



CANADIAN CENTRE FOR ELDER LAW

BRITISH COLUMBIA LAW INSTITUTE

Supporting Vulnerable Adult Victims and Witnesses in the Criminal Justice System

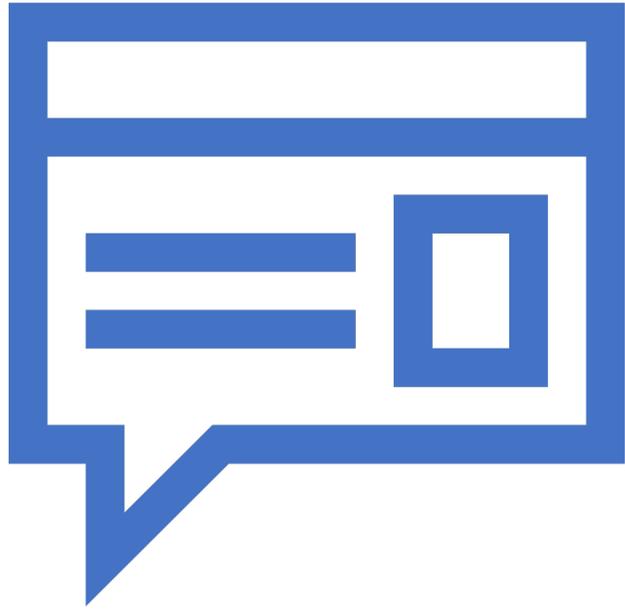
May 16, 2023

Megan Vis-Dunbar

Today's Presentation

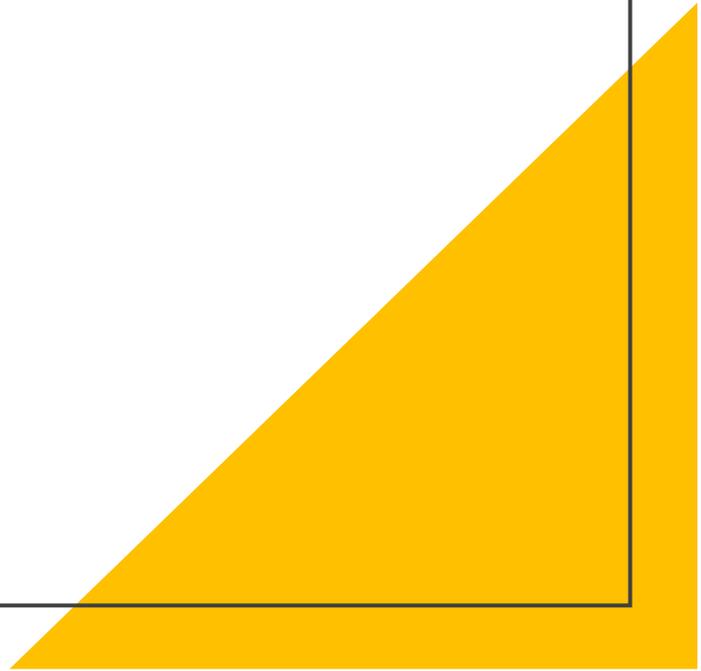
- Overview of Crown role & key policies
- Aging and testimonial capacity
- Vulnerabilities & trauma
- Supporting vulnerable witnesses in reference to policy and legislation
- Support beyond policy & legislation
- Other approaches

A few notes ...



Disclaimer: This presentation is not legal advice.

A note about language.



About the CCEL



The CCEL conducts research, and develops reports and educational tools about legal and policy issues related to aging.

The CCEL is part of the BC Law Institute, BC's non-profit independent law reform agency

www.bcli.org/ccel

Considerations Related to Testifying in Court

Testimonial Competency

All adults are presumed to be competent to give evidence in court.

If challenging a witness' competence, need to show the court that there is an issue.

The Canada Evidence Act, s 16 applies to witnesses who are 14yrs of age and older.

Credibility

Refers to whether a witness is worth of belief / trustworthy

Each witness' evidence must be assessed in light of all the evidence in a case.

Roles and Responsibilities

Police		Crown
Investigate		Decide whether to prosecute
Gather evidence		Impartially present evidence to the court
Interview witnesses		Interview witnesses
Decide whether to refer file to Crown		Features of training / approach: <ul style="list-style-type: none">• Independent• Objective• Not emotionally invested in the interests of victims and witnesses• Have a responsibility to control Crown witnesses and the facts

The Decision to Prosecute

In deciding whether to approve charges:

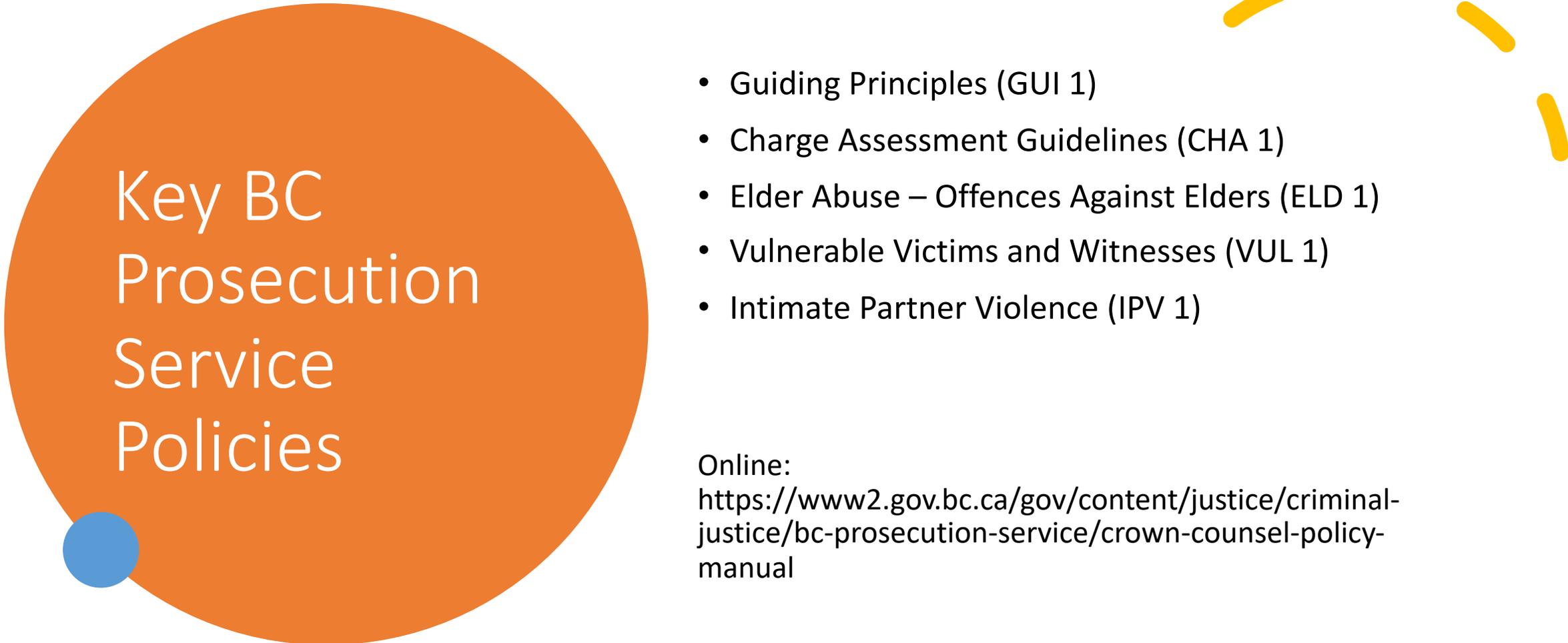
Crown Counsel must independently, objectively, and fairly measure all the available evidence against a two-part test:

1. Whether there is a substantial likelihood of conviction; and, if so,
2. Whether the public interest requires a prosecution.

This two-part test continues to apply throughout the prosecution.

Source: BC Prosecution Service, Crown Counsel Policy Manual, Charge Assessment Guidelines





Key BC Prosecution Service Policies

- Guiding Principles (GUI 1)
- Charge Assessment Guidelines (CHA 1)
- Elder Abuse – Offences Against Elders (ELD 1)
- Vulnerable Victims and Witnesses (VUL 1)
- Intimate Partner Violence (IPV 1)

Online:

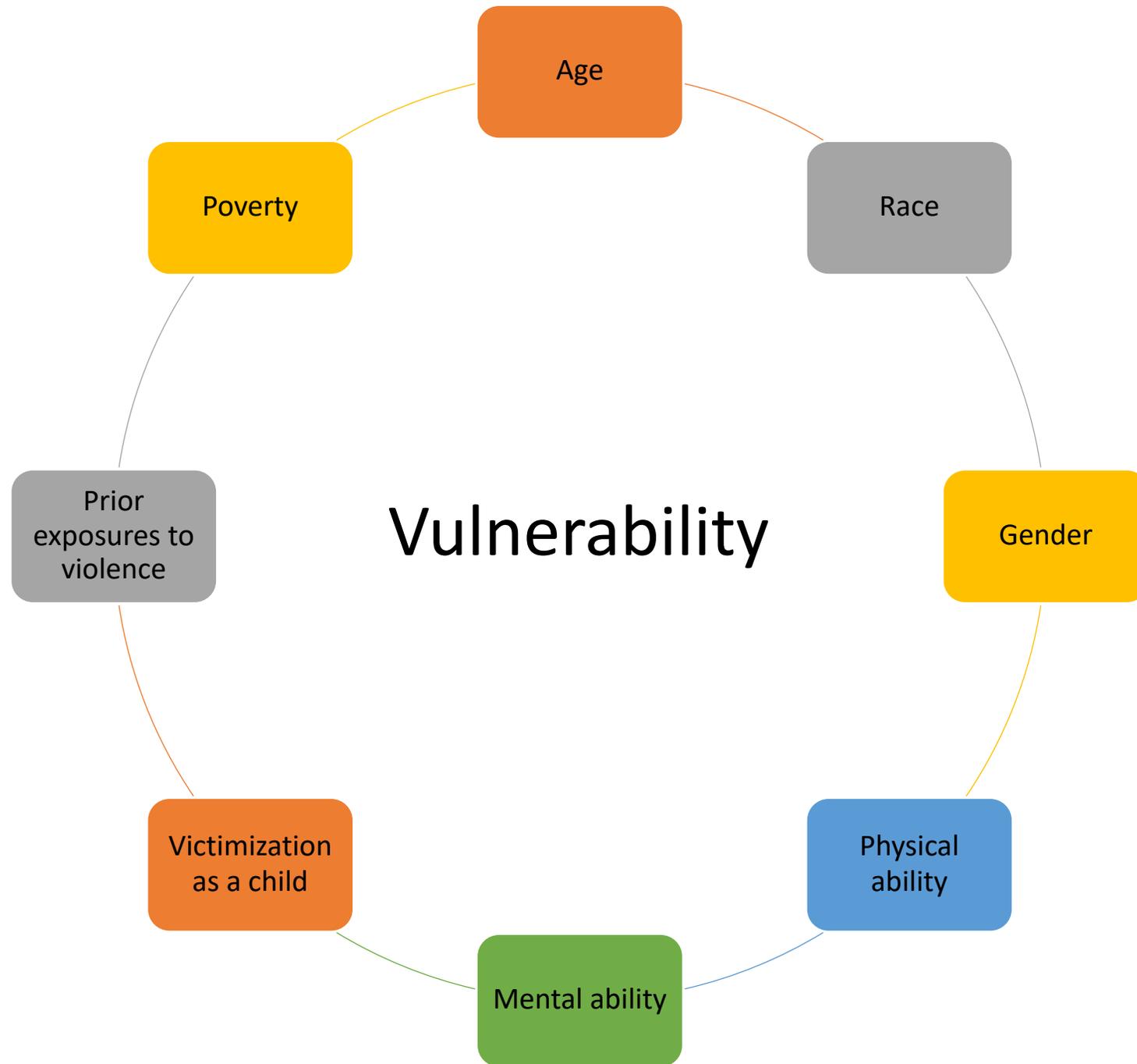
<https://www2.gov.bc.ca/gov/content/justice/criminal-justice/bc-prosecution-service/crown-counsel-policy-manual>



Aging and Testimonial Capacity

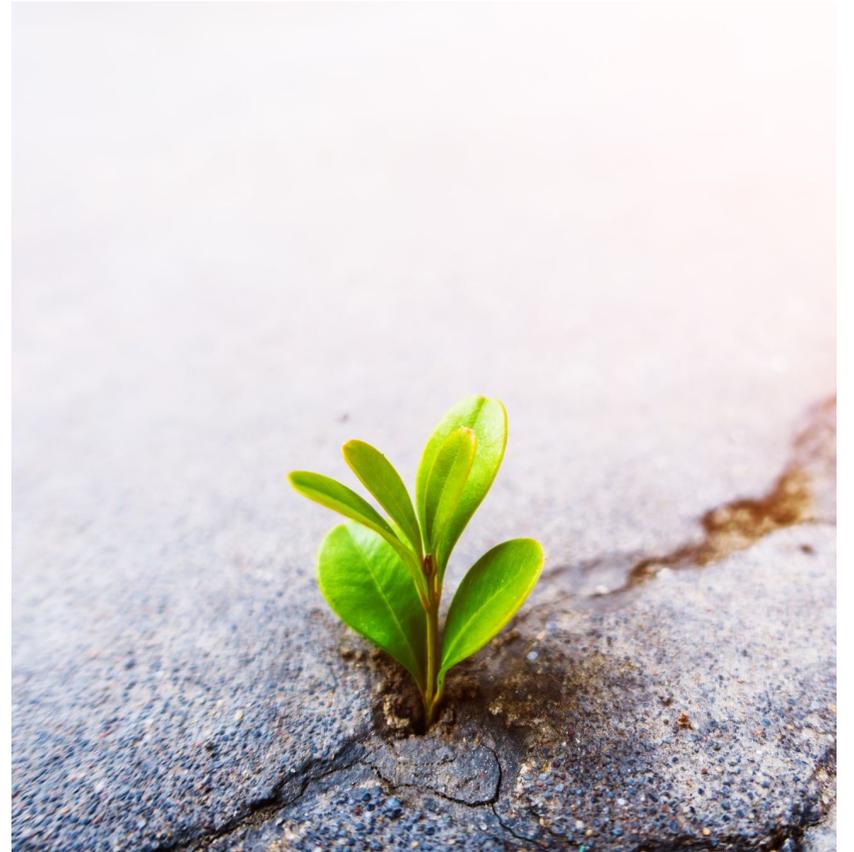
- Witness capability may change by the time of trial
- Witness may not survive until the time of the trial
- Visual and audio perception are more likely to decrease with age
- Increased risk of stroke and dementia
- Memory deficits increase with age
- Mobility issues can make court attendance challenging

Source: Helene Love, *Seniors on the Stand: Accommodating Older Witnesses in Adversarial Trials*, 2019 97-2 *Canadian Bar Review* 240.



Supporting Vulnerable Witnesses

Working with witnesses who are vulnerable can take more time, be exhausting, require a high level of understanding and compassion and clear boundaries.



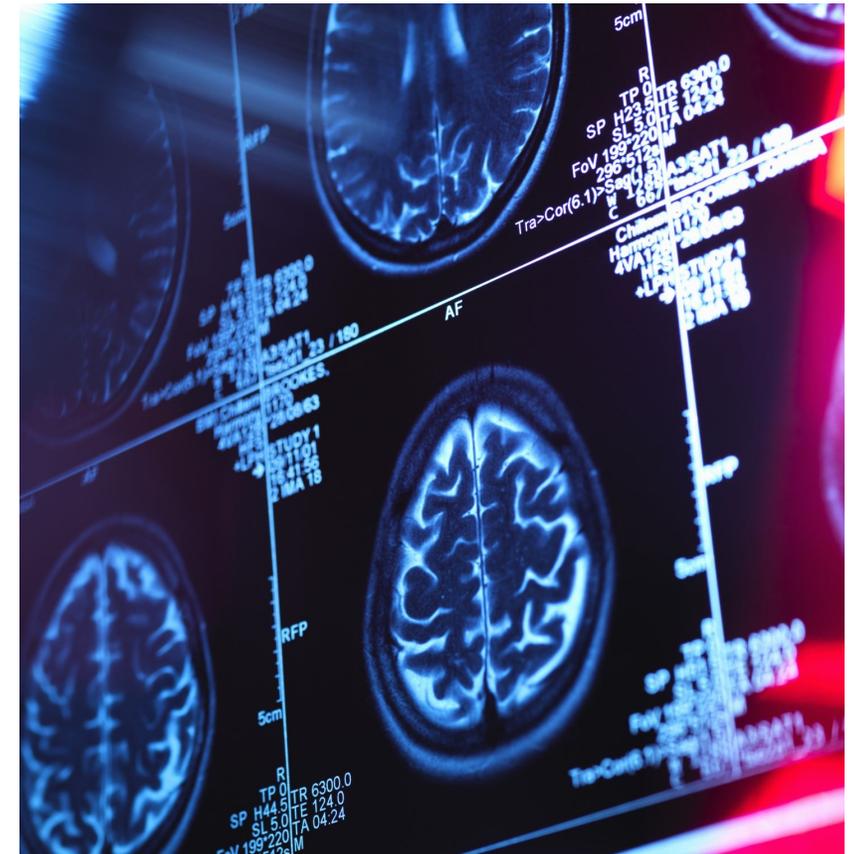


Stereotypes & Assumptions

- Victim doesn't behave the way we expect.
- Witness gives inconsistent accounts of what happened.
- Witness is unable to recount what happened sequentially.
- An emotional witness will be more impactful.

Memories

- Inconsistencies and memory deficits can arise from the way our brains store and retrieve information. That process can be impacted by trauma, age related memory loss, and dementia.
- Memories can be fragmented and may not be formed sequentially.
- Victims and witnesses can be supported in recounting an event by building out from sensory fragments as opposed to in a linear fashion.
- Employing testimonial aids can reduce stress and trauma when recounting an incident.



Testimonial Aids & Accommodations

Criminal Code of Canada

- Exclusion of the public or allowing the witness to be out of public view (s. 486(1) CCC).
- Having a support person or courtroom dog present (ss. 486.1 CCC).
- Giving evidence from a different room or behind a screen (s. 486.2)
- Appointing a lawyer for cross examination of the witness if the defendant is self represented (s. 486.3 CCC)
- Protecting the witness' identity from being disclosed during the court proceedings (s. 486.31 CCC)
- Other orders the court determines necessary to protect the security of a witness and is otherwise in the interest of the proper administration of justice (s. 486.7 CCC)

Testimonial Aids, cont.

Canada Evidence Act

6(1) If a witness has difficulty communicating by reason of a physical disability, the court may order that the witness be permitted to give evidence by any means that enables the evidence to be intelligible

6(2) If a witness with a mental disability is determined under section 16 to have the capacity to give evidence and has difficulty communicating by reason of a disability, the court may order that the witness be permitted to give evidence by any other means that enables the evidence to be intelligible.



Videotaped Evidence

715.2(1) Criminal Code of Canada

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.

Investigative and Preliminary Inquiry Evidence

715(1) Criminal Code of Canada

Evidence taken in the course of the investigation or given at a preliminary inquiry into the charge can be admitted at trial if the person who gave the evidence is dead, has since become and is insane, is so ill that he is unable to travel or testify, or is absent from Canada unless the defendant proves that they did not have full opportunity to cross-examine the witness.

Moving Beyond Policy

- Transparency around requirements to provide statements to the defence and the likelihood of questioning on any inconsistencies.
- Provide opportunities for choice and agency. (Timing? Supports? How they want to be referred to.)
- Help a witness to document their supports (support person in court; arrival time to minimize interactions with the defendant or public).
- Discuss ways to keep a witness on topic – help them to understand their role in the larger picture of the trial and what the court needs from them.
- Is there a space for them to debrief after an interview and/or testifying?
- How accessible the interview room and the courtroom? Are accommodations needed?
- Seek opportunities to raise concerns early with the witness, the other parties and the court.
- Transparency around the role of Crown.
- Encourage the witness to identify their strengths, needs and preferences as it relates to the process.



Other Approaches

- Ground Rules Hearings – a process adopted in the UK.
- Legislated into the Criminal Procedure Rules.
- Responsibility is placed on the court to encourage and facilitate the attendance of any witness when they are needed.
- A ground rules hearing can be held and the court can make directions for such things as having a support person, seating arrangements in court, the manner of questioning, the use of aids to assist with communicating a question or answer.
- Can involve an “intermediary” – a registered communication specialist whose role it is to support vulnerable witnesses to give evidence to the police and in court.

Let's stay in touch

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Thank you to our funders!



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