SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. AMB*, 2022 NSSC 148

Date: 20220519
Docket: CRH 501843
Registry: Halifax

Between:

Her Majesty the Queen

v.

AMB

Restriction on Publication of any information that could identify the victim: s. 486.4 *C.C.*

Decision on Voir Dire

Judge: The Honourable Justice Peter P. Rosinski

Heard: May 18, 2022 in Halifax, Nova Scotia

Final Written: May 27, 2022

Counsel: Alicia Kennedy, for the Crown

Jonathan Hughes, for the Defence

Order restricting publication - sexual offences

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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

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

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

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

Mandatory order on application

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

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

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

Victim under 18 — other offences

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the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

Mandatory order on application

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

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

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

Child pornography

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

Limitation

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

By the Court:

Introduction

[1] SM was born in 2007. With her mother, JM, and stepfather AMB, they lived together at all material times herein, until the Fall of 2018.

[2] AMB is charged that he between July 1, 2018, and December 31, 2019:

i) at Hammonds Plains, Nova Scotia did sexually assault SM, and touch her for a sexual purpose with his penis; and

ii) at Lower Sackville, Nova Scotia did sexually assault SM, and touch her for a sexual purpose with his penis.

[3] The allegations include that AMB, repeatedly over the period July 1 2018 to December 31, 2019: fondled her breasts; had vaginal and anal intercourse with her; and compelled her to fellate him (to ejaculation).

[4] On Sunday, January 12, 2020, SM disclosed the alleged offences to her mother. A complaint was made to the police, and a videotaped statement was taken from SM on January 13, 2020.

[5] Constable ("Cst.") Deborah Murray and Cynthia Bass of the Department of Community Services (child protection) were present for the 2-hour interview.

[6] This decision addresses applications by the Crown pursuant to:

1. section 486.1 of the *Criminal Code* ["*CC*"] (to have a support person present with SM when she testifies, either outside or inside the courtroom);

2. and 486.2 *CC* (preferably to be permitted to testify outside the courtroom by CCTV – or if required to testify in court, behind a screen); and

3. 715.1 *CC* (to allow SM's videotaped statement to be admissible in evidence). This entire videotaped statement was played in court in support of the Crown applications herein.

[7] AMB does not object to SM testifying *in court* with a support person present, and behind a screen per s. 486.1 and s. 486.2 *CC*.[1]

[8] Therefore, what remains in dispute is whether the Crown should be permitted to tender as admissible SM's videotaped January 13, 2020, police statement; and SM should be permitted to testify outside the courtroom by CCTV, (in the company of a support person).

[9] The trial was scheduled to commence on May 18, 2022.

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[1] AMB has conceded that the Crown may introduce the videotaped statements of the two younger siblings of SM pursuant to section 715.1 *CC*. I also granted a request that AMB permitted to sit at counsel table, although I cautioned him that he must remain entirely neutral and not communicate by gesture, facial expressions, noise or other verbalizations during SM's testimony.

[10] At commencement of the trial, Cst. Murray testified on the applications. She testified that:

1. On April 14, 2022, Cst. Murray and a Victim Services worker met with the now 14-year-old SM who was given an opportunity to review the videotape.
2. SM had difficulty doing so and got upset. She requested that she be permitted to view it by herself. Cst. Murray and the Victim Services worker exited the room.
3. SM did permit them back into the room later. SM communicated that she would find it very difficult to testify in court against her step-father on these charges. She was apprehensive and noted the circumstances generally, and content of her testimony, are very embarrassing for her.
4. She indicated that she was having a hard time remembering, but her videotape statement was helping her remember.
5. SM appeared to be an intelligent young person.

[11] I accept Cst. Murray's evidence as credible and reliable.

[12] I am satisfied that the s. 715.1 application should be granted; and that the section 486.1 and 486.2 *CC* applications should be granted. Let me explain this in more detail.

The s. 486.1 and s. 486.2 *CC* applications

[13] Section 486.1 reads in part:

> (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's 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.
>
> …
>
> (2.1) An application referred to in subsection (1) or (2) may be made, during the proceedings to the presiding judge or justice or, before the proceedings begin, to the judge or justice who will preside at the proceedings or, if that judge or justice has not been determined, to any judge or justice having jurisdiction in the judicial district where the proceedings will take place.
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> (3) In determining whether to make an order under subsection (2) the judge or justice shall consider
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> (a) the age of the witness;
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> (b) the witness' mental or physical disabilities, if any;
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> (c) the nature of the offence;
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> (d) the nature of any relationship between the witness and the accused;
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> (e) whether the witness needs the order for their security or to protect them from intimidation or retaliation;

(f) society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process; and

(g) any other factor that the judge or justice considers relevant.

(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.

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

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

[14] Section 486.2 reads in part:

(1) Despite section 650, in any proceedings against an accused, the judge or justice **shall**, on the application of the prosecutor in respect of a witness who is under the age of 18 years…, **order that the witness testify outside the courtroom 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.

…

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

(a) the age of the witness;

(b) the witness' mental or physical disabilities, if any;

(c) the nature of the offence;

(d) the nature of any relationship between the witness and the accused;

(e) whether the witness needs the order for their security or to protect them from intimidation or retaliation;

(f) … and(f.1)…

(g) society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process; and

(h) any other factor that the judge or justice considers relevant.

…

(5) A witness shall not testify outside the courtroom in accordance with an order made under subsection (1) or (2) unless arrangements are made for the accused, the judge or justice and 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.

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

[15] I must make the order(s) for a witness under the age of 18 years *unless* I am "of the opinion that the order would interfere with the proper administration of justice".

[16] Those words were interpreted by Justice William Smart in *R. v. SBT*, 2008 BCSC 711. He stated:

> 39 *The phrase 'the proper administration of justice' is a phrase of wide import*. In the context on this subsection, *it may include* many factors and considerations. When an application is made under section 486.2(1) the judge or justice will likely consider *the age of the witness, the nature of the charges, the relationship between the witness and the accused, the need to have the witness view exhibits while testifying, and whether the requested accommodation can be properly provided in the particular courtroom or courthouse. This is not an exhaustive list. What is central to the decision is whether the requested testimonial accommodation will enhance or undermine the truth-seeking function of our criminal trial process.*
>
> 40 In my view, *it is when the judge or justice is determining whether the requested testimonial accommodation would interfere with the proper administration of justice that he or she may consider other testimonial accommodations.* It is when engaged in this analysis

that he or she may conclude that the requested accommodation would interfere, but a different accommodation would not.

[My italicization added]

[17] More recently in *R v FM*, 2021 BCSC 1867, Justice Riley stated:

Legal Principles

7 I was referred to a number of cases dealing with testimonial accommodation applications. I am going to address some of them here because they are helpful in explaining the parameters of the decision I have to make in the instant case.

8 *R. v. Bell*, 2017 BCSC 2303 [*Bell*], involved an application for testimonial accommodation in relation to two 17 year old complainants on charges of sexual assault. The application was brought under s. 486.2(1), which provides for a presumptive order, that is, the section requires that on application by the prosecutor or complainant witness, the court shall make the requested order unless it would interfere with the proper administration of justice.

9 One of the issues addressed in *Bell* was whether a judge dealing with an application under s. 486.2(1) has the discretion to order a form of testimonial accommodation different than that sought by the complainant. *Tammen J. held that the judge has no independent discretion to choose among different forms of testimonial accommodation, because the judge had to deal with the application before the court, and the order was presumptive and had to be made absent a finding that it would interfere with the proper administration of justice. Tammen J. went on to hold that where the judge considers the application and determines that the form of testimonial accommodation sought by the complainant would interfere with the proper administration of justice, then and only then did the judge have the discretion to determine that another kind of testimonial accommodation was appropriate.*

10 The other issue addressed in *Bell* was the scope and meaning of the phrase "proper administration of justice" in s. 486.2(1). On that point, Tammen J. was guided by other jurisprudence, including *R. v. S.B.T.*, 2008 BCSC 711, holding that the phrase is of wide import and contemplates a variety of factors. *Ultimately, what is central to the analysis under s. 486.2(1) is whether the requested testimonial accommodation "will enhance or undermine the truth-seeking function of our criminal trial process". In Tammen J.'s words, a trial judge should determine whether the accommodation has the potential to cause a trial which is unfair or otherwise creates an unacceptable risk of impeding the truth-seeking function of the trial process.*

> 11 In considering that issue, Tammen J. made some useful comments about the use of CCTV technology and its impact on the fairness and solemnity of the trial proceedings. He said this:
>
> > In my view, the witnesses will understand the importance of the occasion and the need to give careful evidence even if they are not physically in the courtroom with the jury. The jury will equally grasp the importance of the testimony of these witnesses and will not likely be disengaged from the process of critically assessing the evidence. Good quality CCTV should permit the jury to make the necessary assessment of credibility.
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> 12 One other important point made by Tammen J. in *Bell* is that *the court has the ongoing duty to assess whether testimonial accommodation measures ordered by the court are interfering with the proper administration of justice as the evidence is presented at trial.* Thus, if it becomes clear that the testimonial accommodation ordered by the court is unworkable and is thus interfering with the proper administration of justice, the initial order can be revisited.
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> [My italicization added]

[18] Thus, I must ask myself, whether the presumption of "outside the courtroom" (or if I am required to alternatively consider, the secondary option put forward: inside the courtroom, behind a screen or other device that would allow the witness not to see the accused) testimony has been rebutted upon an analysis of whether the order "would interfere with the proper administration of justice"?

[19] I find the commentary in *SBT*, and *FM*, including the relevant factors in s. 486.2(3) *CC* and a reasoned consideration of whether the order sought would facilitate the giving of a full and candid account by SM, are of assistance to me.

[20] The evidence I have here arises from the videotaped January 13, 2020, interview with SM, and the testimony of Cst. Murray of her encounter with SM on April 14, 2022.

[21] While the videotaped interview of 2020 provides me some insights into relevant factors (e.g. age, nature of the charges, the relationship between SM and ABM) *at that time*, I bear in mind that over two years have passed since its making.

[22] Cst. Murray's evidence indicated that SM was quite upset in viewing her videotaped statement in April 2022. She felt very uncomfortable with the notion of testifying in open court. The evidence and the inferences I draw therefrom, suggest that she will be testifying about extremely embarrassing, degrading, and traumatic events that took place between her and AMB, who she has considered as a father since she was two-years old, and who, without these orders, she otherwise while testifying will have to see at relatively close range, since he will be sitting at counsel table with his counsel.

[23] On the other hand, it is important to consider whether permitting SM to testify outside the courtroom as she has requested (or in court behind a screen) has a realistic potential to cause a trial which is unfair or otherwise creates an unacceptable risk of impeding the truth-seeking function of the trial process.

[24] In present circumstances, I am satisfied that more likely than not, permitting SM to testify outside the courtroom would not interfere with the proper administration of justice.

[25] Regarding the alternative to have SM testify behind a screen, but in court, I have considered the relevant factors, including her present age is 14, the fact that the alleged abuse went on for approximately two years from when she was 10 years to 12 years old, which includes allegations that AMB, her stepfather who she had known as "daddy" since she was two years of age, repeatedly made her fellate him to ejaculation, had vaginal and anal intercourse with her to ejaculation, and he touched her breast area. She also alluded in her videotaped interview to AMB's anger, and her concern that she feared he could act violently against her if she reported him to the police.

[26] This courthouse has presently installed very high-quality audio/video tape transmission capability. The courtroom contains numerous video monitors permitting all counsel, the court and the testifying witness to have individual video monitors, while a witness testifies.

[27] I am satisfied from my previous experience and otherwise, that if the Crown application is successful, use of the CCTV which will be relied upon by the court here will not interfere with the ability of the court and counsel to assess the demeanour of the witness and scrutinize the quality and content of her testimony.[2]

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[2] I recognize that, in any event, I should not give undue weight to demeanour evidence.

[28] Bearing in mind my conclusions regarding the s. 486.2(3) factors I have earlier outlined in relation to the s. 486.2 application, and with a focus on all the relevant factors, I am satisfied to make it my opinion that a s. 486.1 order to permit a support person to be present with SM would facilitate the giving of a full and candid account by SM of the acts complained of, *and* that it would otherwise be in the interests of the proper administration of justice.

[29] I order SM to testify outside the courtroom, provided reliable CCTV arrangements of appropriate quality can be made, in the company of a support person.

The section 715.1 Criminal Code application

[30] Justice Fairburn succinctly set out the essential preconditions in, *R. v. PS*, 2019 ONCA 637:

> *(ii) The Components of Section 715.1(1)*
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> 11 The Crown applied pursuant to s. 715.1(1) of the *Criminal Code* to have the video recording admitted into evidence. Section 715.1(1) reads:
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>> 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.

12 As can be seen, s. 715.1(1) contains four mandatory statutory prerequisites to admission of a video-recorded statement. To introduce the statement, the Crown must establish on a balance of probabilities that:

(1)the video-recorded statement was provided by a complainant or witness who was under the age of eighteen years "at the time the offence is alleged to have been committed";

(2)the video recording was made "within a reasonable time after the alleged offence";

(3)the complainant or witness describes the "acts complained of" in the video recording; and

(4)while "testifying", the complainant or witness "adopts the contents of the video recording".

13 In *R. v. L. (D.O.)*, [1993] 4 S.C.R. 419, the decision upholding the constitutional validity of s. 715.1, both the majority and concurring opinions discussed a residual judicial discretion at common law to exclude statements on the basis that their probative value is outweighed by their prejudicial effect: *L. (D.O.)*, at p. 429, Lamer C.J.; at p. 461, L'Heureux-Dubé J., concurring. See also: *R. v. F. (C.C.)*, [1997] 3 S.C.R. 1183, at paras. 51-52. That residual discretion was later explicitly embedded in s. 715.1(1) of the *Criminal Code* by virtue of *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, S.C. 2005, c. 32, s. 23, which came into force January 2, 2006. Therefore, even where the four statutory prerequisites to admission have been met, s. 715.1(1) now requires exclusion where the "admission of the video recording in evidence would interfere with the proper administration of justice."

[31] On a balance of probabilities, have each of these preconditions been met?

1. SM was clearly under the age of 18 years at the time the offences alleged to have been committed;

2. I conclude that the video recording was made “within a reasonable time after the alleged offence”.

[32] In *PS*, the court noted the “limited utility” of looking only to the number of days to decide this issue. Each case must be decided on its own unique facts.

[33] During oral argument I questioned whether the use of the singular statutory reference to “offence” in relation to ongoing offences, such as here over the period July 1, 2018 – December 31, 2019, meant that looking back from the date the video recording was made, at some point in the more distant past, is it still arguable that the video was made “within a reasonable time *after the alleged offence*”?

[34] A purposive analysis of the legislation makes it clear to me that, generally speaking, the “within a reasonable time after the alleged offence” clock starts running after the last date a continued offence is alleged to have taken place.

[35] As the court pointed out in *R. v. DOL*, [1993] 4 SCR 419:

> “Section 715.1 not only makes participation in the criminal justice system less stressful and traumatic for child and adolescent complainants, but also aids in the preservation of evidence and the discovery of truth” per Lamer CJC; and
>
> “While a primary purpose of section 715.1 may be the attainment of truth, the section is particularly focused on the needs of children and the special protections that they require in order to expose the truth. Children, for example, find it stressful to face their perpetrator while they are testifying and to tell their story in front of strangers… In our quest for the truth, if the defendant’s rights must not be infringed, neither must the complainant be further victimized. Children require special treatment to facilitate the attainment of truth in a judicial proceeding in which they are involved… I agree that *section 715.1 does [meet the multifaceted objects set out above – citing the words of Kerans JA in Meddoui]: ‘… [offer] the witness the choice, even if the witness can recall the events in question, to refer, while testifying, to an earlier taped account provided that the witness can recall the taping and can and does affirm that, at the taping, he was honest and truthful. When the witness makes such a reference, the tape becomes evidence and proof of the truth of its contents’*.
>
> …
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> *A further advantage afforded by section 715.1 is the opportunity for the child to answer delicate questions about the abuse in a more controlled, less stressful and less hostile*

environment, a factor which, according to social science research, may drastically increase the likelihood of eliciting the truth about the events at hand.

…

The numerous other advantages of videotaped evidence include the fact that videotaped testimony enables the court to hear a more accurate account of what the child was saying about the incident at the time it first came to light. Secondly, the tape of an early interviewer will reveal how the child was questioned. Thirdly, a suspect may have the opportunity to view the video tape during the course of an investigation. Fourthly, the videotape of an early interview, if used in evidence, can supplement the evidence of a child who is inarticulate or forgetful at trial. I find that these numerous advantages gained through the implementation of section 715.1 are concrete… Section 715.1… acts to remove the pressure placed on the child victim of sexual assault when the attainment of 'truth' depends entirely on her ability to control her fear, her shame and the horror of being face-to-face with the accused when she must describe her abuse in a compelling and coherent manner. Section 715.1 ensures that the child's story will be brought before the court regardless of whether the young victim is able to accomplish this unenviable task.

…

The United States Supreme Court first examined the constitutionality of these legislative enactments in 1988 in *Coy v Iowa*, 487 US 1012. … In *Maryland v Craig*, 110 S. Ct. 3157 (1990) it re-examined the constitutionality of similar legislation in a Maryland statute, with *the use of one-way closed-circuit television and its effects on the rights of the accused.…* In delivering the opinion of the majority… O'Connor J stated page 3167:

'We likewise conclude today that a State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court.' *It is my opinion that section 715.1 of the Criminal Code similarly realizes this important objective."* per L'Heuruex-Dube J.

[My italicization added]

[36] In *R. v. CCF*, [1997] 3 SCR 1183, the court stated:

(i) The Purpose of s. 715.1

18 The interpretation of legislation will always be facilitated by a consideration of its aim or goal. In the case of *R. v. L. (D.O.)*, [1993] 4 S.C.R. 419 (S.C.C.) , the constitutional validity of s. 715.1 was considered. The section was unanimously held to be constitutionally

valid. Chief Justice Lamer, writing for six members of the Court, made this comment upon the aim and purpose of the section at p. 429:

> By allowing for the videotaping of evidence under certain express conditions, s. 715.1 not only makes participation in the criminal justice system less stressful and traumatic for child and adolescent complainants, but also aids in the preservation of evidence and the discovery of truth.

19 It will be self-evident to every observant parent and to all who have worked closely with young people that children, even more than adults, will have a better recollection of events shortly after they occurred than they will some weeks, months or years later. The younger the child, the more pronounced will this be. Indeed to state this simply expresses the observations of most Canadians. It is a common experience that anyone, and particularly children, will have a better recollection of events closer to their occurrence than he or she will later on. (See, e.g., Rhona Flin & J.R. Spencer, "Do Children Forget Faster?", [1991] *Crim L.R.* 189, at p. 190.) *It follows that the videotape which is made within a reasonable time after the alleged offence and which describes the act will almost inevitably reflect a more accurate recollection of events than will testimony given later at trial*. Thus, the section enhances the ability of a court to find the truth by preserving a very recent recollection of the event in question.

20 There is another aspect of the section that cannot be ignored. Any kind of assault on a child may be traumatic. *Assaults of a sexual nature are still more likely to have a serious deleterious effect. This traumatic effect will be greater still when the perpetrator is a parent, guardian or person in authority. Recalling the events will be extremely difficult for every child and the more sensitive the young person, the greater will be the difficulty experienced. It follows that anything that can be done to ease the traumatic effect upon a child should be encouraged*. Thus a record of events made in more informal and less forbidding surroundings than a courtroom will serve to reduce the likelihood of inflicting further injury upon the child witness.

21 It can thus be seen that the primary goal of the section 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. The video record may indeed be the only means of presenting a child's evidence. For example, a child assaulted at the age of three or four years may have very little real recollection of the events a year or two later when the child is attempting to testify at trial. Justice L'Heureux-Dubé in her minority reasons in *L. (D.O.)*, *supra*, noted the fundamental importance of having the videotape before the court. At p. 450 she stated:

> Section 715.1 ensures that the child's story will be brought before the court regardless of whether the young victim is able to accomplish this unenviable task.

22 *The important subsidiary aim of the section is to prevent or reduce materially the likelihood of inflicting further injury upon a child as a result of participating in court proceedings. This will be accomplished by reducing the number of interviews that the child*

> *must undergo* and thereby diminish the stress occasioned a child by repeated questioning on a painful incident. Further, the videotaping will take place in surroundings that are less overwhelming for a child than the courtroom.
>
> [My italicization added]

[37] SM describes "the acts complained of" in the video recording. Although some references are more detailed than others, there is sufficient description of the acts complained of to meet the legislative criterion. Where a complainant has no independent memory at trial of "the acts complained of", the court should caution in itself per the reasons in *CCF* at paras. 35-44:[3]

> 39…
>
> *A videotape made shortly after the event is more likely to be accurate than the child's viva voce testimony, given months later, at trial*. It is quite possible that a young child will have a recollection of going to the police station and making the statement and of her attempt to be truthful at the time yet have no memory of the unpleasant events. This is particularly true where the elapsed time between the initial complaint and the date of trial is lengthy. *If effect is to be given to the aims of s. 715.1 of enhancing the truth seeking role of the courts by preserving an early account of the incident and of preventing further injury to vulnerable children as a result of their involvement in the criminal process, then the videotape should generally be admitted.*
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> …
>
> 44 I recognize that the *Meddoui* approach to "adoption" gives rise to another problem. Specifically, a witness who cannot remember the events cannot be effectively cross-examined on the contents of his or her statement, and therefore the reliability of his or her testimony cannot be tested in that way. However, it was recognized in *R. v. Khan*, [1990] 2 S.C.R. 531 (S.C.C.) ; *R. v. Smith*, [1992] 2 S.C.R. 915 (S.C.C.) , and *R. v. B. (K.G.)*, [1993] 1 S.C.R. 740 (S.C.C.) , that cross-examination is not the only guarantee of reliability. There are several factors present in s. 715.1 which provide the requisite reliability of the videotaped statement. They include: (a) the requirement that the statement be made within a reasonable

[3] Moreover, even if the statutory requirements are not met, the Crown may rely on the common law exception to the hearsay rule to have the statement admitted in a proper case: *R. v. DM*, 2007 NSCA 80 per Fichaud, JA.

time; (b) the trier of fact can watch the entire interview, which provides an opportunity to observe the demeanor, and assess the personality and intelligence of the child; (c) the requirement that the child attest that she was attempting to be truthful at the time that the statement was made. As well, the child can be cross-examined at trial as to whether he or she was actually being truthful when the statement was made. These *indicia* provide enough guarantees of reliability to compensate for the inability to cross-examine as to the forgotten events. *Moreover, where the complainant has no independent memory of the events there is an obvious necessity for the videotaped evidence. In* Meddoui *, it was recommended that in such circumstances, the trier of fact should be given a special warning (similar to the one given in R. v. Vetrovec, [1982] 1 S.C.R. 811 (S.C.C.)) of the dangers of convicting based on the videotape alone. In my view, this was sage advice that should be followed.*

[My italicization added]

[38] I anticipate that SM will "adopt the contents" of her videotaped statement. In *CCF*, the court considered the proper meaning of "adopt". At its core it requires the witness to state that they recall giving the statement and at the time of its making they intended to be truthful to the best of their then constituted recollection.

[39] Lastly, if the court answers these questions in the affirmative, it must also consider the residual discretion to edit or exclude evidence in part or in whole, when the analysis concludes that the prejudicial effect would operate unfairly to the accused because the videotape does not conform to the rules of evidence or the prejudice from its admission would outweigh its probative value - *CCF* at paras.51-2:

51 The minority reasons of L'Heureux-Dubé J. in *L. (D.O.)* , *supra* , indicate that, prior to the introduction of a videotaped statement under s. 715.1, a *voir dire* must be held in order to review the contents of the tape to ensure that the statements within it conform to the rules of evidence. I agree with this conclusion. Both *L. (D.O.)* and *T. (W.P.)* , *supra* , indicate that, at this stage, the trial judge may exercise his or her discretion to exclude the videotaped

statement if prejudice from its admission would outweigh its probative value. The discretion to exclude the videotape is limited to those cases where its admission would operate unfairly to the accused. Those cases will be relatively rare. (See T. (W.P.) , at p. 32; *R. v. Potvin*, [1989] 1 S.C.R. 525 (S.C.C.) , at p. 548.) L'Heureux-Dubé J. in *L. (D.O.)* , at p. 463, suggests that there are a number of factors which should be taken into account in exercising this discretion:

(a) The form of questions used by any other person appearing in the videotaped statement;
(b) any interest of anyone participating in the making of the statement;

(c) the quality of the video and audio reproduction;

(d) the presence or absence of inadmissible evidence in the statement;

(e) the ability to eliminate inappropriate material by editing the tape;

(f) whether other out-of-court statements by the complainant have been entered;

(g) whether any visual information in the statement might tend to prejudice the accused (for example, unrelated injuries visible on the victim);

(h) whether the prosecution has been allowed to use any other method to facilitate the giving of evidence by the complainant;

(i) whether the trial is one by judge alone or by a jury; and

(j) the amount of time which has passed since the making of the tape and the present ability of the witness to effectively relate to the events described.

52 A consideration of these factors would help to ensure that the contents of the statement generally conform to the rules of evidence and that the statement has probative value. The discretionary power to exclude evidence should not be used to determine issues of weight. In cases *where there is conflicting evidence and opinion as to how useful the videotaped statement may be in providing an honest and complete account of the complainant's story, the statement should be admitted unless the trial judge is satisfied that it could interfere with the truth-finding process*. (See *T. (W.P.)* , at pp. 32-33.)

[My italicization added]

[40] I will list those factors and address the concerns of AMB:

1. the form of questioning - Cst. Murray /Ms. Bass did not make objectionable leading statements/questions - even where arguably they may have done so, I find no sufficient prejudice to exclude any part of the videotape on this basis, when seen in the context of all the circumstances;

2. any personal interest of anyone participating in the making of the statement - neither Cst. Murray nor Ms. Bass have such an interest in SM making the statement;

3. the quality of the audio/video reproduction – it is high quality (as is the CCTV court system which will carry it to the screens for the counsel and judge);

4. the presence or absence of inadmissible evidence in the statement - AMB gave numerous examples of what he considered to be objectionable/inadmissible statements by SM - I have carefully considered each of them but will not recount them all (e.g. at p. 26(11) transcript; pages 47(5)-48(9); 84-5; 87(21)-88(5); and 89(5)-91(4). Largely, AMB characterized them as falling within the following categories: “bad character evidence”; otherwise inadmissible, and irrelevant content. Regarding the “bad character evidence” such as

AMB's abuse of and anger towards his then partner, SM's mother JM, or towards SM and the younger siblings, the evidence is situational, and does not rise to the level of "bad character" given the breakup of a relationship where the parents co-parented three children. If I rule that the entire statement is admissible, I must remain alive to the requirement at trial that the evidence be relevant and not objectionable on a common law policy basis. To the extent that the videotape's evidence is irrelevant or otherwise objectionable, I can and will self-instruct myself to ignore such statements – in present circumstances, this is to be preferred to formally editing the statement which would be cumbersome and leave a disjointed statement;

5. the ability to eliminate inappropriate material by editing the tape - see my comments regarding the preceding factor;
6. whether other out-of-court statements by SM have been entered – there are no other statements by SM;
7. whether there is any visual information on the videotape that might tend to prejudice AMB – there are no such visual images, although at one point SM does point to her inner thigh, while wearing pants, to indicate the area of an injury she experienced as a result of AMB's misconduct;

8. whether the Crown has been allowed to use any other method to facilitate the giving of evidence by SM - there is none other than the accepted opportunity to give *viva voce* evidence - per *R. v. CCF* at para. 45;

9. this is a trial by a judge alone, therefore I can instruct myself as required to counter any residual prejudice apparent in SM's videotaped statement;

10. the amount of time which has passed since the making of the tape (January 2020) and the present ability of the witness to effectively relate to the events described- while the statement was made over two years ago, and if SM is not able to remember well, I am confident that she will, on prompting in cross-examination, be able to respond meaningfully.

[41] I am satisfied that any prejudicial effect upon the fair trial rights of AMB of the admission of the videotaped statement, would not operate unfairly to AMB, and does not outweigh its probative value. Furthermore, I am *not* satisfied that its admission would interfere with the proper administration of justice, including the truth-finding process.

Conclusion as to admissibility

[42] I am satisfied that the entirety of SM's videotaped statement is admissible as evidence.

Rosinski, J.