

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

-and-

THOMAS SLATTER

Respondent

FACTUM OF THE INTERVENER

CANADIAN ASSOCIATION FOR COMMUNITY LIVING

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

JANINE BENEDET

Peter A. Allard School of Law
University of British Columbia
1822 East Mall
Vancouver BC V6T 1Z1

Tel: (604) 822-0637
Fax : (604) 822-8108

Email: benedet@allard.ubc.ca

**Counsel for the Intervener
Canadian Association for Community
Living**

MOIRA S. DILLON

Supreme Law Group
900 - 275 Slater Street
Ottawa, ON K1P 5H9

Tel: (613) 691-1224
Fax: (613) 691-1338

Email: mdillon@supremelawgroup.ca

**Ottawa Agents for the Intervener
Canadian Association for Community
Living**

ORIGINAL TO: THE REGISTRAR
301 Wellington Street
Ottawa, Ontario K1A 0J1

COPIES TO:

JAMIE C. KLUKACH
CAITLIN SHARAWY

Attorney General of Ontario
720 Bay St
10th Floor
Toronto, Ontario
M5G 2K1
Telephone: (416) 326-4600
FAX: (416) 326-4656
E-mail: jamie.klukach@ontario.ca

Counsel for the Appellant

ROBERT J. REYNOLDS

Reynolds O'Brien LLP
183 Front St
PO Box 1327 Stn Main
Belleville, Ontario
K8N 5J1
Telephone: (613) 966-3031
FAX: (613) 966-2390
E-mail: reynolds@reynoldsobrien.com

Counsel for the Respondent

NADIA EFFENDI

Borden Ladner Gervais LLP
1300 –100 Queen Street
Ottawa, ON K1P 1J9
Telephone: (613) 787-3562
FAX (613) 230-8842
Email: neffendi@blg.com

Agent for the Appellant

MATTHEW ESTABROOKS

Gowling WLG (Canada) LLP
2600 - 160 Elgin Street
P.O. Box 466, Stn. A
Ottawa, Ontario
K1P 1C3
Telephone: (613) 786-0211
FAX: (613) 788-3573
E-mail: matthew.estabrooks@gowlingwlg.com

Agent for the Respondent

SUZAN E. FRASER

Fraser Advocacy
31 Prince Arthur Avenue
Toronto, ON M5R 1B2
Telephone: (416) 703-9555
FAX: (877) 704-0348
Email: fraser@fraseradvocacy.com

KERRI JOFFE

ARCH Disability Law Centre
55 University Avenue, 15th Floor
Toronto, ON M5J 2H7
Telephone: (416) 482-8255, Ext 2222
FAX: (416) 482-2981
Email: joffek@lao.on.ca

**Counsel for the Interveners, Women's
Legal Education and Action Fund
(LEAF), DisAbled Women's Network of
Canada (DAWN) and ARCH Disability
Law Centre (ARCH)**

**DEEPA MATTOO
TAMAR WITELSON**

Barbra Schlifer Commemorative Clinic
489 College Street, Suite 503
Toronto, ON M6G 1A5
Telephone: (416) 323-9149, ext. 244
FAX: (416) 323-9107
Email : dmattoo@schliferclinic.com
t.witelson@schliferclinic.com

**Counsel for the Intervener, Barbra
Schlifer Commemorative Clinic**

NADIA EFFENDI

Borden Ladner Gervais LLP
1300 –100 Queen Street
Ottawa, ON K1P 1J9
Telephone: (613) 787-3562
FAX (613) 230-8842
Email: neffendi@blg.com

**Ottawa Agent for Counsel for the
Interveners, Women's Legal Education and
Action Fund (LEAF), DisAbled Women's
Network of Canada (DAWN) and ARCH
Disability Law Centre (ARCH)**

NADIA EFFENDI

Borden Ladner Gervais LLP
1300 –100 Queen Street
Ottawa, ON K1P 1J9
Telephone: (613) 787-3562
FAX (613) 230-8842
Email: neffendi@blg.com

**Ottawa Agent for the Interveners
Barbra Schlifer Commemorative Clinic**

MATTHEW R. GOURLAY

Henein Hutchison LLP
235 King Street East
First Floor
Toronto, ON M5A 1J9
Telephone: (416) 368-5000
FAX: (416) 368-6640
Email: mgourlay@hhllp.ca

**Counsel for the Intervener Criminal
Lawyers' Association of Ontario**

MARIE-FRANCE MAJOR

Supreme Advocacy LLP
100- 340 Gilmour Street
Ottawa, Ontario
K2P 0R3
Telephone: (613) 695-8855 Ext: 102
FAX: (613) 695-8580
Email: mfmajor@supremeadvocacy.ca

**Ottawa Agent for the Intervener Criminal
Lawyers' Association of Ontario**

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PART I: STATEMENT OF FACTS

A. The Intervener

1. The Canadian Association for Community Living (CACL) is Canada's national organization for people with intellectual disabilities and their families. Founded in 1958, CACL works with and for people with intellectual disabilities to advance their rights and ensure their full inclusion and participation in all aspects of community life.

2. CACL intervenes in this appeal, as a friend of the Court, to provide this Honourable Court with submissions on equal access to justice for witnesses with intellectual disabilities and, in particular, for women with intellectual disabilities whose credibility and reliability is attacked when they testify as complainants in sexual offence trials.

B. Facts

3. The Intervener CACL accepts the Appellant's Statement of Facts and submits that the following facts are of particular significance to this appeal.

4. The Complainant J.M. testified that she did not want to engage in any of the sexual activity with the Respondent, that she never communicated her consent, and that the Respondent told her that if she reported him, he would deny it.¹ The Respondent testified that no sexual activity of any kind took place.² At trial, neither consent, nor the Complainant's capacity to consent to sex with the Respondent, emerged as material issues. The issue was whether the sexual activity actually occurred.³

5. The Complainant testified, and was cross-examined, at both the preliminary inquiry and the trial. She described a series of sexual assaults by the Respondent committed against her over a period of several years, including the locations where they took place, the kinds of sexual acts involved, and some of the things the Respondent said to her before and after the assaults.⁴

¹ *J.M.*, Appellant's Record, Volume IV, at p. 62; *J.M.*, Appellant's Record, Volume IV, at p. 59.

² Reasons of Tausenfreund J. at paras 36-39, 42.

³ *Motion for Discharge of Count 2 (Defence submissions)*, Appellant's Record, Volume V, p. 81

⁴ *J.M.*, Appellant's Record, Volume IV, at pp. 38-43, 57-59, 84-85.

6. The Complainant told one of her friends, the woman she lived with, and her support workers about the sexual contact with the Respondent, revealing more information in successive disclosures.⁵ The Complainant made the decision to report to the police.⁶ She denied making up the allegations to impress her friend or satisfy her support workers.⁷

7. As a result of her allegations and the ensuing investigation, the Complainant was no longer permitted to live with the people and in the place that had been her home for several years, and was instead moved to a group residence that she did not like.⁸

8. The Complainant testified as an adult woman in her twenties, despite labels applied by others that reduced her to a “mental age” equivalent to a child. The Complainant socialized with friends and family, worked at a variety of jobs, was pursuing further education, and contributed to the home and community in which she resided.⁹

PART II: QUESTIONS IN ISSUE

9. CACL intervenes with respect to the first issue identified by the Appellant:
- (a) The majority of the Court of Appeal erred in finding that the Reasons of the Trial Judge were insufficient, on the basis that the Reasons failed to address adequately the reliability of the Complainant.

⁵ *J.M.*, Appellant’s Record, Volume IV, at pp. 69-70; 95-97; 116.; *Darlene Brennan*, Appellant’s Record, Volume V, at pp. 8-10, 28-29.

⁶ *Stacey Callahan*, Appellant’s Record, Volume III, at p. 69-71.

⁷ *J.M.*, Appellant’s Record, Volume IV, at pp. 107,121

⁸ *J.M.*, Appellant’s Record, Volume IV, at p. 20.

⁹ *J.M.*, Appellant’s Record, Volume IV at pp. 14-16.

PART III: ARGUMENT

A. Overview of CACL'S Argument

10. CACL submits to this Honourable Court that persons with intellectual disabilities have the right to access all aspects of the justice system equally with other Canadians. This includes the right of women with intellectual disabilities to give evidence as complainants in sexual assault trials without discriminatory barriers that other witnesses do not face. Measurements of “suggestibility” should not be used to undermine otherwise credible testimony from witnesses with intellectual disabilities by relabeling that testimony unreliable.

11. The issue in this case was credibility. The Complainant testified to a series of non-consensual sexual acts imposed on her by the Respondent. The Respondent denied any sexual activity with the Complainant. There was no evidence that the Complainant could have misinterpreted otherwise innocuous events, was confused as to the identity of her assailant, or was unable to understand what was happening to her. Reliability was not an issue distinct from credibility in this case: the only reason advanced by the majority of the Court of Appeal for treating it as a distinct issue was that the Complainant was labelled as having an intellectual disability. The trial judge was not required to refer to this discriminatory basis for attacking the reliability of the Complainant, and did not err in declining to do so.

B. Access to Justice for Witnesses with Intellectual Disabilities

12. CACL submits that access to justice for people with intellectual disabilities who testify as witnesses has two overlapping components: (i) the right to a process that allows the witness to give their evidence in a manner that enables the court to hear and understand them; and (ii) the right to be free from discriminatory barriers based on discredited stereotypes and demeaning attitudes about people with intellectual disabilities.

13. Examples of procedural measures in the first category include testimonial supports, communication and interpretation devices, and modifications to questioning techniques, such as

breaking up multi-part questions.¹⁰ Such measures will and should vary with individual witnesses. They reflect the obligation to examine and revise the norms and assumptions built into the standard trial process to ensure that they are equitable and inclusive of all justice system participants.¹¹

14. Substantive measures in the second category include the removal of discriminatory rules of evidence. This includes recognition that adults with intellectual disabilities are competent to testify without abstract inquiries into their understanding of truth, something not required of other witnesses, and that the trier of fact should not automatically assign less weight to evidence given on a promise to tell the truth than to evidence taken under oath.¹²

15. These now-discredited rules were based on discriminatory assumptions that adults with intellectual disabilities were more likely to fabricate evidence and could not be trusted to give an accurate and true account of their observations and experiences. Such beliefs are rooted in ableist myths and stereotypes and must be rejected. Adult witnesses with intellectual disabilities should not be infantilized or underestimated.¹³

16. Canada's domestic and international human rights obligations include securing access to justice for persons with intellectual disabilities. These obligations are a useful interpretive aid for considering how the common law should be developed and applied. In particular, the *Convention on the Rights of Persons with Disabilities*, which Canada ratified in 2010, commits Canada to the equality of persons with disabilities, with particular attention to the multiple forms of discrimination experienced by women with disabilities.¹⁴ These same commitments are

¹⁰ *Criminal Code*, R.S.C. 1985, c. C-46, ss. 486.1(1), 486.2(1), 715.2(1)

¹¹ *Eldridge v B.C.(Attorney General)* [1997] 3 SCR 624 at para. 56; *Eaton v Brant County Bd. Of Ed.* [1997] 1 SCR 241 at para. 67; *R. v. L. (D.O.)*, [1993] 4 SCR 419 at p. 447 (per L'Heureux-Dubé and Gonthier JJ.) ["*L.(D.O.)*"]

¹² *R v DAI*, 2012 SCC 5, [2012] 1 SCR 149 at para. 27 ["*DAI*"]

¹³ *R v Parrott*, 2001 SCC 3, [2001] 1 SCR 178 at para. 80 ["*Parrott*"]; *R v Ogg-Moss* [1984] 2 SCR 173 at pp.187-88.

¹⁴ *Convention on the Rights of Persons with Disabilities*, GA Res, UNGAOR, 61st Sess, Supp No 49, UN Doc On A/61/49, A/RES/61/106 (2006). ["*CRPD*"], art. 5,6,12.

reflected in the guarantee of equal protection of the law without discrimination on the basis of mental disability and sex in s. 15(1) of the *Canadian Charter of Rights and Freedoms*.¹⁵

17. Article 13 of the *CRPD* specifically commits member states to ensuring access to justice for persons with disabilities “on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings...”¹⁶ Rather than detracting from trial fairness, the truth seeking-function of the trial is enhanced when the criminal justice system facilitates this participation.¹⁷

C. Targeting of Women with Intellectual Disabilities for Sexual Assault

18. Access to justice for witnesses with intellectual disabilities in sexual assault trials must take into account the intersecting inequalities present in the perpetration of sexual assault. Sexual assault is a gendered crime, overwhelmingly committed by men against women and girls.¹⁸ Persons with intellectual disabilities are disproportionately targeted for sexual assault, making women and girls with intellectual disabilities particularly vulnerable to male violence.¹⁹

19. Women with intellectual disabilities are targeted for sexual assault in part for the reason that they are considered less likely to report abuse, and less likely to be believed when they do report. The disbelief accorded to their accounts of sexual violence is reinforced by the intersection of sexist myths and stereotypes about women routinely making false complaints out of spite, shame or fantasy, with demeaning and ableist stereotypes of persons with intellectual disabilities as untrustworthy and eager to please. All criminal justice system participants have a

¹⁵ *Canadian Charter of Rights and Freedoms* Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982 (UK) 1982, c. 11, s. 15(1)*.

¹⁶ *CRPD*, art. 13

¹⁷ *L.(D.O.)*, *supra* at 446-447.

¹⁸ *R v Osolin* [1993] 4 SCR 595 at p. 669; *R v Goldfinch*, 2019 SCC 38 at para. 37

¹⁹ *R v Friesen*, 2020 SCC 9 at para 72; *DAI*, *supra* at paras 66-67.

responsibility to recognize and avoid propagating discriminatory treatment of sexual assault complainants based on discredited stereotypes.²⁰

20. Sexual assault complainants with intellectual disabilities are also particularly vulnerable to the overuse and misuse of their personal and private information.²¹ The over-reliance on expert diagnostic evidence, which itself often relies on multiple prior assessments, risks medicalizing disability, infantilizing adult women, and marking these women as suspect. It also reflects the myth that the lives and bodies of women with intellectual disabilities are public property, and that they do not have the same privacy interests in their medical and sexual histories as other women.²²

21. Canada's international commitments recognize the obligation to address the vulnerability of women with intellectual disabilities to violence. Article 16 of the *CPRD* commits members to the prevention, investigation and prosecution of violence and abuse against persons with disabilities, with particular attention to its gender-based aspects.²³ To fully realize this commitment requires that discriminatory barriers be removed and demeaning stereotypes be rejected.

D. “Suggestibility” was not a Necessary Measure of Reliability

22. A witness in a criminal trial should not be subject to tests or metrics to evaluate their suggestibility, with a view to undermining the reliability of their evidence. This is particularly true in a sexual assault trial where the real issue is credibility, and where a separate inquiry into reliability amounts to nothing more than a collateral attack on the question of whether the complainant is credible.

²⁰ *R v Shearing* 2002 SCC 58, [2002] 3 SCR 33 at para. 119; *R v Barton* 2019 SCC 33 at para. 200

²¹ *R v Mills*, [1999] 3 SCR 668 at para. 92

²² Janine Benedet and Isabel Grant, “Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Evidentiary and Procedural Issues” (2007) 52 McGill L.J. 515 at 533-541.

²³ *CRPD*, art. 16

23. Credibility refers to whether a witness is testifying truthfully about what they observed or experienced. Reliability is distinct from credibility when it refers to whether a witness who is testifying truthfully is nonetheless mistaken, confused, or otherwise so imperfect or incomplete in her recollections that her testimony cannot be relied on, in whole or in part.²⁴

24. In a sexual assault trial where the acts testified to by the complainant satisfy the elements of the offence, concerns about reliability may be no more than another way of saying that the complainant cannot be trusted, and should not be believed, when she says she was sexually assaulted by the accused. A finding of credibility in this context is also an implicit finding of reliability.²⁵

25. The trial judge in his reasons noted that the defence had urged the court to find that the evidence of the Complainant was not reliable, given inconsistencies in her evidence and the improbability of certain events having occurred. The trial judge's reasons demonstrate an awareness of the way in which reliability in this sense was properly in issue as it related to the assessment of the Complainant's credibility.²⁶

26. The trial judge in this case found the Complainant to be credible, beyond a reasonable doubt, in the sense that she testified truthfully about what the Respondent had done to her. It was not alleged that the Complainant had made a mistake about the identity of the person who sexually assaulted her, that she misinterpreted otherwise innocent acts of the Respondent, or that her account was so sparse or incomplete that it could not be relied on to make out the elements of the offence.²⁷ For reliability to be an issue distinct from credibility, the court would have had to consider the fanciful argument that the Complainant truthfully but mistakenly believed that she had been sexually assaulted for years.

27. The expert witness in this case was qualified for the limited purpose of providing evidence on the "cognitive ability of adults with developmental disabilities, and in particular whether the Complainant [J.M.] is developmentally delayed, and if she is, the impact on her

²⁴ *R v Morrisey*, (1995) 22 OR (3d) 514 at 526 (CA)

²⁵ *R v Perrone* 2014 MBCA 74 at para. 39, aff'd [2015] SCC 8; *R v Houle*, 2019 MBCA 17

²⁶ Reasons of Tausenfreund J. at para. 44.

²⁷ *R v NLP* 2013 ONCA 773 at paras 27-28.

daily living and how it would affect her capacity to give voluntary and informed consent in a social-sexual setting...”²⁸ Since consent and capacity to consent did not emerge as live issues at trial, the trial judge did not err in deciding not to deal extensively with the expert evidence in his reasons. To the extent that the expert testified to matters unnecessary to reach the opinion for which she was qualified, it cannot be an error to choose not to refer to that evidence.

28. The attempt to measure the suggestibility of the Complainant, and to compare her suggestibility to other individuals with and without intellectual disabilities, was unnecessary and imposed a discriminatory barrier on her. Witnesses without intellectual disabilities are not tested or measured in this way, despite the wide variation in suggestibility among the general population. If the Complainant had been evaluated as highly resistant to suggestion, this evidence could not have been used to bolster the reliability or credibility of her evidence.²⁹ Such a generalized and conclusory label should not be used to undermine the value of her testimony.

E. No Evidence that the Allegations were the Product of Suggestion

29. Even on the metrics reported by the expert witness, there was nothing exceptional about the Complainant’s susceptibility to suggestive questioning. She was labelled average for a person with an intellectual disability.³⁰ If her evidence must be regarded with additional scrutiny, the same will be true for the evidence of most people with intellectual disabilities. The fact that the evidence of suggestibility was considered significant by the majority of the Court of Appeal reflects an unfortunate suspicion, rooted in stereotype, about the diminished value of evidence provided by women with intellectual disabilities.

30. The approach required of the trial judge by the majority of the Court of Appeal would have a significant negative impact on complainants with intellectual disabilities. The Complainant in this case had a mild intellectual disability. The majority’s reasons mean that

²⁸ Appellant’s Record, Volume III, p. 120.

²⁹ *R v Beland*, [1987] 2 SCR 398 at para. 7; *R v Clarke* (1998) 18 CR(5th) 219; 129 CCC(3d) 1 (ONCA) at para. 51.

³⁰ Appellant’s Record, Volume III, p. 164.

witnesses with moderate or severe intellectual disabilities risk an even greater chance of having their evidence categorized as inherently unreliable and less worthy of belief.³¹

31. At no point in her disclosures, interviews, preliminary inquiry testimony or trial testimony did the Complainant recant or abandon her assertion that the Respondent had sexual contact with her, despite suggestions on cross-examination to the contrary and despite being removed from a home and family she had lived with for many years as a result of those allegations. As Pepall J.A., dissenting in the Court of Appeal, noted, the Complainant “never wavered on the core issue of whether the [Respondent] had committed sexual assault.”³²

32. The Respondent argues that because some of the interviews and conversations in which the Complainant disclosed the assaults were not recorded, the court cannot be certain that suggestive or leading questions were not asked.³³ Once again, this is a standard not expected of other adult witnesses, and would require an unrealistic level of formality and surveillance in the lives of people with intellectual disabilities in order to be believed when they report sexual violence. The fact that other people did not record some of their conversations with the Complainant did not make her unreliable.

33. There was no evidence that the details the Complainant provided about the locations where the sexual assaults took place, the comments made to her by the Respondent, or other events occurring in proximity to the assaults, were suggested to her by anyone. The Complainant’s testimony contained numerous examples of her correcting or rejecting suggestions put to her by the trial judge or defence counsel. The claim that the allegations were the product of suggestion was, as Pepall JA noted, “mere speculation.”³⁴

34. There is no quantifiable threshold of resistance to suggestion that is required of witnesses generally before their evidence is heard and accepted. To impose one in this case would be inconsistent with the meaning of equality for persons with disabilities:

³¹ *Parrott, supra; R v HL*, 2017 ONSC 6205 at paras 31,37.

³² Reasons of Pepall J.A., dissenting at para 124

³³ Respondent’s Factum, paragraphs 55-56

³⁴ Reasons of Pepall J.A., dissenting at para 141.

The goal is to achieve a barrier-free society for persons with disabilities which accommodates a wide spectrum of individual abilities, and not a society which simply expects all to conform to one hypothetical, typically fictional "normalcy" standard before they "fit in". Equality seeks to attain an environment whose old barriers have been removed and where new barriers are prevented before they are created, in which persons with disabilities are fully included as of right, free from stereotype or other impediment, with full respect for their dignity and worth as individuals and with full, effective and timely accommodation.³⁵

Invoking "suggestibility" as a reason for discounting the Complainant's evidence amounts to an unjustified and artificial barrier to her equal participation in the trial process.

PART IV: ORDER REQUESTED

35. CACL takes no position on the other issues or on the outcome of the appeal.

36. CACL does not seek costs and asks not to have costs ordered against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 24th DAY OF JULY 2020.



JANINE BENEDET

Counsel for the Intervener Canadian Association for Community Living

³⁵ M. David Lepofsky, "A Report Card on the Charter's Guarantee of Equality to Persons with Disabilities after 10 Years - What Progress? What Prospects?" (1996) 7 N.J.C.L. 263 at 287.

PART V: TABLE OF AUTHORITIES

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<p>Constitutional Documents</p> <p><i>Canadian Charter of Rights and Freedoms</i> Part I of the <i>Constitution Act, 1982</i> being Schedule B to the <i>Canada Act 1982 (UK) 1982</i>, c. 11. s. 15(1). [EN] [FR]</p>	5	16
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<p>International Instruments</p> <p>Convention on the Rights of Persons with Disabilities, GA Res, UNGAOR, 61st Sess, Supp No 49, UN Doc On A/61/49, A/RES/61/106 (2006). [“CRPD”], art. 5,6,12,13,16</p>	4	16
<p>Articles</p> <p>Janine Benedet and Isabel Grant, “Hearing the Sexual Assault Complaints of Women with Mental Disabilities: Evidentiary and Procedural Issues” (2007) 52 McGill L.J. 515</p> <p>M. David Lepofsky, "A Report Card on the Charter's Guarantee of Equality to Persons with Disabilities after 10 Years - What Progress? What Prospects?" (1996) 7 N.J.C.L. 263</p>	6 9	20 34

Appendix I: Statutory Provisions

Constitutional Documents

Canadian Charter of Rights and Freedoms, s. 15(1):

Equality before and under law and equal protection and benefit of law

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Charte Canadienne Des Droits et Libertés, s. 15(1) :

Égalité devant la loi, égalité de bénéfice et protection égale de la loi

15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

Statutory Provisions

Criminal Code, R.S.C.1985, c. C-46

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

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

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.

Code Criminel, L.R.C. 1985, ch. C-46

486.1 (1) Dans les procédures dirigées contre l'accusé, le juge ou le juge de paix ordonne, sur demande du poursuivant à l'égard d'un témoin qui est âgé de moins de dix-huit ans ou a une déficience physique ou mentale ou sur demande d'un tel témoin, qu'une personne de confiance choisie par ce dernier puisse être présente à ses côtés pendant qu'il témoigne, sauf si le juge ou le juge de paix est d'avis que cela nuirait à la bonne administration de la justice. Exclusion — témoins âgés de moins de dix-huit ans ou ayant une déficience

486.2 (1) Par dérogation à l'article 650, dans les procédures dirigées contre l'accusé, le juge ou le juge de paix ordonne, sur demande du poursuivant à l'égard d'un témoin qui est âgé de moins de dix-huit ans ou est capable de communiquer les faits dans son témoignage tout en pouvant éprouver de la difficulté à le faire en raison d'une déficience mentale ou physique ou sur demande d'un tel témoin, que ce dernier témoigne à l'extérieur de la salle d'audience ou derrière un écran ou un dispositif permettant à celui-ci de ne pas voir l'accusé, sauf si le juge ou le juge de paix est d'avis que cela nuirait à la bonne administration de la justice.

715.2 (1) Dans les procédures dirigées contre l'accusé, dans le cas où une victime ou un témoin est capable de communiquer les faits dans son témoignage mais éprouve de la difficulté à le faire en raison d'une déficience mentale ou physique, l'enregistrement vidéo réalisé dans un délai raisonnable après la perpétration de l'infraction reprochée et montrant la victime ou le témoin en train de décrire les faits à l'origine de l'accusation est, sauf si le juge ou le juge de paix qui préside est d'avis que cela nuirait à la bonne administration de la justice, admissible en preuve si la victime ou le témoin confirme dans son témoignage le contenu de l'enregistrement.