“An Awkward Couple”: Examining the relationship between vulnerable witnesses and the Canadian criminal justice system

by
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Abstract

This thesis explored strengths and weaknesses surrounding the Canadian criminal justice system (CJS) and vulnerable witnesses. Literature and case studies typically focus on the negative relationship between the courts and witnesses. Though special measures have been introduced and utilized within the adversarial system, the results indicate a gap in efficacy, specifically with vulnerable witnesses. Interviews were conducted with vulnerable witness and stakeholders in the CJS and students were surveyed. Professionals who worked with vulnerable witnesses emphasized their dissatisfaction with the justice process. Fifteen interviews with criminal justice personnel who worked with vulnerable witnesses, and a vulnerable witness, together with a survey of nineteen undergraduate students were conducted. Consistent with previous research, the current study found that more assistance throughout the process is needed. Findings suggest that a better understanding of ‘vulnerability’ may lead to better treatment of vulnerable witnesses and enhance their ability to provide their “best evidence” in court.

Keywords: vulnerable witnesses, Canadian, criminal justice system, special measures
Dedication

To all victims and witnesses,

“This above all, to refuse to be a victim”.

- Margaret Atwood

To my sister,

Your series of unfortunate events gave me the opportunity to experience my love of qualitative research in a completely different way. Thank you for being brave and encouraging me to continue.
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Chapter 1.

Introduction

The Canadian criminal justice system is multifaceted and complex. Efforts to implement safeguards for witnesses in the courtroom were first introduced in Canada in 1988, through special measures (Hurley, 2013). Vulnerable witnesses are entitled to apply for conditions, in order to receive specific aids while testifying in court. These testimonial aids have offered support and protection for vulnerable witnesses during all facets of testimony. The United States and many Western European countries have also celebrated legislative advancements that assist those who are most vulnerable. However, has the adversarial system done enough for vulnerable witnesses? According to Fan (2014), from the University of Washington, School of Law, the adversarial process is a cause of traumatic exposure (p. 786). She adds that the “adversarial process causes severe stress to victims and discourages them from engaging in the criminal justice system at all” (Fan, 2014, p. 786). Many of the most basic judicial practices are associated with harmful and lasting stressors (Fan, 2014, p. 786).

Canada, along with the United States, has made it mandatory for vulnerable witnesses to be offered appropriate testimonial aids.

- Testimonial aids include closed-circuit television (CCTV);
- Witness screens;
- A support person who may be present during the testimony;
- The appointment of a lawyer to conduct cross-examination of a witness when the accused is self-represented.
- Other Criminal Code provisions which assist vulnerable witnesses allow the judge to exclude the public from the courtroom, impose a ban on publication of identifying information, and allow the use of video recorded evidence. (Northcott, 2009, p. 17)

However, they do not seem to be enough. Legal research supports the need for a more user-friendly process. Witnesses have voiced their disappointment regarding the criminal justice process as it creates an overwhelming amount of emotional obstacles. Though
the goal of the adversarial system is to “achieve [the] best evidence,” victims who recount their experiences criticize the hostile environment of the courtroom (Motzkau, 2007, para. 3). In this thesis, I look at the relationship between vulnerable witnesses and the Canadian criminal justice system, mainly focusing on the province of British Columbia (B.C.), on how to assist vulnerable witnesses so they can provide their “best evidence” in court.

1.1. Supports, Law and Aids for Vulnerable Witnesses

Vulnerable witnesses and the law have had a very tumultuous relationship. Historically, vulnerable witnesses who were required to testify in court did not receive additional supports or testimonial aids. However, these witnesses require the most assistance during the criminal justice process. Courtroom anxiety, judicial barriers, and increased fear may cause further trauma. As a result, legislative amendments have been enacted, particularly in North America and Western European countries. These amendments seek to minimize the negativity that plagues the courtroom by offering special measures on a presumptive basis since 2006 (Cooke et al., 2002; Cunningham & Stevens, 2011; Holder, 2013; Luchjenbroers, 2008; Motzkau, 2007).

The definition of vulnerable witnesses was obtained from the The Missing Women Commission of Inquiry. Vulnerable witnesses are defined as:

Those who, because of their personal characteristics, may have difficulty testifying in a regular adversarial trial process. (Belak, 2012)

The latter part of the twentieth century encouraged dialogue and change toward the treatment of vulnerable witnesses in the courtroom. Article 12 of the UN Convention of Children’s Rights (1989) establishes “unequivocally that children need to be given a voice in legal proceedings concerning them and that their statements need to be given due weight” (Motzkau, 2007, para. 7). Article 12 further articulates that:

The impact of testifying in court is a very traumatic experience, particularly for child witnesses. As the number of cases involving children has increased dramatically over the last few decades, efforts to increase supports and safeguards are paramount (Holder, 2013, p. 1158-1160). Both federal and state legislation “acknowledge the unique position of child witnesses and implement protective measures” to ensure those who are vulnerable are less likely to be negatively affected. (Holder, 2013, p. 1160)
The adversarial process involves two advocates who represent two parties. The advocates must present their evidence and facts to an impartial judge, which may aggravate witnesses in the manner in which it is delivered. This process involves “aggressive argument, selective presentation of the facts, and psychological attack” (Fan, 2014, p. 785). The courts, lawmakers, and legal representatives must be mindful of the trauma of testifying in court and create a more accommodating and less adversarial atmosphere.

1.1.1. Criminal Justice Personnel: Roles for Supporting Vulnerable Witnesses

The focus of my thesis is on supporting vulnerable witnesses through the criminal justice system. I set out to explore the justice process by including the experiences of criminal justice personnel such as victim services (police and court-based), police officers, crown counsel, defence counsel, and a judge. Community-based services also exist but were not included in this thesis. The experiences of the criminal justice process personnel working with and assisting vulnerable witnesses is grounded in British Columbia, Canada, which is the framework that will be utilized.

The roles between each criminal justice group within the justice system is unique. Victim services provide support and empower victims and witnesses during criminal justice process (Department of Justice, 2005). There is considerable support offered to victims and witnesses during police and crown interviews. During court, vulnerable witnesses can request a support person, in the form of a victim services worker, be present for their testimony. Victim services, both police-based and court-based, offer a myriad of services to victims and witnesses, which cater to their specific needs. For the purposes of my thesis, experiences from police-based and court-based victim services caseworkers will be discussed.

Generally, police officers are the first point of contact for victims and witnesses going through the criminal justice system. Police are responsible for “taking statement[s], conducting an investigation aimed at collecting evidence, and if appropriate, forwarding the charge to prosecution services for evaluation and possible approval” (Missing Women Commission of Inquiry, 2012, p. 10). The role of police is integral to the
investigation and court processes and greatly influence the journey of vulnerable witnesses (Missing Women Commission of Inquiry, 2012).

Crown counsel has a significant role to ensure that all vulnerable witnesses have an equal opportunity to participate effectively in the criminal justice system. Further, Crown must take into account factors that may diminish a vulnerable witness’s ability to testify in court if accommodations or additional supports are not offered (Criminal Justice Branch, Ministry of Justice, 2015). Once vulnerabilities are identified (or communicated to Crown by the police or other agencies) Crown should discuss testimonial aids with victims and/or witnesses. By taking into account all the relevant factors, Crown makes an application to a judge requesting testimonial accommodations for the vulnerable witness. Ideally discussions pertaining to testimonial aids should be made early to give judges enough time to approve or deny a request.

1.1.2. Testimonial Aids

It is imperative that distinctions be made between testimonial aids for children, those for vulnerable adults (e.g., adults with a disability) and those for other vulnerable witnesses. Assistance for children through the use of testimonial aids is broad, widely used, and has a long history. Unfortunately, the opposite is true for vulnerable adults. In most studies, victims are also considered witnesses and no distinction is made between them. However, it is likely that the experiences of a victim who is testifying as a witness to their own victimization, will have a different perspective from a witness in the traditional sense, who actively saw or heard a crime take place but was not personally victimized. This thesis will also consider the two terms interchangeably.

Amendments to the Criminal Code and Canada Evidence Act by Bill C-2 (2006), facilitated change toward the use of testimonial aids for cases involving children and vulnerable adults (Bala et al., 2010). The Canadian government has recognized the importance of accommodating child witnesses and treating them differently than adults when they testify in court. Presumptive provisions for children and for adults with a mental/physical disability allows for a support person (s. 486.1 for children; s. 486.1(1) applicable for adult witnesses suffering from a mental/physical disability) and use of a screen or closed-circuit television (s. 486.2(1) for children; s. 486.2(2) to be used by adult witnesses) (Bala et al., 2010; Bala et al., 2001).
According to Bala et al. (2010) provisions pertaining to vulnerable adult witnesses have very limited case law in Canada. Additionally, few applications have been made for the use of testimonial aids for adults and are less likely to be approved when compared to applications made by children (Bala et al., 2010).

1.2. Legal and Policy Framework: Canadian Setting

Since 1988, various amendments have been made to the Criminal Code of Canada and Canada Evidence Act, to recognize the needs of vulnerable witnesses (Department of Justice, 2016). Testimonial aid provisions in the Criminal Code include section 486.1 allows for a support person to be present and section 486.2 allows for testimony of a witness to take place outside the courtroom or behind a screen. Canada’s Bill C-2 (2005), An Act to Amend the Criminal Code (Protection of Children and Other Vulnerable Persons) expanded upon the current legislation and make alternative measures more accessible for vulnerable witnesses (Law Commission of Canada, 2015; Holder, 2013, p. 1160). These alternative measures are offered specifically to those who are deemed to be the most vulnerable and include the following with respect to Canada:

The 2006 amendments made testimonial aids available for all victims and witnesses under the age of eighteen years and adult witnesses with a mental or physical disability upon application unless they would interfere with the proper administration of justice (“presumptive” orders). The 2006 amendments also made these testimonial aids available to other vulnerable adult witnesses on a discretionary basis if the judge believes they are necessary to obtain a full and candid account from the witness. When deciding whether to order a testimonial aid for an adult witness, the judge will take into account factors such as the nature of the offence, and the nature of the relationship between the witness and the accused. (Ainslie, 2013, p. 1)

On July 23, 2015 amendments were made to the Criminal Code to enact the Canadian Victims Bill of Rights. The amendments made, which are of interest to this study include:

- To align the definition of “victim” with the definition of “victim” in the Canadian Victims Bill of Rights;
- Make testimonial aids more accessible to vulnerable witnesses;
- Acknowledgment of the harm done to victims and to the community is a sentencing objective. (Justice Laws, 2018)

Applications made for witnesses who require testimonial aid in order to communicate their testimony effectively, can receive presumptive or discretionary applications (Department of Justice, 2016). Presumptive applications are for witnesses
who have a mental or physical disability and have difficulties providing a full account of their evidence. Discretionary applications are for adult witnesses who require testimonial aid to assist with their testimony (Department of Justice, 2016). Applications for testimonial aids are made by Crown, who must establish that the witness has challenges testifying in court. Often, applications are not brought forward until the first day of trial, which can cause anxiety for vulnerable witnesses. The judge or justice must take into account, “the nature of the offence, the nature of the relationship between the witness and the accused, whether the witness has a mental or physical disability, and any other circumstances that is deemed relevant” (Hurley, 2013, p. 5). Furthermore, the judge or justice must be of the opinion that an application is “necessary to obtain a full and candid account from the witness”, therefore presumptive applications are often more successful (Hurley, 2013, p. 5).

1.2.1. International Context for Victims’ Rights

The UN Declaration on the Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) is a key international document that has shaped the context for victims’ rights/involvement in the criminal justice system throughout the Western World. This document is the most influential and significant international documents for the treatment of victims in Canada. Additionally, the document formed the impetus for Canada’s approach to victims’ rights and testimonial accommodations.

The United Kingdom, more specifically England and Wales, has implemented special measures, which parallel North American legislative practices for vulnerable witnesses (Motzkau, 2007; Luchjenbroers, 2008; Cooke et al., 2002). The Code of Conduct of the Bar of England and Wales (1991) states that barristers must be aware of their language and questioning techniques when communicating with a witness (Ellison, 2001, p. 371). This Code discourages questions that are “scandalous, intended, or calculated only to vilify, insult or annoy” a witness while delivering testimony in a courtroom (Ellison, 2001, p. 371). The Youth Justice and Criminal Evidence Act (1999) provides additional supports for vulnerable witnesses. The Act lists special measures designed to assist a variety of witnesses who are deemed to be vulnerable, including: “young, disabled, vulnerable or intimidated” (Kebbell et al., 2007, p. 113). Similar to the practices in Canada, United States, England and Wales offer special measures that
provide witnesses with meaningful assistance during what can be an extremely troubling experience.

Many countries have adopted provisions that promote more support and security for vulnerable witnesses. The New Zealand Law Commission recently made recommendations expanding the legislation to encompass “restrictions on the ‘unfair’ questioning of witnesses in court” (Ellison, 2001, p. 369). The recommendation responds to research that suggests judges shy away from intervening while witnesses are being examined (Ellison, 2001, p. 369). In addition, the Queensland Law Commission in Australia implemented legislation that parallels the proposals offered by New Zealand. Section 85 of the proposed Evidence Code enables trial judges to have more judicial power when a vulnerable witness is questioned (Ellison, 2001, p. 369). Ellison (2001) details when a judge can intervene and restrict questioning:

The judge may disallow any questions that he or she considers intimidating, improper, unfair, misleading, needlessly repetitive or expressed in language that is too complicated for the witness to understand. In deciding whether to disallow questions, the trial judge may take into account the age or maturity of the witness, any physical, intellectual or psychiatric disability, the linguistic or cultural background of the witness and the nature of the proceedings. (p. 369)

Although efforts in legislative reform pertaining to vulnerable witnesses are applauded, legislation must strike the right balance for both the defendant and witnesses.

1.3. Aim of Study

This thesis first outlines the challenges faced by vulnerable witnesses while testifying in a courtroom. Participants from various fields in the criminal justice system were interviewed and provided meaningful and insightful information on vulnerable witnesses going through the judicial process. The participants were from a myriad of backgrounds, including lawyers (Crown and defence), judge, victim, victim service workers, researchers specializing with vulnerable witnesses, police officers, and policy writers. The use of courthouse dogs, the first of its kind of program in British Columbia (more commonly used in the United States), along with the importance of utilizing intermediaries showcase improvements toward offering special measures and highlight the need to incorporate other tailored accommodations to support vulnerable witness’s
experiences. The aim was to make recommendations where the Canadian criminal justice system can improve on assisting vulnerable witnesses to provide their ‘best evidence’ in court.

1.4. Thesis Organization

Chapter 1 introduces the relationship between vulnerable witnesses and the Canadian criminal justice system. The term ‘vulnerable witness’ was defined to provide context and explain how a victim may qualify as ‘vulnerable’ as outlined in the Criminal Code of Canada.

Chapter 2 begins with a discussion of the difficulties associated with vulnerable witnesses taking part in the criminal justice system. Research conducted in other countries details negative associations with the justice process including anxiety, stress, and trauma. Canadian literature is scarce. The majority of the literature pertaining to vulnerable witnesses is from sources in the United States and United Kingdom.

Chapter 3 details the methods used to conduct the research. Fifteen participants from various roles within the criminal justice system were interviewed. Undergraduate students currently enrolled at Simon Fraser University answered questions in an online survey. This chapter discusses the transcription process, coding using NVivo, along with the emerging themes. Finally, ethical considerations and the importance of conducting authentic research are explained.

Chapter 4 explores five themes that emerged from the data. The first theme presents the expectations versus reality, the negative experiences of a vulnerable witness through the Canadian criminal justice system. Next, a lack of agreement in defining vulnerability is addressed. The third theme touches upon how experts don’t always get it right in terms of identifying vulnerability. The fourth theme looks at enhancing access to justice by discussing special measures and intermediary support for vulnerable witnesses while testifying in court. The final theme examines the imperfections of the Canadian criminal justice system.

Chapter 5 provides a more detailed discussion of the themes. The literature outlines the importance of building trusting and meaningful relationships between vulnerable witnesses and criminal justice personnel. The role of intermediaries assisting
vulnerable witnesses with communication (during interviews and in court) is discussed. The *Canadian Victims Bill of Rights* (2015) is examined in terms of leaving the door open for additional special measures to be used in the courtroom.

Chapter 6 provides concluding remarks regarding the research. Offering recommendations about the use of courthouse facility dogs and the implementation of a national communication tool as a resource are explored. The limitations of the research highlight the need for future research in areas of policy, special measures and program funding. I also note the need to assist vulnerable witnesses throughout the criminal justice process to ensure that they are prepared with the necessary skills to provide their ‘best evidence’ at all times.
Chapter 2.

Literature Review

The adversarial system is a challenging process, which, more often than not, causes witnesses to experience severe stress, anxiety, and trauma (Fan, 2014). The term ‘trauma exposure’ is included in the most current edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR). Cunningham and Stevens (2011) define ‘trauma exposure’ as a two-part event when an individual can experience the trauma and continue to have an adverse reaction to the trauma (p. 16). In addition, they note an individual may also experience ‘complex trauma’, referred to as trauma that is “chronic or repetitive and which has a pervasive negative impact” (p. 16). Once an individual has been subjected to trauma, one may continue to re-live the experience through ‘triggers’ (e.g., sound, smell, sight) (Cunningham & Stevens, 2011, p. 16). The criminal justice system is often seen as causing further trauma to victims and witnesses (Cunningham & Stevens, 2011). As all traumatic experiences are individualized, it is imperative that vulnerable witnesses are supported to protect them from re-victimization.

Testifying in a courtroom can be a very frightening experience and the criminal justice system is not a user-friendly process. In a study in Zambia, many vulnerable witnesses were found to be negatively impacted by numerous facets of the trial process (Mwewa et al., 2015, p. 20). Eastwood and Patton (2002) found that “victims would not recommend others ‘go through the same hell’ as it was not worth it” (as cited in Mwewa et al., 2015, p. 20). Many other studies in other countries echo similar findings based on interviews with witnesses who have voiced their disappointment with the overall system (Dodge & Pankey, 2003; Mwewa et al., 2015; Nathanson & Saywitz, 2003; Zajac & Gross 2003; Schetky & Green, 2014; Sternberg et al., 2001). A survey utilizing mixed-methods (2015) showcased the overwhelming majority of victim’s fear, unhappiness, and anxiety with the justice system (Mwewa et al., 2015, p. 17-18). The results from the survey and semi-structured interviews highlight the following:

90% of victims were anxious in court while […] 92% described court set up as unfriendly…[Another] 80% stated they were not aware of what was happening in court neither were they familiar with the terminology used. Only 13% of victims were able to follow proceedings while 13% were not and the remaining 50% were lost while […] 80% had no one to explain the
meaning of legal terms used or why things were done in a particular way during proceedings. (Mwewa et al., 2015, pp. 20-21 & 25)

These findings suggest a breakdown within the criminal justice system. The environment of the courtroom, the legal representation (lawyers, judges), along with fear of the unknown, ultimately threaten the quality of the adversarial system. Victims and witnesses are unable to speak their truth given the overwhelming number of obstacles placed before them at every stage of the process. Muller et al. (2004) argue that “justice cannot prevail in an atmosphere” that is currently plaguing the courts (as cited in Mwewa et al., 2015, p. 20). The criminal justice system is generally unnerving for all witnesses but particularly traumatic and challenging for vulnerable witnesses. At each stage of the process, vulnerable witnesses experience various risk factors that prevent victims and witnesses from reporting, communicating, and participating in the justice process. Unfortunately, the disengagement from the onset creates feelings of frustration and intimidation which further inhibits vulnerable witnesses from coming forward and sharing important details.

2.1. “Complex and Intensive Process”

Every time he [defence barrister] said something to me I had to agree. He got me where he wanted me. The reason I agreed with everything he said was because I didn’t understand what he was saying, which was all making me worse. (Ellison, 2001, p. 357)

The criminal justice process is a complex system. The foundation of this system is adult-centred, which is “biased toward male, white, educated, middle-class people, and the language and culture of [this] process at every stage [is] reflected [in] this bias” (Luchjenbroers, 2008, p. 191). For those who do not fit this bias, the environment becomes challenging and unwelcoming. Nonetheless, vulnerable persons (children, disabled, seniors) may find the court system exceptionally difficult to manoeuvre, as the legal jargon and confrontational atmosphere create a disadvantage. Ellison (2001) from the University of Reading, in the UK, addressed various concerns surrounding vulnerable witnesses in the courtroom and its negative impacts (Ellison, 2001). She stated the following:

There are [witnesses] who do have the verbal skills, who do have clear sustainable and substantial stories to tell but whose sense of self and command of the language is not able to negotiate the rigours of cross-
examination. The extant procedures are not ones which focus on the establishment of truth but rather on the assertion of power...the power to confuse. (Ellison, 2001, p. 356)

The trial process is very complex and intensive. The legal jargon, courthouse customs, and other formalities creates an uncomfortable and intimidating environment (Ellison, 2001). Vulnerable witnesses, specifically children, who play a significant role in the trial must overcome various challenges in order to perform as a witness. The author stated that the current UK system fails to offer vulnerable witnesses the chance to feel supported as they try to understand and digest the emotionally-draining atmosphere (Ellison, 2001).

Research conducted in England and Wales suggests that the “linguistic complexity of courtroom questioning adversely affects the ability of child witnesses to communicate effectively in court and diminishes the accuracy of their oral evidence” (Ellison, 2001, p. 354). Despite the chronological age of witnesses, those deemed vulnerable may find it challenging to articulate their answers to questions while feeling stressed and anxious. Zajac and Hayne (2006) found “multiple part questions [were] difficult to answer […] due to the difficult language, use of negatives, double negatives and lack of professional training in appropriate questioning techniques” (as cited in Mwewa et al., 2015, p. 21). For vulnerable witnesses, courtroom questioning is embarrassing, demoralizing, and uncomfortable. Those who are anxious and fearful may not be able to systematically analyze or be mindful of the tactics often utilized by defence lawyers (Evans & Lyon, 2012). Psychological research asserts that all “witnesses are undeservedly discredited by this tactic, as an inability to recall peripheral detail does not necessarily imply inaccurate or incomplete recall of significant salient information” (Ellison, 2001, p. 361). Research highlights the ineffective nature of current questioning techniques that fail to accommodate vulnerable witnesses by further hindering their ability to communicate their story.

Empirical research suggests that witnesses are most dissatisfied with trial preparation time and the lack of contact they have with Crown counsel lawyers (Ellison, 2007). Research conducted in five different countries affirmed witness’s frustrations by stating that witnesses would appreciate receiving more information and guidance from a prosecutor (Ellison, 2007). According to Konradi (1996), “pre-trial preparation may have an important bearing on complainants' willingness to participate in the prosecution
process” (as cited in Ellison, 2007, pp. 178-179). One’s perceived journey through the criminal justice system is significantly related to the quality of time spent with Crown (Ellison, 2007). Konradi (1996, as cited in Ellison, 2007) explained his findings in regard to the importance of creating a working commitment with both Crown counsel and vulnerable witnesses. He stated:

When prosecutors initiated and maintained contact with complainants this was seen to reflect a serious commitment to the case. Prosecutor’s investment implied ‘team membership’ and this, in turn, enhanced complainants’ confidence and, importantly, their willingness to testify at the trial. In contrast, a lack of contact by prosecutor was interpreted negatively by complainants. Without some affirmation that the prosecutor was invested in their case, they assumed that she or he was not. This led survivors to question the fairness of the justice system and contributed to their general reticence to be part of the trial process. (as cited in Ellison, 2007, p. 179)

Vulnerable witnesses are able to focus on the matters that most concern them, serving as a real benefit, pre and post-trial. During this process, witnesses may relieve their stressors and anxieties and establish a clear understanding of the court system. The utility of providing vulnerable witnesses with the chance to receive personalized preparation encourages positive growth and overall satisfaction.

2.2. Victim’s Views of the System

Unfortunately, difficulties and weaknesses with the justice system dominate the literature. Vulnerable victims recount their experiences in the courtroom as one that is complex, full of judgement, and trauma. Vulnerable witnesses believe their voices are silenced (Cooke et al., 2002; Edwards, 2013; Ellison, 2001; Ellison, 2007; Fan, 2014; Holder, 2013; Kebbell et al., 2007; Luchjenbroers, 2008; Stygall, 2001). Research suggests that the nature of giving evidence along with re-living the trauma of an incident is damaging for vulnerable witnesses (Ellison, 2007, p. 383). According to Michele Burman (2009) from the University of Glasgow “the trial is not an arena in which a victim can recount her experiences in her own way; rather she answers questions which are put to her, by both prosecution and defence (p. 383). A trial can be characterized as a one-sided process with interests in discrediting and humiliating a witness.

Vulnerable witnesses who have negative views of the criminal justice system state they have “their credibility judged, tested, and challenged” (Fan, 2014, p. 788).
Particularly during cross-examination, defence counsel utilizes legal verbiage and confrontational tactics to subject vulnerable witnesses to high levels of anxiety (Cooke et al., 2002; Kebbell et al., 2007). In addition, defence lawyers have unrealistic expectations of witnesses, as they seek precise and concise answers while under pressure. As the trial process is “constructed entirely through linguistic performances of various kinds, both spoken and written,” many witnesses are limited and feel unable to contribute in the format demanded of them (Luchjenbroers, 2008, p. 191). Defence lawyers have admitted to using techniques in cross-examination to “weaken or destroy evidence” when questioning witnesses (Ellison, 2007, p. 176).

Many witnesses who are required to testify in court feel a sense of judgement (Fan, 2014). Expectations are placed upon witnesses to convey their story, their memories, and their traumas. The majority of witnesses report negative experiences when testifying. Research suggests that witnesses find defence counsel’s approach to questioning them the most challenging and traumatic component of the criminal justice process. Burman (2009) speaks to defence lawyers’ strategies when questioning vulnerable witnesses:

Questioning strategies employed by defence counsel to discredit the complainant have been identified as ‘oppressive and invidious’ (Temkin, 2002). Tactics include asking the same question again and again in an increasing louder voice, with little opportunity for the complainant to answer (Kebbell et al., 2003); the use of a hostile tone; calling the complainant a ‘liar’ and a ‘time-waster’ and suggesting that the allegation was false. (p. 384)

Limited research has been conducted on the effects of courtroom examination and questioning styles. However, the questioning techniques utilized by defence lawyers cause significant anxiety and stress for their witnesses as they feel their “credibility and character” attacked (Burman, 2009, p. 384). This detail is a concern. According to Burman (2009) a combination of tactics (leading questions, face-to-face contact, and confrontational approaches) significantly affected witness accuracy is significantly affected. According to Kebbell et al. (2007), defence lawyers specifically “ask questions that stump a witness – make them appear to have no memory of the events – make them feel nervous and embarrassed, [and] reduce their confidence” (p. 112). This approach subjects all witnesses to behaviour that is further traumatizing, but can be even more disturbing for vulnerable witnesses.
2.3. Trauma

Testifying requires victims to re-live their experiences and talk about them with strangers in very intimate ways. Many have deemed the process to be distressing, embarrassing, and intimidating (Burman 2009; Ellison, 2007; Edwards, 2013; Holder, 2013). Vulnerable witnesses have categorized the criminal justice system as a form of secondary victimization (Burman, 2009; Orth, 2002). In 2009, Ann Robertson ran away from inside Edinburgh High Court in an attempt to escape the trial process. Burman (2009) details the events of Ms. Robertson’s escape and punishment and explained that she felt,

[…] so distressed that she tried to flee the court room, but because, as a result of her actions, she was brought back to court, remanded by the trial judge, and subsequently arrested by police. She was then taken from the court to the police cells and detained there overnight for failing to deliver her evidence. (p. 379)

The criminal justice process is a stressful event that leaves people with feelings of powerlessness (Burman, 2009, p. 383). Witnesses are subjected to multiple rounds of interviews (both from police officers and lawyers) and are expected to remember specific details of the incident. According to Mwewa and her colleagues (2015), “[witnesses’] memories do not remain static and are affected every time the event is discussed” (Mwewa et al., 2015, p. 23). In addition, the trauma of testifying in the courtroom occurs when one is surrounded by strangers, who are making judgements and examining one’s credibility (Mwewa et al., 2015, p. 24). The fear of being in an unfamiliar setting amongst unfamiliar people is not only traumatic for the witness but can be very damaging to the overall trial (Holder, 2013, p. 1159). The Canadian criminal justice system fails to offer safeguards for vulnerable witnesses who are affected every time they must speak in detail about their case.

This chapter explored the experiences shared by victims and witnesses during the justice process. However, vulnerable witnesses emerge as a group of victims and witnesses that require more specialized assistance to maneuver through the criminal justice system. Vulnerable witnesses have specific needs, unique to each individual, which require attention and ongoing support. In Chapter 3 I discuss the methods used during the research process and discussions surrounding my research decisions. My main research question looks at how we can ensure vulnerable witnesses are able to
provide their best evidence in court, while also determining the best methods to avoid retraumatizing witnesses and promoting satisfaction. Collectively, fifteen interviewees and nineteen undergraduate students who voluntarily participated in an online survey, shared their feelings and experiences with vulnerable witnesses while mainly focusing on British Columbia’s as a setting for their responses.
Chapter 3.

Methods

3.1. Research Questions

The research questions reflect my initial areas of interest and curiosity regarding vulnerable witnesses in the Canadian criminal justice system. My decision to focus on ensuring that vulnerable witnesses are able to provide their ‘best evidence’ in court materialized as a result of a gap in the judicial system pertaining to witnesses. ‘Best evidence’ refers to the ability of vulnerable witnesses to provide a full and candid account of their testimony in court.

My primary research question is: how do we ensure that vulnerable witnesses are able to provide their ‘best evidence’ (in other words, a full and candid account) in court while ensuring that all participating parties are subject to a fair and impartial trial process?

Secondary research questions include:

How is vulnerability defined?

What is the court’s role / responsibility for vulnerable witnesses?

What can British Columbia’s court system do better to assist vulnerable witnesses?

Qualitative data were gathered using two methods: in depth interviews with major stakeholders in the criminal justice system and online surveys of undergraduate students, in order to gain a broader understanding of the issues surrounding vulnerable witnesses in the criminal justice system.

3.2. Interviews

Past research has shown that, in general, witnesses are dissatisfied with the system and feel belittled and traumatized by their experiences. The aim of the interviews
was to elucidate the experiences and perceptions of professionals who work commonly with vulnerable witnesses. As well, one vulnerable witness was included, at her request. The participants came from a variety of backgrounds within the criminal justice system. The following list provides background information on each participant. The first part of the research involved interviewing key stakeholders in the criminal justice system. My sample was purposive as some of the participants were known to me, others were located through research and others in a snowball sample.

3.2.1. Participant Sample

1. Senior Crown counsel Winston Sayson, Q.C. Mr. Sayson has been a prosecutor for 29 years and is very involved with victims of crime and their families. I know Mr. Sayson personally.

2. Delta Police Victim Services Coordinator (police-based), Kim Gramlich. Ms. Gramlich has been the coordinator of the Victim Services program for over 10 years and working in the field for 17 years. She is an advocate for victims of crime and trauma. I know Ms. Gramlich personally.

3. Victim Services worker (court-based), Sam (pseudonym provided by researcher). Sam has approximately 5 years’ experience with Victim Services. Ms. Gramlich introduced me to a gatekeeper who provided my contact information to Sam.

4. Victim Services worker (court-based), Aaron (pseudonym provided by researcher). Aaron has approximately 2 years’ experience with Victim Services. Ms. Gramlich introduced me to a gatekeeper who provided my contact information to Aaron.

5. Victim Services worker (court-based), Rene (pseudonym provided by researcher). Rene has approximately 15 years’ experience with Victim Services. Ms. Gramlich introduced me to a gatekeeper who provided my contact information to Rene.

6. Police Victim Services of British Columbia Executive Director (police-based), Carolyn Sinclair. Carolyn has worked in the Victim Services field for over 22 years. She is an advocate for victims of crime and trauma. Ms. Sinclair is personally known to me.

7. Defence Counsel, Chris Johnson Q.C. Mr. Johnson has experience working for both Crown counsel and defence counsel. A gatekeeper provided my contact information to Mr. Johnson.

8. Defence Counsel, Michael Klein Q.C. Lawyer for 29 years. Mr. Johnson introduced me to Mr. Klein.
9. Judge, Judge G, (pseudonym provided by researcher) has been a judge for over 10 years. A gatekeeper provided my contact information to Judge G.

10. Victim, Sarah Shinn\(^1\) is a sexual assault survivor who spends her spare time educating and sharing her personal story with professionals on what the criminal justice process is like for a vulnerable witness. A gatekeeper provided my contact information to Sarah.

11. Dame Joyce Plotnikoff has a law degree from Bristol University. She was the Attorney Advisor in the Administrative Office of the US Courts, Washington D.C. She returned to Britain in 1983 where she worked for the Home Office. In 1991, Dame Plotnikoff formed a partnership with Richard Woolfson to undertake research and consultancy assignments on behalf of the government departments involved in the operation of the legal system. I contacted Dame Plotnikoff personally.

12. Communication Disabilities Access Canada, Executive Director, Barbara Collier. Since 2001 Ms. Collier has developed and managed projects relating to human rights, communication access, and improved quality of living for people with speech and language disabilities. Dame Plotnikoff introduced me to Ms. Collier.

13. Municipal Police Officer, Cst. M (pseudonym provided by researcher) with over five years experience as a police officer. Cst. M is personally known to me.

14. Municipal Police Officer, Cst. K (pseudonym provided by researcher). Over five years experience as a police officer. Cst. K is personally known to me.

15. Municipal Police Officer, Cst. D (pseudonym provided by researcher). Over five years experience as a police officer. Cst. D is personally known to me.

### 3.2.2. Interview Questions

The full list of questions presented to participants is found in Appendix A. The interview questions were broken into five different categories touching upon vulnerable witnesses, Canadian criminal justice system, special measures, courts, and players in the courtroom. I started the interview by asking an open-ended question, “as my main area of interest focuses on vulnerable witnesses, I am leaving this open. Where would you like to start?”

\(^1\) Sarah is the real name of the victim. She was given the option of using a pseudonym but she declined, as she felt empowered to use her real name. This decision was discussed carefully and sensitively with Sarah.
3.3. Online Survey

The second part of the research involved surveying undergraduate students. The survey was administered online to students completing their undergraduate degree at Simon Fraser University and affiliated with either the School of Criminology or the Department of Biological Sciences. Nineteen students volunteered to take part in the study. The survey was anonymous. The online survey was created using FluidSurveys®, which was at the time of this study, licensed by Simon Fraser University and available to students with an active SFU Computing ID. Administrators in the school of criminology and department of biology at SFU were contacted and agreed to send out the study invitation, study details, and link to the survey on my behalf. The survey was conducted in order to learn, about the student’s overall knowledge and experience within the Canadian criminal justice system. In particular, to learn whether any had participated in the criminal justice system in any way, and whether they were offered testimonial aids. As well, I surveyed students as educated members of the public to see whether they, as representatives of the general public, were aware of or had strong opinions about the use of testimonial aids. A copy of the online survey is found in Appendix B.

In total, ten students experienced the criminal justice system once, followed by six students who had contact with the justice system two or more times and finally three students with no experience. Those who had contact with the justice system two or more times provided neutral responses to their overall criminal justice experience. Fifteen students noted their place of birth as Canada. The remaining four students were born in Pakistan, Romania, Malaysia, and Singapore. Of the students born in different countries, the male born in Singapore, who experienced the justice system as an offender, indicated a positive experience with the overall criminal justice process. The average age of the nineteen students was 22.5 years old with the oldest 34 years old and the youngest 18 years old.

3.4. Coding and Analysis

Interviews were audio recorded using a Sony (mp3) digital recorder. The information was uploaded on my password protected laptop and then transferred to a password protected flash drive. Using the digital recorder, I listened to every interview and transcribed them. The audio files on my digital recorder are stored in a locked
cabinet in a secure location. The recordings were destroyed once transcripts were verified and anonymized, when necessary.

Transcripts were then uploaded to NVivo 11®. This software program assists with thematic analyses allowing the researcher to electronically code the data. I created nodes based on themes that emerged from the data. Selecting content from the interview, I dragged the material into existing nodes. I displayed each node in ‘detail view’ so I could review the content, ensuring the data offered support for the given theme. The online survey was coded by hand since the response rate was low. I looked for keywords among the student responses and used coloured highlighters to identify reoccurring themes.

As my analysis evolved, NVivo offered flexible research techniques that catered to various changes made while exploring the data. Many new ideas emerged which shifted the outline and structure of the thesis. Once I was satisfied with each theme and accompanying data, I re-analyzed the material using only coloured pens and paper. This process was valuable as it allowed me to tangibly assess my decisions, promptly organize (and re-organize) themes, and consolidate any miscellaneous data.

An iterative process was utilized to confirm the robustness of the final product. Time was spent carefully selecting quotes that best represented the voices of the participants. I found myself going back many times checking over my coding and re-coding to enhance the quality of the themes. My decisions were greatly influenced by my memo-writing, as a way to track my decisions and thoughts and hold me accountable throughout the project.

### 3.5. Ethics

This study was approved by the Office of Research Ethics on February 20th, 2017 and deemed minimal risk. As I continued to conduct research, I had the opportunity to interview a victim, who was willing to participate in this research. I received amended approval from the Office of Research Ethics on March 3rd, 2017.

In an effort to safeguard my participants, I introduced the principles of informed consent (Appendix C) at the beginning of every interview. An information sheet was provided to the participants (hardcopy or emailed attachment) at the very beginning of
the interview. Each participant provided verbal consent to participate in the study. For those participants whose real names were used, the Wigmore Criteria were discussed so that they clearly understood that they were waiving privilege. Participation in this study was entirely voluntary, and participation could be withdrawn at any time, without consequence.

I was mindful that participants and students completing the online survey may encounter a question that they did not feel comfortable answering or that triggered a traumatic memory. The following disclaimer was provided to interviewees and SFU students: If anything has upset you in this survey or at any time during an interview (or if someone you know has been involved in the criminal justice system), you can contact SFU Health and Counselling for support.2 Participants had the right to refuse or withdraw their participation at any point. If the participant later decided not to take part, they could choose to withdraw from the study without giving a reason and without any negative impact. Participation in the online survey was entirely voluntary. By submitting the online survey, the students consented to participate in this research study and were unable to withdraw their comments once submitted because the data were collected anonymously and it was not possible to link surveys to individuals.

3.5.1. Management Approval

Before conducting interviews with my participants, I received approval from the management teams for each participant, when applicable. As per policy, Crown counsel Winston Sayson and all three victim service workers (Rene, Aaron, and Sam) were required to receive approval from their managers, before participating in the interview. Crown counsel management were interested in receiving a copy of the study details and the types of questions that would be asked of their staff members. Similarly, management from victim services requested a copy of the study details and interview questions. Using pseudonyms for those participants, they were each given the opportunity to choose their names, otherwise a name was chosen for them on their behalf. The remaining participants requested that their real names be used in the thesis.

2 The following website http://www.sfu.ca/students/health.html was provided to students who were taking part in the online survey.
3.6. Authentic and Credible Research

The use of qualitative approaches to exploring in-depth data with regard to the human experience is valuable. Certain standards must be followed when conducting qualitative research. Guba (1981) explains the importance of research having “‘truth value,’ ‘applicability,’ ‘consistency,’ and ‘neutrality’ in order to be considered worthwhile (pp. 79-80).” Authentic and credible research also extends to the researcher. Researchers must utilize characteristics in their own research to showcase their ability to conduct meaningful and quality work. “Active involvement” from the researcher is required to ensure that future researchers can relate to the work that has been done and feels confident in the way that the data are presented (Long & Johnson, 2000, p. 30).

In preparation for this thesis, I relied on Rose’s (2016) work because she researches vulnerable populations using a human-centered approach that focused on the “needs, contexts, and desires” of those who are affected by the policies and decision-makings of others (p. 428). My work focused primarily on professionals working with vulnerable witnesses but Rose’s work is still pertinent. My research took many twists and turns due in part to the level of detail from each participant and transformation of the analysis over time. Throughout this process I have practiced ongoing self-reflexivity by assessing my own biases and motivations for conducting this research. As a child, I was a vulnerable witness falling between the gaps of the criminal justice system. Special measures were not offered to me though I felt vulnerable, in many ways. I found that the reflexive process was paramount to managing my own thoughts and feelings, especially when analyzing the data. It was important that I was careful to ensure that I kept an open-mind and honoured the voices of my interviewees. As I had identified a problem based on my own experiences, my goal was to conduct my analysis, acknowledge my own tensions with the topic, and focused on the experiences and feelings of the participants.

To establish a level of rapport and trust with each interview participant, I sent them information in advance of the interview to ensure they could familiarize themselves with the topic and have the opportunity to ask clarifying questions for areas that may be unclear. I kept detailed notes in my research journal and while I was conducting interviews in the field. In addition, all interviews were typed-out and re-checked for any errors. This process instilled confidence in the representation of each participant.
My research focusing on vulnerable witnesses is relevant, timely, and significant. The research is marked by rich, thick description from participants providing their own knowledge and experiences. One of the best ways to achieve credibility is through the use of descriptive words, which allows the reader to read information from the participants in detail and draw their own conclusions on the material (Tracy, 2010). As all research has an “agenda” it is important to showcase sincerity in your work (p. 846). Sincerity includes discussing biases, subjective values, and being transparent about challenges along the way (Tracy, 2010). Acknowledging biases, checking them, and being honest through the research process was imperative to this study.

In the next chapter, I discuss the results from the interviews and online survey. Five emerging themes depict the negative experiences of vulnerable witnesses, the lack of agreement in defining vulnerability, that experts don’t always get it right, enhancing access to justice for vulnerable witnesses, and finally, looking to see if the justice system is truly a just system. Through these results I delve into experiences many interviewees have had with and as vulnerable witnesses and explore the challenges associated with going through the justice system. Alternatively, interviewees also caution against relaxing the criminal justice process to assist the needs of vulnerable witnesses. The results offer various points of view from different areas of the criminal justice system.
Chapter 4. Results

Interviewees and students participating in the online survey provided their insight and experiences with vulnerable witnesses in the Canadian criminal justice system. Five dominant themes emerged from the data and are presented here.

4.1. Experiences of Professionals Dealing with Vulnerable Witnesses

This theme unpacks the experience of one vulnerable witness navigating the criminal justice system. Interviewees shared their experiences with how they addressed the needs of victims or witnesses showing signs of vulnerability. Sarah Shinn described her experience in the criminal justice system as a vulnerable witness. After ten years of abuse, at the age of sixteen, Sarah Shinn’s first call was to her local police department. She felt it was finally safe for her to tell her story about the atrocities she had suffered as she was now worried for the well-being of her family. Sarah’s contact with the police was her first interaction with the criminal justice system.

We called the police, an officer showed up, asked to speak to me alone, privately upstairs. So, I went upstairs, and she asked me a few questions, 10 minutes later we came downstairs. Then she said “okay, I am off shift, so I will talk to you guys tomorrow and you guys can come and do your report then.” So, she confirmed with my mom where to go and my mom said “so, the main detachment, where the Surrey Courthouse is?” And she said “yes.” So, we were left hanging because basically the police car showed up and he actually, the offender, lived on the street and he was stalking me. So, we were really afraid that he had seen the cop car and would do something, and we did not know what to do. So, my mom tried asking her “could you try sending another officer or somebody, so we could get some sort of security or figure some things out. And she said, “No, I am handling this case” and that was it. (Shinn, personal communication, 2017)

By coming forward to report this incident to police, Sarah expected to feel safe. In reality, she felt more vulnerable than before. As her first contact with the criminal justice system, Sarah felt abandoned and alone and not supported.

Sarah Shinn’s abuser was extremely manipulative and reminded her daily that despite her best efforts, no one would believe her story. Sarah feared that her greatest
challenge would be securing the trust of the police and trying to prove that her experiences, stories, and traumas were real. Despite her best efforts, Sarah felt silenced and alone.

The police officer did an interview with me, conducted one for about 4.5 hours, I think. She did not know really what to ask me. It was very awkward. She even cried at some points. And it felt like I was not being heard and that she did not believe me. It came to a point of me physically describing his genital area to express that I knew and that it was something that I should not know. And, I just felt like she did not believe me. My mom had an interview for 2 hours or 2.5 hours, or something. In the meantime, before we went there because we were left alone, I was made to believe that my mom actually hated me and that I stole her husband from her [...]. I was really scared, and I felt like I needed to somehow be like “no, this is not me, this is him.” He actually had a shrine of pictures in his bedroom. And, so I was trying to say that “he has got stuff there, so go and get the cops over there now, there is stuff there, you can see it, and I am not lying.” (Shinn, personal communication, 2017)

Sarah Shinn’s initial experience with police investigators did not leave her feeling optimistic for the journey ahead. In the following quote, Sarah describes her first point of contact with Crown counsel.

They finally had given it to somebody, we did not want to lose it and be like okay we have to adjourn it, or toss it to someone else. So, when we went there, we were like exhausted. And I felt like nobody was going to take my case anyway it was just a file, it was not anything important. And, so when I got there the Crown actually did not even know my name and then he read through the file in front of me and proceeded to be like “oh well this is just a sexual abuse case, these things never get any time, it is not a murder case, so don’t expect much.” So that was my first kind of meet with a Crown. (Shinn, personal communication, 2017)

Once charges were approved by Crown counsel, Sarah was in contact with Crown counsel and she was expecting some form of justice, someone to listen to her side of the story. In reality, she was told by Crown to not “expect much” and to understand that the severity of her case is not a top priority.

The build-up, it was scary, it was very, very scary. Just because of everything the offender had said to me, and threatened me about. There was a lot of drama between the family as well. Maybe a lack of support from certain family and friends as well. It just made me feel a little more isolated [...] It is not like I am walking into something entirely unknown, I would just freeze up or flee. It was really helpful to be able to see the room, what it would be like, where the offender would be sitting and where [Crown] would be standing. He gave me tips, “when you are
sitting here, just follow me, look at me when I ask the question and answer to the judge” because I have to look here but the offender is right here (very close). He explained that he would be there and that really got to me, so then he did a whole thing to get a screen put up. (Shinn, personal communication, 2017)

While testifying in the courtroom, one of Sarah Shinn’s main stressors was being in proximity to the accused. The setup of the courtroom is a stressor for many vulnerable witnesses. Throughout this process, Sarah felt judged by others including herself. She continued to feel vulnerable, unsure of what to expect, since overall support was lacking. Despite the continued disappointment, Sarah’s file was transferred to a new Crown lawyer. Her reality became one of kindness, encouragement, and support.

I wish that he was not close. He should not, offenders should not be that close to a witness. I feel like if that is just pure intimidation because even in the prelim all he did was make faces at me try to make me feel bad and played the whole game and he knew how to manipulate me. It makes no sense why you would put an offender right next to the victim, for such a lengthy period of time. It is not right. And to have the person representing you over there, it just makes no sense, especially I could not have my mom in the courtroom or [my fiancé] in the courtroom. I had to be by myself in there and so you are throwing me back in a room with somebody who stole 10 years of my life from me every day. And that is not cool. (Shinn, personal communication, 2017)

Vulnerable witnesses experience challenges throughout the criminal justice process. Many interviewees discussed challenges assisting vulnerable witnesses. Sarah Shinn stated “you are literally by yourself, alone on this journey” (Shinn, personal communication, 2017).

Sarah Shinn’s case was assigned to senior Crown lawyer, Winston Sayson. After feeling let down by the justice process, Sarah describes her meeting with Sayson, which highlights a shift between her experiences with the judicial process thus far.

When we went to go meet with Winston for the first time, we sat down in his room, he brought us in and he introduced himself, he knew my name. He just said “how are you today” that kind of thing. My mom is holding on to her purse and getting ready to leave. She is like “look if you are not going to actually take the time and listen to what we have to say and take this case seriously, we are just going to leave. We are sick and tired of getting tossed around” she just went off. I can remember just sitting there so awkward and uncomfortable, at the same time I am like “yeah!” So, then he looks at the file, he closes it and says, “I see that there have been several Crown on this case so far.” And I said “yeah.” And he closed the file and started telling me details about my case, things that you would not know unless you actually read the
file. Me and my mom looked at each other and he said “so, how am I doing thus far?” And then my mom said “good, keep going!” He promised me that he believed me, and that god forbid anything ever happen to him, he was not going to let go of this case. His supervisor / manager was trying to get him to take time off as he had just done several serious files right before I met him. He was trying to get him to let go of it. And he refused. He held on to it and promised that we would go through it all together. The meeting with Winston was not like any other. He was very understanding to the fact that he was a male and it can be really intimidating to speak about intimate and personal topics about myself and everything that I went through. I was literally left alone in my own head with everything, with everybody, feeling like nobody believed me. I was pretty bad, rough shape. It was the way that we did things, was unlike any other experience I had with Crown. (Shinn, personal communication, 2017)

This was the first time Sarah Shinn felt that her story would be taken seriously. She had only her voice, her memory, and her experiences left to communicate. Everything with evidentiary value had been destroyed by the length of time that had passed or by the accused himself. Her expectation was that the criminal justice system had failed her. However, Sarah explained Winston’s approach in terms of establishing trust and building her confidence. The reality was that there was actually hope in the system.

He took the time to really learn details, which was really important to me. I felt like that helped build a bit of trust, somehow, just because nobody else seemed to take anything seriously. He was very sensitive. He was very to the point with things and he made it easier for me to explain certain things, we broke it down. He was like “okay, so let’s really break this down, where did this happen? Where did this happen? What age were you? What area were you in? Show me the home? Show me the place in the home that this happened? What exactly happened?” He would be very sensitive after and compassionate saying, “wow, I can’t image, that must have been so scary” or “I can’t believe that this had to happen to you, I am so sorry.” Things like that. The way that he did things it just made me feel like maybe I had something now, because at this point I had no evidence. It made me feel like I could at least explain it in more detail and better; he just made me feel comfortable, he made me feel like he had my back and that he was going to help me do this the best that I could, with what we had. And just meeting him as frequently as I did, getting to know him was important to because this was a personal topic. At that point I was uncomfortable just sharing it with anyone. He was just very, like I said compassionate, very sensitive, he was always touching base with me via email or phone, giving me homework to do, “stay on it.” It was just helpful. (Shinn, personal communication, 2017)

Sayson shared a part of a conversation he had with Sarah.
You are not defined by what happened to you, because what was done to you was against your will, you were a child, an adult forced himself on you, against your will. Do not give him any more permission to rob you of your happiness. (Sayson, personal communication, 2017)

The problem remains that far too many Crown lawyers do not spend time with witnesses to get a better understanding of who they are as people and how best to assist their needs. Kim Gramlich estimates that nearly 50% of Crown lawyers fail to show any interest in the needs of witnesses, particularly in preparing the victim for trial. She states, “I believe I have been involved in cases that went sideways, because there was a lack of victim preparation” (Gramlich, personal communication, 2017). Those lawyers who fail to establish a working relationship with witnesses or show interest in their clients, risk damaging the outcome of the trial.

4.2. A Lack of Agreement in Defining Vulnerability

The second theme explores the Canadian legislation by examining the term vulnerability as the best means of identifying victims and witnesses who require assistance through the criminal justice system. Children who have been sexually assaulted dominate the literature regarding vulnerable victims. Difficulty in clearly defining “vulnerability” was a recurring theme. Crown counsel, Winston Sayson encouraged open-mindedness when discussing vulnerability as “not all witnesses are considered vulnerable in the classic sense” (personal communication, 2017). Similarly, defence counsel, Michael Klein, agreed that there are lots of “different types of witnesses,” but found the term vulnerable challenging to define (personal communication, 2017).

First off, define your vulnerable witness. There are several possibilities, maybe a far range of possibilities about vulnerable witnesses. I think legally we talk about competence first and foremost – is the witness competent to testify? And then second, we look at whether or not a person has some issue that prevents them from testifying in the normal course. A good example is children, young children. We try to foster an environment that allows them to testify… I don’t know that vulnerable is a pejorative term. There are witnesses that have challenges to testimony. I guess the question is vulnerable to what? So, I do not know that vulnerable is the best term to use. Witnesses have challenges in testifying and there are plenty of mechanisms within the Criminal Code and within the Evidence Act to assist witnesses with that. (Klein, personal communication, 2017)
Victim Services offers support to victims of crime and trauma. Additional services such as court accompaniment and court orientation are most often provided to clients who are deemed the most vulnerable. I was interested in obtaining a definition from participants working with victim services. Interestingly, the victim service workers provided different views on defining vulnerability.

You do not need to necessarily have a mental health or a disability to be vulnerable. It could really be anyone that has gone through a trauma that makes them vulnerable. (Rene, personal communication, 2017)

Someone who is in a position where they have less power. There is a big power dynamic and they’re usually the ones who do not have a say in what is happening. And depending on the health of the individual, a child where you are a lot younger, so you don’t really have many choices. And it goes both ways, it is not just women who are in vulnerable situations it can also be men. (Erin, personal communication, 2017)

That is a good question. I don’t really know how to define it. I kind of think that it is a very subjective thing. It is quite subjective based on what the court case is about, what has happened to the victim, what their experiences are. (Sam, personal communication, 2017)

Collectively, victim service workers had a challenging time defining vulnerability. There were many moments where the conversation stopped, as the workers took their time trying to grasp the meaning of a word that is all too common in the legal world. Kim Gramlich, Coordinator of Delta Police Victim Services, defined vulnerability in terms of risk factors. She has dedicated many years to assisting vulnerable witnesses who may not have the obvious or typical characterizations of vulnerability.

Vulnerability is when a person has two or more risk factors. There is a whole myriad of things that could be risk factors and depending on the individual, one risk factor might be sufficient. The level of trauma, could be a risk factor, pre-existing challenges that the individual faces such as mental health issues or addiction issues, a lack of support in their personal life – when it comes to court, a whole bunch of other things are potential risk factors. For example, we have a client right now where her vulnerability is the fact that she has six children. That doesn't necessarily make someone vulnerable but in her case, she is by herself so she has six people depending on her, tremendous responsibility. She is actually a very strong individual but her circumstances led to her vulnerability. (Gramlich, personal communication, 2016)

Joyce Plotnikoff and her colleague Richard Woolfson are co-founders of Lexicon Limited. Together they undertake research and consultancy assignments for the government in the United Kingdom. Lexicon has expertise in measures to support
victims and witnesses through education and training. In defining a vulnerable witness, Plotnikoff and Woolfson argued that “anybody that has to go through the criminal justice system is vulnerable” and broadened the scope of the term vulnerability with respect to the criminal justice system (Plotnikoff, personal communication, 2017). Plotnikoff further stated that identifying vulnerability

... is really difficult. We are still not very good at it. Obviously, the police ought to be identifying and they should be identifying vulnerable defendants we know there are lots of defendants with learning difficulties etc. in the system. But you are relying on the quality of the training of the people that see them. (Plotnikoff, personal communication, 2017)

The results from the student survey also underlined difficulties in defining a vulnerable witness. The majority of the students were females (n = 15), who were born in Canada, completing their undergraduate degree with a major in Criminology. Students who provided feedback believed that the Canadian criminal justice system could be doing a better job, overall, to support vulnerable witnesses. Each student had been involved in the criminal justice system at least once in various capacities. Though only a small number of students participated in the online survey, the data indicate the experiences that these 19-34 years old students have (in various capacities) within the Canadian criminal justice system.

Most of the students indicated that they had some experience or involvement with the criminal justice system. It is not clear why the response rate was so low. However, it seems that students who provided feedback wanted to share personal experiences or opinions about the Canadian process. The topic pertaining to vulnerable witnesses may be sensitive or not applicable for many students. In addition, my target audience of undergraduate students may have played a significant role. Students may not check emails (a link for the online survey was distributed by an email), deleted the email at the onset, were disinterested in the topic itself, or may have been uncomfortable discussing their contact with the criminal justice system.

The following definitions were provided by students when asked to define the term vulnerable witness and they illustrate further difficulties in defining this term.

A witness who is vulnerable.
A witness who by reason of conflict of interest or vital statistics may be vulnerable to issues in court.

A witness that due to their race / culture / socio-economic status or other factors is labelled as vulnerable.

A witness who is in danger physically or psychologically from testifying or from the event itself.

A person easily accused / avoided / ignored by the system.

For the purposes of my research, the very last definition from a student proved to be the most closest definition of a vulnerable witness,

A witness who is especially at risk of having his or her testimony weakened due to internal (age, mental capacity, cultural background) and external (criminal justice procedure) factors.

Students grasped the idea that a vulnerable witness is someone who has a certain risk factor that impedes their ability to communicate their testimony effectively. Five out of nineteen students provided comments pertaining to “harm” suggesting that vulnerable witnesses are exposed to various situations in the criminal justice system that harm their safety. Students did not explain the type(s) of harm to which they were alluding.

Both interviewees and students found it challenging to define, explain, and identify vulnerability. When asked to define vulnerability, interviewee Provincial Court Judge G, simply said “I can’t”. She stated that it was the job of the Crown counsel to identify vulnerability (Judge G, personal communication, 2017). Overall, criminal justice personnel are not in agreement with the term vulnerability or how it should be defined.

4.3. Experts Don’t Always Get It Right

Typically, police officers are the first point of contact for people who are victims and witnesses of a crime. Victims and witnesses, particularly those who are vulnerable, can be challenging to interview as their needs may not be easily identifiable. The role of an investigator is to fact-find and ensure that victims and witnesses can effectively
communicate the events that transpired. Unfortunately, many victims and witnesses have mental and/or physical impairments that hinder their ability to provide details of a crime. Vulnerabilities encompass a myriad of factors, which can challenge investigators in the way they go about managing and guiding the interview process.

The general consensus amongst participants was that vulnerability is both hard to define and identify. At the earliest stage of the criminal justice process, police officers, victim services caseworkers, and Crown counsel are the first point of contact for vulnerable witnesses. Crown lawyer Winston Sayson, outlined various barriers associated with vulnerable witnesses coming forward to tell their story.

How do we get the victims, specifically, vulnerable witnesses to even come forward? A very small percentage ever make it to the police, even a smaller percentage make it to court. So, if we are trying to fix the problem, we need to go further and deeper, how do we increase the participation of victims of crime, especially for vulnerable victims in the criminal justice system. So, let’s talk about sexual assault. It is common understanding, incorrectly perhaps, that if “I go to court, my name will be splashed all over the media” or “if I go to court the defence counsel will talk all about my previous sexual partners”, “if I go to court, I will be trashed by the defence,” “if I go to court I will be made to look like the aggressor and the guilty party.” These are legitimate concerns. In addition to that, “I can’t let my family know, because I was not supposed to be seeing this guy, but I went against their wishes and I did, and he ended up raping me, or forcing himself on me.” There are so many barriers to people coming forward with their story and they include familiar factors, personal circumstances, and beliefs about what the criminal justice system is all about. (Sayson, personal communication, 2017)

Experts in the criminal justice system need to invest their time and skills to identify vulnerable witnesses and ensure they feel supported. As an integral part of the process, if experts fail to get this right, vulnerable witnesses may not come forward and report crimes. It is imperative that experts look at the bigger picture to break down the barriers and encourage involvement and lead by example.

4.3.1. Getting the Full Picture: Getting To Know Your Witness

Cst. D discussed the importance of having a face-to-face conversation with people to best address their needs. He stated that you can do all your homework, research, and preparation for the interview but nothing prepares you better then meeting with the victims or witnesses.
It is hard to tell on paper when you maybe do your research as you start, in preparation for the interview but you can’t really identify people as vulnerable until you know them, until you go to their house and see their living conditions. You bring them in and see how articulate they are, what they say, how they act. You really don’t get a sense of them until you see them there. So, it really is the full package that you can really assess are they vulnerable, not until you are done your interaction with them. An interaction could be 5 minutes or 5 hours. Sometimes you get more time to identify if they are vulnerable or not. (Cst. D, personal communication, April 2017)

Further to Cst. D’s comments, Cst. M. added,

It is by the questions that they ask, regarding their situation, so where to go, what happens next, or really not sure how to present their problems or their struggles. Sometimes by their emotional state, some are very emotional, some are not so much. As long as they are not totally cold, you can try to pick out things from how they speak or how they handle themselves, by their support system, whether they have family or friends, this is all situational specific. Do they have support of their family or do they have some friends to work with? And even just asking if they want victim services. If they do not want the help of victim services through [the police department], does not mean that they are not vulnerable. But if they are not open to receiving assistance or encouragement or direction, or whatever from victim services then maybe they are not as vulnerable, as they portray themselves to be? But they can always come back and ask for help. (Cst. M., personal communication, 2017)

Cst. D. believed that as a police officer conducting interviews, responsibility is already embedded within the “nature of our job” (Cst. D., personal communication, April, 2017). Conversely, Cst. K. asserted,

[It is] our role is to take the best statement and the best information as we can get from the person by making them feel comfortable in their own environment. And it is our responsibility to manage those people through the criminal justice process with the help of victim services, of course as well. It is our responsibility to follow these people and make sure that they stay on track and we definitely have a responsibility to keep tabs on these people as they make their way through the criminal justice process, if that is how it goes. Absolutely. (Cst. K., personal communication, 2017)

Lastly, Cst. M. stated that police officers “can only do so much” to manage the witnesses through various stages of the criminal justice process. However, it is important to keep the “relationship alive” and maintain a proactive approach when assisting people with vulnerabilities (Cst. M, personal communication, 2017).
Kim Gramlich mentioned that Crown counsel can “do a better job,” specifically when dealing with vulnerable witnesses (personal communication, 2016). She continued by explaining that “lawyers are lawyers first…” but that does not mean that one can ignore the human element when dealing with witnesses (Gramlich, personal communication, 2016). Kim Gramlich’s role as a Victim Services caseworker often places her in Crown counsel's office. Here she observes the interaction between Crown and witnesses, who usually have more than one risk factor adding to their vulnerability.

Until you sit down and actually have a conversation with a witness, you just don’t know. But the good Crown do that. They put their pen down and sit back and start conversing in a normal way. This is who I am and this is why I am here but I want to learn about you first, because it is important that I know a little bit about you. And when the Crown lawyers do that, you can see some of the witness’s vulnerabilities disappear a bit. They go away because the witness is more at ease. (Gramlich, personal communication, 2016)

The national, non-profit, charitable organization, Communication Disabilities Access Canada, was founded in 2011. Executive Director Barbara Collier is one of the founding members of this organization. Her background in speech-language pathology and augmentative communication has guided her in her mission to offer all Canadians who have communicative disabilities, the opportunity to have equal access to services.

During our interview, Barbara Collier explained the value of using intermediaries, especially during police and Crown interviews, to identify possible vulnerabilities and work closely with the police to address the vulnerabilities a victim or witness might have accordingly.

How do you get into the courts if you can’t go through the police? And that is a major problem because people who have very complex communication needs cannot speak, and that is my population, they cannot speak, how do you even begin to go into a police station? Particularly, most, we already know from the people with disabilities are 2-3 times more likely to be abused than people who do not have disabilities. Now think about if your disability affects your ability to communicate with people, you are far, far more vulnerable. The best victim is the one who cannot tell or is perceived by the offender as not being able to tell. And, also, we know that it is very often caregivers, one of the biggest groups of offenders. So how do you get to the police, how do you even know that there is such a thing as an intermediary? How do you know that you have a right to communication supports in the justice system when the justice system does not even know? The police do not even know? And so, we build this platform and we need to
advocate to open it up. And there is no excuse anymore. (Collier, personal communication, 2017)

Vulnerabilities may not be visible. As mentioned above, Barbara specializes in assisting people who are non-verbal. Other intermediaries have other specialities that can benefit both a victim and or witness during an interview.

Cst. K. mentioned they had a non-verbal vulnerable witness who offered challenges for the team in terms of conducting an effective interview. Intermediary services were never requested. Upon reflection, Cst. K. referenced the case and mentioned that they would have liked to “re-do this one” by changing the location and environment in which the interview was conducted (Cst. K., personal communication, 2017). It is unknown whether these factors would have assisted the police officers in obtaining any information from the victim. Similarly, Barbara’s comments surround the need for advocacy and agencies within the criminal justice system to utilize intermediary services.

Experts do not always get it right. In terms of identifying vulnerability it is clear that a lack of time, training, and knowledge plays a role. Many of the participants not only acknowledged that they require more training but stated that it should be mandated by their agencies to train their employees with knowledge pertaining to vulnerability.

4.4. Enhancing Access to Justice

In terms of advocacy for victims and reducing their anxiety and fears, Kim states the following:

When witnesses come to court [victim services and Crown counsel] should be doing everything we can to reduce [victim] anxiety, and fear of the unknown. So, when they walk into court the day they have to testify, very little should be unknown to them. We can’t always tell them what all the defence counsel’s questions will be, but we can sometimes predict. There are a million things that would normally provoke anxiety for people, and if we are doing a good job as service providers, both us and Crown, those things we have reduced to a minimum. (Gramlich, personal communication, 2016)

Despite the proactive approach from the Canadian government and the courts to provide assistance for vulnerable witnesses, the reality remains that special measures
are rarely used. Victim Service workers, who are commonly present in the courtroom, describe the use of special measures as a “rarity.”

I hear, unless it is definitely going to impede with their testimony, it doesn't always go forward, so not a lot of people, as far as I know, not a lot of people do use witness accommodations. (Aaron, personal communication, 2017)

Sam, a victim services worker, attributes the infrequent use of special measures to Crown believing the accommodations may impede the way “testimony comes out.” She explains that

Even though it would be a better choice for someone that was vulnerable [to utilize special measures], it may affect the case, and so Crown [may] feel that it would allow the case to not be as successful... [yet] I think a lot of people are interested to ask for it. (Sam, personal communication, 2017)

Results from my interviews and survey respondents indicate that special measures are not commonly utilized within a courtroom, particularly in British Columbia. Criminal justice personnel need to consider the benefits of special measures for all witnesses coming to court. According to Aaron, “the option should always be there and the person should always be able to choose” and be kept informed by Crown, with regard to the appropriateness and usefulness of special measures (Aaron, personal communication, 2017).

Students were not as familiar with special measures in the courtroom. Of the nineteen students who participated in the study, sixteen students indicated that they had been involved in the criminal justice system at least once and the average was 2-3 times in the courtroom. Nine students had experience testifying in a courtroom, and none were offered any testimonial accommodation. The reason for attending court is unknown. It is important to note that providing special measures may not have been appropriate. The survey provided an opportunity for participants to expand upon their understanding of special measures. Five participants had no knowledge of special measures, and a few others seemed unsure with their responses.

I think of special measures as other routes or options for people who under circumstances should be dealt with differently. Like youth and aboriginal offenders. As a young offender, I was never offered any special measures and had a very traumatic court experience.
Important [to] protect vulnerable witnesses who may otherwise not be willing or able to testify. They are underused or ineffective and relatively unknown.

I don’t know much about them. From above – screen, testimony via CCTV, support person. They should be provided with whatever support they need to feel safe giving testimony.

If justified, then it is warranted.

I think witness protection is a good idea.

One female student who identified as a youth offender indicated a negative response to her experience with special measures. The remaining eighteen participants left this field blank. The majority of responses from the open-ended questions included variations of “I think,” “I don’t know,” and “not applicable.”

Kim had the opportunity to provide all witnesses, particularly vulnerable witnesses, with an effective tool to offer assistance. “Caber,” a canine assistance intervention dog, the first of his kind in Canada, was introduced to support and comfort victims of crime and trauma. In summer 2016, Victim Services coordinator Kim Gramlich spoke in New Westminster Supreme Court on behalf of Caber and presented his credentials in a voir dire made by Crown counsel. For the first time in British Columbia, Caber was granted approval by a provincial court judge to assist vulnerable witnesses as a “support person” during trial (Gramlich, personal communication, 2015). Winston Sayson states

This judgment is an important acknowledgement by the court that the criminal justice system can continue to evolve and be innovative in accommodating children and vulnerable victims so their access to justice is enhanced. (personal communication, 2015)

Kim provides a meaningful example of Caber’s effectiveness in assisting a vulnerable witness while at her side in the courtroom.

We had a case where Caber was in the courtroom with the client, she was a 15 year old sex assault victim, she became highly agitated by cross-examination, to the point that she actually stormed out of the courtroom. We took Caber outside, and we got down on the floor here with the dog, we sat in a quiet room and she pet Caber, and we just took some deep breaths because she did not want to go back in, she felt like she could not go back in and finish. If she did not finish her cross-examination they would have had to issue a stay of proceedings, because she could not give full account. We got her to such a point of calm, she found some renewed strength and was able to go back in to
court. In that case, Crown believed that Caber had a direct effect, correlation to her ability to finish her testimony and thus achieve a conviction. (Gramlich, personal communication, 2016)

The use of special measures during court proceedings requires Crown present an application to a judge, who must grant formal approval. Even though the needs of victims and witnesses should be taken into consideration, in practice, this is not always the reality. All victims and witnesses are different. I spoke with two defence lawyers who felt that, in terms of the fears, stressors, and needs of vulnerable witnesses, the criminal justice system needs to acknowledge each incident on a “case-by-case” basis (Klein, personal communication, 2017). They agreed that, if applied in an appropriate manner, they would be in favour of special measures (Klein, personal communication, 2017; Johnson, personal communication, 2017). However, this is inconsistent with the literature which requires vulnerability to be defined in a much more structured manner. With many years of experience as defence lawyers, both Klein and Johnson recognize the need to protect vulnerable witnesses and encourage them to testify in court.

We know that the evidence has to come out in some fashion, the process has to be fair and it is hard to generalize in terms of why a [defence lawyer] might object [to special measures]. A trial dynamic is a very interesting dynamic. You really do not know how that dynamic is going to unfold, until you are actually in the middle of it. You are dealing with individuals, whether it is the accused or witnesses, you are dealing with individuals who often have many challenging traits that requires some creativity in order to have the evidence come forward [...] I do not know if there are any limits on creativity, the only limit being whether or not it impedes the fair trial of the accused. At times that may arise for example, a therapy dog. As a defence counsel, I am not going to object to that. It really should not matter. (Klein, personal communication, 2017)

Defence lawyer Michael Klein insists that assisting vulnerable witnesses through creative means will only strengthen one’s ability to provide evidence in court (Klein, personal communication, 2017).

### 4.5. An Imperfect Justice System

The criminal justice system is in need of repair. Plotnikoff, a criminologist in the United Kingdom, identified the need for cultural change within the justice system. She explained that change will be most effective through leadership. During my interview with sexual assault survivor, Sarah Shinn, she admitted that she had difficulties and was
vulnerable when sharing her story. Although the majority of the abuse took place while
she was a child or teenager, she was an adult when she came forward to police and
became involved in the criminal justice system. She felt that being an adult had barriers,
in terms of expectations for a victim or witness.

I found that really challenging. I felt like more was expected of me
because now I am an adult. Even though all of it happened to me as a
child with a child mentality or a young adult or teenager, whatever you
want to say. I felt like there was more pressure put on me because now
I was an adult and I was looked at differently, things were handled
differently. For even the screen, it was a fight to get. I think it should
just be open to all ages, I do not think there should be that factor where
you hit an age. It is not my fault and you guys just took three years to
get to this point. (Shinn, personal communication, 2017)

Victim Services support workers who provide court accompaniment services for victims
and witnesses discuss their experience with vulnerable adult witnesses.

I have had cases where there are not children but they are adults but
they are still vulnerable and they have had quite a bit of anxiety having
to attend court and whether or not if it is a stranger or a domestic
violence, the anxiety, and there have been requests for testimonial aids
but it has not lead to anything because some of these cases end up
getting dropped. (Aaron, personal communication, 2017)

Aaron works in a courthouse that deals mainly with adults. She confirms that she is
seeing a lot more vulnerable adults, typically associated with domestic violence cases
(Aaron, 2017). Rene echoes Aaron’s thoughts regarding seeing more adult vulnerable
witnesses coming forward and being acknowledged by the courts. However, Rene states that

We are seeing an increase in adults and I think that is more of the fear,
because the court process can take quite some time, that the person,
they may change, they may not necessarily look the same – they may
certainly want to feel protected and not have obviously have the
offender see what they look like today, because it could be two years
later. So, there is a lot of, worried about retaliation, or someone harming
them. There is a lot to do with gang violence, murders that are
happening out in the community. People are feeling as adults that they
need more protection to keep their identity safe. (Rene, personal
communication, 2017)

Rene adds that when you become an adult there is “more that Crown has to do” to make
certain accommodations or requests happen (Rene, personal communication, 2017).
Provincial Court Judge G has not seen an increase in the number of vulnerable adults, particularly inside the courtroom.

I see certain [Crown] suggesting it more to adults, but I do not see it, I don't think it has increased. I think certain [Crown] just like the use of it [...] the only people who have difficulty testifying, generally, are individuals with intellectual impairment. And, if they are vulnerable it is often for a different reason. (Judge G, personal communication, 2017)

I asked Judge G to share an example of a vulnerable witness testifying. Although Judge G does not consider the young woman to be vulnerable as she was simply nervous, an agreement was made with the Crown to allow the adult woman to testify behind a screen.

A young woman who had grave anxiety and probably under any standard would not have been considered a vulnerable witness but I permitted her to testify behind a screen, simply because I thought that even though there was no relationship with the accused and there was none of the traditional criteria, while the [Crown counsel] were interviewing her, it was obvious that [Crown] concluded that she was just far more nervous. I did find that she was vulnerable. She needed to be able to present her evidence and she felt more comfortable, more secure with a screen. (Judge G, personal communication, 2017)

Although a victim or witness may not “fit” the legal definition of a vulnerable witness, victims and witnesses who suffer from anxiety and other stressors may greatly benefit from the use of special measures. The criminal justice system and experts in the field must explore ways to assist all victims and witnesses who may need additional supports to effectively share their stories.

Winston Sayson explained that if an adult does not have a disability (mental or physical) the onus is on the Crown to prove its case to secure testimonial accommodations. Sayson provided an example of how vigorous Crown must be in their application for adult vulnerable witnesses as they have a “higher hurdle to meet.”

For this adult, spouse, who has no disability, but simply has fear, the Crown has a higher hurdle to meet, we have to establish, for example, for a support person or for testimony behind a screen it is not presumptive it is only discretionary, we need to establish that this will facilitate a full and candid account and that has to be done in court. Similarly, without disability, the husband cannot cross-examine her that is permitted for harassment and sexual offences. But if it is a common assault, it is discretionary; the Crown has to establish that the testimonial accommodations, the accused not to cross-examine her is
such that this would allow for her to give a full and candid account. And we are getting push-backs understandably from the defence, wanting to confront the witness, wanting them to see the accused, insisting that their story will change once they see the accused, it is a one version of events, once she sees the accused her lies will evaporate. It could be true, it might be true, but the reality is, most cases, they are so scared, so fearful of the accused that they cannot make themselves tell the court what the accused did. The Crown has to be quite vigorous in their application for testimonial accommodation. For example, in Surrey we have 30% domestic violence cases, it is just a very difficult to assume that all spouses will not testify, unless they are behind a screen or behind CCTV. (Sayson, *personal communication*, 2017)

Carolyn Sinclair believes that the criminal justice system has a role and responsibility to all victims. The courts need to be more open-minded and aware that adults, both men and women, can suffer from fear, anxiety, and stress while testifying. Sinclair explains that adults without disabilities not only have a greater threshold to meet if they want to make an application for special measures but greater expectation of simply getting through the testimony. The imperfections within the justice system pertaining to vulnerable witnesses starts with breaking down labels and understanding that those who are deemed vulnerable may not always have a visible impairment.

I think the people within the court system have a responsibility because it is their job to make sure that everyone’s story is told and heard and that everybody can give their testimony and present their evidence in a safe way that is their job. So, I think if we look at ways, I look at victim services as an extension of the preparation for court and that handling of human evidence, I would like to hope that when we are working with Crown and our judges that we are passing the baton of their safety. So, I think they have a huge responsibility. (Sinclair, *personal communication*, 2017)

Sinclair added that despite the good intentions of the court, she does not feel that the justice system is proactive in Canada but insists that British Columbia leads in providing support for vulnerable witnesses (*personal communication*, 2017).

A big part of the *Canadian Victims Bill of Rights* is participation and information. If our role is to help them participate, if you are vulnerable, if you may need some extra help, or extra accompaniment, or extra aid to help you go through the process; the system is now making them available. There is actually going to be some videos released in the new fiscal from our Provincial Ministry of Public Safety and they will be about helping people with challenges or without challenges understand how the whole criminal justice with court is going to proceed and how the [Canadian Victims Bill of Rights] gives them different access to things. (Sinclair, *personal communication*, 2017)
Many of the participants, whose careers are based in British Columbia, were not familiar with other provinces’ or territories’ policies, legislation, or courtroom practices. A small number of participants were unsure of any newly acquired or expanded special measures offered in British Columbia (such as courthouse dogs) that were immediately available to witnesses. Participants believed that the criminal justice system needs improvement and does not meet the needs of vulnerable victims. All nineteen students chose to respond more generally about the criminal justice system more widely than specifically to testimonial aids:

Negative.

It’s an imperfect system that suffers from over work while being under resourced. But I support their decisions and believe in the system they use.

Needs improvement.

I question whether the Canadian CJS is really a "system" given the massive challenges that it has faced. The increasing complexity of cases has created a backlog within the judiciary, leading to an overcrowding of provincial jails in the form of remand. Additionally, criticisms are levied against the inefficiency and unstandardized system of policing, given that the different policing agencies vary between cities, have led to challenges in how information is transferred to one another.

All nineteen students stated that the courts had a role and responsibility to ensure the comfort of each witness and continue to offer supportive services to vulnerable witnesses. Many participants acknowledge challenges plaguing the justice system. It is clear that vulnerable witnesses’ abilities to provide their best evidence in court is compromised if they are not given appropriate supports. Though participants were from various backgrounds within the criminal justice system many similarities were echoed in terms of supporting and addressing the needs of vulnerable witnesses. Moving forward, the next chapter discusses each of the themes in more depth, providing literature to further unpack the main points.

Overall, both interview participants and survey respondents expressed their dissatisfaction with the present system, including an inability to define ‘vulnerability. The professionals explained a number of challenges, such as lack of support for vulnerable witnesses, problems with lack of resources and time constraints.
Chapter 5.

Discussion

This chapter addresses some of the main areas of concern for vulnerable witnesses while they are involved in the justice system. Addressing the individual and specific needs of vulnerable witnesses can impact the way evidence is presented in court. Traditional methods in the courtroom along with new approaches to assisting vulnerable witnesses are discussed to look at ways of enhancing vulnerable witnesses’ abilities to effectively communicate in the courtroom.

5.1. Experiences of Professionals Dealing with Vulnerable Witnesses

The first theme that emerged from my interviews with a variety of stakeholders ranging from victims, witnesses and criminal justice personnel, was the differences between expectations and reality. Sarah Shinn explained that she had high expectations for the criminal justice system, but these were not met. In particular, she was very disappointed with Crown counsel. Commonly, Crown’s role with victims and witnesses is limited. With respect to vulnerable witnesses who require more time, attention, and sensitivity, the results indicated that there was a distinct lack of contact and communication.

A lack of contact with Crown counsel and lack of preparation were frequently cited as concerns by the personnel interviewed in this study and have been reported many times in the literature. Many studies suggest that witnesses are, first and foremost, dissatisfied with a lack of trial preparation time and a lack of contact with Crown counsel lawyers (Ellison, 2007). According to Konradi (1996), “pre-trial preparation may have an important bearing on complainants’ willingness to participate in the prosecution process” (as cited in Ellison, 2007, p. 178-179). One’s perceived journey through the criminal justice system is significantly related to the quality of time spent with Crown counsel (Ellison, 2007).

Many interviewees discussed a lack of communication between the witness and Crown. This detail is consistent with the literature. Tinsley and McDonald (2011)
examined the importance of building a trusting relationship between Crown and witnesses as they see it as integral to securing a conviction (p. 716). In their own work, a victim advisor (equivalent to a victim services caseworker in Canada) provided a detailed account of their experience regarding the importance of communication.

Often victims tell us that they have information and knowledge of the crime that the Crown is unaware of and establishing a relationship between prosecutor and victim allows for a better prosecution and most likely, a better chance at conviction. As it is, prosecutors may not know the best questions to ask as they have the minimum information...Victims have expressed frustration and lack of trust in the prosecution process and feel disempowered by this distance between victim and prosecutor. (Tinsley & McDonald, 2011, p. 716)

The rationale of establishing a relationship between Crown lawyers and vulnerable witnesses focuses on preventing unnecessary frustrations during the criminal justice process (Standbridge & Kenney, 2009, p. 476). An article published in 1984 in the Globe and Mail by reporter Victor Malarek characterized witnesses as “stand(ing) in the shadows of the justice system – bitter, disillusioned, frustrated, angry, and confused” (as cited in Standbridge & Kenney, 2009, p. 476). This was published over 30 years ago, and one would hope that much has changed since then, yet this study still showed that feelings of anxiety, compounded by isolation and neglect heighten witnesses’ vulnerabilities beyond the courtroom.

Kim Gramlich, Coordinator of Delta Police Victim Services, discussed the overall value of having a Crown who is sensitive to the needs of witnesses. Kim explained

That if you have a vulnerable person, you have to change your approach to that individual, you have to change the way you communicate with that person, you have to do things as simple as repeating information in simple terms, over months over time in advance – you have to give them opportunity for advanced interviews. (Gramlich, personal communication, 2016)

Gramlich also stated that she encouraged all agencies that support vulnerable witnesses to go the extra step to help people who are vulnerable. She “believes wholeheartedly that there is a direct correlation between the scope of services and assistance that you provide and the calibre of a witness that you get (Gramlich, personal communication, 2017).
A study in the Netherlands examined whether Crown’s sensitivity can positively affect a witness’s experience and perception of the justice system (Carr et al., 2003, p. 132). The findings suggested that a "positive interaction" with a Crown lawyer will provide comfort to the most vulnerable of witnesses (Carr et al., 2003, p. 132). There is no question that Crown lawyers must remain impartial and unbiased, but it is imperative that "victim-centred" practices are acknowledged (Gramlich, personal communication, 2016). The use of victim services and court support workers would be helpful in this context. However, in his interview, defence lawyer Michael Klein, emphasized the historical importance of the offender-centred process. He added that we must not try to change the design of the Canadian criminal justice system. The justice system is not meant to be “cathartic” for vulnerable victims. However, defence lawyers, Klein and Johnson, both stated that they recognized the value in supporting vulnerable witnesses throughout the justice process, encouraging their participation and testimony in court.

Building rapport, securing trust, and giving time to vulnerable witnesses will enhance their ability to provide meaningful testimony in the courtroom. As noted above, Carr et al. (2003), acknowledged having a “positive interaction” with a Crown lawyer can have a meaningful impact (p. 132). A Crown who provides the opportunity for one-on-one meetings and advanced interviews will usually secure much more prepared and comfortable witnesses. This information is not new, yet we are still having problems both recognizing and assisting vulnerable witnesses. Part of the issue is related to Crown’s workload. Perhaps court support workers could have a more active role and greater interaction with crown to assist with such cases.

Sarah Shinn stated in the results that she was intimidated with the design of the courtroom. She was scared with the proximity of the accused to the witness box. Additionally, Sarah was confused with the overall set up, as her support network were kept at a distance, at times outside the courtroom.

The traditional adversarial model is not adequate for vulnerable witnesses. According to Ellison (2002),

The paradigmatic adversarial trial offers limited scope for the improved treatment of vulnerable and intimidated witnesses” (p. 160), […] and a more fundamental rethinking of the essential elements of adversarial trial process is required. (p. 140)
Common sources of stress experienced by people are only heightened in an unfamiliar setting. These strains and stressors can be experienced at any point in the justice process.

The courtroom can be a very unwelcoming place, often a reminder of a very troubling life event. Authority is introduced and expectations for all participating parties are heightened in the courtroom. Research further suggests that improving one’s emotional and physical stability in the courtroom will effectively enhance the quality of witness communication and evidence (Cunningham & Stevens, 2011). When surveyed, vulnerable witnesses state that they are much more satisfied with the criminal justice system when they feel supported in the courtroom.

Dame Joyce Plotnikoff extended the feelings of intimidation from the courtroom to include all players (lawyers, judges). She further suggested that judges are “very powerfully persuasive” which can discourage victims and witnesses from asking for clarification and assistance (Plotnikoff, personal communication, 2017). However, defence lawyer Michael Klein emphasized that the design of the courtroom should not be changed as it is a recognized part of our adversarial system but was not opposed to the use of other sorts of testimonial aids (Klein, personal communication, 2017).

Victim services worker, Sam, argued that the sterile environment of a courthouse or Crown office may diminish the quality of evidence being given (Sam, personal communication, 2017). Isolation, stress, and fear surrounding the courtroom extend to other areas in the courthouse. Assisting witnesses through the court process, including interviews with Crown counsel, victim service workers identified other locations where the environment within the court is less than ideal.

There is nothing child-friendly [in the courthouse], they do not even have toys in the waiting room. I think they have one old bucket of Lego that does not match anything and some crayons and some books that are from the 1980s. There is nothing to make it a more comfortable experience. Nothing accommodating in the Crown office either. (Sam, personal communication, 2017)

Although the above courthouse is not representative of all Canadian courthouses, in terms of child-friendly rooms or additional comforts afforded to witnesses, it is important to acknowledge that the physical environment of the courthouse can influence and impact witnesses.
The overall atmosphere of the justice system including the waiting room and other surrounding areas are very daunting for the average person. Research conducted in London, UK addressed the design of the courtroom itself and the idea that its appearance contributes to feelings of isolation and restricts one’s ability to communicate effectively in the courtroom (Mulcahy, 2007, p. 387). This detail was found to be similar in Magistrates courts (Carlen 1976), in which Mulcahy (2007) stated that the “spatial arrangements” in the courtroom had an impact on witness’s experience in the justice system. According to Carlen (1976),

The exploitation of courtroom space has a paralyzing effect on those who are not regular users of the court system...So, for instance, accepted and familiar modes of conversational practice are perverted so that confessions and highly personal stories which would normally be told in close and intimate spaces are conducted over much longer distances and in the presences of strangers. In this way space was seen to contribute to a ceremonial stripping of dignity. (p. 12)

Significantly, all the participants in Carlen’s (1976) study complained of the sterile theatricality of the courtroom in which temporal and spatial conventions were successfully manipulated to produce a disciplined display of justice in which ‘alternative performances evocative of unpermitted social worlds’ were suppressed (p. 12). Although the above study is more than forty years old, very little has changed inside the courtroom to date. In conversation with some participants, in particular, Judge G., it appears that unconventional changes inside the courtroom to accommodate vulnerable witnesses, specifically children, are still met with protest.

The criminal justice system is very offender-centric. Many of the interview participants and survey respondents indicated that they felt that the entire system was much more focused on the accused and that their own feelings and concerns were much less important. This belief is a common theme in the literature as well. Clarke (1986) explored the origins of distrust in the Canadian criminal justice system, stemming from the idea that the courts are “soft on criminals” thus isolating witnesses (Standbridge & Kenney, 2009, p. 477). A small number of studies have focused on victims and witnesses who have been negatively impacted by the justice process, particularly by Crown lawyers, resulting in further distrust in both authority and the system (Standbridge & Kenney, 2009; Wemmers, 2013).
Students, in answer to the question regarding the courts responsibility to vulnerable witnesses, indicated that the courts should reduce intimidating factors in the courtroom by:

facilitat[ing] assistance towards vulnerable witnesses
protecting [vulnerable witnesses]
Courts should “help get honest statements
Courts need to acknowledge the needs of their [victims] and witnesses and make them as comfortable as possible so that they can achieve the best testimony that they can give.

Based on the findings from interviewees, the relationship between victims and witnesses and criminal justice personnel could be greatly improved. This detail is especially relevant when vulnerable witnesses are going through the criminal justice system as they are quite often expected to navigate through each phase of the process on their own. It seems unreasonable for professionals not to offer guidance. Sarah Shinn, sexual assault survivor, as previously noted, mentioned feelings of isolation and loneliness. Referencing her journey, Sarah states “you are literally by yourself, on this journey alone” (Shinn, personal communication, 2017).

As echoed by Ellison (2007), some of the critiques the respondents gave regarding the relationship between vulnerable witnesses and the criminal justice system come from lack of contact. For example, victim services caseworker Sam discussed the “sterile environment” in Crown counsel’s office. She suggested the sterile environment may actually be harmful to the quality of evidence produced by vulnerable witnesses (Sam, personal communication, 2017).

In my study, several lawyers and a judge did accept that it was important to provide certain special measures to vulnerable witnesses, they were all unwilling to change anything for fear of looking as though they were compromising the accused’s right to a fair trial. It is imperative not to compromise the accused’s right to a fair trial, for the sake of justice and also in securing a conviction (to prevent wrongful convictions); however, there are many things that could be done to ensure that the witness feels a part of the process and is nurtured throughout the proceedings.
Vulnerable witnesses require support throughout the criminal justice process. This responsibility is placed on criminal justice personnel who should make every effort to ensure all witnesses, vulnerable or otherwise, have the same opportunities and abilities to provide their best evidence in court. We do not want to compromise the witness or his or her ability to communicate the facts of the incident. As previously discussed, Crown’s role in assisting vulnerable witnesses is crucial. However, lack of time and other factors substantially decrease time spent with a vulnerable witness.

As a realistic solution, I suggest more use should be made of local victim services programs. Victim services caseworkers, both police and community-based, offer a free and confidential service to all victims and witnesses of crime. In addition, caseworkers have knowledge and training to effectively assist vulnerable witnesses by offering court orientation, court support, and utilizing other community resources. By working closely with vulnerable witnesses, victim services can identify areas where vulnerabilities need to be addressed. Caseworkers can advocate for vulnerable witnesses and notify lawyers and police to issues that need addressing, to ensure vulnerable witnesses are able to give their best evidence in court. I am not proposing a new idea but encouraging police and lawyers to use an already available service such as victim services. Another option might be using law students. Law students may have more time to offer assistance to vulnerable witnesses by answering questions, explaining the process therefore alleviating pressures on Crown.

5.2. A Lack of Agreement in Defining Vulnerability

The second major theme in my study highlighted the difficulties in defining ‘vulnerable.’ Vulnerability is a dynamic concept. As human beings, we are susceptible to harm throughout the life course. Interviewees in this study and students from the online survey had difficulty defining the term ‘vulnerable.’ The results ranged from suggesting that all witnesses going to court should be categorized as vulnerable to disagreement with the term in its entirety. Students were asked to define a vulnerable witness and acknowledged that this is someone who may suffer from various challenges including race, culture and socio-economic status. Additionally, one student stated that a person could be deemed vulnerable if they are “avoided or ignored by the system.”
Peate and Potterton (2011) describe vulnerable adults as people who simply require “special attention and protection” (p. 9). Emphasis is placed on safeguarding the complex needs of the individuals and actively listening to a victim’s voice. According to the Nursing and Midwifery Council (NMC) “safeguarding refers to a means of acting in the best interests of people…to protecting people from abuse and neglect as well as actively promoting their welfare” (Peate & Potterton, 2011, pp. 8-9).

Plotnikoff, a UK researcher, also agreed that the concept of vulnerability is difficult to define and understand. She notes that criminal justice personnel are “still not very good” at identifying and addressing vulnerability (Plotnikoff, personal communication, 2017). Plotnikoff argued that the responsibility falls on police officers, as the first point of contact with victims and witnesses, to identify vulnerability and communicate this to other criminal justice personnel (Plotnikoff, personal communication, 2017). It appears that the identification of vulnerability depends on education and quality of training. During the interview, I asked Cst. K about her thoughts on why vulnerabilities may be missed. She explained that it was:

Lack of training. There is not a lot of training unless it is really obvious, within society these days. There are many issues people are dealing with, whether it be mental health or any variety of issues, such as intellectual disabilities. The front-line officers are not being trained in a lot of those areas. (Cst. K, personal communication, 2017)

She adds that basic training is provided to police officers but there is a “lack of ongoing training.” Cst. K. has been in major crime, specializing in the sexual offence section for six years and has only recently received the training needed to interview special needs victims and witnesses. She believes this is “unacceptable, since without training, you do not really have a lot to go on” (Cst. K, personal communication, 2017).

Senior Crown counsel lawyer Winston Sayson stated that he encouraged colleagues to be open-minded when conducting interviews. He added that “not all [victims] and witnesses are considered vulnerable in the classic sense” (Sayson, personal communication, 2017). Kim Gramlich, victim services coordinator, echoed the necessity for taking the time to build a relationship before asking witnesses to recount traumatizing events. The literature examining vulnerable witnesses highlights a need for criminal justice personnel to be more effective and efficient when interviewing vulnerable witnesses. For instance, Bull (2010) examined the value of communicating with
vulnerable witnesses. He explored the best means of obtaining effective testimony from vulnerable victims and found communication was the most effective tool for providing guidance and developing confidence in a witness (Bull, 2010, p. 7). To best achieve this skill, criminal justice personnel must recognize the importance of establishing good rapport (Bull, 2010, p. 9).

The results from the interviewees and students suggest a need for more awareness regarding the term vulnerability. Each definition provided by interviewees and students was different with limited overlap. Nonetheless, it is apparent that a vulnerable witness means someone who has multiple risk factors that impede a witness’s ability to communicate their testimony. The lack of detail and understanding of vulnerability emphasizes a need for training and education for people within the criminal justice system to ensure that victims and witnesses with vulnerabilities are not overlooked, and instead, are given the opportunity to receive available supports. It is the responsibility of the criminal justice system to provide meaningful resources so that victims and witnesses come forward.

A further concern that arose from the interviews was the problem with labelling a witness as ‘vulnerable.’ Sarah Shinn, legally deemed a vulnerable witness by the Canadian court system as her assault occurred when she was a minor, stated that being a vulnerable witness was “challenging to accept.” Clearly, she felt that being labelled ‘vulnerable’ was somehow demeaning. She stated that she “struggled” with the concept and ultimately “did not want to be affected by it” (Shinn, personal communication, 2017). This point is commonly seen in literature on rape in which labelling a victim as a victim can be seen as demeaning, whereas the term survivor is considered more helpful. The term victim, although not intended as such, suggests weakness. Similarly, the term ‘vulnerable witness’ may present various labels that overtly characterize the victim or witness as different.

The definition of vulnerability is a key concern for review. Deciding how to classify ‘vulnerable witnesses’ is directly related to the meaning of vulnerability; various levels of intervention are required. Interviewees were unable to settle on a straightforward definition of vulnerability. Many were able to identify similar key words while others simply had no answer. Based on his own research, Elliott (1997) defined a vulnerable witness [a]s any witness (whether a victim or not) who may:
Despite how a vulnerable witness ought to be identified, it is important to acknowledge that not all victims and witnesses may want to be considered to be a vulnerable witness and some may reject all additional supports altogether. Victims and witnesses may feel re-victimized by being labelled as a vulnerable witness. This can be especially harmful when victims and witnesses ascribe meaning to the word ‘vulnerable’. The aim is not to disempower any victims or witnesses in the process or risk any further harm from arising.

Identifying vulnerability has been recognized as a problem. It is clear that various players in the criminal justice system are not in agreement with how to classify, assist, or support vulnerable witnesses throughout each stage of the justice process. Based on the information gathered from the interviews, justice personal do not have enough time, training, or support to be able to assess witnesses and identify them as vulnerable so that their needs can be met.

5.3. Experts Don’t Always Get It Right

The third theme that emerged from my research was the difficulties with experts in the criminal justice system not always getting it right. Initially, interviewees discussed challenges with Crown counsel interviewing vulnerable witnesses, in terms of setting extra time aside to assist before trial. However, many of the interviewees referred to the police as the most important first point of contact for victims and witnesses. Cst. M and Cst. D explained the importance of face-to-face contact to best address the needs of each person (Cst. M & Cst. D, personal communication, 2017). As well, Cst. K spoke about the lack of ongoing training and basic training for police officers in specialized sections responsible for the in-depth interviewing of vulnerable witnesses. Cst. K added that this practice is simply unacceptable and needs to be addressed to equip police officers with the necessary knowledge, skills, and ability to interview victims and witnesses (Cst. K, personal communication, 2017).

As noted above, police officers are the first point of contact and starting point for victims and witnesses in the criminal justice process. Plotnikoff argued that criminal
justice personnel need to do better and offer “tailored support” to vulnerable witnesses (personal communication, 2017). However, criminal justice personnel do not have the specialized training to assist with all of the different types of vulnerabilities. As well, what is less clear, is how best to respond to adult victims and witnesses who may have a mental, physical, and/or learning disability. Plotnikoff argued that all would qualify as vulnerabilities (personal communication, 2017). She provided an example of someone who may be deaf. She added deaf individuals may not consider themselves vulnerable, but would still require communication assistance, and participation within the criminal justice system would be a challenge (Plotnikoff, personal communication, 2017). The lesson is that age and visible disability should not be the only factors associated with vulnerability.

Interviewees focused on responsibility on the part of the criminal justice system to ensure that vulnerable witnesses receive professional assistance. Barbara Collier, Executive Director of Communication Disabilities Access Canada, stated that there is a breakdown in our justice system in terms of knowing that each victim and witness has a right to communication supports. This breakdown includes all levels of the Canadian justice system, including police officers and Crown counsel (Collier, personal communication, 2017). From an offender’s perspective, Collier emphasized, “the ‘best victim’ is one who cannot tell or is perceived by the offender as not being able to tell” (Collier, personal communication, 2017). Therefore, the criminal justice system must take advantage of professionals who have expertise in dealing with various disabilities. There is no excuse. We need to do better.

5.3.1. Getting the Full Picture: Getting to Know Your Witness

Attempts have been made to accommodate vulnerable witnesses. The role of police officers and Crown counsel is to assist with interviews, offering specialized assistance to ensure everyone has the ability to communicate their story, despite disabilities or other impairments. The courts rely on the testimony of victims and witnesses to ensure that all relevant and admissible facts are conveyed clearly in a courtroom (Henderson, 2016). For many, the process of re-living the events and communicating the facts may not only be challenging but actually impossible. As the courts have a responsibility to enable vulnerable witnesses to provide their ‘best evidence,’ they must be mindful to facilitate appropriate accommodations to ensure
witnesses are able to communicate their evidence “complete[ly] as well as accurate[ely]” (Henderson, 2016, p. 193).

People who have speech and language disabilities have a right to expect services that will allow them to converse with others and express themselves. A list of expectations retrieved from Communication Disabilities Access Canada (CDAC) outlines basic requirements offered to those with disabilities to improve their ability to communicate (Communication Disabilities Access Canada, 2013).

- Be treated with respect.
- Understand what the person is saying to them.
- Have their messages understood by the other person.
- Use the communication method(s) that work best for them.
- Use a communication assistant if they want.
- Have someone follow their instructions on how to communicate with them.
- Get enough time to communicate their messages.
- Ask questions and express their opinions.
- Be taken seriously.
- Connect with the organization using the telephone or another way that works better for them.
- Get communication supports that they may need to communicate effectively at meetings.
- Get supports they may need to read or understand the organizations written materials.
- Get supports they may need to complete an organization’s forms, take notes and sign documents. (Communication Disabilities Access Canada, 2013)

As noted earlier, the definition of vulnerability and how a witness is deemed vulnerable is contentious. Plotnikoff and Woolfson (2009) believe that anyone going through the justice system is vulnerable, which was also echoed by the students in the survey. However, she recognized the problems associated with the legislation and how it limits other deserving vulnerable witnesses from receiving adequate supports (Plotnikoff, personal communication, 2017).

Our legislation defines vulnerability as someone under the age of 18. You do not have to have any other qualifiers, just age. And if you are an adult, if you have a mental health problem, a physical disability, or you have a learning disability – all of those would qualify as vulnerable. However, it is really difficult. It is not a good fit, supposing it is someone who is deaf. They would say that they are not vulnerable, just need communication assistance because they are deaf. For people who are called ‘vulnerable’, it is like the word victim, so many overtones about it. You need a tool kit to identify vulnerability. You do not need to have a diagnosis to be vulnerable. (Plotnikoff, personal communication, 2017)
The parameters that surround vulnerability need to be revisited and allow for other witnesses with disabilities, reasonable stressors, and fears to exercise their rights to receive meaningful assistance.

The Convention on the Rights of Persons with Disabilities (CRPD) was enacted by the United Nations. Members of the Convention, in partnership with the United Nations, spent years trying to reverse the attitudes associated with approaching persons with disabilities and offer a more holistic approach when assisting them. They work to reaffirm “that all persons with all types of disabilities must enjoy all human rights and fundamental freedoms” (Division for Social Policy and Development Disability, 2016, para. 3). Embedded within provincial legislation is the right for people with speech and language disabilities to have services that will enable them to communicate. Accessibility for Ontarians with Disabilities Act (2005) recognized the importance of inclusion for all persons with disabilities. This act defines “disability” as

(a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,

(b) A condition of mental impairment or a developmental disability,

(c) A learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,

(d) A mental disorder, or

(e) an injury or disability for which benefits were claimed or received under the insurance plan established under the Workplace Safety and Insurance Act, 1997; (“handicap”).

Furthermore, Part III of the Act provides a list of “accessibility standards” to outline various guidelines for ensuring that persons with disabilities are afforded fair and respected accommodations (Accessibility for Ontarians with Disabilities Act, 2005).
5.4. Enhancing Access to Justice

The fourth theme that emerged from my research looked at the necessity to enhance access to justice for vulnerable witnesses, specifically through the use of special measures. Interviewees and students did not provide many examples regarding the use of special measures (testimonial accommodations) in the courtroom. Of the nineteen undergraduate students surveyed, only one student stated that special measures were offered and noted this was a negative experience, without further explanation. Kim Gramlich stated that the criminal justice system should be doing everything possible to reduce anxiety for vulnerable witnesses (*personal communication, 2017*). However, Judge G did not agree with Gramlich, as she stated that there should be restrictions on special measures. Although CCTV is an approved testimonial accommodation, it is evident that approval is based on the subjectivity of a judge. It was clear that the judge did not feel any concern for vulnerable witnesses, did not feel that it was her role to offer any sort of accommodation and felt that all responsibility rested with Crown.

Based on my interviews and online survey, results suggest that special measures are not mainstream in the Canadian criminal justice system. In the US, researchers have focused their attention on improving the way in which vulnerable witnesses testify in court (Hamlyn et al., 2004). A range of reforms was introduced in the US to ensure that appropriate supports are offered to those who testify in court. Reforms included video recorded pre-trial cross-examination and implementing special measures more widely, not just in serious cases (Hamlyn et al., 2004). The aim is to ensure that witnesses are willing and able to partake in the criminal justice process to provide their best evidence. Vulnerable witnesses rated special measures very high. Based on the findings from 862 vulnerable and intimidated witnesses, “around a third of witnesses […] said they would not otherwise have been able or willing to give evidence” (Munton, 2004). However, it appears from this survey, that they are rarely used or even acknowledged.

Despite the fact that my results show that special measures are rarely invoked, the *Canadian Victims Bill of Rights*³ came into force on July 23, 2015. Then Minister of

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Justice and Attorney General of Canada Peter MacKay addressed the importance of this bill for victims stating

Our government is extremely proud of this new piece of legislation that was informed by Canadians across the country, in particular, victims of crime. We have delivered this transformational change for victims to ensure that every victim of crime will now have an effective voice in our criminal justice system. The protection of Canadians, particularly those who have suffered the harm and devastation of victimization, is a responsibility our Government takes very seriously. We are also committed to standing up for our most vulnerable victims of crime, our children. (Minister of Justice and Attorney General of Canada, Peter MacKay, Department of Justice Canada, 2015, para. 8)

The Canadian Victims Bill of Rights offers a specific set of guidelines to judges. These guidelines have “opened the door a little bit more […] to potentially use other types of accommodations” while assisting vulnerable witnesses (Gramlich, personal communication, 2016). Within the Bill is a section that states that all accommodations “must be within the administration of justice,” thus making it open to interpretation and encourages dialogue for new ways of assisting vulnerable witnesses (Canadian Victims Bill of Rights, 2015).

Despite the advancements in legislation for victims of crime, attention to the use of existing special measures in the courtroom remains necessary. Based on the comments from interviewees and the lack thereof from students, special measures do not appear to be commonly used during court proceedings. A survey conducted by Hamlyn et al. (2004) indicated that 68% of vulnerable witnesses were not consulted about special measures (p. xv). The use of special measures becomes even scarcer for adult vulnerable witnesses.

Melton and Thompson (1987) suggested that the experiences of victims and witnesses within the courtroom impair their ability to provide credible evidence. Children who were questioned in a courtroom showed impairments in their ability to recall events and had many incorrect responses in contrast to children who had the opportunity to answer questions inside a private room (Hill & Hill, 1987).

4 Interpretation of this Act

20) This Act is to be construed and applied in a manner that is reasonable and not likely to:
(a) interfere with the proper administration of justice (Department of Justice Canada, 2015)
It doesn’t necessarily happen at the time of the incident…it’s several weeks later when people are beginning to realize, when the scars are healing, that they’re going to go to court and they are going to have to face the defendant again and all these sorts of things that sort of comes into focus. So, it’s at that point when you do start telling people… (Unknown, as cited from Charles, 2012, p. 40)

The Crown prosecution service research team, strategy and policy directorate, based out of London, UK, compiled a research report in 2012, pertaining to special measures for vulnerable and intimidated witnesses, which could be valuable if applied in a BC context (Charles, 2012). This report highlighted the importance of vulnerable witnesses in the criminal justice system and the need for all justice personnel to recognize the vulnerabilities of all witnesses using special measures. Despite positive advancements, researchers have identified a number of concerns pertaining to the ineffective and / or misuse of special measures by criminal justice personnel (Charles, 2012, p. 18). Charles and her research team outline key areas when opportunities to assist vulnerable witnesses were missed:

Vulnerable and intimidated witnesses are not always identified at the earliest opportunity;
Victim and witness needs are not always considered by the Crown Prosecution Service (CPS) at the charging stage;
Some witnesses who are eligible for special measures are not identified as vulnerable or intimidated until they arrive in court on the day of trial;
Where a vulnerable or intimidated witness has been identified, early special measures discussions between the police and the CPS are rare;
Special measures meetings between the CPS and vulnerable or intimidated witnesses are infrequent; and
Applications are often made late.” (Charles, 2012, p. 18)

Notably, an examination of improving emotional stability and support to vulnerable witnesses is imperative. Cunningham and Stevens (2011) advocated for the wellbeing of vulnerable witnesses during the criminal justice process. Additionally, Silverman (2005) provided guidelines for criminal justice personnel to clearly articulate how best to support vulnerable witnesses through various accommodations. The answer to the question should special measures be used is yes. Special measures provide additional supports to vulnerable witnesses. These testimonial accommodations need to be used appropriately in helping vulnerable witnesses communicate and feel safe. While conducting this research it became clear that criminal justice personnel do not use special measures to their full potential. The role of special measures ought to be explored more often with less negative influence from criminal justice personnel.
5.5. An Imperfect Justice System

The final theme unpacks the criminal justice system’s use of special measures and if the needs of vulnerable witnesses are being met. I was expecting undergraduate students to provide more detail and stronger opinions concerning the Canadian criminal justice system. A few comments were short and to the point simply writing “negative” and “fine” whereas others used this as a platform to discuss their feelings about the justice system. One student stated that the criminal justice system is an “imperfect system” while another questioned whether the justice system “is really a system” based on the challenges that it faces. Nathan and Saywitz (2003) would agree with them in terms of the complexity and challenges that have befallen the justice system. Carolyn Sinclair, Police Victim Services of British Columbia Executive Director, discussed the provinces of British Columbia’s plan to address challenges in the courtroom. She explained that the Ministry of Public Safety has made it a priority to address these challenges and ensure that different approaches are explored to assist vulnerable witnesses.

It is important to acknowledge my data sources and that they all wanted to talk to me about the topic of vulnerable witnesses. Many interviewees have a vested interest in assisting and advocating for vulnerable witnesses. In addition, many feel strongly about voicing their concerns and using this platform to do so. Students from the online survey all had some form of knowledge and experience with the criminal justice system. Students may not have had experiences with all facets of the criminal justice system but had strong thoughts about specific areas. Therefore, it is imperative that the bias be discussed and recognized. Finally, participants’ views on vulnerable witnesses and the role of the criminal justice system were very different, with many cautioning about going too far to support them.

The effects of the criminal justice process can involve a variety of emotions from witnesses. The context of the courts can influence a witness and have a far greater impact on a vulnerable witness. Plotnikoff discussed the need for repair and change (personal communication, 2017). She adds that the criminal justice system must be open to all vulnerable witnesses.
Nathanson and Saywitz (2003) conducted a “cost-benefit analysis to determine whether the expected outcome is worth the effort required” (p. 70). Though their research focused on children and their anxiety in the courtroom, their analysis could potentially be applied to all witnesses who must provide testimony. The results suggest that a child’s memory can be influenced if they find testifying to be an “interesting and challenging” task (p. 70). Additionally, the court can provide either “support” or “interference” to witnesses which can greatly affect their memory. In many instances, when witnesses indicated significant stressors related to the justice process, research stated that both children and adults may not bring their concerns forward (p. 89).

Similarly, the literature and results from interviewees and students highlight the need for change within the criminal justice system. As previously noted, sexual assault survivor, Sarah Shinn’s initial Crown counsel lawyer told her to “not expect much” as her case was not a murder trial (Shinn, personal communication, 2017). Informing victims and witnesses that they are not important does not instill the confidence that many desperately crave.

In many cases, the court case and the act of testifying revictimize the witness. For example, The Independent (2003) newspaper published an article in the United Kingdom describing a young witness aged nine, who suffered greatly during her cross-examination. The defence barrister had blatantly accused the young girl of lying during her testimony and only recalling certain events to protect her mother (Dugan, 2013, May 24, para. 3).

Marie’s experience is echoed by those in countless other trials across the country, where young, vulnerable abuse victims are treated to aggressive cross-examination that can leave them traumatized. In the recent Oxford abuse trial, one of the victims was in such an emotional state during questioning that she had to halt the process repeatedly to throw up. Now judges and ministers are considering proposals to make giving evidence less traumatic for child abuse victims. (The Independent, 2003, para. 4)

The Courts and Tribunals Judiciary of the United Kingdom published the Equal Treatment Bench Book (2013), a guide for judges, magistrates, and other justice personnel to reference on various topics (Judicial College, 2013). Section five examines

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5 “Marie” is a pseudonym whose real name cannot be used. She testified in the court when she was nine but was interviewed by The Independent when she was twelve years old.
children and vulnerable adults and requires the courts to “adopt a more flexible approach” when they are in contact with vulnerable witnesses (Hurley, 2013, p. 5-1). The book outlines areas of best practice for safeguarding vulnerable witnesses while they are in the justice process. In addition, recommendations were made assisting vulnerable witnesses further by encouraging judges and other justice personnel to be continually proactive and alert to their needs (Hurley, 2013, p. 5-5). In 2013 Lord Chief Justice stated,

Just because a change does not coincide with the way we have always done things does not mean that it should be rejected…Do proposed changes cause unfair prejudice to the defendant?: if so, of course they cannot happen. If, however, they make it more likely to enable the truth to emerge, whether favourable or unfavourable to the defendant, then let it be done. The truth is the objective. (Toulmin, 2013)

The courts are expected to make every effort to accommodate the needs of witnesses in order to facilitate open, effective, and meaningful participation (Judicial College, 2013, p. 5-2).

England has made advances in controlling the way children are questioned during pre-trial cross-examination. The goal was to eliminate cross-examination during the preliminary stages, in order to simplify the process for children. Plotnikoff (personal communication, 2017) considers this pilot project to be “extraordinary” in terms of eliminating unnecessary stressors for children and encouraging information to be captured ahead of time. The intention in England, moving forward, is to extend the project to adult witnesses in hopes of improving questioning, testimony, and overall well-being in the courtroom. Contributions from criminologists like Plotnikoff and her colleagues, who advocate for change, showcase how lessons can be universal, shared, and applied in other criminal justice systems to support vulnerable witnesses.

People who are accused of a crime in Canada have rights. In accordance with The Canadian Charter of Rights and Freedoms (1982), Canadians who are accused of a crime have constitutional protections. Proceedings in criminal and penal matters, Section 11(d) outlines that an accused person has the right,

11(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.
Therefore, any advancements and amendments to assisting vulnerable witnesses in court must not obstruct the accused person’s right to a fair trial. Nevertheless, there has been a “gradual shift, or evolution…to a recognition of the concerns, interests and involvement of the individual who have suffered as a result of crime” (Cameron, 2013, p. 3). The guarantee of a fair trial must not be compromised. Efforts to assist vulnerable witnesses through special measures and other accommodations need to maintain a balance between protecting both parties’ during the trial process.

In Canada, we need to look to other countries and take note of the positive advances in legislation pertaining to witnesses. The Canadian criminal justice system must be open to change and overt in its engagement with the public to highlight awareness in the protection of witness’s well-being throughout the justice process. Carolyn Sinclair discussed the importance of providing education to the public that exemplifies equal opportunities for all, especially those who are required to testify (personal communication, 2017).

Historically, victims are expected to communicate their story many times, over a long period of time, and in different locations. Sophie’s Place, a child and youth advocacy centre (CYAC), alleviates stressors and fears as professionals are present on site providing assistance and support. The imperfections of the justice system affect vulnerable witnesses, especially with complex files. The gaps in the justice system lead vulnerable witnesses, especially children and teenagers, to share their story multiple times over an extended period of time. Sophie’s Place is a program that eliminates fears, repetition, and delay.

Sophie’s Place is a CYAC in Surrey, BC dedicated to assisting children and youth who are victims of physical, mental, or sexual abuse. Established in 2012, staff provide a safe space for children aged 0-18 years to share their story in a secure and friendly environment. In partnership, local agencies including the Surrey RCMP, Ministry of Children and Family Development, The City of Surrey, Minister of Safety and Solicitor General and patron Sophie Tweed-Simmons collaborated to offer care for victims in one place. The goal is to provide victims with the opportunity to be seen by all criminal justice personnel and medical staff in one place. Child abuse survivor, Andy Bhatti, said that

6 Sophie’s Place main website: http://the-centre.org/sophies-place/
had there been a child advocacy centre like Sophie’s Place in Metro Vancouver when he was younger, he probably would not have waited 20 years to tell someone that he had been sexually abused.

I know if I did speak up, I wouldn’t have spent eight years in jail and I probably would have graduated from high school. Unfortunately, given the circumstances of my life at the time, I went from Grade 6 to a psychiatric assessment centre to a juvenile facility to an adult facility to a longer facility. Eventually, I was out on Hastings Street stuck on heroin.⁷

This type of advocacy centre is laying the groundwork for change in the Canadian criminal justice system. Since opening in 2015, the centre has supported over 2700 victims. However, it is operating solely on soft money and requires government support to operate. There are currently six child and youth advocacy centres in British Columbia and 21 centres across Canada, which are part of a national, federally-funded advocacy initiative designed to address the needs of child and youth victims. Advocacy centres like Sophie’s Place are a great starting point for offering support to vulnerable witnesses as the goal is to minimize system-induced trauma and to offer co-located criminal justice system services.

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⁷ (Retrieved directly from website: http://the-centre.org/child-abuse-survivor-says-without-sophies-place-he-waited-20-years-to-tell-his-story/).
Chapter 6.

Conclusion

Victims and witnesses are an integral component of the criminal justice process. Improving the experience of witnesses and increasing awareness of sensitive practices must be a priority. The Law Commission of Canada emphasizes

Victims and survivors have unique needs characterized by their victimization, their gender, their relationship with the offender and with their community, and their own personal characteristics. Victims are not a homogenous group, and they do not speak with one voice in identifying needs and approaches. (The Law Commission of Canada, 2015, para. 1)

The shared understanding between various levels of government (federal, provincial, and territorial governments) to address the needs of witnesses is progressing steadily (Government of Canada, Department of Justice, 2015).

The goal of this research was to identify ways to best support vulnerable witnesses through the Canadian criminal justice system. Although advances have been made, specifically for vulnerable witnesses, this research has identified gaps within the process. These gaps begin with discrepancies involving the meaning of “vulnerability” as there is no shared definition, making it challenging for criminal justice system personnel to work together in a timely manner.

Collectively, criminal justice personnel in this study agreed that more can be done to assist vulnerable witnesses. The ultimate goal is to ensure that vulnerable witnesses can provide their “best evidence” in the courtroom. To achieve this, results indicate that preparing vulnerable witnesses for each stage in the process can greatly increase their ability to communicate their story. In addition, Plotnikoff and Woolfson (2009) argued that “tailored support” in the courtroom is a necessity. Tailored support through special measures can assist with various vulnerabilities.

My main research question was: How do we ensure that vulnerable witnesses are able to provide their ‘best evidence’ in court while ensuring that all participating parties are subject to a fair and impartial trial process? The results demonstrate that the Canadian criminal justice system is not doing enough to embolden vulnerable witnesses.
to communicate their best evidence, not just in court but at all stages of the process. However, over the years, the criminal justice system has been plagued with negativity and criticized for creating an unwelcoming environment for witnesses.

The integrity of the trial is enhanced through witness preparation. The guidance offered by Crown can only prove beneficial if the witness is given the opportunity to play a more informed and active role. In 2005, Attorney-General Goldsmith presented a ten-point ‘Prosecutors Pledge,’ “which requires all prosecutors and defence to consider and support the interests of victims at every point in the case from the charge to the appeal” (Ellison, 2007, p. 185). This pledge enables vulnerable witnesses to build rapport with the Crown, ask questions, and receive guidance (Mwewa et al., 2015, p. 26). It is essential that prosecutors do not lose sight of the human being who has been greatly affected by a crime.

Regardless of age, it is imperative that Crown provide witnesses with a reasonable amount of knowledge and understanding of the criminal justice system. Through this understanding, witnesses can provide the best evidence and remain focused on their task. Psychological studies discuss the seriousness of “heightened emotional arousal” and how it alters one’s ability to manage thoughts and communicate responses (Ellison, 2007, p. 181). Apart from providing vulnerable witnesses with the knowledge and skill-set to testify in the courtroom, witness preparation serves to minimize the likelihood of psychological re-victimization (Ellison, 2007, p. 181). Thus, in 2005 the Professional Standards Committee of the Bar Council of B.C. established a rule that not only encouraged but also deemed it appropriate for Crown to familiarize witnesses with the basic techniques of giving quality evidence (Ellison, 2007, p. 183).

Despite the attention raised for addressing witnesses’ needs, efforts to strengthen supports and building of trusting relationships require improvements, particularly in British Columbia. The government of Alberta created child-friendly courtrooms dedicated to encouraging vulnerable victims to feel more at ease when delivering their testimony. Kim Gramlich travelled to Alberta and visited one of these specialized courtrooms.

Alberta is one province and I believe several others have very child friendly court spaces and they actually even have courtrooms that are dedicated to being child friendly – so they have a different set up in the courtroom and they have children’s seating that is different. They are
not sitting in this big intimidating witness box, on this high high chair, I
know that, in Alberta, in the courtroom the judge insisted that his
loveseat be brought into the courtroom from his chambers so that the
dog could sit beside the child on the loveseat, so very child friendly
practice. It is very poor in B.C., like extremely poor, I do not know why
we have not caught up in that regard, I know that we do not necessarily
have the funding for our criminal justice system that we would like.
Children are being caught in the mix. (Gramlich, personal
communication, 2016)

Attention toward the needs of vulnerable witnesses, particularly children, ought to be
explored to create a more user-friendly space.

6.1. Recommendations

Special measures offer vulnerable witnesses the opportunity to feel supported
while testifying in the courtroom. Surrounded by an environment that can be stressful,
imimidating, and embarrassing for witnesses, special measures provide those who are
vulnerable with the opportunity to feel supported (Motzkau, 2007; Luchjenbroers, 2008;
Kebbell et al., 2007). Special measures are “set out to mediate the […] physical, spatial
or even temporal relationship in the courtroom” (Motzkau, 2007, para. 17).

Research further suggests that improving one’s emotional and physical stability
in the courtroom will effectively enhance the quality of witness communication and
evidence (Cunningham & Stevens, 2011, p. 13). According to Cunningham and Stevens
(2011) vulnerable witnesses who have been surveyed state that they are much more
satisfied with the criminal justice system when they feel supported in the courtroom. The
courts have made accommodations to ensure that vulnerable witnesses are able to
communicate their story efficiently and effectively, even in the most challenging of
circumstances.

6.1.1. Courthouse Facility Dogs

The Canadian Victims Bill of Rights (2015) has left the door open for other
opportunities to assist vulnerable witnesses. Caber, Canada’s first accredited facility
dog, has started assisting vulnerable witnesses in the courtroom. He has the “capacity to
reduce people’s blood pressure, lower their heart rate and generally just try to put a
smile on their face” (Gramlich, October 2017). My study suggests that there is a need for
such assistance and these type of intermediaries should be explored and be introduced at the earliest opportunity, assisting with police and Crown interviews.

According to Prothmann, Bienert, and Ettrich (2006) “the presence of a dog positively change[s] children’s states of mind” by increasing their enthusiasm toward completing tasks (p. 265). Dogs satisfy important social, cognitive, and emotional needs in people by creating a comfortable atmosphere under stressful conditions (Hergovich et al., 2002). The research is not limited to children, as some adults also seem to benefit from the mere presence and contact with dogs. Dogs accredited by Assistance Dogs International (ADI)\(^8\) have the professional training to accompany a vulnerable victim to court and retain proper etiquette throughout the process (Courthouse Dogs, 2018, para. 1). A courthouse dog should have the following characteristics,

They must be quiet, unobtrusive, and emotionally available for the witness when the need arises. The dogs should be able to sit or lie down beside the witness for an extended period of time. The dogs should not engage in any behaviour that would distract the witness or other people in the courtroom. The dogs should be able to assist the witness for as long as necessary. (Courthouse Dogs, 2018, para. 2)

The dog and handler must keep up to date with training to maintain the dog’s necessary skills for the courthouse. Best practices include procedures that would allow the dog to be placed in the witness box before the trial and before members of the jury would enter the courtroom.

Interacting with a dog can be valuable and therapeutic for some people. Children are often captivated by animals, and through simple interaction, they respond well physically, mentally, and emotionally to this form of companionship. In the company of a friendly dog “studies on the potential anxiolytic effects of companion animals show evidence for reductions in cardiovascular, behavioural, and psychological indicators of anxiety” in a variety of different populations (Wilson, 1991, p. 482). Dr. Wells, senior lecturer at Queen’s University, explored the effects animals have on improving very emotionally distressing life events, such as divorce and grief by increasing one’s overall

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\(^8\) Canadian ADI Accredited Assistance Dog Schools: Dogs with Wings (Edmonton, Albert), National Service Dogs (Cambridge, Ontario), and PADS (Burnaby, British Columbia).
well-being (Wells, 2009, p. 527). Dogs are the animals of choice in professional settings due in part to their overall popularity, unobtrusive behaviour, and interactive capabilities (Hergovich et al., 2002, p. 38).

6.1.2. Canada’s First Victim Services Dog: “Caber”

Caber, a canine assistance intervention dog, is the first of his kind in Canada. Delta Police Victim Services Coordinator, Kim Gramlich, gained the idea for this initiative when she attended a national victim services conference in Scottsdale, Arizona. Kim Gramlich proposed the idea to management and former Delta Police Chief Constable Jim Cessford, who supported the initiative. The police board approved the notion with considerable enthusiasm and Caber became an official member of the Delta Police Victim Services on July 26, 2010.

Caber was bred and trained by the Pacific Assistance Dogs Society (PADS). Caber’s trainers, handlers, and volunteers exposed him to a variety of different settings including Canucks hockey games, the Pacific National Exhibition (PNE), and Sky Train rides. Caber is very low energy and does not exacerbate someone’s anxiety with his own negative or high energy. Before deployment of Caber, the handler must ensure that a client or anyone else in the courtroom does not have any allergies, phobias, and/or fear of dogs. In addition, if the client is psychologically unstable or under the influence of drugs or alcohol Caber will not be deployed.

In spring 2015, Victim Services coordinator Kim Gramlich spoke in Surrey Provincial Court on behalf of Caber and presented his credentials as a well-suited courthouse dog, for the first time in British Columbia. Caber was granted approval by a provincial court judge to assist a young vulnerable witness as a “support person” during trial (Gramlich, personal communication, 2015). Prior to this ruling, vulnerable witnesses could have a support person but never an accredited animal. Surrey Crown counsel Winston Sayson QC., stated that

This judgement is an important acknowledgement by the court that the criminal justice system can continue to evolve and be innovative in accommodating children and vulnerable victims so their access to justice is enhanced. (Sayson, personal communication, 2015)
In May 2015, Caber successfully completed his first court appearance supporting a child sexual assault victim.⁹

The Supreme Court of British Columbia, allowing an application pursuant to s. 486.7 of the Criminal Code, noted that the presence of service dogs such as Caber has a calming influence, and allows witnesses to “effectively communicate the evidence without creating interference or distraction.” (R. V. Marchand, [2016] B.C.J. No. 1912)

Caber was placed in the victim box, directly beside the child, where he silently lay for the duration of the child’s testimony. The young witness was able to hold his leash and pat him while she provided her testimony.

As the use of courthouse dogs increases, it is important to note the potential bias against the accused in court. Defence lawyer Christopher Decker fought the use of dogs during criminal trials.

Having dogs and other emotional support animals in the witness box can illegitimately boost witness credibility and prejudice jurors against defendants. I think it distracts the jurors from what their job is, which is to determine the truthfulness of the testimony. It tends to imply or infer that there has been some victimization. It tends to engender sympathy. It’s highly prejudicial. (“For Defenders and Judges, Comfort Dogs in Court Do Opposite,” 2018)

Defence lawyers may object to the use of courthouse dogs. When not permitted inside the courtroom, courthouse dogs have been used outside the courtroom. As the use of dogs in the courtroom has spread quickly, many people have voiced concerns and called for limits to its use (Collins, 2018). Facility dogs in Washington State helped Ivy Jacobsen get through three trials. Although they were not permitted in the courtroom during the trial, Jacobsen stated that they helped her and “made it easier to talk [...]” (Collins, 2018, para. 11). With a growing number of courthouse facility dogs working in North America, it is imperative that witness credibility, prejudice, and biases do not interfere with the administration of justice. By allowing the dog to be placed in the witness box before the jury enters the courtroom can assist with mitigating any potential biases.

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6.1.3. A Nationally Coordinated Criminal Justice System

Findings from my thesis outlined various gaps within the criminal justice system. These gaps include a range of challenges associated with criminal justice personnel identifying vulnerability, a lack of preparation for vulnerable witnesses during the trial process, and a breakdown of overall communication between criminal justice personnel and vulnerable witnesses. There is opportunity to coordinate, design, and develop an integrated operational communicative tool that implements and links services for all victims and witnesses. In partnership with (but not limited to) policing agencies, crown counsel, and victim services could funnel information and resources directly to supporting victims and witnesses during the trial process.

Once implemented, the communication device could be accessed by victims and witnesses at any point during the justice process. Such technology will allow for enhanced efficiency and create an updated platform for updated information to be shared between agencies and with victims and witnesses. With the creation of an integrated system, the idea is to encourage all appropriate agencies to create an online space for supports and other relevant resources to be readily available for victims, witnesses, and vulnerable witnesses. The online space would afford people the opportunity and ability to seek proper help, receive guidance, and obtain information in a timely manner.

The national system would enable new information and resources to be updated and shared. Such technology would be a great way for criminal justice personnel to share with each other and in turn with victims and witnesses provide them with the ability to have equal access that is shared across the country. This may alleviate time constraints from police officers and crown who do not always have the time to adequately spend with each person. The idea is that all newfound opportunities and resources are updated and published for victims, witnesses, and criminal justice personnel to be made aware of and highlight new ways in which supports have been utilized within the justice setting.
6.2. “We can do better” – (Plotnikoff, 2017)

The overall consensus from the participants I interviewed and the responses I received from students taking the online survey was that they believed the criminal justice system can do a better job to support vulnerable witnesses. Moving forward, Canada can look to advancements and policies in the United Kingdom in terms of supporting vulnerable witnesses. Plotnikoff and Woolfson’s (2009) evaluation of young witnesses in criminal proceedings discusses “tailored support” to children requiring customized support during court.

Current policies indicate that all young witnesses are entitled to support, tailored to their individual needs. The objectives include offering support from an early stage (CJS, 2007, sections 5.1–5.28) and enabling children to give their best evidence with as little stress and anxiety as possible. (CPS, 2006, p5) On the day of trial, a trained child witness supporter will be there to help. (CPS, 2006, p. 14 as cited in Plotnikoff & Woolfson, 2009)

The criminal justice system and its players need to be mindful and cautious when approaching vulnerable witnesses and their needs. The implementation of the Canadian Victims Bill of Rights (2015) has expanded the court’s ability to provide newfound opportunities to vulnerable victims, specifically in (or out) of the courtroom.

Geraldine Monaghan, who heads the Investigations Unit of Liverpool Social Services, discussed the specific protocol used to develop a witness profile. This profile serves as guidelines for the prosecution, defence, and the judge to best address the needs of the vulnerable witness and accommodate them in the courtroom (Silverman, 2005). The goal is to make the courtroom “a less forbidding place” that encourages participation and increases the quality of evidence given (Silverman, 2005, para 1).

The results of my research suggest the need for improvements for vulnerable witnesses in the criminal justice system. Similar results have also been found in the UK, as Hamlyn and colleagues (2004) echo the necessity for improvements to meet the needs of vulnerable witnesses, to ensure vulnerable witnesses have the necessary tools and abilities to provide their “best evidence” in court. Given the nature of the adversarial system, it is not surprising that participants, students from the online survey, and much of the discourse struggle to articulate what the term vulnerability means. The result is considerable extremes at one end cautioning the use of the term and the other arguing
all victims and witnesses have vulnerabilities. The results demonstrate a need for the following:

- Agreement with the term “vulnerability”;
- Recognizing that the needs of all victims and witnesses, particularly vulnerable witnesses, requires greater consideration;
- Catering to individual needs to enhance the quality of evidence;
- Time commitment from criminal justice personnel to reduce stress and anxiety;
- Funding local programs that offer specialized services for vulnerable witnesses.

I acknowledge that the above recommendations require considerable time and funding. Additionally, criminal justice personnel, particularly Crown counsel, are limited in availability and time to assist vulnerable witnesses. Many resources such as students completing graduate studies in the field of criminology, law students, and articling students offer affordable alternatives in place of Crown. Furthermore, utilizing students provides them with an opportunity to hone their skills and offer a meaningful service to vulnerable witnesses.

6.3. Limitations

When I started my thesis, I was aware that the literature on vulnerable witnesses was limited and even more so from a Canadian perspective. The majority of the research pertaining to vulnerable witnesses is from the United Kingdom and United States. Therefore, research from the Canadian perspective is hard to obtain and my research relied on research from other countries.

Canadian provinces vary in the types of support offered and acknowledged to vulnerable witnesses. Many participants noted differences amongst the provinces and territories in their ways of supporting vulnerable witnesses. Most notable was a courtroom in Alberta, where the entire process, from Crown counsel meetings to the inside of the courtroom, is child-friendly, including colourful wall art, toys, and comfortable seating. In British Columbia, child-friendly spaces are just starting to appear in the criminal justice system. Information about the Canadian criminal justice system
and vulnerable witnesses was obtained from personal communication, Government of Canada websites, and participants.

The student online survey was disseminated to undergraduate students majoring in criminology and biology at Simon Fraser University. Despite emails that were sent to the undergraduate students in the criminology and biology departments, only nineteen students successfully completed the survey. Surprisingly, the majority of students who responded had experienced the criminal justice system. At the onset, I was hoping more students who had no experience would participate, to see whether a lack of experience contributed to different understanding of the processes. Perhaps, students with experience felt comfortable to share their opinions, both positive and negative as they had a real life understanding of the process. I was unable to compare and analyze the material to the degree in which I had hoped. I felt that the undergraduate students were a good population to focus on when sending out the online survey, as representatives of the general public who may have a vested interest in the topic. In an attempt to avoid being too broad, I decided to limit recruitment to this population as I thought the responses would otherwise be too overwhelming.

During the interview process, I found judges to be the most challenging population to recruit as participants for the study. I had a gatekeeper who had many personal connections with judges but I found most were mandated not to speak about their profession. Therefore, the perspectives shown in this research are largely based on crown counsel, police officers, and victim service caseworkers.

Through a conversation with an interviewee, I had the chance to meet and interview a vulnerable witness. Though it added greatly to the final product, I was only able to provide the voice and experience of one vulnerable witness. The experiences of other vulnerable witnesses may be different.

6.4. Future Research

Vulnerable witnesses have many stories to tell. Criminal justice personnel or the courts may not have formally deemed many witnesses as “vulnerable witnesses.” Future research might explore this issue if a larger sample of vulnerable witnesses was available or if witnesses were approached to share their experiences. Future research
might take a closer look at community programs (such as Sophie’s Place), and initiatives being used across Canada to support vulnerable witnesses. Future research should take a closer look and delve into whether these initiatives are viewed positively by vulnerable witnesses and are assisting them effectively.

In Canada, criminal justice personnel need to recognize that all victims and witnesses have unique differences, challenges, and barriers. The role of special measures should be readily available and better promoted to include everyone who may need assistance with communicating their evidence in court, rather than primarily children. In order to uphold the administration of justice, we need to ensure that all victims and witnesses feel safe to come forward and know that they will be supported and given the ability to communicate regardless of their stressors, impairments, or disabilities.

According to Madame Justice L’Heureux Dubé (1993)

The goal of the court process is truth-seeking and, to that end, the evidence of all those involved in judicial proceedings must be given in a way that is most favourable to eliciting the truth. (Levogiannis [1993] 4 R.C.S. 475)

The criminal justice system must uphold its objective to “seek [and] discover criminal wrongdoers and bring them to justice so as to keep their communities safe and provide solace to victims” all while maintaining the administration of justice (Thompson, 2012, p. 340). Vulnerable witnesses’ role in the criminal justice system is vital. It is important to take full advantage of existing special measures and utilize new measures, so that vulnerable witnesses can “give their best evidence” and tell their story at every stage of the criminal justice process.
References


### Legislation

*Accessibility for Ontarians with Disabilities Act, 2005.* Available at: https://www.ontario.ca/laws/statute/05a11


*Canadian Victims Bill of Rights,* S.C. 2015, c. 13, s. 2

*Criminal Code,* R.S.C. 1985, c.46, s.231(6).


*Evidence Act 1995,* No 25, New South Wales Government (NSW)


*UN Declaration on the Basic Principles of Justice for Victims of Crime and Abuse of Power* (1985)

*Victims of Crime Act 1990* H.T. 4688 (101st) (United States Congress)


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Cases Cited


Appendix A.

Interview Questions

Main Research Question: How do we ensure that vulnerable witnesses are able to provide their ‘best evidence’ in court while ensuring that all participating parties are subject to a fair and impartial process?

Open Questions

- As my main area of interest focusses on vulnerable witnesses, I am leaving this open, where would you like to start?

Vulnerable Witnesses

- How do you define vulnerability?
- How were you identified as a vulnerable witnesses?
- How were you prepared as a vulnerable witness for court?

Canadian criminal justice system

- In your own words, what does an adversarial process mean to you?
  o What does this look like?
- Would you make any recommendations

Special Measures

- Explain the role of special measures?
- Did you utilize testimonial accommodations?
  o If yes, explain its use?

Courts

- What is the courts role/responsibility towards vulnerable witnesses?
- How were you prepared by Crown counsel?
- Explain what it was like to testify in court?
- Any challenges? Any surprises?
- What were your thoughts and feelings after your testimony?
Players in the Courtroom

- A defendant has a right to have fair and impartial trial.
  o What does this mean to you?
  o What does this look like?

- Human Rights Act (1998) outlines the importance of how “best to resolve the inherent tension between protecting the complainer’s privacy and dignity and the right of the accused to a fair trial in a proportionate manner” (Kibble, 2001; Rait, 2001 as citing in Burman, 2009, p. 385)
  o How can this balance be attained? Is it possible?

- The Ministry of Justice (2009) outlines the duty of a prosecutor is “not to obtain a conviction at any cost but, rather, to ensure that justice is done in a fair, impartial, efficient and respectful manner” ensuring that the trial process is fair to all parties involved.
  o What are your thoughts on this statement?
  o How will special measures affect the role of impartiality?

References


Appendix B. Online Survey

Canadian criminal justice system

Vulnerable Witnesses in the Canadian criminal justice system

Student Survey: Applications No: 2017/002

Purpose of Study
To obtain information from the perspective of Canadians particularly those who are students attending a post-secondary institution. All answers will remain confidential.

Overview of Study
This study will be looking at vulnerable witnesses in the Canadian criminal justice system. Specifically, looking at the relationship between the courts and vulnerable witnesses. Though special measures have been introduced and utilized within the adversarial system, literature indicates a gap in its effectiveness.

Main Research Question
How do we ensure that vulnerable witnesses are able to provide their 'best evidence' in court while ensuring that all participating parties are subject to a fair and impartial trial process?

Have you ever been involved in the criminal justice as a...

- Victim
- Witness
- Other, please specify. [Type here]

Please rate your overall experience in court.
[Rating]
Please rate the quality of your overall experience while testifying in court.

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If you testified in court, were you offered any special measures (testimonial accommodations?)

Yes  No

If any, what special measures (testimonial accommodations) were you offered?

☐ Screen

☐ CCTV (testified in another room)

☐ Support Person

☐ Other please specify:  

Please rate your experience with special measures..

---

How frequently have you attended court?

☐ Never

☐ Once

☐ 2-3 times

☐ 4 or more times

Personal Characteristics

Gender

☐ Male

☐ Female

☐ Other please specify:  

Type here
Age

Type here

Define the term vulnerable witness.

Type here

What do you know about special measures?

How do you feel about them?

Type here

What is your overall opinion of the Canadian criminal justice system?

Type here

What do you feel is the courts role / responsibility toward vulnerable witnesses?

Do they have a role / responsibility?

Type here

Any other comments?

Type here

Thank you for taking part in this survey. If anything in this survey has upset you, or if you or someone you know has been involved in the criminal justice system, you can contact SFU Health and Counselling for support.

http://www.sfu.ca/students/health.html

Submit

Administrator
Appendix C.

Informed Consent

“In Awkward Couple”: Examining the relationship between vulnerable witnesses in the Canadian criminal justice system

Principal Investigator: Soraya Janus (MA Student) School of Criminology, Simon Fraser University

Contact Information: […]

Faculty Supervisor: Dr. Gail Anderson

Application Number: 2017s0022

Purpose of Study: This study will be looking at vulnerable witnesses in the Canadian criminal justice system. I will explore the strengths and weaknesses surrounding the relationship between the courts and vulnerable witnesses. Though special measures have been introduced and utilized within the adversarial system, literature indicates a gap in its effectiveness. Collectively, literature and case studies from North America and Western Europe address this negativity and speak to the dissatisfaction of vulnerable witnesses who are expected to effectively communicate their story.

Voluntary Participation: Your participation is voluntary. You have the right to refuse to participate in this study. If you decide to participate, you may still withdraw at any time without negative consequences.

Methods: Semi-structured interviews will be conducted. These interviews will be audio-recorded and will be stored in a secure location. The interviews will be approximately one-hour in length with the intention of having another follow-up interview (length of time to be discussed). As the interviews are audio-recorded they will be transcribed verbatim. Quotations will be used in the final published copy of my Master’s thesis. You may request to have the interview questions prior to the schedule interview.

Potential Risks of the Study: There are no foreseeable risks to you in participating in this study.

Potential Benefits of the Study: Participation in this study may offer insight to address change in the criminal justice system. The information will provide a voice for vulnerable witnesses who are expected to provide testimony in court.

Confidentiality: Your confidentiality will be respected. Please advise on how you would like to be addressed moving forward in this study. You may choose to use your real name...
or you may select a pseudonym. The pseudonym can be utilized to ensure that your confidentiality is protected and others will not be able to indirectly identify you based on your responses. As the recordings and notes will contain confidential information they will only be accessible by a secured password. Additionally, once the data has been transcribed and coded (shortly after conducting the interview) the information will be encrypted to maintain confidentiality and then the audio-recordings will be destroyed. All identifying information will be removed (unless otherwise specified by the participant) and a pseudonym will be used. The audio file along with the USB will be kept in a locked filing cabinet in my office at Simon Fraser University, where only the researcher has access. All notes and papers will be shredded. The survey will be uploaded on a computer and data will be saved on my password-protected laptop. The audio recordings will be kept for five years.

Retention and Destruction of Data: The data will be kept for five years and the data will be retained on a USB that is stored in a locked cabinet, which the researcher will only have access to. The data will not have any identifying information that could link back to any participant. The audio recordings will be destroyed soon after transcription of the data is complete. The electronic collection of the data from the online server will be obtained from a secured server that is password protected. The information will be analyzed from Simon Fraser University computers.

Future Use of Participant Data: The results of this study will be reported in a graduate thesis and may also be published in journal articles and books. The results will be presented at a seminar in front of faculty members and graduate students at the end of the year.

If you have any concerns about your rights as a research participant / or your experiences while participating in this study, you may contact Dr. Gail Anderson at [...] and/or Soraya Janus at [...] Concerns and/or complaints should be directed to Dr. Jeff Toward, Director, Office of Research Ethics [...] or [...]

Taking part in this study is entirely up to you. You have the right to refuse to participate in this study. If you decide to take part, you may choose to pull out of the study at any time without giving a reason and without any negative impact.