of a witness who has a mental or physical disability, 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 or 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 is necessary to obtain a full and candid account from the witness of the acts complained of.

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.

Factors to be considered: (3) In making a determination under subsection (2), the judge or justice shall take into account the age of the witness, whether the witness has a mental or physical disability, the nature of the offence, the nature of any relationship between the witness and the accused, and any other circumstance 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.

486.2

(1) Despite section 650, in any proceedings against an accused, the judge or justice shall, on application of the prosecutor, of a witness who is under the age of eighteen years or of a witness who is able to communicate evidence but may have difficulty doing so by reason of a mental or physical disability, 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 or 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 is necessary to obtain a full and candid account from the witness of the acts complained of.

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.
Factors to be considered: (3) In making a determination under subsection (2), the judge or justice shall take into account the factors referred to in subsection 486.1(3).
Specific offences: (4) Despite section 650, if an accused is charged with an offence referred to in subsection (5), the presiding judge or justice may order that any witness testify

a) outside the court room if the judge or justice is of the opinion that the order is necessary to protect the safety of the witness; and
b) 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 is necessary to obtain a full and candid account from the witness of the acts complained of.

Offences: (5) The offences for the purposes of subsection (4) are
an offence under section 423.1, 467.11, 467.12 or 467.13, or a serious offence committed for the benefit of, at the direction of, or in association with, a criminal organization;

a) a terrorism offence;
b) an offence under subsection 16(1) or (2), 17(1), 19(1), 20(1) or 22(1) of the *Security of Information Act*; or
c) an offence under subsection 21(1) or section 23 of the *Security of Information Act* that is committed in relation to an offence referred to in paragraph (*c*).

Same procedure for determination: (6) 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) or (4) 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: (7) A witness shall not testify outside the court room under subsection (1), (2), (4) or (6) 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: (8) No adverse inference may be drawn from the fact that an order is, or is not, made under this section.

Appendix B: CASE SUMMARIES: SUPPORT PERSONS AND TESTIMONY OUTSIDE THE COURTROOM

Case	Nature of Application	Timing of App	Relationship & Vulnerability	Materials Filed	Application Opposed?	Ruling & Key Findings
R v Agar, 2007 #26636-1-K (BCPC), Williams Lake Criminal harassment Trial	Application under ss. 486.2(2) (CCTV) 486.1(2) and 486.3 Discretionary	A year before trial application made, but denied. Application renewed at trial	• Adult, middle-aged female complainant with no disability • Lengthy and difficult domestic history with the accused	• Unknown	Not opposed as self-represented accused "out of compassion" for complainant says if that's what she wants then he is "ok" with it	• Trial judge ordered counsel to cross-examine complainant (486.3), but accused refusing to instruct counsel, so counsel withdrew • Accused still entitled to cross-examine complainant as it is integral for administration of justice • Judge orders that witness testify by CCTV and with a support person present • Judge is told and "accepts that she would find the whole experience of being face to face with the accused in a courtroom very difficult" [20] • and accused not opposed • Judge says "I have some hesitancy always as a trial judge with witnesses testifying outside of the courtroom. I like to see people face to face, but these harassment cases I do think are somewhat unique, and Parliament certainly seems to indicate that with provisions such as s. 486.3(4) • Notes that another judge commented that CCTV had the capability to be almost better than face-to-face interaction between the judge and a witness in court in that the camera can be zoomed in on a witness" (R. v. C.N.H., [2006] B.C.J. No. 782, 2006 Carswell BC 734 (BCPC)
R v Alam, 2006 ONCJ 593; Attempted murder and related weapons offences; Preliminary	Crown application under ss. 486.2(1), or in the alternative (2) for CCTV Mandatory	Beginning of Prelim [1]	• Complainant allegedly shot in the head and at close range by accused for confronting the accused • Complainant was unknown to accused • Complainant has mental and physical disabilities, and fears for the safety of his family [1] • Complainant has complex range of mental and physical disabilities, resulting from injuries before and after the	• Written application record and testimony of a victim/witness assistant with Ont AG's office, who met with the complainant and discussed his concerns about testifying [10-12] (concerned about comprehension, understanding, easily frustrated, self-conscious, concerned about others in the courtroom looking at him, difficulty comprehending nature of legal proceedings) • Witness also described what she observed when speaking to victim	• Accused opposed on basis that there was no evidence of the complainant 's potential difficulties in communicating his evidence were the result of mental and physical disabilities, as opposed to normal stress and disinclination to testify; and no evidence that testifying outside of court would ameliorate the complainant's communicative problems, enhancing ability to give full and candid, and no objective evidence supporting reasonableness	• Application granted for CCTV under s. 486.2(1) [37] • Judge considers purpose behind the legislation [13] • As a result of Bill C-2 changes, protections are extended to a larger class of vulnerable witnesses and there is greater procedural clarity. [19] • The Court's ability to make an order under either ss. (1) or ss. (2) is now extended to any proceeding [19] Re: s. 486.2(1): The subsection creates a presumption that a child or "a witness who *may* have difficulty communicating evidence due to a physical or mental disability" can testify from behind a screen or outside the courtroom. Unless the order would prejudice the accused's right to a fair trial or otherwise interfere with the proper administration of justice, the court "shall" make the order where requested to do so by the Crown or the witness. The Crown may have an evidentiary burden if the existence of a mental or physical disability that may impact on the ability of a witness to testify is disputed, as it was in this case. However, once the presumption is engaged, the Respondents bear the burden of establishing that the use of a testimonial aid would interfere with the proper administration of justice. [20] Re: s. 486.2(2) is new. It is intended to recognize and accommodate adult witnesses who may be vulnerable to intimidation. This section permits a court to make an order for the use of a testimonial aid for any witness, if the judge or justice considers it "necessary to obtain a full and candid account from the

Case	Nature of Application	Timing of App	Relationship & Vulnerability	Materials Filed	Application Opposed?	Ruling & Key Findings
			shooting (brain injury, deficits in new learning, verbal memory, decreased motor skills and dexterity, facial paralysis, hearing loss, vision loss, seizures, pain, does not handle stress well) [5-11]	• Victim concerned that his mother would have to testify at hearing – fears of reprisals (no evidence to support concerns) • Witness supported application on basis that many witnesses express anxiety, but this witness may not be able to testify fully [12] • Doctor's report indicating disabilities both before and after shooting [6, 7]	of safety concerns about complainant's family [2] • Defence counsel "novel" legislation shold be interpreted with caution, to ensure there is no unwarranted curtailment of right to confront witnesses • Accused argues that s. 486.2(1) does not apply because the complainant's testimonial difficulties arise from reluctance to participate in the criminal process, rather than a mental or physical disability [22] • Fair trial would be affected by lack of ability to face accuser [22] • Accused argues that the use of the screen reinforces racist stereotypes regarding the accused's involvement in gang activity [35]	witness of the acts complained of." The test to be applied in the exercise of the court's discretion is the same test used in the old s. 486(2.1), allowing a child or disabled adult to testify behind a screen or outside of the courtroom. The onus is on the Crown to establish an "evidentiary basis" for the making of the order concerning an adult witness, having regard to the age of the witness, the presence or absence of mental or physical disability, the nature of the offence, the nature of any relationship between the witness and the accused, and any other circumstances considered relevant (the same criteria in the new s. 486.1(3) that the court must consider when making an order to permit a support person to sit near an adult witness). The requisite evidentiary basis could be established through the testimony of a mental health professional or other expert or through the direct testimony of the witness, using the testimonial aid under consideration, as required by s. 486.2(6). In some cases, the submissions of counsel may suffice, as in the case of *R. v. Smith*, where the Alberta Court of Appeal held that submissions accepted by the court might be a sufficient basis for making such an order at a preliminary inquiry. [21] • Judge finds ample vidence for factual finding that witness may have difficulties testifying due to mental and physical disabilities • Judge also considers that witness is victim to a shooting, the courtroom is public, including supporters of the accused and members of public [24], [25] • Testifying outside the courtroom will ameliorate the difficulties for the witness – minimize distractions [26] • Rejects argument that witness should start in open court to see if he has difficulty communicating – "this is contrary to the letter and spirit of the legislation" – the preumption operates to prevent a "wait and see" approach (hence use of word "may") [27] • Analysis re: interference with the administration of justice: "I interpret the "proper administration of justice" in the context of these provisions 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 Respondents' fair trial interests, including the right to make full answer and defence." [29] • Witness removed from rigours of courtroom and blocks view of accused, but trial otherwise conducted in usual manner – accommodation meets requirements of 486.2(7) [31] • Communicating via CCTV does not impact on the right to face one's accuser – "society's interest in accommodating a disabled witness to promote the truth-seeking objectives of a trial must be carefully balanced with the right to fair trial." [34]
R v Allen, 2007 ONCJ 209; [2007] O.J. No. 1353	Crown application under s. 714.1 – Court also	Appears to be pre-prelim	• Crown's main witness helped plan the murder and is in a witness protection program – there is	• Case law invoked by Crown all addresses s. 714.1 (there appears to be no case law on the section) [9, 12] • There is evidence that the	• Accused opposes [1] • Argues that such applications should rarely be granted, as it derogates from the traditional practice	• Only s. 486.2(4) applies to these facts. Section 714.1 should not be interpreted so broadly as to include the subject matter of s. 486.2(4) and (5). This would render s. 486.2(4) and (5) redundant [10] • These facts fall within the meaning of s. 486.2(5)(a) (serious offence committed for the benefit of, at the direction of, or in association with a criminal organization) – this allegation does not need to be part of the count, so long as the evidence or anticipated evidence supports such an allegation [11]

Case	Nature of Application	Timing of App	Relationship & Vulnerability	Materials Filed	Application Opposed?	Ruling & Key Findings
Murder of high-ranking member of the cocaine trade Preliminary	considers s. 486.2(4) Discretionary		evidence to show that a hit is out on him [5] • Crown's second witness is the accused's former girlfriend – fears retribution [6]	first witness is a former confederate of the accused and that there is reason to fear an assassination attempt (the murder at hand, for example) [20] • The judge appears to defer to the knowledge of the police and Crown without requiring proof [22]	of allowing an accused to face his/her accuser [14] • The words "necessary to protect the safety of the witness" imposes a Crown burden to prove that no other measure could reasonably protect the witness [14]	• The words "may order" in the section provide discretion, which involves a balancing of competing interests and relevant circumstances [13] • The accused's suggested least restrictive measures approach is not appropriate – Parliament has provided a new technology and the courts should embrace it, where appropriate – there should be no bias in favour of the traditional approach [15] • The section does not require the measure to be a last resort and does not impose a heavy burden on the Crown – would compromise the objective of witness safety [16] • Necessity Test: If other measures leave some gap in protection (i.e. if there is any possibility of harm), then necessity is established and s. 486.2(4) is appropriate [17] • Section 486.2(4) can be used in conjunction with other protective measures [18] • In exercising discretion, "all of the circumstances should be considered, particularly the nature and extent of the safety concern and any negative impact such an order would have on the rights and interests of the accused and the trial process." [19] • Added security is more costly and creates more issues than a video-link (gives examples) [23] • Less constitutional protection is available to the accused at prelim (the discretion balancing at trial might be different) [24] • If cross-ex is affected, the issue can be revisited [25] • Credibility assessments will likely not be impeded – may actually be improved [26] • Cites *Levogiannis* for limitations on the right to face one's accuser [27] • Order granted for the first witness – balance weighs in his favour [28] • The second witness is different and an order was not granted – her evidence is less important and there is less reason to believe she will be harmed [29] • The remainder of the decision discusses the methods used to implement the video-linked testimony (this section appears to have been written after the above portion of the decision at the conclusion of the prelim inquiry)
R v Billy, 2006 BCPC 203; Sexual assault Preliminary	Crown application under ss. 486.1() and (2) and 486.2(1) and (2) for CCTV and support person Mandatory	Pre-Prelim	• Complainant has been diagnosed with borderline personality disorder - suffers from, *inter alia*, major mood swings, impulsivity, and unpredictability – when in stressful situations she has in the past on some 15 or 20 occasions	• Testimony of complainant's doctor of 25 yrs: complainant has borderline personality disorder and a history of psychiatric intervention, and is on antipsychotic medication [5] – suffers from stress, mood swings, and substance abuse, suicidal ideation after being called for Crown interview • Doctor concerned that she	• Accused argues there is insufficient evidence to grant the Crown's application and deny the accused the "opportunity of being in the physical presence of his accuser, both for examination and cross-examination" [8]	• Note: the judge seems to conflate the subsections (1), (2), and (3) analyses • The complainant has a diagnosed, specific mental illness – she is appropriately categorized as a vulnerable person – the sort Parliament meant to deal with under the legislation [9] • "Although the legislation is directed primarily at those witnesses under 18, it also is clearly applicable to people such as the complainant who have a clear mental handicap." [10] • No *Charter* right to confront your accuser face-to-face in court – fair trial rights are not affected [10-11] • The court should embrace advancements that further the truth-seeking process without detracting from the accused's right to a fair trial [15] • [15] "It may be trite, but we are all involved in the search for truth as to what in fact occurred in any particular incident. If arrangements can be made to both protect and balance both the accused's right to full answer and defence and a fair trial, and also obtain a fuller and more candid account from a

Case	Nature of Application	Timing of App	Relationship & Vulnerability	Materials Filed	Application Opposed?	Ruling & Key Findings
			caused injury to herself, by burning herself with either a lighter or a lit cigarette. Also experienced suicidal ideation [5] • Acquaintance of accused [7]	could seriously harm herself if called to testify – CCTV and support person / accommodations would alleviate stress [6] • Doctor feels testimony would be less confused • Testimony of the complainant: 55 yrs old, has drug and alcohol addictions, intense fear of testifying – feels her clarity would be affected [7]		mentally troubled witness of events by way of technological innovation, in my view, the court should embrace the process. Criminal law shouldn't be a static, but rather a changing and evolving process." • Fact of stress will impact her ability to testify and out of courtroom evidence will be less-confused and hopefully reduce the possibility of self-harm • Applications granted [16]
R v Buckingham, 2009 CarswellOnt 3531; [2009] O.J. No. 3546 (Ont.S.C.Jus.) Sexual assault Trial	Crown application under s. 486.2(2) to testify behind a screen Discretionary	During trial after Crown's opening statement [2]	• 42 year old woman who did not know accused and would not be able to identify him • The complainant didn't know the defendant [5] • The complainant suffers from anger and anxiety attacks that cause her to hyperventilate [5]	• The complainant testified in support of application from behind a screen – testified that she suffers from anger and anxiety attacks and feared she would suffer an anxiety attack if she couldn't use a screen, agreed that seeing the accused wouldn't affect her recollection [5], [6] • The complainant's counsellor, a case worker with the AIDS network, testified about the complainant's anger and anxiety attacks when describing offence [8] • The complainant's mother testified about complainant's highly emotional state at prelim [10] and also when she heard court was considering whether she'd have to testify without a	• Accused consented at pre-trial conference before another judge, but it was not endorsed on the indictment – the accused then withdrew consent and the judge held a *voir dire* [3-4] • Accused argued the screen would significantly impact fairness of trial, validate the compl's fears, and that it should not be used until the compl is incapable of continuing [22-23]	• Testified behind screen at preliminary inquiry [6] • There must be "an evidentiary basis upon which the judge can form the opinion that the order is necessary to obtain a full and candid account of the acts complained of" (relying on *R v M(P)*, [1990] OJ No 2313) where Ont CA held that child witness who did not want to see accused did not support order, as this reason did not amount to evidence of her inability to testify fully and candidly if she were able to see him. [24] • s. 486.1(3) factors: age not significant, offence is shocking and violent [26] • Trial judge "carefully observed complainant during *voir dire*" where she was questioned about why she did not want to testify without a screen. [25] • Comp's desire to not have to look into the face of the defendant is reasonable and understandable based on the allegation • The judge is satisfied on a strong balance of probabilities that if a screen is not provided, the complainant will suffer significant emotional distress, anxiety, and possibly an anxiety attack [27] • Adding a screen during trial if the witness cannot continue would be more prejudicial to the accused than just starting with the screen [28] • The behavior of the accused might interfere with the complainant's ability to give a full and candid account (mouthed obsenities, shaking his head during *voir dire*) [29] • An instruction will be given to the jury that the screen has nothing to do with the guilt or innocence of the accused and that it should not draw any inference of any kind from its use [30] • It is an exceptional case where a screen should be used [31] • Application granted [33] In the case at bar, the accused will be able to hear S testify and observe her. He is represented by counsel who will have the opportunity to observe her testify through the screen and will be granted leave to approach the witness and cross examine person to person without doing so through the screen. All members of the jury will be able to see S testify without their view of her being

Case	Nature of Application	Timing of App	Relationship & Vulnerability	Materials Filed	Application Opposed?	Ruling & Key Findings
				screen • The lead investigator testified about the complainant's anxiety about testifying and that comp prepared to testify, but decision to hold a voir dire upset her [11-12] • A Victim Witnesses Program worker testified about the complainants high anxiety and how it improved when discussing testifying behind a screen [13-17]		impeded by the screen. As noted counsel and Mr. Buckingham will be able to see her testify through the screen.
R v Clark, [2007] OJ No 1553 (Ont SCJ); Intimidation; uttering threats, unlawful confinement, and assault: Trial	Crown application under s. 486.2(2) for comp to testify behind a screen Discretionary	Appears to be first day of trial (witness described as distraught first day of trial: [4])	• The complainant lived with the accused in an intimate relationship a few years before the trial [5]	• Voir dire: Evidence of police officer who is familiar with case and took the complainant's statement – and tape of phone messages left by accused, and testified on the nature of the accused's conduct and the complainant's nervousness and distress, she was "very afraid" while testifying at prelim [4]	• Not indicated	• The new section of the Code to some extent codifies the inherent jurisdiction in a superior court of criminal jurisdiction to make such an order in proper circumstances [1] • Judge does not consider it necessary for the complainant to testify on the voir dire – evidence required to permit judge to consider the factors in 486.1(3) has been made available to an "adequate degree" [5] • Section 486.1(3) factors: ◦ The complainant is an adult with no apparent physical or mental disability [5] ◦ Comp claims to be victim of physical and emotional abuse at hands of the accused with whom she lived in an intimate relationship – and the phone messages played give an indication of the basis for her concerns ◦ The crimes are serious – there is some evidence supporting the seriousness of the accused's attempts to intimidate the complainant [5] ◦ Comp testified at prelim without a screen, but committal not in issue and direct and cross examination shorter and more straightforward • The jury will be instructed that the use of the screen is unrelated to the guilt or innocence of the accused and that it should not draw any inference of this kind from its use [7] • Application granted
R v Collins, 2012 ONSC 6571; sexual assault, assault	Crown application under s. 486.2(2) to testify behind a screen	Appears to have been pre-trial	• The complainant was 22 at trial • The complainant was formerly in a common law relationship with the	• Not indicated	• By consent	• It appears that the application was granted because the complainant was under 18 at the time of the alleged offences [2] • No further indication of reasoning for granting the application is given • A support person was also granted on consent [2]

Case	Nature of Application	Timing of App	Relationship & Vulnerability	Materials Filed	Application Opposed?	Ruling & Key Findings
Trial	Discretionary		accused			
R v Darling, 2006 BCPC 426; [2006] B.C.J. No. 2038, Assault, assault causing bodily harm, breach UTA Trial	Crown application under s. 486.2(2) for CCTV Discretionary	Start of trial	• The complainant and accused were in a long-term relationship, both as friends and common law partners [4] • The complainant is 39 and has no mental or physical disabilities [4]	• The complainant gave testimony from another room – direct and cross-examination – at one point camera zoomed in to complainant's face [5] • The complainant testified that she was afraid of the accused and there had been a history of abused – testified that she would be unable to give evidence, cried throughout the hearing [7]	• Accused objected	• These reasons were provided at the conclusion of trial • Every case will depend on the factors and how the witness presents herself [8] • Application granted – judge focused on the complainant's obvious and genuine distress and the nature of the charges [8]
R v D(C), [2010] OJ No 4351, (2010), 257 C.C.C. (3d) 531 (Ont SCJ); First-degree murder Trial	Crown application under s. 486.2(2) for CCTV Discretionary	Appears to be pre-trial	• Accused young persons charged with murder and the witnesses all attended the high school where the shooting occurred, testifying about seeing accused shoot the victim or with victim around time he was shot • 4 witnesses – 3 are over 18 by the time of trial • The witness all expressed genuine fears about testifying because of fear of reprisals	• Two homicide detectives testified on the fears of the witnesses [3] • An excerpt from a Toronto District School Board report on the incident, which contained information on the general level of fear in the school concerning the offenders and possible reprisals	• Accused opposed the application • Accused argued that the evidence should not go in through the homicide detectives [3]	• With respect to allowing the detectives to testify instead of the witnesses, the judge indicated that if he needed to hear from witnesses he would have them called – but that would cause delays to get witnesses and in order to set up CCTV for the application and "the other reason is that given the concerns expressed by these witnesses, I thought that it was preferable not to subject them to yet another appearance in this proceeding if that could be avoided." [3] • All witnesses testified by CCTV at the preliminary hearing and the public was screened from seeing them, but could hear what they said • While evidence for these applications does not have to take a particular form, per *Levogiannis*, it still must meet the usual standard for admissible evidence [8] – therefore one more general report about concerns of retaliation at schools for reporting violence not relied upon – not admissible evidence [8], [9] • Note: the judge includes the one underage witness in the same analysis at the other three, seemingly ignoring the presumption in favour of any witness under 18 [12] • Here the witnesses are not the complainants (distinguishing from *Levogiannis*) [15] • [16] "If the stated fear is a fear of reprisal arising from the fact that these individuals are going to give evidence in this trial, then it is self-evident that the core fear arises from the fact of being a witness -- not from the manner in which the evidence is given. I do not see how changing the manner in which the individuals give their evidence addresses that central concern. In other words, the concern as expressed by these individuals arises from the fact of being a witness, not from the form in which their evidence is given. . . In addition, it is difficult to substantiate the concern from an objective point of view." • Section 486.1(3) analysis: all except one are adults, none have disabilities, the offence is serious and

Case	Nature of Application	Timing of App	Relationship & Vulnerability	Materials Filed	Application Opposed?	Ruling & Key Findings
						shocking [12] • None said they would be unable to give evidence in person or feared the accused, rather it is fear of reprisal [15] • "A judicial decision to depart from the normal trial procedure must have a rational basis. There must be some evidence upon which the court could be satisfied that there is a legitimate foundation for the concern – one that would warrant intervention by the court." [17] • this "common and subjective concern" is not intended to be sufficient to provide a proper foundation for an order under s. 486.2. . . if that form of concern was sufficient, it would be a slippery slope" [17] • accused persons any departure from normal trial process therefore bears special scrutiny • Credibility is a central issue – TV might impair the jury's ability to assess – could prejudice the accused [19] • The threshold here to be met is one of necessity (to give a full and candid account) – no evidence of necessity – no statements that they would not otherwise testify (parsa 20-21] • A preference to testify by CCTV does not satisfy necessity [21] • The change from witnesses appearing in person to appearing by CCTV during the trial could cause the jury to make incorrect and prejudicial inferences (distinguishes from *Levogiannis* on the facts) [22] • Application denied [25-26]
R v Esford, 2011 BCSC 1718; Sexual assault (see 2012 BCSC 1223) Trial	Crown application under s. 486.2(2) for a screen Discretionary	Not indicated	• (see 2012 BCSC 1223) – accused was step-father to complainant and sexually abused her between ages of 12-17	• Testimony given from a witness who has known the complainant for a considerable period of time – the complainant has been distressed, crying, shaking, and her complexion has changed [4]	• Unclear – appears to have been opposed, with the accused citing concerns about observing the witness [8]	• Age of witness now not stated, but appears to be mid twenties (2012 BCSC 1223) • Judge notes that screen will not block accused's view of complainant [2], [8] • There has to be an evidentiary basis for an order under s. 486.2(2) [4] • The type of evidence to be given "is such that it would be difficult for anyone to speak of in front of a large group of people, whether it be in a courtroom or anywhere else." [5] • Standard of necessity is not about whether the complainant is reasonably fearful or needs to be protected, the issue is whether the order is necessary to obtain a full and candid account. (Cites other cases) [6-7] • Beyond evidence that the complainant is fearful, there is evidence that she is distraught and suffering emotionally. [7] • The fact that the screen is one-way is an important factor -- the accused can see the witness, but the witness can't see the accused – it doesn't deny the accused the right to observe the complainant [8] • Witness's fear that she could see the accused at any point could interfere with her ability to give a full and candid account, and justifies use of screen. [9]
R v F(M), 2010 ONSC 4018; 15 counts, including sexual assault, sexual touching,	Crown applications under ss. 486.1(2), 486.2(2)	Ruling during the trial for one witness [4]	• Witness (T.K.) over 18 at trial, but under 18 at prelim [88] • The accused is the T.K.'s biological	• a child protection officer, testified that T.K. is extremely concerned about seeing accused and will be unable to testify if she's in	• no objection to her adopting her video-tape statement as her evidence (as occurred at prelim when T.K. under 18)	• T.K. allowed to testify in a separate room via CCTV with a support person [95] • Order necessary to ensure a full and candid account and would not interfere with administration of justice • T.K. testified outside of courtroom and had a support person at prelim – "it was only through an accident of timing that a discretionary order became necessary" (T.K. turned 18 just before trial) [96]

Case	Nature of Application	Timing of App	Relationship & Vulnerability	Materials Filed	Application Opposed?	Ruling & Key Findings
and death threats; Trial	(CCTV), and 715.1 Discretionary		mother and step-father, occurred when she was living with them (now a ward)	the same room as the accused, It will be important for T.K. to have a support person or she will be paralyzed by fear, and T.K. has attention issues and is easily distracted (has A.D.D.) [89-93]		• Judge ordered that there be no communication between T.K. and the support person [97]
R v Forster, 2006 BCPC 237; [2006] B.C.J. No. 1262 Sexual assault Prelim	Crown application under ss. 486.1(2), 486.2(2) for a screen and support person Discretionary	Beginning of Prelim [1]	• Accused was neighbours with the complainant for approx. 4 months [8] • Crown asserts that the 50 year old complainant is both mentally and physically disabled [8]	• Crown called evidence from two witnesses: the investigating officer and the victim support worker employed by Family Services of Greater Vancouver [3] • Crown then abandoned mandatory application • The officer gave evidence that the complainant had some difficulties in providing a statement, zoned out and "was slow", and was afraid of the accused[4] • Victim Services Worker met the complainant the day prior and the complainant expressed reluctance to testify – less reluctant when advised that worker would be with her, expressed fear of testifying if no screen • Told worker she was bipolar	• Crown asserted witness both mentally and physically disabled, defence would not concede this [2]	• Fear of testifying not enough: "Now, I think that it may be trite to say, but the practice in criminal courts, going back over the centuries, is if witnesses testify in public, the person accused is present in the courtroom. And witnesses, I dare say over the centuries, often are nervous, do not want to see the person that they have accused, and frankly, do not want to testify." [6] • Sections apply only in special cases: "These sections that we are dealing with here are obviously for those very special circumstances where there is a particular important reason to divert from this practice." [7] • Test: the test is whether the accommodations are necessary in order to obtain a full and candid account [7]. • To answer the test, look to s. 268.2(3) factors: (1) age, (2) disability, (3) nature of the offence, (4) relationship with the accused • Here, screen not necessary for a full and candid account – application denied [9] • Application for a support person allowed, but support person must stay in the counsels' row of chairs near the witness box [9]
R v Hockley, 2009 YKSC 62; Sexual assault,	Crown application under s 486.2(2) to	Appears to have been pre-trial	• Adult woman complainant did not know the accused – attacked while	• Not indicated	• Not indicated	• No reasoning given.

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causing bodily harm Trial	testify by CCTV Discretionary		walking at night [3-5]			
R v Kerr, 2011 ONSC 1231; Sexual assault Trial	Crown application under s. 486.2(2) for CCTV (or screen) Discretionary	Appears to be a pre-trial application	• Complainant is 38 • Complainant was platonic friends with accused for over 30 yrs	• Crown called a victim witness officer, who testified about the evidence given at the prelim, and the facts received from the complainant [3-4] (and refers to her affidavit) • Officer described how complainant acted during Crown interview – comp said she had concerns and would lose her focus if in same room as accused and have difficulty testifying [13] • Also, officer's opinion that comp would benefit from testifying behind screen or CCTV • Crown also referred to part of the prelim transcript [3] • No evidence of mental or physical disability [11]	• Not indicated	• Allegation that accused put penis in complainant's vagina while in a hot tub [8] • Complainant testified behind a screen at the preliminary inquiry [10] • No evidence of a mental or physical disability • "I am not satisfied that the Crown has established that the complainant should testify behind a screen or from a child friendly room. One must remember that this is a jury trial and that there is always the concern that the jury may place undue emphasis on the screen or the child friendly room to the detriment of the accused's right to have a fair and open trial." [16] • Crown application denied – if Crown has medical evidence that would allow it to bring an application under s. 486.1, the judge would entertain the application [17]
R v Khreis, 2009 CarswellOnt 8354; [2009] O.J. No. 5687 (Ont.Sup.C.J.) Extortion (accused threatened to expose fact of	Crown application under s. 486.2(2) to testify behind a screen Discretionary	Not indicated	• The complainant will be a few days short of 20 yrs old at trial [4] • Muslim [5] • Had been in consensual sexual relationship with accused	• Evidence of the investigating officer – described as "minimal" - said the complainant felt emotionally upset, violated, and did not want to see the accused. During the interview she cried. Relieved when told she could testify behind screen at prelim. She broke	• Opposed – cross-examined officer during *voir dire*	• Evidentiary Basis: "The Court of Appeal has clearly established that there must be an evidential base capable of supporting the requisite opinion before the trial judge can make the order. See *R. v. M. (P.)* (1990), 1 O.R. (3d) 341 (Ont. C.A.)" [2] • Preference to testify behind screen is insufficient: [6] "On the basis of this very limited evidential record, I cannot form the opinion that the use of a screen is necessary to obtain a full and candid account from the complainant. At best the evidence establishes that in July 2008, she was embarrassed and emotionally upset about her upcoming testimony at the preliminary inquiry. In view of the wording of s. 486(21) to the effect that the screen must be necessary to obtain a full and candid account, simply establishing that the complainant was relieved when she was told she could give her testimony behind the screen is not enough. If that was the case, the use of a screen would be routinely ordered whenever

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consensual sexual intercourse to comp's family) Trial				down once at prelim [3] • Accused cross-examined the officer – usual for witnesses to be nervous, he was unaware of the complainant having a mental/physical disability, complainant is almost 20, complainant did not say she would not otherwise testify [4]		the complainant preferred to testify behind a screen. Here the issue of whether the complainant could give a full and candid account without the use of a screen could not really be assessed. Moreover, there is no evidence of the complainant's present situation, nor her attitude towards her upcoming testimony during the week of March 8, 2010 when she will turn 20 years old."
R v Land, 2012 ONSC 4080; Second degree murder Trial	Crown application for a support person: - 2 witnesses pursuant to ss. 486.1(1), but third witness pursuant primarily to 486.1(2) Mandatory & Discretionary	Pre-trial	• Three witnesses, two with acknowledged mental disabilities • Witness #3 just turned 18 • Witnesses knew accused or witnessed murder, not victims	• Crown relies on testimony from prelim and her interviews with the detective to show that non-disabled witness needed accommodation for "full and candid" as she is immature, difficulty understanding some questions and loses patience [10] • a mental disability can be "inferred" [10]	• Accused consents to the worker for the two witnesses with acknowledged mental disabilities, but opposes order for non-disabled witness • Argues that order not "necessary" and that her evidence is not regarding "acts complained of"	• Two witnesses suffer from mental disability, so judge "shall" make order: s. 486.1(1) • But, no presumption in favour of third witness, as there is no disability and she is over 18 at the time of testifying, consideration to discretionary order: • Evidence suggests that witness #3 was not "shy, intimidated, or reticent to talk" – youth is not a barrier for her - accommodations not necessary for a full and candid account, within the meaning of s. 486.1(2) - [7] • No evidence of physical or mental disability, and it cannot be inferred - review of prelim transcript demonstrates why she "lost it" and "stormed out" and had to be coaxed back -[8], [9], [11] • No mental disability that makes it more difficult for her to provide a full and candid account • Witness testified at the prelim and no evidence that she had support there • The accused is not charged with an offence against the witness, and accused had never been aggressive with her • Section 486.1(3) factors do not indicate the need for a support person [14-16] • Discretionary application denied: s. 486.1(2)
R v LDP, [2008] O.J .No. 5144 (OntCJus); Assault Trial	Crown application under s 486.2(1) to testify by CCTV Mandatory	Oral application at beginning of trial, in a voir dire	• Complainant is 28 year old woman with a physical disability alleging that the accused assaulted her	• Crown filed the report of a doctor. It stated that the complainant suffers from epilepsy, which can be triggered by stress. If an attack were to occur, she would be unable to function for a prolonged period, and the risk would be minimized through testimony via CCTV [2]	• The accused opposed – objected to the admission of the report of a doctor [2]	• Disability must be connected to communication of evidence: "…there is a requirement that the physical and mental disability be linked to the witness's difficulty in communicating his or her evidence." [3] • The section creates a presumption in favour of the accommodation that is rebutted if the "opposing party satisfies that presiding judge that the Order would interfere with the proper administration of justice." [3] • Judicial notice taken that epilepsy is a physical disability and the courtroom is a stressful environment [4] • Timing of Application: It is generally better for the Crown to provide as much notice of its intention to bring such an application as possible, and to bring the application in writing, but under the section, such applications can be brought at the commencement of trial [5]

Case	Nature of Application	Timing of App	Relationship & Vulnerability	Materials Filed	Application Opposed?	Ruling & Key Findings
						• In the present case, notice was adequate [6] • Also, "while the issue is to be decided on a case-by-case basis, my sense of our community is that neither the health care or criminal justice systems could sustain the attendance of medical doctors were they to be required to attend and give oral evidence on every application of this kind". [6] and no need for actual presence of doctor for "fairness" or to "provide with [further] information" [7] • Court: "I am mindful of the arguments of [defence counsel] that there is a risk of opening the floodgates to many more such applications were a ruling to be made in favour of the Crown. Nevertheless, these applications are always to be determined on a case-by-case basis. I think that, so long as judges exercise their discretion appropriately, the concern with respect to the floodgates opening will not happen." [8], CCTV granted • Application granted for testimony via CCTV [9]
R v L(MAC), 2008 BCPC 272; Firearms offences, uttering threats, obstruction of justice, in context of comp being involved with someone else; Prelim	Crown application under s. 486.2(2) for a screen Discretionary	During prelim	• The accused and the complainant were former spouses and have a child • The complainant did not make a request for accommodations [30]	• Crown submissions regarding history of proceedings between comp and accused, played some wiretap of some of accused's calls to her since charges • No evidence on the central issue of how the complainant's testimony would be truncated or circumscribed, or on how the accommodations would serve to overcome a tendency to give constrained testimony [23]	• Accused opposed [1]	• Evidentiary burden: Section 486.2(2) imposes an onus upon the Crown to tender evidence that gives rise to an opinion that the accommodation is necessary to obtain a full and candid account [10] [10] I interpret s. 486.2(2) as imposing an onus upon the Crown to tender evidence that persuades me, or gives rise to an "opinion" on my part (to track the language of the section), that such a testimonial accommodation is necessary "to obtain a full and candid account [from Ms. K] of the acts complained of" / the charges. This onus is better understood when it is remembered that the s. 486.2 processes are a departure from the norm, as specified in s. 650 (of which s. 486.2(2) makes express mention). Section 650 affirms the right of an accused, subject to defined exceptions, to be present in court during the whole of his or her trial. I take that to mean present and able to observe all that unfolds in the ordinary course of the prosecution, subject (again) to defined exceptions. • s. 486.1(3) factors: - Complainant is not a child and does not have a mental disability [12] - Serious offences, flowing from the breakdown of a spousal relationship, as well as intimidation and obstruction of justice, which are linked to the accommodations requested [13] - Nature of the relationship is most important in this case– history of assault, intimidation and threats [16-19] [23] Cst. Coupe did not give any evidence that went directly to the question of Ms. K providing only circumscribed or truncated evidence if she were to be required to testify in M.A.C.L.'s presence without having some kind of barrier placed between them. Nor did I hear any evidence, or argument, as to how, or why, such an accommodation would serve to overcome a tendency to give constrained testimony. • Evidence should be introduced to prove: (1) that the witness's testimony would be truncated or circumscribed and (2) that the testimonial accommodations would serve to overcome a tendency to give constrained testimony [23] • Test for s. 486.2(2): (citing *R v Pal*, 2007 BCSC 1493) ◦ The standard is one of necessity [24] ◦ It is a high standard [24]

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						◦ Fear of testifying is not sufficient – the accommodations would not allay safety concerns because they do not protect the accused from knowing the witness's identity [24] • Such orders are extraordinary departures from the normative practice where the accused is permitted to face his or her accuser (citing *R v Forster*, 2006 BCPC 237) [27] • Crown did not invoke s. 486.2(6) procedure, so the court did not hear from the complainant by way of testimony concerning the constraints that might be placed upon her candour if required to testify [30] • Application dismissed [31]
R. v. McDonald, [2008] O.J. No. 5714 (Ont.C.J.) Assault causing bodily harm and breach of UTA Preliminary	486.2(2) for CCTV	A week before start of prelim	• Testifying against ex spouse, lengthy history • Not young, and no disability	• Lengthy court history set out for court (history of offending, probation orders breaches) • Officer testified and explained that complainant admits she is "putty" in the hands of the accused and still loves him, but wants to move on – she wants to "break the cycle"	Appears to have been	• History of abuse • Judge grants application: "I have taken into consideration the nature of the relationship between the two, the nature of the offences and all those other circumstances I have just mentioned and there is no doubt, in my view, that the Crown has amply proved on a balance of probabilities that the complainant ought to testify outside the courtroom, and I believe the particular request was through a closed-circuit television." [7]
R v Miller, 2008 BCPC; # 141446-2-KC Victoria Assault	Application under s. 486.2(2) for use of screen Discretionary	Trial – start of testimony	• Adult female with mood disorders, panic attacks, anxiety and depression • In an intimate relationship with the accused	• Witness testified that she had panic attacks, anxiety, depression, would be able to give her testimony in clearer manner if screen in place • gave evidence on application with a screen	• Unknown	• Judge notes that accused can view complainant through the screen • Judge observed witness getting more and more anxious during cross-examination • The allegation is that she was assaulted with a chemical compound causing burns to much of her body, a serious offence – a profound shock to her to be assaulted • Judge says "I am satisfied that indeed the screen being employed would enable me to get her testimony in a better, clearer manner, and that if the screen was not in place, that the account she provides would not be complete • The screen will remain – application granted
R v Obelikpyha, 2012 BCPC 282; Sexual assault Trial	Crown application under s. 486.2(2) for CCTV testimony Discretionary	Mid-trial	• Complainant is 18 and has no mental or physical disability • The accused was a stranger and has not seen him since incident [4]	• The witness support person testified that the complainant was afraid, and was nauseous, vomiting and crying and felt under the accused's control when earlier giving evidence [2]	• Accused opposed and asked the court to speak with a witness support person [2]	• Complainant is very young • No physical or mental disability • Allegation is a sexual assault, accused a stranger • The judge had already observed the complainant in the morning and noticed "she spoke softly through an interpreter and made no eye contact with the judge or counsel and was having difficulty giving evidence" [5] • In view of nature of the charge and young age, satisfied that the accommodation is necessary to obtain a full and candid account [6] • Judge says it is important that the complainant and support person are visible in the other room, and

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						that there be no communication between them when the witness is testifying [6]
R v Pal, 2007 BCSC 1493; [2007] B.C.J. No. 2192 Kidnapping, unlawful confinement, assault causing bodily harm, sexual assault Trial	Crown application under s. 486.2(2) for male comp to testify behind a screen Discretionary	Appears to be during trial	• The accused kidnapped the complainant because they were trying to locate his brother-in-law [2] • The sexual assault charges relate to torture used to get him to talk [2]	• Affidavit of complainant, explaining the allegations, and alleging that he continues to be terrified for himself and his family, and that his family has gone into hiding. • Claimed other perpetrators remain at large (worried if they see him, they will track him down) [4]	• Accused opposed?	• The right of an accused person to be present in court throughout the trial and to observe his accusers and those who testify against him is a fundamentally important right and recognized by s. 650 of the *Criminal Code* – it must not be lightly interfered with [5] • Necessity standard requires evidence: "there must be an evidentiary basis to establish the standard of necessity set out in the subsection." [6] • The standard of necessity "is not whether the witness reasonably has a fear or whether the order is necessary to protect the witness" [8] – must be "necessary to get a full and candid account from the witness of the acts complained of" • There must be evidence that lack of accommodation "would affect his ability to give a full and candid account of what happened" [9] • No evidence from complainant that he would be unable to give a full and candid account [9] • Application dismissed [10]
R v Piotrowski, 2011 ONCJ 561; Assault and uttering death threat Trial	Court ordered support person, under s. 486.1(2) Discretionary	During trial	• Accused lived in the building next to the complainant • Accused has mental health issues	• None indicated • Order granted due to disruption at trial caused by accused	• Not indicated	• Note: Accused was removed pursuant to s. 650(2)(a) for misconduct during proceedings, for yelling at and threatening the complainant [2,3] • Accused could not control outbursts during comp's testimony [5] and complainant was shaken and upset • Witness testified that she was "petrified" of accused [1] • Judge sought to move the complainant to another room and have her testify via CCTV pursuant to s. 486.6(2) but the equipment was being used in another trial, had witness box moved inside the courtroom • Accused was eventually brought back in. [5] • Judge also made an order for a support person (her fiancé) to be present pursuant to s. 486.1(2), despite the fact that he had already testified, because of the material risk that the complainant would not be able to give her evidence effectively and the alternative was to exclude the accused [6]. • The disruptive behaviour continued and the accused was once again excluded [7]
R v Pizzolato, 2007 ONCJ 722; [2007] O.J. No. 5618, Criminal harassment, possession of a weapon	Crown application under s. 486.2(2) for CCTV testimony, or in the alternative, a screen	Start of trial	• The 25 year old female complainant dated the accused for about two years – harassment started after they broke up [2] • The complainant does not have	• The complainant testified via CCTV pursuant to s. 486.2(6) – testified that if she saw the accused she wouldn't be able to speak [2] • Described the accused's harassing behaviour after they broke up • Testified that being in a	• Accused opposed [7] • Argued that proceedings only summary, and other facts distinguishing case from *Clark*	• The must be an evidentiary basis upon which the judge can form the opinion that the accommodation is necessary to obtain a full and candid account (citing *R v M(P)*, [1990] OJ No 2313) [5] • Considering the nature of the offence, that the complainant is an adult with no disabilities, the nature of her relationship with the accused, and her evidence that she could not effectively testify, she would "choke up", and how she appeared on the application, the application is granted [10] **[8]** In my view, evidence that a witness will be nervous and even fearful in giving testimony is not enough unless that nervousness and fearfulness are such that it would prevent the witness from giving a full and candid account of the events complained of. There is nothing to suggest that the complainant in this case would give less than a candid account of the alleged events. The issue is whether or not

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Trial	Discretionary		mental or physical disabilities [4]	different room when testifying helps [3]		she would be able to give a full account of the events. She testified at the commencement of her evidence that if she were able to see the defendant she did not think she would be able to come out with anything and that she was nervous just knowing he was outside in the courtroom. She concluded her evidence-in-chief testifying that in imagining herself in the courtroom, she would just choke up.
R v Ragan, 2008 ABQB 658, [2008] A.J. No. 1574; Conspiracy to commit murder and assault; Trial	Crown application under s. 714.1 on the basis witness does not want to see accused	Appears to be pre-trial	• 50 year old man (witness) was hired by the accused to kill two individuals – Witness was shot in the back of the head and fears for his safety [2] • Application rooted in fear for his safety should he testify • Witness suffered a significant brain injury as a result [5]	• Records from witness's post-shooting hospitalization and reports of rehab team suggest that he has significant brain inury and "persistent anxiety" about testifying [5] • Doctor's opinion that minimizing contact with perpetrators would be best interests of witness's mental health [6] • Records indicated witness has fear of further violent attacks, based on hearsay he had heard	• Accused opposes, witness is critical and that cross-examination would be impaired and negatively impact the trier of fact's assessment of his credibility (especially important because it is a jury trial) [12] • Witness's anxiety no ore than any witness to a serious crime would experience [13] • Technology may cause audio lag and disrupt flow of cross [14]	• Crown assures arrangements can be made for witness to be in Edmonton while trial in Lethbridge (hard copies of evidence will be available at both places • "virtual appearance" can be arranged • Jury trial • Witness safety is a factor under s. 486.2(4), not s. 714.1 where the offence is listed in s. 486.2(5) [26] • s. 714.1 cannot be used for reasons of witness safety – this is beyond the intent of the section [32] • s. 486.2(4) does not extend beyond the offences listed in s. 486.2(5) [34] • Crown has not produced compelling evidence for testimonial accommodation [58] – he is a critical witness, his evidence is controversial and credibility will be highly contested, and a jury may infer that the witness testifying by video link that the accused was connected with his shooting [58] **[33]** In contrast, s. 486.2(4) was intended to address witness safety. That is what its plain language says and, when read in context; the conclusion to be drawn is that Parliament intended s. 486.2(4) to be "a tool that provides a perfect solution to the problem of witness safety" (***Allen*** at para. 15). **[34]** Section 486.2(5) describes the offences to which s. 486.2(4) applies - cases involving criminal organizations, terrorism, *Security of Information Act* offences, and intimidation of justice system participants. It does not go beyond that, evidencing Parliament's intention to limit virtual evidence in witness safety cases only to the most vulnerable or at-risk witnesses. **[35]** As Duncan J. observed in ***Allen***, to interpret s. 714.1 as giving residual authority to allow virtual evidence based on concerns for witness safety in situations that do not fit the limiting parameters of ss. 486.2(4) and (5) would be to render those limitations and the section itself redundant. **[61]** In brief, while I am satisfied that the technology would be adequate to permit a free-flowing cross-examination and that the right to face one's accuser can be met by virtual presence, I am in no way satisfied that the health of this critical witness, whose credibility must be assessed by a jury, is such that it warrants testimonial accommodation. Alternate measures can be taken to assuage [witness's] anxiety. • Application denied
R v Rohrich, [2009] OJ No 4050 (Ont SCJ); Sexual assault Trial	Crown application under ss. 486.2(2) (CCTV) and 715.1 Discretionary	Pre-trial	• Complainant is 20 (17 at time of offence) and has no mental or physical disabilities [10] • Went to house where two accused	• Not indicated	• Accused are opposing application [3] • Some suggestion that counsel thought appt of counsel obviated need for CCTV	• Although 17 at time of offence, 20 by time of trial and therefore order is not mandatory [7] • Witness did not have a mental or physical disability and had already testified at preliminary without an accommodation [7, 10] • Application denied under s. 486.2 [10] • Remainder of the case focuses on the s. 715.1 application

Case	Nature of Application	Timing of App	Relationship & Vulnerability	Materials Filed	Application Opposed?	Ruling & Key Findings
			were, drank, danced blacked out			
R v Salehi, 2011 ONCJ 39; Sexual assault Trial	Crown application under s. 486.2(2) for CCTV Discretionary	Appears to be pre-trial	• Accused is the great uncle of both complainants, who are sisters, offences occurred when they were around 10 years old, and now 20 and 23 [3] • No evidence of mental/physical disability for complainants – both expressed fear of the accused [8-9] • Complainant one stated she suffers from depression – no documentation presented [15]	• The officer who interviewed the complainants the week prior to the trial (and application) presented evidence about the feelings of concern about testifying and fear of the accused – obvious distress, concern that they would not be able to testify [6-12]	• Not indicated	• Age of witness favours granting application: The complainants are 20 and 23 and do not have a significant degree of life experiences that gives a person "the wisdom to separate all potential fears from reality" [14] • Crown did not assert mental disability, but the judge notes the first complainant's statement that she suffers from depression [15-16] • Nature of the offence favours granting application: Sexual attacks are very serious – though the judge acknowledged these are not the most serious incidents in this case, he held that attacks on sexual integrity are by their nature very disturbing to the individual, and are aggravated where the complainant is a child and the perpetrator is a family member [17-19] – testifying by video-link would allow the witness to feel less intrusion on her privacy and thus more relate to relate her allegations. [19] • The nature of the relationship – here there is familial closeness, though not as close as a parent or sibling [20] • [21] "A statement by a potential witness that she will not testify about her allegations if forced to do so in open court causes me great concern. If I was led to believe that this was not a sincere (even if misguided) belief then I would discount it and give it no weight. But where I cannot discount it, it goes to the central issue and that is "getting a full and candid account". Clearly the witness Complainant #1 is more adamant in this regard than Complainant #2. Even so, I think I must consider the real possibility for both witnesses that they would be unable to testify. In the final analysis however, I give this factor the least weight because it is so very much a statement of the subjective feelings of the witness." • Refers to two cases for factual similarities / dissimilarities • [26] "I am the trial judge in this case and need not be concerned with the possible prejudicial effect upon a Jury that allowing this style of testimony would entail. I am also mindful of the fact that the facilities in this courtroom allow the defendant (and the presiding Judge) to see and hear the witness. The rights to cross-examine are not diminished." • Application granted for both witnesses [28]
R v Tejeda-Rosario, 2009 Carswell Ont 9057; Sexual assault Trial	Crown application under s. 486.2(1) for CCTV Mandatory	Beginning of trial	• Complainant was the patient of the accused (his psychiatrist) • Complainant has psychological issues – post-traumatic stress disorder (PTSD) and suicidal	• The complainant's current psychiatrist testified that the complainant demonstrates symptoms of PTSD and has expressed suicidal inclinations – could affect his ability to focus and concentrate if required to give evidence in a normal	• Not indicated	• Crown applies on basis of complainant's concern about being in the presence of accused and ability to testify would be severely compromised • Application for a screen granted [44] and that steps be taken to ensure that complainant not be able to see the accused while entering or leaving the courtroom.

Case	Nature of Application	Timing of App	Relationship & Vulnerability	Materials Filed	Application Opposed?	Ruling & Key Findings
			inclinations [43]	manner [43] • The complainant testified that he was concerned about being coherent in court and confirmed his psychiatrist's description. Also stated he had previously been committed and would return to the hospital if not allowed to testify outside of the courtroom [43-44]		
R v T(M), [2009] OJ No 2384; Sexual assault, sexual interference Trial	Crown application under s. 486.2(2) (screen) Discretionary	Appears to be pre-trial	• The accused is the complainant's grandfather • The complainant was 5 to 8 yrs old at the time of the offences – She turned 18 less than a month before trial and is 8 months pregnant [2] • No mental or physical disability	• Testimony of detective – the complainant expects she will freeze up, cry, be intimidated by the accused, and her evidence will be worse [5]	• Not indicated	• Testified at preliminary inquiry with a screen and assumed she would get to do so at trial • Facts: witness is somewhat introverted; prefers not to see accused; concerned about the prospects of having to give evidence without a screen; without a screen, she expects to cry; feels accused would intimidate her; eye contact would make her nervous; she found that the screen was helpful at the preliminary hearing; in her words "It was like he was not there"; without a screen, she feels she would be more responsive in giving her evidence because she might see him; she feels uncomfortable about talking about the alleged sexual assault and sexual interference; she feels she might "freeze up" if the screen were not in place; without a screen, she fears that she will speak fast, stutter and the quality of the evidence would be worse. • "Having regard for the very personal, intimate, and private nature of the acts complained of, the relationship of trust between a grandfather and his granddaughter, the trauma of the event, the necessity to recount it in a public forum, and the fact that a screen will not obstruct or interfere with the trial" the trial judge granted the application [12] • Will instruct the jury not to draw an adverse inference
R v Y(L), 2010 ONSC 7257; [2010] O.J. No. 527 Sexual assault, trafficking marijuana Trial	Crown application under s. 486.2(2) to testify behind a screen Discretionary	Appears to have been pre-trial	• Witness was 18 years old and the daughter of the accused – she was 14 years old at the time of the sexual assault	• A witness testified in a *voir dire* on the application under 486.2(2) - [8], [17]	• Not indicated	• Reasons for granting application not repeated [17] • Judge notes after seeing the witness testify at the trial behind the screen that "I am more convinced than ever that the use of the screen by this 18 year old witness assisted her in this case to give to the best of her ability a full and candid account of the evidence as she understood it to be." [17]

Appendix C: CASES ON SECTION 486.3: APPOINTMENT OF COUNSEL FOR CROSS-EXAMINATION

Case	Nature of Application	Timing of App	Relationship & Vulnerability	Materials Filed	Application Opposed?	Ruling & Key Findings
R v Agar, 2007 BCPC; #26636-1-K, Williams Lake; Criminal harassment Trial	Application under ss. 486.2(2) and 486.3 discretionary	Pre-trial	• Adult female complainant with no disability • Lengthy domestic history with the accused	• Unknown		• The judge appointed counsel, but accused was unwilling to instruct him or share his defence • A week before trial counsel came to court and advised judge that he could not receive instructions and ethically did not know what to do, as he could not effectively cross-examine without instructions • On trial date nothing had changed and trial judge excused counsel – Law Society Benchers had advised him that he could not ethically perform his job as counsel • Crown argued that accused should not be entitled to cross-examine complainant at all in light of his behavior • Judge permitted cross-examination as the right to do so is integral for administration of justice • Judge had originally denied Crown's application under s. 486.2(2) for CCTV • In light of fact that accused would be cross-examining (not counsel) and that accused did not oppose CCTV order, this application was revisited and granted
R v Canning, 2010 NSPC 59, [2010] N.S.J. No. 497 (P.C.) Multiple sexual offences against multiple individuals, some under 14 Trial	Crown application under s. 486.3 considered, after accused's application for state-funded counsel for the trial was denied. [6] Mandatory and discretionary	Appears to be pre-trial	• Four complainants • Some under 14 at the times of the offences [1]	• Each complainant testified about how they would feel about being cross-examined by the accused [47] • #1: is under 18 and would have difficulty concentrating (and wanted a screen) [47] • #2: is over 18 said accused questioning him would affect his answers [47] • #3: prefers to be cross-examined by a lawyer, but did not say accused questioning him would affect his answers [47] • #4: said it would make no difference [47]	• Accused opposed, arguing that he should be able to face his accuser directly [48]	• The court must consider "the age of the witness, the nature of the offence and the relationship between the witness and the accused." [47] • Here, the accused also made an application for court funding for counsel, which indicates that he has no issue with having a court appointed lawyer [48] • The Test: "The test is not met simply by a witness expressing a wish. There must be reason to think that there is actual need for the requested order. The rationale is not to spare a witness some discomfort, but to prevent the injustice which would occur if the witness were unable to speak the whole truth." [49] • Application granted for complainant #1 – proper administration of justice does not require the accused to personally cross-examine [50] • Application granted for complainant #2 – necessary to obtain a full and candid account [50] • Application denied for complainants #3 and #4
R v C(CA), 2011	Crown	At start	• Not indicated	The Crown was applying	• Not indicated	• Very little discussion on this point. The judge states that the criteria are satisfied and nothing indicates any

Case	Nature of Application	Timing of App	Relationship & Vulnerability	Materials Filed	Application Opposed?	Ruling & Key Findings
BCPC 170; sexual touching and uttering threats; Prelim	application under s. 486.3(1) (presumptive) (along with application under s. 486.2(1))	of, or before prelim		to have the child's videotaped statement entered at the preliminary inquiry, without the child having to testify. This was denied, but counsel and CCTV was granted.		interference with the proper administration of justice [24] • Application granted [24]
R v Fazekas, 2010 ONSC 6603; Criminal harassment and related charges; Trial	Crown application under s. 486.3(4) (enumerated offence)	Appears to be pre-trial	• Not indicated	• Crown filed affidavit re: charges and transcript of *Partial Proceedings at Trial*. [3] • Crown who observed the accused at the original trial testified that he was vulgar, used foul language and became agitated when cross-examining the complainant [3] • The accused filed the transcript of the cross-examination of another complainant on a subsequent trial [4]	• Opposed, based on s. 650 of the Criminal Code and *Charter* ss. 7 and 11(d) [6] • Argued that full answer and defence requires him to personally cross-examine the complainant because he knows her best, and he get admissions a lawyer could not, and that the jury might draw an adverse inference [7-10]	• "Section 486.3(4) of the *Criminal Code* establishes a presumption that an accused charged with criminal harassment shall not cross-examine the complainant. The accused has the onus of rebutting this presumption by demonstrating that the proper administration of justice requires him or her to personally cross-examine the complainant." (cites *R v G(DP)*, [2008] OJ No 767) [5], [12]) • Cites *G(DP)* and *R v Grey*, [1996] OJ No 4743 (Ont Prov Div), where it was held that the accused's right to make full answer and defence was not infringed because he could instruct counsel [14]-[16] • Purpose of the section (quoting *R. v S.(P.N.)*, [2010] O.J. No. 2782 (Ont CJ)): "Section 486.3 is found within that part of the Criminal Code setting out legislated aids for a witness in court, such as screens and support people, to facilitate a witness providing full and candid testimony. Specifically, s. 486.3, if an application is made, authorizes the court to order that an accused not cross-examine a particular witness directly, but to insert a "legal screen" between the accused and witness by ensuring a third party conduct the cross-examination" [17] • Notes that section 486.2 was upheld as constitutional in *R v S(J)* (2008), 238 CCC (3d) 522 (BCCA), aff'd (2010), 251 CCC (3d) 1 (SCC): quoting from *S(J)*: "s. 486.2 of the *Criminal Code* 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."[18]-[21] • In the present case, the accused has not demonstrated that the proper administration of justice requires him to conduct the cross-examination. He was polite and civil, but had difficulty staying focused and a tendency to get excited – he is no substitute for a legally trained advocate, and will have ample opportunity to consult with counsel [22]-[23]
R. v D.P.G., [2008] O.J. No.	Crown application	Pre-trial	• Several witnesses between 9-15 years		• Yes	• The reason advanced by D.P.G. for opposing the Crown's motion is that his past experience with lawyers has left him without any confidence that the questions he wishes to ask will be put to the witnesses. He cites

Case	Nature of Application	Timing of App	Relationship & Vulnerability	Materials Filed	Application Opposed?	Ruling & Key Findings
767 (S.C.J.) Pornography charges	under s. 486.3(1) Mandatory		old • voyeurism			examples of prior trials where he was unable to communicate with counsel in the court room even to the point of being prohibited from passing notes to counsel. [3] • He adds that four of the witnesses under the age of 18 are cousins, that he has known them since they were born, and has never had any difficulty communicating with them. He also suggests that I ought to interview the witnesses to determine if they are reluctant to be cross-examined by him personally. He submits further that cross-examination by him likely would be les intimidating than if it were conducted by a lawyer. [4] • The section does not require that I interview the witnesses or even that I determine it is their wish to be cross-examined by someone other than the accused. Once 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. [5]
R v Gendreau, 2011 ABCA 256; Sexual assault, unlawful confinement; Appeal	Argues on appeal of conviction that trial judge erred in appointing counsel to cross-examine the complainant at trial (486.3(2))	Appeal	• Complainant was the former co-worker of the appellant	• Not indicated	• Appellant did not oppose the application at trial, but expressed preference to conduct it himself [21] • On appeal, argues that his ability to fully defend himself was compromised [24]	• At trial, the Crown submitted that the unequal relationship between complainant and the appellant, the intimate and humiliating nature of the sexual assault, and the appellant's explanation all indicated that counsel should be appointed [22] • The appellant effectively agreed and confirmed that he was content to have the lawyer he proposed appointed [22] • The judge agreed to appoint counsel • This ground of appeal is without merit – the appellant and counsel consulted on several occasions and the lawyer put the appellant's theory to the complainant [24] • Here, the circumstances of the case, nature of the relationship between the appellant and complainant, and the nature of the alleged criminal acts all support the judge's decision to appoint counsel [25]
R v Jones, 2011 NSPC 3; Assault, unlawful confinement, threats against three complainants (two of accused's children and estranged spouse) Trial	Crown application under ss. 486.3(1) and 486.3(2)	Pre-trial	• The children are three and six years old; • The adult complainant is the accused's estranged spouse • No disability mentioned	• Crown called police constable – testified about the complainant's fears and anxieties, and that the complainant said she would not be able to testify fully and candidly [40]	• Accused opposed. Argued that his reason for being self-represented was to cross-examine the complainants and this would deprive him of his right to represent himself [44]	• No requirement to call witness/complainant: The Crown does not need to call the actual witnesses or complainants to give evidence on these applications (citing *R v Predie*, *R v G.(D.P.)*). [7] • Hearsay allowed: Nothing in the *Criminal Code* prohibits the court from receiving hearsay evidence – to allow it would be to undermine the purpose of the provisions, as the accused would be able to cross-ex the witness [7] • Children: How will a disservice be done to the proper administration of justice if a lawyer on behalf of accused conducts the cross-examination of the young girls rather than accused himself? He argues that he can communicate well with the children. Crown has presented persuasive case that they would be further traumatized. Therefore, ordered. • Adult: The court need only "form the opinion that the appointment of counsel is necessary to obtain a full and candid account from the witness" (citing *R v Predie*) • This case is factually similar to *Predie*: previous intimate relationship between complainant and accused, power imbalance – this is the type of witness this section is intended to protect [38], [40]

Case	Nature of Application	Timing of App	Relationship & Vulnerability	Materials Filed	Application Opposed?	Ruling & Key Findings
						• Other relevant factors: the accused's behavior in court, if emotion-driven, supports an appointment of counsel (citing *Predie*) [41], [42] – can he conduct a focused, rational cross-examination? • In this case, the accused is reasonably focused, managed his emotions, and took direction from the court. However, the judge noted some "indications of a controlling attitude, in his demeanour and comments, that could express itself in a cross-examination of [the complainant]" (accused refused to refer to his ex-spouse by her new name) [42] • Response to accused's arguments re: self-representation: (1) on the balance of the trial, he will be able to represent himself, and (2) the *Criminal Code* provisions trump his right to self-representation for the limited purpose of such cross-examinations [44] • Application granted
R v Lloyd, 2011 ONCJ 15 (Sup.Ct.Jus.) Prostitution offences Trial		Intake (early) Pre-trial (judge notes that he is not the trial judge)	• Accused was the witness's pimp			• Accused not opposed to order, and lawyer was prepared to act, but wanted an order from the judge fixing his rate of remuneration • The materials now before judge indicate that there is a protocol in existence between Legal Aid Ontario and the Ministry of the Attorney General of Ontario. Under that protocol, when an order under section 486.3 is made the Ministry will fund counsel as opposed to Legal Aid Ontario. Legal Aid, however, will find counsel and monitor the case in accordance with Legal Aid billing and payment rules and practices. [4] • Section 486.3(4.1), which was not brought to judge's attention during the argument of this matter, vests jurisdiction to order the appointment of counsel under 486.3 "during the proceedings" in the judge "presiding at the proceeding" or "before the proceeding begins" in "the judge who will preside at the proceeding". The way this subsection is structured, it can only view the reference to "proceeding" as a reference to the actual hearing that is anticipated before the court. In this case, that would be the judge presiding at trial or the preliminary inquiry or the judge specific assigned to preside at the trial or preliminary inquiry. . . In order to solve this jurisdictional issue , the judge seized himself with this matter prior to making any order and, and directed the trial co-ordinator to have this matter set before him for trial or preliminary as the case may be. [8], [9] • Compensation issue – does the judge have the authority to set the rate? "The fact that section 486.3 is silent on a mechanism regarding compensation in this context may simply mean no more than Parliament is expressing its contentment to leave the fixing of compensation, if necessary, to the various courts upon which it has conferred the jurisdiction to appoint under 486."
R v C.M., 2012 ABPC 128 Second degree murder	Crown application under s. 486.3(1) Mandatory	First day of trial	• Witness under 18 • Not the victim, but an important witness • Had been friends with the accused and then robbed by him, no	• Crown relied on evidence given by witness in examination, and a homicide detective	• No objection until conclusion of examination in chief of witness	• the accused's previous counsel was appointed as *amicus* and in order to cross-examine witness • accused consents to order, but seeks to withdraw consent after examination in chief as he no longer trust the lawyer and he had since received disclosure that made him see the evidence as more valuable [28] • judge allowed accused to withdraw consent and entered a *voir dire* • accused wanted to call the witness on the stand in the *voir dire* – denied on basis that it would defeat the purpose of the provision [26]

Case	Nature of Application	Timing of App	Relationship & Vulnerability	Materials Filed	Application Opposed?	Ruling & Key Findings
Trial			longer friends			• accused wanted to call the lawyer to the stand, found not to be compellable [27] • accused a careful, capable, respectable cross-examiner, but he threatened the witness with a knife and exercised power over him • Order granted
R v DBM, 2006 BCSC; #71566-4, Kamloops; Sexual assault, criminal negligence, assault causing bodily harm, weapons charges, threats	Application under s. 486.3(2) discretionary	Not known	• 3 adult female witnesses, no mental disabilities • Witnesses are the daughter, sister-in-law, and wife of the accused • There is a pattern of abuse with the wife	• Unknown	• Unknown	• Accused subpoenaed 3 witnesses, more of a direct examination than cross-ex • Use of section shouldn't be restricted where subpoenaed (the accused subpoenaed the witnesses) • Provisions intended to provide a power beyond that a judge has in controlling the questioning of a witness • Application granted for wife and daughter, not for sister-in-law (more distant relationship, only a few specific questions to ask)
R v M.J.M., 2011 ONSC 2717; Sexual assault and sexual interference; Trial	Crown application under s. 486.3 (unclear which subsection)	Appears to have been pre-trial	• Complainant is 18 yrs old, alleging sexual assaults from age of 11-13 years [1], [87]	• Not indicated	• Not indicated	• Complainant and mother lived in the apartment of accused, who was friends with complainant's mother – the accused treated the complainant like his daughter [8]-[10] • No reasoning given. [2]
R v Morton, 2012 ONCJ 593; Voyeurism, mischief; Trial	Application under s. 486.3(2)	Pre-trial	• Complainant was the roommate of the accused, who was alleged to have set up a camera in her room	• Not indicated	• Not indicated	• No reasoning given [3]
R v Peetooloot, [2006] 42 CR (6th) 53 (NWT Territorial Court), [2006] N.W.T.J. No. 23; unlawful confinement, sexual assault,	Crown application under s. 486.3(2) discretionary	Pre-prelim	• Not indicated	• Not indicated	• Not indicated	• Considered factors in s. 486.1(3) • Once a judge is satisfied that the appointment of counsel is *necessary* to obtain a full and candid account, then the order "shall" be made (no discretion) [11], [14] • Application granted [11] • The lawyer will be paid for his service (through legal aid or otherwise from government funds)

Case	Nature of Application	Timing of App	Relationship & Vulnerability	Materials Filed	Application Opposed?	Ruling & Key Findings
common assault: Prelim						
R v Predie, [2009] O.J. No. 2723 (Ont SCJ); 7 offences including assault, assault with weapon, extortion, and firearms offences; Trial	Crown application under s. 486.3(2) discretionary	Pre-trial	• The complainant is the former common law spouse of the accused and alleges years of abuse • Evidence supports that she is fearful of testifying	• Affidavit of Victim/Witness support worker who was assigned to the complainant to provide services [16] • Evidence consisted of support worker's direct observations of the complainant and hearsay statements made by the complainant in relation to her potential trial testimony [17]	• Accused opposed the appointment of counsel – argues that they've been able to negotiate with his ex-partner outside of these proceedings, indicating he can conduct a proper cross-examination [24]	• An evidentiary basis is required to support an order under s. 486.3(2), although the section does not provide for any specific form of evidence (citing *R v B(R)*, 2004 ONCJ 369) [12] • The witness does not need to testify in connection with the application (citing *R v Aikoriogie*, 2004 ONCJ 96) [13] • "It is sufficient if the requisite evidence is forthcoming from another witness with appropriate knowledge of the witness." [13] • The court has wide latitude in considering s. 486.3(2) applications – "The circumstances need not be ones that would create inordinate or exceptional stress" (citing *Levogiannis*) – it need only be necessary to obtain a full and candid account [14] • No requirement for the witness to attempt to testify: The witness does not need to try to give evidence and fail before an order appointing counsel can be made [15]. • Hearsay evidence: Section 486.3(2) does not preclude the introduction of hearsay evidence to support an application [17] • Section 486.1(3) factors: In the instant case, it is a domestic violence offence, connoting a power imbalance, and there is a close relationship – these indicate the possibility of not getting a full, candid account [21]-[23] • Additional factor: The accused's ability to conduct a "focused, rational and relevant cross-examination" is relevant to the application – "An unfocused, emotion-driven cross-examination will only heighten the anxiety and fearfulness of the witness and will increase the likelihood that the encounter between examiner and witness will take on the character of the very kind of domestic dispute that appears to have given rise to the charges now before the court." [25] • Application granted – the accused has demonstrated that he will not be able to conduct a focused, rational and relevant cross-examination [26]-[28]
R v Papequash, [2006] Y.J. No. 15 (S.C.) Sexual Assault Trial	Adjournment of trial based on Crown's application for counsel, s. 486.3(2) discretionary	Pre-trial				• Counsel for the accused withdrew because accused was not keeping in touch with him • Accused needed an adjournment, and Crown also indicated it would make application for counsel to cross-examine complainant
R v S.(P.N.), [2010] O.J. No.	Crown application	Pre-trial		- Affidavit in support		• Two child witnesses (one his twelve year old niece) • Section 486.3 authorizes the court to order an accused not to cross-examine a particular witness directly, but to

Case	Nature of Application	Timing of App	Relationship & Vulnerability	Materials Filed	Application Opposed?	Ruling & Key Findings
2782 (Ont.C.Jus.) Assault Trial	under s. 486.3(1) mandatory					insert a "legal screen" between the accused and witness by ensuring a third party conduct the cross-examination. But not just a "human screen" who parrots questions on behalf of accused [13] (QL) • At a minimum, to meet such professional standards, counsel would need to meet with the accused for sufficient time to develop the defence theory and strategy of the cross-examination - this would surely require counsel to have first familiarized themselves with the disclosure including reviewing any videos. Counsel would also be required to have a detailed understanding of the evidence of any witness who testified prior to those witnesses the subject of a s. 486.3 order. In my view, any prior witness' testimony would need to be provided to counsel by way of a transcript or counsel would need to attend and observe the testimony both in-chief and the accused's cross-examination of the witness. [20] (QL) • "Unfortunately there is a lack of guidance as to how the process should work." [15] (QL) • counsel arranged between government and legal aid, accused can participate in choice, funding arrangements between government and lawyer • judge sets out a suggested protocol
R v Tehrankari, 2008 CarswellOnt 8750; (2008), 246 C.C.C. (3d) 70 (Ont.C.Jus.) First degree murder; Trial	Crown application under s. 486.3(2) discretionary	Pre-trial	• The witnesses are neighbours of the accused • Neither witness is essential to the Crown's case [2]	• Crown called the lead investigator who testified that both witnesses expressed serious concerns that they might "shut down" during testimony, and would feel nauseas, but that they would both testify if need be [3]	• Accused opposed – insisted on right to cross-examine personally [10] • Argued that he will behave properly in cross-ex, having amicus curiae conduct the cross-ex would prejudice him in the minds of the jury, and the Crown's application is based solely on hearsay [10-12]	• The purpose of the new provisions is to render the trial process more "user-friendly" to vulnerable witnesses [6] • Counsel is not appointed simply because of the witness's preference [9] • A solid evidentiary foundation must be laid before an order under s. 486.3 should be made [16] • The judge is not satisfied that the witnesses will be unable to give a full and candid account of their observations [16] • The judge looks to the prelim transcript to observe that counsel obtained a full and candid account from the witnesses, though it was not the accused who conducted the cross-ex [17] • The Test: "Weighing the unfettered right of the accused to defend himself against the discretionary order that I might make to accommodate a witness, I believe I must be satisfied on a balance of probabilities that a full and candid account would be unachievable should the accused cross-examine an individual witness. The evidence on a *voir dire* must establish the "necessity" of making such an order." [19] • Evidence required: "…at a minimum there must be reliable, trustworthy evidence from sources with intimate knowledge of the individual witness so that the court can be satisfied on a balance of probabilities that a full and candid account could not be achieved in the event the witnesses were subject to cross-examination by the accused." [19] • In this case, the witnesses are prepared to testify if need be – the accommodation is therefore not necessary [21] • There are other methods available to assist nervous witnesses [22]
R v Williams, 2010 BCPC 16	None (application for court appointed counsel for	None	• Not relevant	• Not relevant	• Not relevant	• Crown notes that a s. 486.3 application may only be brought by the Crown or the witness [134]

Case	Nature of Application	Timing of App	Relationship & Vulnerability	Materials Filed	Application Opposed?	Ruling & Key Findings
	trial)					