

*“a full
and candid
account”*



Using Special Accommodations and Testimonial
Aids to Facilitate the Testimony of Children

BOOK

4

Video-recorded Evidence

*by Alison Cunningham
and Pamela Hurley*

The opinions expressed herein are those of the authors and do not necessarily reflect those of the Department of Justice Canada or the Government of Canada.

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After several months of not being herself, eight-year-old Bella told her teacher about sexual abuse by her step-father. She immediately dissolved into tears saying her mother would be angry at her for telling. Bella was interviewed by a police officer with a child protection worker present and tearfully recounted details of the abuse. Bella went to a foster home where she was lonely and upset at first. Five days later, Bella was interviewed for the second time after a further disclosure to her foster mother. Bella settled into her new home, but missed her mother terribly. She became distressed when told about testifying in court. She told the prosecutor that it would be too hard to tell the judge what happened and she worried that she would not remember everything. The prosecutor decided to make an application to admit Bella's recorded statements into evidence. In court, Bella watched the video. She testified that she remembered talking to Officer Chris in the “special police room” and that she had told the truth. During cross-examination her step-father's lawyer suggested that if anything had really happened she would have told someone sooner. Bella told him that her dad said it was a “secret” that would get him into trouble if anyone knew. She was glad that her videos had been used because she could not have said it all again.

Under s. 715.1 of the Criminal Code, courts can admit video-recorded statements as part or all of a witness's evidence in-chief, if the statement was made within a reasonable time after the alleged offence, the witness is available for cross-examination in court, and using the evidence would not interfere with the proper administration of justice.

This accommodation is available when a child's statement to police (and/or a child protection official) is recorded on video tape or in a digital manner as on a DVD. Certain criteria must be met including that the child must testify that the statement represents the truth and be available for cross-examination. This handbook also presents principles of interviewing children.



Section 715.1 can be used in conjunction with a witness screen and a support person, or testimony outside the courtroom and a support person. Refer to other handbooks in this series for information on those testimonial aids.

Video-recorded Evidence: Introduction

With access to video-recorded statements, a court can receive evidence that might otherwise be unavailable. The period between an offence and the trial date is often lengthy. During that time, one or all of these things may occur:

- children's memory for details fades to the point where they no longer remember all the events described in an investigative interview;
- children actively try to forget painful memories; and/or,
- having to remember abusive or frightening experiences overwhelms children with noxious emotions to such an extent that they cannot repeat a description of events they witnessed or experienced.

In the extreme, some children never talk about a traumatic event again because it is too painful even to think about.

A video-recorded interview preserves the child's early account of the alleged events. Ideally, the investigative interview is conducted in a child-centred environment by someone skilled in interviewing children. By watching the recording, observers in the courtroom see the child's demeanour and stage of development at the time of first report. They also hear the child's live testimony at the preliminary inquiry or trial when the defence counsel cross-examines the witness.

Criteria for the use of a child's video-recorded statement include:

- the witness was under age 18 at the time of the alleged offence;
- the witness describes the acts complained of during the interview;
- the recording was made a reasonable time after the alleged offence; and,
- the witness adopts the contents while testifying and is available for cross-examination.

The presiding judge considers if any potential prejudice outweighs the probative value of the evidence. Factors the Court considers when exercising its discretion to admit or exclude a video-recorded statement include the circumstances in which the recording was made, the ability to edit out inadmissible portions, and the quality of audio or visual reproduction.

The primary goal of s. 715.1, according to the Supreme Court of Canada, is “to create a record of what is probably the best recollection of the event that will be of inestimable assistance in ascertaining the truth.” A secondary objective is to “prevent or reduce materially the likelihood of inflicting further injury upon a child as a result of participating in court proceedings.”

R. v. F. (C.C.), [1997] 3 S.C.R. 1183.

Why Use Video-recorded Statements as Evidence?

Video recordings address several issues.

Accuracy and reliability of information

- Everyone's memory fades with time and children are no different: a video recording is made close to the time of the event(s), when details are vivid.
- A video recording preserves the child's original account of events in his or her own words.
- Because a preliminary inquiry or trial may be held months or years after the interview, a video recording refreshes a child's memory to aid cross-examination.

Quality of information about the alleged offence

- Investigative interviewers are experienced in questioning children and trained to elicit complete information without leading or other types of improper questions.
- A child will likely be more forthcoming in an investigative interview than in a courtroom.
- The child's non-verbal communication (e.g., facial expressions and emotional state) are recorded to be observed later by the trier of fact.
- Many children are intimidated by the adversarial process and cannot give complete evidence, especially during cross-examination.
- A visual record of the child's age and stage of development is captured: a child's language skills, maturity, and physical appearance will change dramatically over several months.
- A child may unconsciously demonstrate a sexual act as she describes details of the alleged offence.



In the Overview handbook to this series, we describe key differences between questioning a child during an investigative interview and questioning a child in a courtroom. The former context is much better suited to eliciting a complete and candid account.

Necessity

- As children process trauma over time, some get to a point where they cannot emotionally face thinking about (let alone talking about) the event.
- A child may begin to testify, only to freeze on the stand.

Fairness

- The interview process is transparent: any inappropriate questioning will be apparent to the defence attorney or experts hired by the defence.

Addressing testimony-related stresses

- Introduction of a video-recorded statement reduces the length of time a child testifies and, therefore, is exposed to the testimony-related stressors discussed in handbook No. 1.

A few points to keep in mind...

- Having a video recording for use as evidence is especially helpful for young children, children who have limited attention spans, and children with special needs.
- However, introduction of video-recorded evidence is useful for teenaged witnesses as well.
- Accompanied by a support person, a witness can adopt the contents of her videotape and be cross-examined from outside the courtroom or from behind a witness screen inside the courtroom.



PRACTICE TIP: Seeing their video-recorded statement twice in one day (once as a memory refresher and once in the courtroom) is too much for any child. It is an especially difficult task for children who have short attention spans and/or emotional difficulties. Give children an opportunity to review the statement about one week before the date upon which they are expected to testify. Use a private, quiet, comfortable room. A person other than the designated support person should sit with the child to avoid allegations of coaching. Teenagers may prefer to be alone when watching their statements. Ask first.



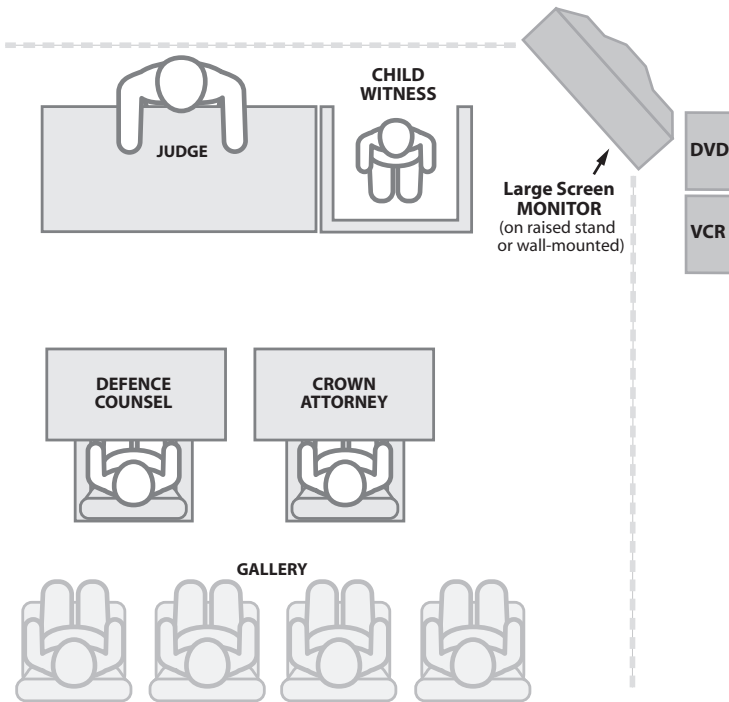
Does showing video-recorded evidence impact jury decisions? This U.K. study followed 640 cases involving child witnesses where applications were made to use children's video-taped interviews. Comparing the 202 cases where the video recording was shown to the other cases, there was no significant difference between the proportion of guilty verdicts delivered for video-taped evidence as opposed to live examination-in-chief. It was concluded that video-taped evidence has much the same impact on a jury as does a live examination.

Graham Davies, Clare Wilson, Rebecca Mitchell & John Milsom (1995). Videotaping Children's Evidence: An Evaluation. London UK: The Home Office, Research & Statistics Department.

Diagrams of Four Possible Configurations

Figure 1

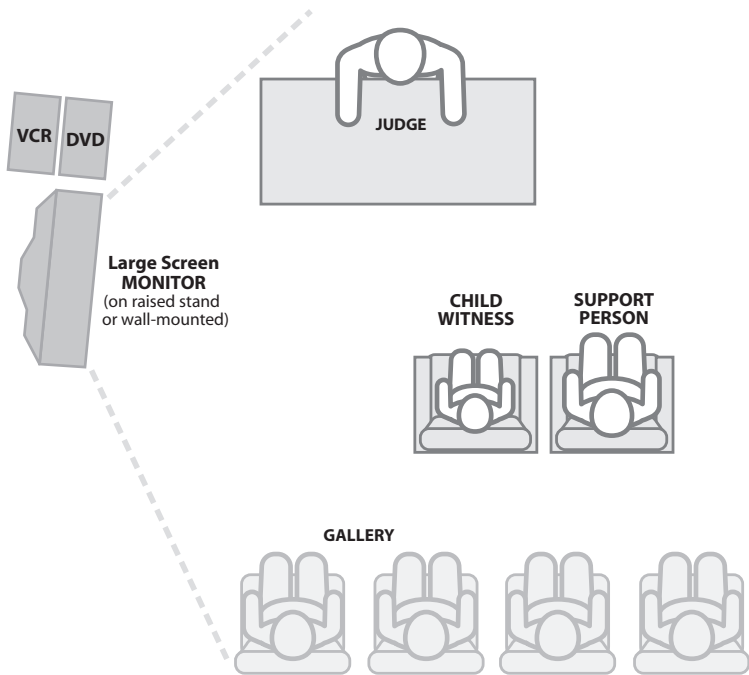
This child is viewing the video-recorded statement from the witness box. A large monitor permits the judge, accused and others present in the courtroom to also view the statement. Equipment in the courtroom includes a large plasma screen and a DVD/VCR player. A courtroom needs at least one monitor but ideally has two or more.



PRACTICE TIP: Regular testing of audio-visual equipment is vital. Ensure both DVD and VCR players are available because both formats continue to be in use. Set up the equipment and test the video recording on the day before court.

Figure 2

This case is being heard in a community hall because there is no courthouse nearby. Two chairs face the judge to accommodate the witness and designated support person.



PRACTICE TIP: *The support person gives emotional support but must not communicate with the child. If the child loses focus while watching the video, the support person cannot redirect his or her attention. Refer to handbook No. 5 in this series for guidance on how to be a designated support person.*

Figure 3

This child is adopting the contents of her video-recorded statement while testifying from behind a witness screen. A support person stands beside her and she views the statement on a monitor beside the witness box. Ideally, large monitors are angled for the judge, the accused and the public gallery to view the child's statement simultaneously as the child watches.

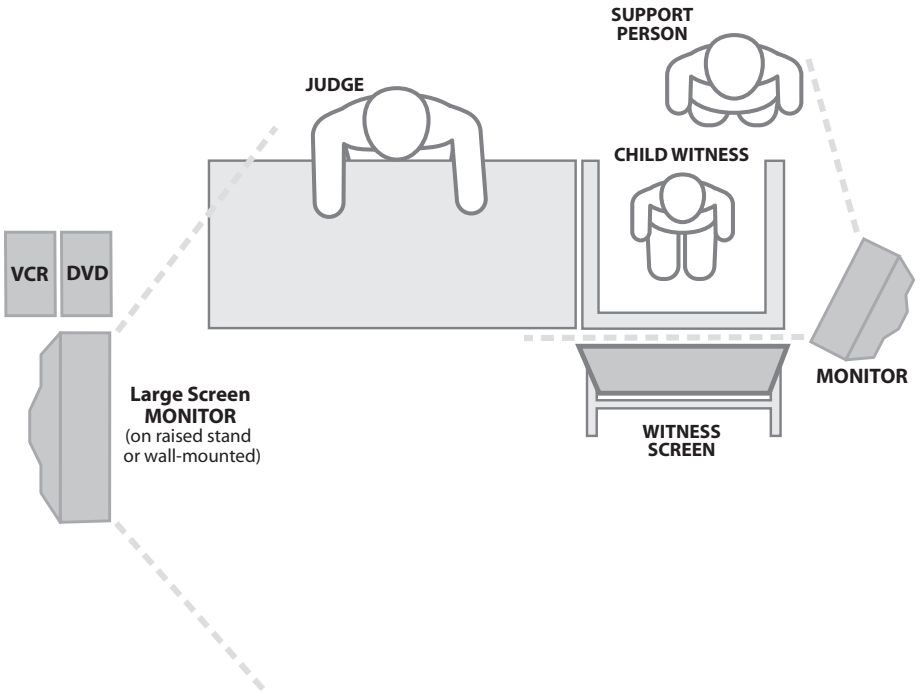
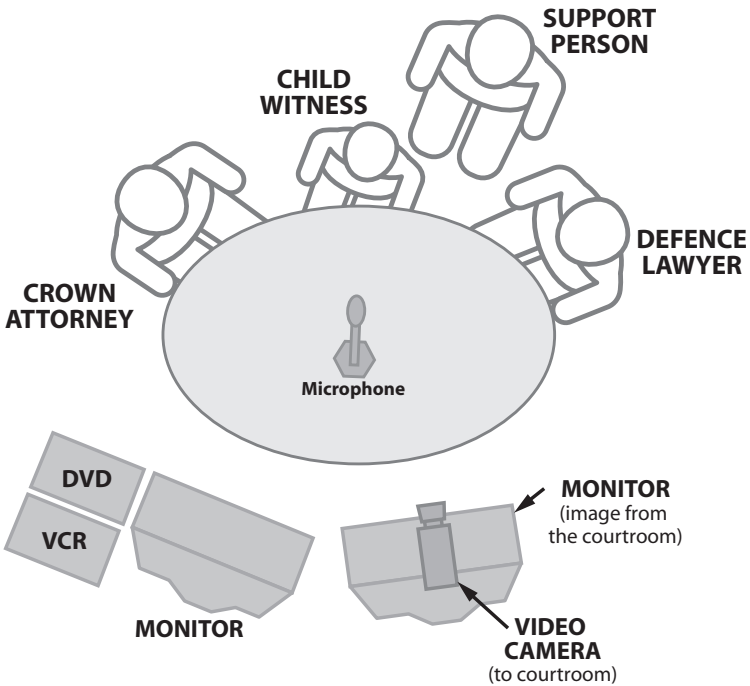


Figure 4

In this diagram, the child watches his video-recorded statement in the testimony room. If you have two monitors in the testimony room, as illustrated here, shut off the monitor feeding video from the courtroom while the child watches the statement. Seeing images on both monitors is a distraction for many children.



PRACTICE TIP: Consider acquiring equipment for split-screen viewing. With this technology, people in the courtroom can view the video-recorded statement while simultaneously observing the child's demeanour as he or she watches the video outside the courtroom or from behind a witness screen.

Criminal Code Section 715.1

These are the provisions relating to the video-recorded evidence of witnesses under 18 years of age.

Evidence of victim or witness under 18

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

Order prohibiting use

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

Voir dire

A voir dire is held to determine if the video recording is admissible.

Conditions of exclusion

The judge or justice will exclude the video-recorded evidence where its prejudicial effect exceeds its probative value.

Jury trials

The judge should warn the jury of the dangers of convicting only on the basis of video-taped evidence.

Weight of the evidence

While the statement may be admissible, several factors affect its weight. For example, where police conducted a pre-video interview (not a recommended practice) the weight of the evidence may be reduced.

Charter issues

The constitutionality of s. 715.1 was unanimously affirmed by the Supreme Court of Canada in *R. v. L.(D.O.)* (1993). The Court held that admitting video-recorded evidence violates neither s. 7 nor s. 11(d) of the *Canadian Charter of Rights and Freedoms*.

Bill C-2: What's the Same? What's Changed?

When Bill C-2 amendments (An Act to Amend the Criminal Code (Protection of Children and Other Vulnerable Persons) and the Canada Evidence Act) came into force in January of 2006, these features of s. 715.1 of the Criminal Code changed.

NEW

- no restriction on type of offence

- technology now called “video-recorded evidence”

PREVIOUS

- use was restricted to specified offences, mainly sexual offences and offences in which violence was used, threatened, or attempted

- technology was called “video-taped evidence”



For more information on the Bill C-2 amendments, see handbook No. 1: Overview of Issues Related to Child Testimony.



Australian researchers surveyed 300 professionals and tracked 700 cases. They found wide-spread support for the use of electronic recordings as evidence but only about 20% of recordings were, in the end, used in court. Many investigations ended without charges laid (i.e., child protection response was used solely), many others ended in guilty pleas, and prosecutors or judges sometimes decided not to use the recordings. Recording quality was often a factor including interview length, poor standards of questioning, and audibility problems. Some prosecutors prefer to lead evidence themselves and some believe live evidence (even if admitted via CCTV) has a greater impact with the trier of fact. Because the interviews had a dual purpose (criminal investigation and child welfare decision-making) they could be lengthy and address topics irrelevant for the prosecution.

Diana McConachy (2002). *Evaluation of the Electronic Recording of Children's Evidence: Final Report*. Sydney AU: New South Wales Department of Community Services.

Basic Facts About Video-recorded Evidence

Who qualifies for a s.715.1 application?

A child under the age of 18 at the time of the alleged offence who made a statement that was recorded.

In what type of proceedings can a child's video-recorded evidence be admitted?

In any criminal court or youth justice court proceeding.

When does the Crown prosecutor make an application?

At any point in the proceedings. The judge calls a voir dire to discuss the application.

Can the judge or justice refuse to admit the child's video-recorded statement?

Yes, if the judge or justice believes that “admission of the video-recorded statement would interfere with the proper administration of justice.” The judge might exclude a video if, for example, the interviewer's questions were improper or if the picture or audio quality is poor. In addition, as discussed earlier, specific criteria must be met before the video is admissible (e.g., the child must be under age 18 at the time of the alleged offence and the recording made “within a reasonable time”).

Can the child use a testimonial aid in addition to having the video statement admitted?

Yes. Help the child nominate a support person of his or her choice. When adopting the contents of the statement and during cross-examination, the child might be able to use a witness screen or testify outside the courtroom.



For information on other types of testimonial aids, see the handbooks in this series about testimony outside the courtroom, witness screens, and designated support persons.

How does the witness “adopt the contents” of the statement?

The witness testifies that he or she was telling the truth when giving the statement. The witness may then be cross-examined by the defence attorney. If the witness fails to adopt the contents of the statement, the statement will not be admissible as evidence.

FAQs About Video-recorded Evidence

Q. *Are all statements video-recorded?*

A. No. Video recording of statements is never done in some areas, always done in others, or local practice is to record statements in some types of cases (e.g., sexual assault or cases with very young victims). Local preference of the judiciary can encourage or discourage the practice. A suitable location with the necessary equipment is required. Availability of trained personnel and volume of cases might also dictate how many, if any, statements are recorded.

Q. *What is a “reasonable time” after the alleged offence?*

A. The Court decides on a case by case basis. Few child victims of sexual abuse disclose immediately after an offence so this factor must be taken into account.

Q. *Are video-recorded statements routinely used in court?*

A. That depends on local practice and judicial preference.

Q. *If the child talks about someone else abusing them, could that video be used in court?*

A. Statements about other individuals are inadmissible so edit out those portions.

Q. *I am working with a child who remembers the police interview but has no memory of the events she talked about. Could her video be admitted?*

A. The Supreme Court of Canada addressed this issue in *R. v. F.* (C.C.). To “adopt” a statement, the child need not have a current recollection of what he or she said. The child can adopt the video as long as he or she testifies that he or she was trying to tell the truth when the video was made.

Q. *Are transcripts made of video-recorded statements?*

A. Not routinely, because they are expensive and time consuming. Occasionally, a special request is made for a transcript to be made available.

What Children Say About Video-recorded Evidence

The majority of children appreciated the use of the video recording because it eased the stress of testifying. A small group of children had negative experiences.

Concerns about breaches of confidentiality

“I was really upset when my friend [a witness and daughter of the accused] told me that her dad brought home my video [given to him by his lawyer] and that they all watched it. How come that could happen?”
(Carla, age 11)

Glad to refresh memory

“It was hard to watch the video of me talking to the police officer, but it helped me remember some stuff I forgot like what I was wearing and who lived beside us. ... I was in grade seven then and really young. But I remember exactly what he did to me. Since I told the police, I tried not to think about it. I just wanted to get on with my life.” (Gani, age 14)

Having to testify was a surprise

“When they made a video of me at the police station, my mom and I thought I wouldn't have to go to court. We were really mad about that.”
(Jack, age 9)

Frustrated by faulty equipment

“The social worker picked me up at school and brought me to the police station. They asked me questions there and told me that they were making a video. It was very hard to answer the questions because I had to tell them what my grandfather did. The next day they told me that I had to go back and do it all over again because the sound didn't work on the first video.” (Amoya, age 10)

Relieved to avoid repeating the details of the offence

“I was glad they showed my video in court because I don't think I could've said it all again. Telling people about a sexual assault is very hard, especially when you're talking about your dad. I had to answer his lawyer's questions, but having the video shown first made it easier.”
(Bridget, age 15)

Feeling exposed

“I hated that everyone in the courtroom could watch me on the video. I was saying private things and I was very upset. And people, any one, can just go into the courtroom and know about me.” (Ila, age 13)

Good Practice Guidance for Using Video-recorded Evidence

What to tell the witness

Using language consistent with age and intellectual level, ensure children and teenagers understand these key points.

- The judge is the only person who decides if the recorded statement will be used.
- If the judge agrees, the video recording will be shown in the courtroom and all the people in the courtroom will watch it, including the accused.
- The child must watch the statement again at the same time as the judge and others in the courtroom.
- Ideally, by this point you know if the child will testify inside or outside the courtroom, so tell the child where he or she will sit while watching the statement.
- Encourage the child to concentrate and listen very carefully while watching the video.
- Once the video recording is finished, the child must report if what they said in the statement is the truth.
- The prosecutor may ask the child some questions at this point.
- Next, say the defence attorney will probably ask some questions.
- Teach and reinforce the “rules for witnesses” discussed in handbook No. 1 (e.g., say only what you remember and never guess).



PRACTICE TIP: As soon as you know the video recording will be used in court, inform the child because this news relieves a great deal of anxiety. It follows, therefore, that it is best to apply to use the video recording as early in the process as possible.

Cultural issues

- Some cultures and some faiths frown on the use of cameras and photographic representations. An audio rather than video recording is best when interviewing children from these faiths or cultures (e.g., Amish).
- For teenagers of many cultures, it is highly improper to speak with a person of the opposite sex about personal or sexual matters. To know there is a video recording of themselves speaking with a person of the opposite sex would be distressing.



PRACTICE TIP: Be cautious about video recording children in cases involving production and use of child pornography. Ensure the child understands for what purpose the tape is made, who will see it, and what procedures are in place to ensure confidentiality and eventual destruction.

Preparing to Interview Children

Children will tell us what they saw or experienced if we ask the right questions in a way they understand. Frankly put, because of education, proclivity and/or experience, some people are better at this task than others. No model of investigative interviewing is universally embraced, but most include an introductory phase followed by rapport building, questioning and closure.

Interview facility

- A sound-proof room is necessary when interviewing children. Hearing voices outside the room will worry or distract a child
- A comfortably furnished room with neutral decor and few distractions works best.
- Good lighting and ventilation are crucial.

Equipment

- Children often whisper or stutter when upset. Some get up and walk away from the microphone. Highest quality cameras and microphones guarantee all information is recorded and available, if necessary, for use in court.
- The camera must show all people present in the room. Some facilities have two cameras, one used to zoom in on the child.
- A new tape for each interview avoids recording problems (if using VHS).

General guidance for interviewers

- Ideally, the interviewer is knowledgeable on child development, the dynamics of abuse, and children's communication patterns at different ages.
- You must be comfortable speaking with children about difficult topics such as sexual abuse. If you are nervous or seem shocked or repulsed, the child will probably stop sharing details of the offence.
- Learn as much as possible about the child ahead of the interview.

Introductory phase

- Children may be worried and anxious at arrival. Maybe they were recently removed from parental care or experienced a trauma. Be kind and reassuring and make them feel comfortable.
- Introduce yourself and explain the purpose of the interview using words and concepts tailored to the age of the child.
- Point out the camera and microphone and say that the interview is being recorded.



PRACTICE TIP: *Develop a repertoire of words and questions that children of different ages can understand. For example, to ask about a child's age, there are several approaches: How old are you? What is your age? What is your date of birth? When is your birthday? Show me, on your fingers, how old you are? etc.*

Building rapport

- Spend some time making the child feel at ease and comfortable.
- Use open-ended questions. Asking a child “do you like school?” results in a yes or no answer. Encourage an elaborated response by saying “I was never in your school. Please tell me about your class.”
- Listening to the answers helps you assess the child's verbal skills and developmental level relative to other children of the same age.
- You can also assess if a language interpreter is required.

Think through each question before you ask it

- How many words are you going to use? Keep sentences short.
- How many clauses in that question? Keep sentences simple.
- How many questions in that sentence? One question at a time.
- Any jargon, idioms, or sophisticated vocabulary? Find a different word.
- Is there a negative (e.g., “you don't really like broccoli, do you?”)? Re-frame the question if possible (e.g., “do you like broccoli?”).
- Does this question demand a yes or no answer? Use open-ended questions if your intent is to elicit more detail.
- Are you referring to an abstract concept? Be concrete.
- Using a pronoun? Use names (“Tom” or “book”) instead of pronouns (“him” or “it”).
- Never ask a young child to “imagine” or “pretend” during an investigative interview.

Zebra Child Protection Centre (Edmonton, Alberta): www.zebracentre.ca

This is the first facility of its kind in Canada, a child-centered environment staffed by a multi-disciplinary community of professionals: police, prosecutors, child protection workers, medical and trauma screening professionals, and volunteer child and family advocates. Investigations, interventions, prosecutions and supports are carried out in this Centre.

The Gate House (Toronto, Ontario): www.thegatehouse.org

The Gate House is a child-centred facility for investigative interviews conducted by police and child protection services. The interview room with “state of the art” video-recording equipment looks like an average living room. Staff support all individuals involved during the investigative process.

Further Readings

In addition to sources already cited, these resources may be helpful.

Burton, Mandy, Roger Evans & Andrew Sanders (2006). *Are Special Measures for Vulnerable and Intimidated Witnesses Working? Evidence from the Criminal Justice Agencies*. London UK: The Home Office. †

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Lamb, M., K. Sternberg, Y. Orbach, I. Hershkowitz & D. Horowitz (2003). Differences Between Accounts Provided by Witnesses and Alleged Victims of Child Sexual Abuse. *Child Abuse & Neglect*, 27(9): 1019-1031.

Lamb, Michael & Deirdre Brown (2006). Conversational Apprentices: Helping Children Become Competent Informants About Their Own Experiences. *British Journal of Developmental Psychology*, 24 (1): 215-234.

Poole, Debra & Michael Lamb (1998). *Investigative Interviews of Children: A Guide for Professionals*. Washington DC: American Psychological Association.

R. v. L.(O.D.), [1993] 4 S.C.R. 419. †

Walker, Anne G. (1999). *Handbook on Questioning Children: A Linguistic Perspective, 2nd ed.* Washington DC: American Bar Association Center on Children & the Law.

† These documents are available on the Internet.

About the Handbook Series

This is one of seven handbooks written to aid front-line justice personnel who use special accommodations and testimonial aids for young victims and witnesses in criminal proceedings. The series title – “A Full and Candid Account” – reflects the legislative imperative of facilitating the conditions whereby a child witness can best communicate his or her evidence to the Court. The seven topics covered in the series are:

1. Overview of issues related to child testimony
2. Testimony outside the courtroom
3. Witness screens
4. Video-recorded evidence
5. Designated support person
6. Hearsay evidence and children
7. Children and teenagers testifying in domestic violence cases

These booklets provide a concise and convenient summary of legislation, operational and logistical issues, FAQs, and helpful tips for working with children and teenagers.



The information, references and guidelines in this handbook focus on child witnesses (under age 18), although some material may be relevant for some adult witnesses contemplated in the provisions for vulnerable witnesses.

Over two decades, our own research and experience at the Child Witness Project have clearly demonstrated how the stressful aspects of testifying can be ameliorated to maximize a child's ability to give “a full and candid account” of his or her evidence. Special accommodations and testimonial aids are important tools available for this purpose.

Every child witness in Canada has the right to ask for measures including closed-circuit or remote testimony, screens, and recourse to a support person while testifying. Yet, there is wide variation in the frequency of use of the special accommodations and testimonial aids now provided for in the *Criminal Code*. The overarching goal of this handbook series is to ensure that no child is denied access to the appropriate accommodation or testimonial aid only for want of awareness or understanding. By creating these timely and useful handbooks, we hope to fulfill the promise of special protections made available by Parliament so children and young people will not be traumatized by their experiences as witnesses.