

**BILL C-15 AND THE CHILD WITNESS: THE ROLE OF SOCIAL-SCIENTIFIC
EVIDENCE IN DISPELLING THE PRESUMPTION OF INCOMPETENCE**

by

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Bill C-15 and the Child Witness: The Role of Social-

Scientific Evidence in Dispelling the Presumption of

Incompetence

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ABSTRACT

The Canadian legal system has traditionally considered children to be a category of witnesses who offer inherently flawed testimony and, consequently, their credibility and competence were often questioned. Historically, all complainants of sexual assault, whether they be adults or children, had to have their testimony corroborated. Prior to 1954, the rule of practice for rape was that the judge was required to instruct the jury that it was unsafe to find the accused guilty in the absence of corroboration. This rule was incorporated into the *Criminal Code* of 1953-1954. However, the rule was repealed in 1976. In 1983, in order to prevent judges from reviving the common law practice, Parliament enacted the requirement that in cases of sexual assault, the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration. These actions of Parliament in 1976 and 1983 reflected the belief that the testimony of adult sexual victims was no longer considered by Canadian law to be inherently untrustworthy. However, the repeal of Section 659 of the *Criminal Code*, R.S.C. 1985 (that required corroboration of child complainants of sexual assault and other offences) was not proclaimed in force until the Bill C-15 amendments in January of 1988.

Clearly, prior to the Bill C-15 amendments to the *Criminal Code* and *Canada Evidence Act*, children who were the victims of

sexual assault, were subject to different judicial treatment than their adult counterparts. Even with the repeal to Section 659 which had required corroboration, sexually assaulted children are still not treated as being as competent as sexually assaulted adult witnesses, since they are required to go through a competency enquiry before they are allowed to testify (Section 16 of the *Canada Evidence Act*).

This thesis will examine whether, in light of the empirical social-psychological evidence which was available at that time, was there justification for considering children to be less credible and competent than adults when offering evidence in allegations of sexual abuse. This thesis will examine the degree to which the legislators, in the Parliamentary Committees, explicitly addressed the social-scientific literature vis-à-vis the capabilities of the sexually abused child witness. If the legislators had carefully examined the scientific literature on the credibility of the sexually abused child witness, would Parliament continue to treat this group of witness as being less competent than sexually abused adult witnesses? The failure of the Parliamentary members, as well as the formal witnesses, to adequately address the body of literature on the capabilities of the child witness is addressed in terms of the problematic nature of the utilization of empirical work by legal scholars and policy-makers.

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TABLE OF CONTENTS

Approval	ii
Abstract	iii
Acknowledgments	v
List of Tables	ix
I. Antecedents To Bill C-15	1
Introduction	1
Policy-makers And Children: The Assumptions	1
The History of Bill C-15: The Sexual Assault Law Reforms	8
Law Reform Commission Of Canada: Report On Sexual Offences	9
Bill C-53 Proposals	12
The Scope of Bill C-127	13
Corroboration and Bill C-127	14
The Badgley Report	16
The Fraser Report	21
The Subject Matter of Bill C-15	23
Reform Under Bill C-15	25
Sexual Interference	25
Invitation to Sexual Touching	27
Sexual Exploitation	28
Exploitation Of Our Youth	29
Amendments To The Law Of Evidence	30
Witness Whose Capacity Is In Question	30
Corroboration Not Required	31
Recent Complainant	32

Videotaped Evidence	32
II. The Body Of Literature On The Child Witness	37
Introduction	37
Human Memory And Its Development	39
The "Four Factor" Model	39
Cognitive Developmental Research	41
A Reconstructive View Of Memory	43
Eyewitness Research	49
Capabilities Of The Child Witness	56
Suggestibility	56
Credibility And Truthfulness	58
Fact Or Fantasy?	60
Ability To Communicate	62
Perception	64
The Child Sexual Abuse Accommodation Syndrome	65
Secrecy	66
Helplessness	67
Entrapment And Accommodation	67
Delayed, Conflicted, And Unconvincing Disclosure	68
Retraction	68
Research And The Child Witness: A Cautionary Note	69
III. The Utilization Of Social-Psychological Evidence In The House Of Commons	720
Introduction	72
The Subject Matter Of Bill C-15	72
Interest Groups And Legislative Witnesses	73
The Canadian Bar Association	74

The Canadian Council On Children And Youth	76
Canadian Association Of Criminal Defense Lawyers	80
Wendy Harvey:Crown Attorney And Child Witness Expert	81
Pediatric Specialists	83
The National Association Of Women And The Law	85
The Canadian Child Welfare Association	86
The Metropolitan Toronto Special Committee On Child Abuse	88
Introduction	92
Background To Bill C-15	92
Legal And Constitutional Affairs: The Witnesses	93
The Department Of Justice	93
The Childrens' Hospital Child Protection Centre (Winnipeg)	95
The Canadian Council On Children And Youth	98
The Erickson Institute	100
The American Bar Association	103
The Quebec Bar Association	105
IV. Analysis	109
The Literature On The Capabilities Of The Child Witness	109
Legislative Witnesses' Utilization Of Empirical Research	115
Amount Of Referenced Literature	116
Incomplete Referenced Literature	119
General Reference To Research	121
Failure To Utilize Empirical Research	124
V. Conclusion	126
Appendix	137

Human Memory And Cognitive Development	137
The Tripartite Model	138
Bibliography	141

LIST OF TABLES

Table	Page
1 Summary of Legislative Committee Witness' Utilization of Social-Scientific Evidence	90
2 Summary of Senate Committee Witness' Utilization of Social-Scientific Evidence	107

CHAPTER I

ANTECEDENTS TO BILL C-15

Introduction

Child sexual abuse is not a new phenomenon; it has existed since biblical times (Rush, 1980). Theorists such as Demause (1974) and Masson (1984) maintain that there is evidence of sexual abuse of children throughout history and yet the recognition of this phenomenon as a pervasive social problem is relatively recent. Ever since reported cases of child sexual abuse began to appear in large numbers in the early 1970s, there has been a fervent interest in establishing the true scope of the problem (Finkelhor, 1986). The traditional assumptions held by policy-makers and legislators of the perceived credibility and competence of children have been reflected in the evidentiary procedures governing the reception of children's evidence.

Policy-makers And Children: The Assumptions

The conception of children's capabilities and limitations in offering evidence have not been explicitly stated by policy-makers and legislators alike; "yet policies and decisions concerning children have ultimately derived from conceptions of childhood" (Skolnick, 1975:38). With the concept of childhood becoming more important, society for the first time began

associating it with all sorts of negative qualities: irrationality, imbecility, weakness, prelogicism, and privitism. Certain categories of witnesses (e.g. sexual assault complainants, children) were considered to offer inherently flawed testimony, as a result the validity of their testimony was questioned. Christine Boyle (1984:18) maintained that:

the law relating to offences against children is even more revealing of the perspective of the law-makers, since their values are expressed in the Statutes themselves as well as in judicial and enforcement decisions.

In allegations of child sexual abuse, there is a questioning of the 'credibility' and competence² of child witnesses relative to adult witnesses. These assumptions about both the credibility and competence of children's testimony have influenced policy-making. The assumptions surrounding the sexually abused child witness, vis-`a-vis competence and credibility, must be examined together in order that a complete picture may be drawn as to the capacity of this category of witness. Skolnick (1975:38) maintains that policy-makers 'formally codify'

¹"Credibility concerns generally the assessment or weighing of the evidence of witnesses... not merely the 'appreciation of the witnesses' desire to be truthful but also of their opportunities of knowledge and powers of observation, judgment and memory - in a word, the truthworthiness of their testimony, which may have depended very largely on their demeanour in the witness box and their manner in giving evidence" (McWilliams, 1990:39-3).

²"Subject to some specific exceptions, the basic test of the competency of a person to testify is his ability to understand the nature of an oath...thus, generally, age, weakness of intellect, mental illness or drunkenness are not grounds of incompetency...it is only if they render the witness unable to understand the nature of an oath and to accept the obligation thereof that they become so; the witness must also have some minimal capacity to perform as a witness, that is to observe, comprehend, recollect and narrate observations" (McWilliams, 1990:34-16.1).

assumptions about children's competence and credibility and they:

premise their choices on ideas about children's needs and capacities, how these change with age, what circumstances are good and bad for growing children, and some notion of where to draw the line between childhood and adulthood.

Children as witnesses have traditionally been considered to be a category of witnesses who offer inherently flawed testimony and, consequently, their credibility and competence were often questioned. In the past, the legal system reflected the assumption that to be a child is to be incapable of offering reliable and credible testimony in a court of law.

Amendments in the *Criminal Code* were proclaimed on April 26, 1976, amendments which were to result in a more equitable procedural and evidentiary balance in sexual assault trials. Eliminated was the requirement that a trial judge caution the jury as to the danger of acting upon the uncorroborated evidence of the complainant in respect of the offences of rape, attempted rape, sexual intercourse with females under 14 years of age or, if of previous chaste character, between 14 and 16 years, and indecent assault on a female. Prior to 1954, the rule of practice for rape was that the judge was required to instruct the jury that it was unsafe to find the accused guilty in the absence of corroboration. This rule was incorporated into the *Criminal Code* of 1953-1954. However, the rule was repealed in 1976. In 1983, in order to prevent judges from reviving the common law practice, Parliament enacted the requirement that in

cases of sexual assault, the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration. These actions of Parliament in 1976 and 1983 reflected the belief that the testimony of adult sexual victims was no longer considered by Canadian law to be inherently untrustworthy. This reform failed to affect the corroboration requirement of a child's unsworn testimony. The repeal of Section 659 of the *Criminal Code*, R.S.C. 1985 (that required corroboration of child complainants of sexual assault and other offences) was not proclaimed in force until the Bill C-15 amendments in January of 1988. Section 586 of the *Criminal Code* provided that:

586. No person shall be convicted of an offence upon the unsworn evidence of a child unless the evidence of the child is corroborated in a material particular by the evidence that implicates the accused.

For complainants of incest, the requirement of corroboration was mandatory. For child complainants of sexual assault the removal of the requirement of corroboration did not take place until 1988; prior to this child sexual victims were considered by Canadian law to be inherently untrustworthy. From 1983 to 1988, the rules of evidence surrounding the reception of children's evidence:

...reveal the same kind of unsubstantiated distrust of the evidence of children that has been displayed toward that of women complainants...children are not the only people to have unreliable powers of observation and recollection, so that the case for singling children out cannot be made on this basis... further, it is a mere assumption rather than an established fact that they are prone to lying and fantasizing (Christine Boyle, 1984:161).

In January of 1988 the Bill C-15 amendments were proclaimed in

force; one such amendment was the repeal of Section 659 of the *Criminal Code*, R.S.C. 1985 (removal of the requirement of corroboration for child complainants of sexual assault). And yet even with the repeal of Section 659, sexually assaulted children are not treated under the law as being as competent as a sexually assaulted adult witness.

The sexually victimized child witness still is set apart from the sexually assaulted adult witness. With respect to competence, children are still required to go through an enquiry before they are allowed to testify (Section 16 of the *Canada Evidence Act*). Between 1983 and 1988, the law systematically discriminated against the class of sexually abused children. This statement is supported by the findings of the Badgley Committee (1984:381):

at least in the context of child sexual abuse, the requirement of corroboration for a young child's testimony had traditionally been based on both untested and unfounded assumptions about the intrinsic reliability of children's evidence.

Parliament suggests that not all children are as competent as adults to give evidence in cases of sexual assault. Bill C-15 amendments were intended to correct the existing imbalance in the justice system which denies children adequate protection from the psychological and physical harm of sexual abuse. The creation of new criminal offences and evidentiary and procedural amendments were intended to better protect Canadian youth from the insidious harm of sexual abuse.

Unquestionably, prior to Bill C-15 amendments to the *Criminal Code* and the *Canada Evidence Act*, children had been discriminated against and had been subject to differential judicial treatment. However, it can be argued that Bill C-15 does little to change the discrimination against the sexually abused child witness. Children are still required to go through an enquiry before they are allowed to testify; the sexually assaulted child witness is still set apart from the sexually assaulted adult witness. In terms of the competence-determination, children are not being accorded equal treatment vis-`a-vis sexual assault laws and rules of evidence.

This thesis will examine whether, in light of the empirical social-psychological evidence there is justification for considering children to be less credible and competent than adults when offering evidence in allegations of sexual abuse. The social facts underlying Section 274 of the *Criminal Code*, R.S.C. 1985, and Section 16 of the *Canada Evidence Act* will be identified and contrasted with the traditional rules of evidence. Does the literature on the sexually assaulted child witness support the traditionally held belief that this category of witness offer inherently flawed testimony? Did the legislators and policy-makers explicitly attend to the social-scientific literature on the credibility and competence of sexually assaulted child witnesses relative to adult witnesses when enacting Bill C-15? Through an analysis of the scientific literature on adult and eyewitness testimony, a

relationship may be drawn between the current knowledge of the competence and credibility of the sexually abused child witness and the attendance to this literature during the Parliamentary hearings on Bill C-15.

This thesis addresses the scientific literature vis-à-vis the competence and credibility of the sexually abused child witness. Further, this thesis will examine the degree to which the Bill C-15 legislators, in the House of Commons Legislative and Standing Committee on Legal and Constitutional Affairs, explicitly addressed the social-scientific literature and empirical findings vis-à-vis the competence and credibility of the sexually assaulted child witness. To what extent were the legislative changes based on scientific knowledge of child development? If the legislators had carefully examined the scientific literature on the credibility of the sexually abused child witness, would Parliament continue to treat this group of witness as being less competent than sexually assaulted adult witness? The problematic nature of the utilization of psychological theories and empirical work by legal scholars and policy-makers will be discussed. The generalizability and external validity of the body of research on eyewitness memory and testimony and its applicability to the testimony of the sexually assaulted child witness will also be addressed.

The History of Bill C-15: The Sexual Assault Law Reforms

The sexual assault law reforms and the historical background of Bill C-15 legislative amendments must be identified and the broader context of the origin and drafting of the Bill be examined, in order that the amendments be placed in their proper historical perspective. A complete understanding of the significance of Bill C-15 amendments is not possible without considering the proposed sexual assault law reforms of Bill C-53 (1981), Bill C-127 (1983) and Bill C-113 (1985). As well, the important contributions made by the Law Reform Commission of Canada Report on Sexual Offences (1978), The Badgley (1984) and Fraser Report (1986) will be addressed in terms of their relevance to the Bill C-15 amendments.

Amendments to the *Criminal Code* were proclaimed on April 26, 1976, amendments which were to result in a more equitable procedural and evidentiary balance in the sexual assault trials.³ As outlined by Watt (1984:3-4):

These amendments eliminated the requirement that a trial judge caution the jury as to the danger of acting upon the uncorroborated evidence of the complainant in respect of the offences of rape, attempted rape, sexual intercourse with females under 14 years of age or, if of previous chaste character, between 14 and 16 years, and indecent assault on a female;⁴ curtailed the right of crossexamination of the complainant with respect to her previous sexual conduct with a person other than the

³S.C. 1974-1975-1976, c.93.

⁴See, *R. v. Camp* (1977), 36 C.C.C. (2d) 511, 39 C.R.N.S. 164, 79 D.L.R. (3d) 462 (Ont. C.A.), as to the effect of the repeal of former s. 142.

accused;⁵ permitted the exclusion of the public during all or part of the proceedings;⁶ and, prohibited publication of the identity and evidence of the complainant.⁷

The amendments did not attempt to amend any substantive offences or change the structure of the *Code* and definition of sexual assaults. It is important to note that Parliament attempted to remove the requirement that a trial judge caution the jury as to the danger of acting upon the uncorroborated evidence of the complainant with respect to the offences of rape, attempted rape, sexual intercourse with females under 14 years of age or, if of previous chaste character, between 14 and 16 years, and indecent assault on a female. In 1983 Bill C-127 repealed the mandatory requirement of corroboration in prosecutions for the listed sexual offences, however, this did not prevent the trial judge from commenting upon the evidence given and the weight that should be given to it. A cautionary note by the judge to the jury was mandatory until the 1988 Bill C-15 amendments.

Law Reform Commission of Canada: Report On Sexual Offences

On June 6, 1978, the Law Reform Commission Of Canada published *Working Paper 22 - Sexual Offences*; the purpose was to solicit public comment on its tentative proposals in order to assist the Commission in the formulation of its final recommendation on the subject matter. Large-scale consultations

⁵ *Criminal Code*, s. 142. See, *Forsythe v. The Queen*, [1980] 2 S.C.R. 268, 53 C.C.C. (2d) 225, 15 C.R. (3d) 280.

⁶ *Criminal Code*, s. 442(2).

⁷*Criminal Code*, s. 442(3).

with organizations, groups and individuals were carried out after the publication of the Working Paper. The Commission confirmed that, subject to minor changes, "many individuals and institutions are in agreement with the fundamental principles of the reform" (The Law Reform Commission Of Canada, 1978:1). The age of the victims was an important factor considered in the formulation of the Commission's final recommendations:

There is a strong feeling in our society that children and other traditionally protected persons should be guarded from possible exploitation and corruption because they may be too immature to foresee the consequences of their decisions (The Law Reform Commission Of Canada, 1978:5).

There had been concern that the contact between adults and children would result in an interference with the process of sexual maturation. The Working Paper outlined the three purposes of the application of the criminal law to sexual offences: (1) to protect the integrity of the person, (2) to protect children and special groups, and (3) to safeguard public decency (The Law Reform Commission of Canada, 1978:47). The Commission (1978:47) concluded that special rules about sexual interaction between adults and children reflected a general understanding that children, lacking as they do both physical and social development, may not be capable of protecting themselves.

The Law Reform Commission Of Canada issued a report in 1978 which recommended the revision of the criminal law in relation to sexual offences against children. As well, the Commission paved the way for a change in the substantive law (i.e., rape became sexual assault). The *Criminal Code* dealing with sexual

offences was thought to be in need of reform for the following reasons:

the *Criminal Code* is a compilation of disparate sections which do not reflect consistent views of the problem of sexual offences; the language used in the existing *Code* is outmoded and archaic; and social attitudes in matters of sexual behavior have drastically changed since the promulgation of the *Criminal Code* (The Law Reform Commission Of Canada, 1978:5-6).

The following represented the philosophy underlying the revision and repeal of a number of offences which were to result in the protection of children and special groups:

The development of human sexuality is a gradual process [and] its full realization presupposes the achievement of an equilibrium between body and spirit...our society believes, and justly so, that the law must protect those who have not attained full sexual autonomy or who have not yet achieved this equilibrium...children must therefore be protected from sexual exploitation and corruption until they have arrived at a degree of maturity which will enable them to foresee the consequences of their acts and take important personal decisions with full and clear appreciation of the facts, or at least until they come to the age at which that degree of maturity should be presumed (The Law Reform Commission Of Canada, 1978:7).

In recent years, these concerns, shared by many groups in Canadian society, led to the establishment of two special committees charged with investigating the sexual abuse of children, pornography and prostitution. On February 16, 1981, the Committee on Sexual Offences Against Children and Youths (thereafter referred to as the Badgley Report or Committee) was established by the Ministers of Justice and National Health and Welfare; the Special Committee on Pornography and Prostitution (thereafter referred to as the Fraser Report or Committee) was appointed by the Justice Minister on June 23, 1983 to study

prostitution and pornography.⁸

Bill C-53 Proposals

In January 1981, Bill C-53 was introduced in the House of Commons. The Explanatory Note accompanying its first reading described the intent of the proposed amendments:

The main purpose of these amendments are to replace existing non-consensual sexual offences by the offences of sexual assault and aggravated sexual assault, to amend certain provisions of law that are prejudicial to complainants, to protect young persons against sexual exploitation and to ensure that the provisions of the *Criminal Code* apply equally to persons of both sexes.

Bill C-53 was never passed, although the Minister of Justice, the Cabinet and the Department of Justice supported the proposed amendments. "Notwithstanding its support, Bill C-53 was severely criticized by civil libertarians and was also felt, by Badgley and others, to not go far enough in dealing with the emerging problem of child sexual abuse" (Vallance, 1988:161). The amendments proposed in Bill C-53 to Part Four of the *Code* were as follows:

- (1) repealed the heading of the Part and replaced for purposes here relevant, "Sexual Offences";
- (2) repealed the several substantive crimes enacted in ss.138 to 158, inclusive, leaving only so far as Part Four is concerned, incest and a modified offence of gross indecency;
- (3) repealed ss.168 inclusive and substituted therefor new offences described by the subheading "Sexual Exploitation of the Young"; and,
- (4) described the offences thus created in terms such to ensure equality of treatment of persons of both sexes.

⁸Note: The mandates of these aforementioned committees will be outlined on page 15 and 20 respectively.

The proposed amendments of Bill C-53 met with substantial opposition.⁹ Consequently, the Bill was divided into Bill C-127, amendments to the *Criminal Code* with respect to sexual assault, and Bill C-113, specific legislation to deal with the problem of child sexual abuse.¹⁰

The Scope of Bill C-127

On January 4, 1983, the provisions of Bill C-127 came into force. The amendments consisted of the enactment of substantive law, creating new offences, and amending the procedure to be followed at the trial of such offences. "In connection with sexual offences, C-127 enacted a new tri-level structure of sexual assault offences in replacement of certain non-consensual sexual offences¹¹ and supplementary to others" (Watt, 1984:86).¹²

⁹Refer to Vallance (1988) for a detailed analysis of the problematic nature of the proposed amendments of Bill C-53.

¹⁰"Bill C-113 was not destined to live a long life and died when the House was prorogued in August 1986... by this point the government had declared itself publicly to be committed to the issue and had sunk too much energy into the bill to let it die without a quick resurrection...the government promptly re-introduced Bill C-113 in October 1986 in the same form but under the new name Bill C-15" (Vallance, 1988:164).

¹¹The offences of rape (s.143), attempted rape (s.145), sexual intercourse with the feeble-minded (s.148), indecent assault upon a female (s.149) and upon a male (s.156) are repealed without substitution.

¹² The offences of sexual intercourse with a female under 14, or between 14 and 16, if of previous chaste character (s.146), incest (s.150), seduction of a female between 16 and 18 (s.151), seduction under promise of marriage (s.152), sexual intercourse with children, wards and employees (s.153), seduction of female passengers (s.154), buggery and bestiality (s.155) and gross indecency (s.157).

With respect to evidentiary rules, the enactment of Bill C-127 affected the following: (a)corroboration (s.246.4); (b)recent complaint (s.246.5); (c)other sexual activity of the complainant (s.246.6); (d)evidence of sexual reputation (s.246.7); and, (e)spousal competence and compellability (ss.4(2) and 4(3.1) of the *Canada Evidence Act*). The following section will address the effect of the enactment of Bill C-127 on the evidentiary rule of corroboration, s.246.4 of the *Criminal Code*.¹³

Corroboration and Bill C-127

At the time of the proposed amendments of Bill C-127, the sole remaining corroboration rule with respect to sexual offences was s.139(1). Corroboration was mandatory in respect to:

- (1)sexual intercourse with the feeble-minded (s.148);
- (2)incest (s.150);
- (3)seduction of a female of previous chaste character between 16 and 18 years of age (s.151);
- (4)seduction under promise of marriage (s.152);
- (5)sexual intercourse with step-daughters, foster daughters, female wards or female employees (s.153);
- (6)seduction of female passengers on vessels (s.154);
- and,
- (7)parent or guardian procuring defilement (s.166).
(Watt, 1984:169).

With respect to the trial of sexual assaults, a child of tender years was frequently called as a prospective witness. "The

¹³For a detailed analysis and discussion of the C-127 amendments (definitions and neutering amendments, offences and ancillary matters, evidentiary and procedural rules, and transitional and consequential provisions) refer to Watt (1984).

child's mental immaturity¹⁴ require[d] that there be a *voir dire* examination conducted in order to ascertain whether the proposed witness is competent to give evidence and, if so, the form in which such evidence may be received" (Watt, 1984:169-170).

The amendments of Bill C-127 repealed s.139(1), the mandatory requirement of corroboration in prosecutions for the listed sexual offences. It must be noted however, that this did not prevent the trial judge from commenting upon the evidence given and the weight that should be given to it. Following this amendment Watt (1984:172) stated that "the repeal of s.139(1) did not purport to in any way alter the provisions or application of s.586 of the *Code* or s.16(2) of the *Canada Evidence Act* making corroboration mandatory in the event that the unsworn testimony of a child of tender years is received in the proceedings." As well, the amendments to Bill C-127 enacted Section 246.4 which stated that:

246.4 Where an accused is charged with an offence under section 150 (incest), 157 (gross indecency), 246.1 (sexual assault), 246.2 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 246.3 (aggravated sexual assault), no corroboration is required for a conviction and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration.

¹⁴See, *Kendall v. The Queen*, [1962] S.C.R. 469, 132 C.C.C. 216, 37 C.R. 179. The difficulty with the evidence of children even if sworn, was said to be fourfold: the capacity to observe, recollect, understand questions put and frame intelligent answers and the witness' moral responsibility.

The Badgley Report

The Committee was to "enquire into the incidence and prevalence in Canada of sexual offences against children and youths and to recommend improvements in the laws for the protection of young persons from sexual abuse and exploitation" (The Badgley Report, 1984:3). Factual information was to be gathered about these issues as well as juvenile prostitution and the exploitation of young persons for pornographic purposes.

Terms Of Reference

The terms of reference were as follows:

(1) The Committee on Sexual Offences Against Children and Youths is appointed by the Minister of Justice and the Minister of National Health and Welfare to conduct a study to determine the adequacy of the laws in Canada in providing protection from sexual offences against children and youths and to make recommendations for improving this protection.

(2) The committee is asked to ascertain the incidence and prevalence of sexual abuse against children and youths, and of their exploitation for sexual purposes by way of prostitution and pornography. In addition, the Committee is asked to examine the question of access by children and youth to pornographic material. The Committee is asked to examine the relationship between the enforcement of the law and other mechanisms used by the community to protect children and youths from sexual abuse and exploitation.

(3) The Committee will collect factual information on and examine *Criminal Code* sexual offences and offences under related laws which either expressly refer to children and youths as victims or which are frequently committed against children and youths.

(4) In particular, the following matters are to be examined:

The elements of the offences with special attention to issues of age and consent and related considerations of evidence and publicity.

The incidence and prevalence of sexual offences against

children and youths in Canada. Where possible, comparisons are to be made with the incidence and prevalence of sexual offences in general.

Whether such offences are likely to be brought to the attention of the authorities; whether they are likely to be prosecuted and, if prosecuted, are likely to result in convictions.

The effectiveness of criminal sanctions and methods other than the application of criminal sanctions in dealing with the types of conduct involved in these offences.

(5) The study is to be completed within two years from the time of establishment of the Committee, and its recommendations will be contained in a report which will be made public. Officials from the Departments of Justice and National Health and Welfare will be available for consultation and will provide any assistance the Committee may require for the purpose of facilitating its work (The Badgley Report, 1984:3-4).

Through the submission of briefs and direct participation in the National Population Survey, a large number of persons and institutions were involved in conducting the research. The Committee's work was directly supported by voluntary organizations, different federal, provincial and municipal public services, knowledgeable administrators and experienced professionals (The Badgley Report, 1984:6).

Lowman et al. (1986:8) outlined fourteen research studies conducted by the Committee:

(a) a review of legislative reports and previous research; (b) a review of the evolution and configuration of relevant legislation; (c) a "National Population Survey" of the incidence of "sexual abuse"; (d) a "National Police Force Survey" of cases of sexually abused children; (e) a survey of child protection services; (f) a survey of health services; (g) a study of newspaper publicity of sexual offence cases, and legal reporting of those cases; (h) a study of relevant crime statistics from 1876-1973; (i) a study of convicted sexual offenders whose offences involved child victims; (j) a study of sexual assault homicides with child victims; (k) a study of "dangerous" sexual

offenders whose offences involved children; (l) a "Juvenile Prostitution Survey"; (m) a study of the production of child pornography; and (n) a study of the accessibility of pornography to children.

Specifically, this discourse will focus upon the legal issues within the mandate of the Committee and the implications for the content and implementation of laws enacted at all levels of government.

Children As A Special Class

The Badgley Report (1984:291) contended that the special legal status of children in Canada should be based on three considerations: "the special needs of children who, by reason of their age and immaturity, need the care and guidance of others in order to develop into healthy, responsible adults; the substantial vulnerabilities of children to persons older and in many senses more powerful than they; and the actual or presumed incapacity of children to perform certain legal acts of daily life". With the growth of the child into adolescence and young adulthood, these presumed 'special needs, substantial vulnerabilities and natural incapacities' will diminish; prior to this stage, the legal consequence was the withholding from the child of legal powers otherwise enjoyed by adults and, conversely, the imposition of special duties and responsibilities towards the child on members of society generally (The Badgley Report, 1984:291).

Rules Of Evidence

There are numerous legal principles which are relevant to the issue of child sexual abuse and exploitation. The legal principles which applied to children's evidence were, in the Committee's view, inappropriate. As presented in The Badgley Report (1984:294):

In prosecutions of sexual offences against children, the testimony of the child victim typically is crucial to proving that the offence was committed...the law places serious fetters on the legal effect of the child's testimony, if received.

The Committee suggested that, through the "conscientious removal of the legal fetters", children would be allowed to speak effectively for themselves.

Corroboration

Essentially, "corroboration is evidence, independent of the witness whose testimony requires corroboration, that tends to show that the testimony of such witness is true" (The Badgley Report, 1984:378). The Report (1984:378) maintained that, where corroboration of a witness' testimony was required, the trier of fact would determine whether the witness was credible and, if so, whether the testimony of the witness was strengthened or confirmed (corroborated) by other evidence that was independent of the witness' testimony. Corroboration was required in order to convict a person accused of certain sexual offences on the evidence of only one witness. The relevant section of the *Criminal Code* was repealed in January 1983 and Section 274

(R.S.C., 1985) of the *Criminal Code* now provides that:

274 Where an accused is charged with an offence under section 151, 152, 153, 155, 159, 160, 170, 171, 172, 173, 212, 271, 272 or 273, no corroboration is required for a conviction and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration.

This reform failed to affect the corroboration requirement of a child's testimony. Section 586 of the *Criminal Code* provided that:

586. No person shall be convicted of an offence upon the unsworn evidence of a child unless the evidence of the child is corroborated in a material particular by the evidence that implicates the accused.

The enactment of Section 274 of the *Criminal Code*, R.S.C. 1985, reflected the belief that the testimony of adult sexual victims was no longer considered by Canadian law to be inherently untrustworthy. The Badgley Report (1984:380) examined the *reasons* why the law continued to treat the evidence of young children with caution; these reasons were then scrutinized in light of the Committee's research findings.

In the National Police Force Survey, it was found that "the vast majority of sexual assaults on children were considered to be 'founded' by the police and that the reports of young children were typically perceived by the police to be both truthful and sufficiently detailed" (The Badgley Report, 1984:381). The Committee concluded (1984:381) that:

at least in the context of child sexual abuse, the requirement of corroboration for a young child's testimony had traditionally been based on both untested and unfounded assumptions about the intrinsic reliability of children's evidence.

In the last few years, there have been significant changes to Canadian law relating to corroboration, yet the Badgley Report suggested that these reforms have failed to reflect any change in the "conventional assumptions about the credibility of children" (The Badgley Report, 1984:378). Historically, the general assumption of Canadian legal doctrine has been that the young child's testimony was inherently untrustworthy.

The Fraser Report

The Fraser Committee was to enquire into the problems associated with pornography and prostitution as well as to complete a program of socio-legal research to provide a basis for its work.

Terms Of Reference

The terms of reference were as follows:

- (1) To consider the problems of access to pornography, its effects and what is considered to be pornographic in Canada.
- (2) To consider prostitution in Canada with particular reference to loitering and street soliciting for prostitution, the operation of bawdy houses, living off the avails of prostitution, the exploitation of prostitutes and the law relating to these matters.
- (3) To ascertain public views on ways and means to deal with these problems by inviting written submissions from concerned groups and citizens and by conducting meetings in major centres across the country.
- (4) To consider the experience and attempts to deal with these problems in other countries, including the United States, the European Economic Community and selected Commonwealth countries such as Australia and New Zealand.
- (5) To consider alternatives, report findings and recommend solutions the problems associated with

pornography and prostitution in Canada (Fraser Report, 1984:5-6).

The Department Of Justice commissioned research studies which provided a basis for its work. Lowman et al. (1986:8-9) outlined the studies conducted by the Committee:

(a) a study of pornography and prostitution in Denmark, France, West Germany, The Netherlands and Sweden (Kiedrowski and van Dijk, 1984); (b) a study of pornography and prostitution in the United States (Sansfacon, 1984a); (c) a study of United Nations agreements and conventions with respect to pornography and prostitution (Sansfacon, 1984b); (d) a study of pornography and prostitution in selected countries (Jayewardene, Juliani and Talbot, 1984); (e) a study of newspaper coverage of pornography and prostitution (El Komos, 1984); (f) a national survey of use of and attitudes toward prostitution and pornography (Peat Marwick and Partners, 1984); (g) a study of prostitution and sexually transmitted diseases (Haug and Cini, 1984); (h) five regional studies of prostitution, including one each in Vancouver (Lowman, 1984), the prairie provinces (Lautt, 1984), Ontario (Fleischman, 1984), Quebec (Gemme, Murphy Bourque, Neme and Payment, 1984) and the Maritime provinces (Crook, 1984); (i) a review of research on the impact of pornography (McKay and Dolf, 1984); (j) a study of law and public debate on pornography in the United Kingdom (Taylor, 1984); (k) a content analysis of sexually explicit videos in British Columbia (Palys, 1984); (l) a study of censorship and the criminal control of obscenity in Canada (Boyd, 1984); and (m) a survey of Canadian distributors of pornographic material (Kaite, 1984).

Rules Of Evidence

The Fraser Committee (1984:53) concluded that law enforcement authorities were relying on the evidence of young persons under 18 in order to proceed successfully with a prosecution. The Committee failed to support the requirement of

corroboration of a child's testimony, or that the judge caution the jury on convicting the accused on the basis of such evidence alone. The Fraser Report (1984:53-54) recommended the following:

Recommendation 81: The Evidence Acts of Canada, the provinces and the territories should be amended to provide that every child is competent to testify in court and that the child's evidence is admissible; the weight of the evidence should be determined by the trier of fact.

Recommendation 82: There should be no statutory requirement for corroboration of 'unsworn' child's evidence; this would entail repeal of section 586 of the *Criminal Code*, section 16(2) of the Canada Evidence Act and section 61(2) of the Young Offenders Act and corresponding sections of Provincial Evidence Acts.

Recommendation 83: No alteration be made to the Evidence Acts of Canada or the provinces and territories to permit reception by a court of hearsay evidence of a child's account of the commission against him or her of a sexual offence.

The Subject Matter of Bill C-15

The Report on Sexual Offences (1978) and the *Badgley* (1984) and *Fraser Report* (1986) concluded that the criminal law component of state intervention was inadequate in its response to the sexual abuse of children. The aforementioned reports recommended the reformulation of rules of evidence which allowed for procedural and evidentiary safeguards for sexually assaulted child witnesses. Bill C-15 and the amendments to the *Criminal Code* and *Canada Evidence Act* were a direct product of these recommendations.

On January 1, 1988, Bill C-15 entitled "An Act to Amend the Criminal Code and the Canada Evidence Act" was proclaimed by the

Federal Government. The formulation of the bill was a result of extensive consultation with a variety of organizations and individuals.¹⁵ As stated by Ramon John Hnatyshyn (the then Minister of Justice and Attorney General of Canada), Bill C-15 was to deal with the two areas of law that urgently needed amendments so that our Canadian youth would be better protected from the insidious harm of sexual abuse that is reported to pervade our society. In his address to the legislative members, Hnatyshyn maintained:

First, new criminal offences are proposed that will protect girls and boys equally and will replace outmoded offences which limited protection to girls and even then to those who were victims of a very narrow range of sexual behavior...the second set of proposals in this bill, therefore, those dealing with the admissibility of children's evidence, complete the protection offered by the proposed criminal law offences (The Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15, First Meeting:18).

The proposed amendments were intended to correct the existing imbalance in the justice system which denies children adequate protection from the psychological and physical harm of sexual abuse.¹⁶

¹⁵Refer to Vallance (1988) for a detailed discussion of the process by which interest groups influence the formulation of legislation. It is not within the scope of this thesis to examine, through personal interviews, the interaction of bureaucrats, politicians and interest groups in developing legislation.

¹⁶The following outline and analysis of Bill C-15 will not include the following amendments: Anal Intercourse 154(1)(2)(3); Bestiality 155(1)(2)(3); Parent or Guardian Procuring Sexual Activity (166); Householder Permitting Sexual Activity (167); Exposure 169(2); Loitering 175(1)(e); and Order Restricting Publication 442(3)(3.1). These remaining amendments are not significant for the present discussion. Refer to Stewart (1988) for a detailed discussion of these amendments.

Reform Under Bill C-15

Bill C-15 creates three new criminal offences - sexual interference, invitation to sexual touching and sexual exploitation - to ensure that children under 14 years of age are protected from all forms of sexual contact; persons between the ages of 14 and 18 years would be protected from exploitative sexual activities (The Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15, First Meeting:19).

Sexual Interference

The new offence of sexual interference is designed to protect boys and girls up to the age of 14 years. "This offence recognizes that sexual touching of other parts of the body may be detrimental to the child and will obviate the need for legal arguments about whether or not a particular locale of the touching - for example, the upper thigh - falls within the Badgley prohibited area, the anal or genital region" (The Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15, First Meeting:19). The matter of consent of the child to being touched for a sexual purpose is irrelevant. However, if the youths are 12 or 13, and if there is not more than three years difference in age between the complainant and the youth, consent becomes relevant. The age of criminal responsibility is 12, children under 12 will not be held criminally responsible for any sexual activity. The new offence, sexual interference, is to provide an absolute protection to

children under 14 years of age from being touched for a sexual purpose.

Changes To The Criminal Code

CONSENT NO DEFENSE

139. (1) Where an accused is charged with an offence under section 140 or 141 or subsection 155(3) or 169(2) or is charged with an offence under section 246.1, 246.2 or 246.3 in respect of a complainant under the age of fourteen years, it is not a defence that the complainant consented to the activity that forms the subject-matter of the charge.

EXCEPTION

(2) Notwithstanding subsection (1) where an accused is charged with an offence under section 140 or 141, subsection 169(2) or section 246.1 in respect of a complainant who is twelve years of age or more but under the age of fourteen years, it is not a defence that the complainant consented to the activity that forms the subject-matter of the charge unless the accused

(a) is twelve years of age or more but under the age of sixteen;

(b) is less than two years older than the complainant; and

(c) is neither in a position of trust or authority towards the complainant nor is a person with whom the complainant is in a relationship of dependency.

EXCEPTION FOR ACCUSED AGE TWELVE OR THIRTEEN

(3) No person aged twelve or thirteen years shall be tried for an offence under section 140 or 141 or subsection 169(2) unless the person is in a position of trust or authority towards the complainant or is a person with whom the complainant is in a relationship of dependency.

MISTAKE OF AGE

(4) It is not a defence to a charge under section 140 or 141, subsection 155(3) or 169(2), or section 246.1, 246.2 or 246.3 that the accused believed that the complainant was fourteen years of age or more at the time the offence is alleged to have been committed unless the accused took all reasonable steps to ascertain the age of the complainant.

IDEM

(5) It is not a defence to a charge under section 146, 154, or 168 or subsection 195 (2) or (4) that the

accused believed that the complainant was eighteen years of age or more at the time the offence is alleged to have been committed unless the accused took all reasonable steps to ascertain the age of the complainant.

SEXUAL INTERFERENCE

440. Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body of with an object, any part of the body of a person under the age of fourteen years is guilty of an indictable offence and is liable to imprisonment for a term not exceeding ten years or is guilty of an offence punishable on summary convictions.

Invitation to Sexual Touching

The second new offence that is created is "invitation to sexual touching" which ensures more complete protection for children under 14 from all forms of sexual abuse. It would be an offence for anyone to invite a child under 14 to touch him or her for a sexual purpose; it would also be an offence for anyone to incite young children to engage in sexual touching of themselves or others" (The Minutes and Proceedings of Evidence of the Legislative Committee on Bill C-15, First Meeting:20). Bill C-15 recognizes that a child of 14 may not be sufficiently mature enough to enter into sexual relations on an equal basis with an adult who is either in a position of trust or authority, or with whom the young person is in a relationship of dependency.

Changes To The Criminal Code

INVITATION TO SEXUAL TOUCHING

141. Every person who, for a sexual purpose, invites, counsels or incites a person under the age of fourteen years to touch, directly or indirectly, with a part of

the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the person under the age of fourteen years, is guilty of an indictable offence and is liable to imprisonment for a term not exceeding ten years or is guilty of an offence punishable on summary conviction.

Sexual Exploitation

The third offence, that of sexual exploitation, protects young people between the ages of 14 and 18 years from those individuals who would use their position of authority, trust, or the children's dependency, to exploit them. Youths between 14 and 18 would be protected from exploitative sexual relationships with, for example, step-parents, teachers and camp counsellors.

Changes To The Criminal Code

SEXUAL EXPLOITATION

146. (1) Every person who is in a position of trust or authority towards a young person or is a person with whom the young person is in a relationship of dependency and who

(a) for a sexual purpose, touches, directly or indirectly, with a part of the body of the young person or

(b) for a sexual purpose, invites counsels or incites a young person to touch, directly or indirectly, with a part of the body of any person, including the body of the person who so invites, counsels or incites and the body of the young person, is guilty of an indictable offence and is liable to imprisonment for a term not exceeding five years or is guilty of an offence punishable on summary conviction

(2) In this section, "young person" means a person fourteen years of age or more but under the age of eighteen years.

Exploitation Of Our Youth

Bill C-15 addresses the exploitation of our youth - juvenile prostitutes by customers, and by those who would live on the earnings of the prostitution of juveniles. Bill C-15 creates a new indictable offence, punishable by a maximum sentence of five years, for any one in any place who obtains the services of a juvenile prostitute. Mr. Hnatyshyn stated that this bill would also increase the penalties for living on the avails of prostitution, from the present 10-year maximum, if a young prostitute under 18 were involved.

Changes To The Criminal Code

OFFENCE IN RELATION TO JUVENILE PROSTITUTION ITEM

195(2) Notwithstanding paragraph (1)(j), every person who lives wholly or in part on the avails of prostitution of another person who is under the age of eighteen years is guilty of an indictable offence and is liable to imprisonment for a term not exceeding fourteen years.

(3) Evidence that a person lives with or is habitually in the company of a prostitute or lives in a common bawdy-house or in a house of assignation is, in the absence of evidence to the contrary, proof that the person lives on the avails of prostitution, for the purpose of paragraph (1)(j) and subsection (2).

(4) Every person who, in any place, obtains or attempts to obtain, for consideration, the sexual services of a person who is under the age of eighteen years is guilty of an indictable offence and is liable to imprisonment for a term not exceeding five years.

Amendments To The Law Of Evidence

The second major focus on Bill C-15 is the amendments to the law of evidence, which is pivotal in meeting the criminal justice system needs of sexually abused children. Hnatyshyn stated to the legislative committee members that:

very young children frequently lacked the protection of the law because of their inability to be sworn and therefore to testify in court...offenders who choose very young victims are, at the present time, often able to abuse a child on a number of occasions, or to abuse a series of young children without significant fear of the law.

Procedural and evidentiary amendments enable more children to get accounts of their experiences of sexual abuse before the court.

Witness Whose Capacity Is In Question

An amendment to Bill C-15 provides a procedure whereby a judge would examine a child under 14 to determine whether the child could be sworn or heard to affirm. If the child cannot be sworn or cannot make an affirmation, the judge would determine whether the child could be heard on promising to tell the truth. The weight to be given to such evidence would, of course, be a matter for the judge or jury to decide.

Changes To The Canada Evidence Act

WITNESS WHOSE CAPACITY IS IN QUESTION

16.1 (1) Where a proposed witness is a person under fourteen years of age or a person whose mental capacity is challenged, the court shall, before permitting the person to give evidence, conduct an inquiry to determine (a) whether the person understands the nature of an oath or a solemn affirmation; and (b) whether the person is able to communicate the evidence.

(2) A person referred to in subsection (1) who understands the nature of an oath or a solemn affirmation and is able to communicate the evidence shall testify under oath or solemn affirmation.

(3) A person referred to in subsection (1) who does not understand the nature of an oath or a solemn affirmation but is able to communicate the evidence may testify on promising to tell the truth.

(4) A person referred to in subsection (1) who neither understands the nature of an oath or a solemn affirmation nor is able to communicate the evidence shall not testify.

(5) A party who challenges the mental capacity of a proposed witness of fourteen years of age or more has the burden of satisfying the court that there is an issue as to the capacity of the proposed witness to testify under an oath or a solemn affirmation.¹⁷

Corroboration Not Required

A second major obstacle to obtaining conviction in cases of child sexual abuse is removed with the Bill C-15 amendments. The requirement of corroboration before a conviction can be sustained is removed, when it is based only on the unsworn evidence of a child.

Changes To The Criminal Code

CORROBORATION NOT REQUIRED

246.4 Where an accused is charged with an offence under section 140, 141, 146, 150, 154, 155, 166, 167, 168, 169, 195, 246.1, 246.2, or 246.3, no corroboration is

¹⁷Note: Section 16 was used to require (in effect) corroboration before the Bill C-15 changes; this amendment was significant.

required for a conviction and the judge shall not instruct the jury that it is unsafe to find the accused guilty in the absence of corroboration.

Recent Complainant

It has been recognized that children are often unable to make a disclosure of their sexual victimization until a significant time has passed.¹⁸ "The absence of a recent complaint could be used against the child victim and could result in offenders' evasion of punishment" (The Minutes and Proceedings of Evidence of the Legislative Committee on Bill C-15, First Meeting:22). Although "Recent Complaint" has been abrogated in relation to sexual assault, the Bill C-15 amendment broadens the abrogation to include the new offences.

Changes To The Criminal Code

RECENT COMPLAINT

246.5 The rules relating to evidence of recent complaint are hereby abrogated with respect to offences under sections 140, 141, 146, 150, and 154, subsections 155(2) and (3) and sections 166, 167, 168, 169, 246.1, 246.2, and 246.3.

Videotaped Evidence

A videotape of a child victim describing the acts complained of could be shown in court, if the child adopted the contents while testifying. This amendment is seen as a means of saving the child from feeling intimidated by the nearness of the accused in the court room. Hnatyshyn suggested that:

¹⁸See Roland Summit's (1983) clinical diagnosis of the Child Sexual Abuse Accommodation Syndrome.

Further amendments would permit the judge to exclude the accused from the court room during the testimony of the child complainant in a sexual offence case, if the judge believe[d] the exclusion of the accused is necessary to obtain full and candid testimony from the child...before being excluded however, provision would be made for the accused to watch the proceeding by closed-circuit television and to communicate with his or her legal counsel during the evidence of the child (The Minutes and Proceedings of Evidence of the Legislative Committee on Bill C-15 First Meeting:22).

With the Bill C-15 amendments come innovative methods used to protect children from the trauma of court.

Changes To The Criminal Code

VIDEOTAPED EVIDENCE

643.1 In any proceeding relating to an offence under section 140, 141, 146, 150 or 143, subsection 155(2) or (3), or section 166, 167, 168, 169, 246.1, 246.2 or 246.3, in which the complainant was under the age of eighteen years at the time the offence is alleged to have been committed, a videotape made within a reasonable time after the alleged offence in which the complainant describes the acts complained of, is admissible as evidence if the complainant adopts the contents of the videotape while testifying.

Bill C-15 provides further procedural safeguards to child victims of sexual assault. The following amendments were intended to lessen the trauma experienced by the child offering testimony in a court of law.

Changes To The Criminal Code

NO EVIDENCE CONCERNING SEXUAL ACTIVITY

246.6(1) In proceedings in respect of an offence under section 140, 141, 146, 150 or 154, subsection 155(2) or (3), or section 166, 167, 168, 169, 246.1, 246.2 or 246.3, no evidence shall be adduced by or on behalf of the accused concerning the sexual activity of the complainant with any person other than the accused unless...(note: exceptions (a), (b) and (c) remain the same).

TESTIMONY OUTSIDE THE COURT ROOM

442(2.1) Notwithstanding section 577, where an accused is charged with an offence under section 140, 141, 146, 150, or 154, subsection 155(2) or (3) or section 166, 167, 168, 169, 246.2 or 246.3 and the complainant is, at the time of the trial or preliminary inquiry, under the age of eighteen years, the presiding judge or justice, as the case may be, may order that the complainant testify outside the court room behind a screen or other device that would allow the complainant not to see the accused, and the judge or justice is of the opinion that the exclusion is necessary to obtain a full and candid account of the acts complained of from the complainant.

CONDITION OF EXCLUSION

(2.2) A complainant shall not testify outside the court room pursuant to subsection (2.1) unless arrangements are made for the accused, the judge or justice and the jury to watch the testimony of the complainant by means of closed-circuit television or otherwise and the accused is permitted to communicate with counsel while watching the testimony.

It appears that with the pressure for reform came the challenge to the traditional rules of evidence as they relate to the sexually abused child witness. Even with the repeal of Section 659 which had required corroboration, sexually assaulted children are still not treated as being as competent as a sexually assaulted adult witness.

In the following chapter the literature on the capabilities of the sexually assaulted child witness will be presented. Does the literature on the sexually assaulted child witness support the traditionally held belief that this category of witness offer inherently flawed testimony? The scientific literature vis-à-vis the competence and credibility of the sexually abused child witness relative to the adult witness is one component of this thesis. This thesis will examine whether, in light of the

empirical social-psychological evidence there is justification for considering children to be less credible and competent than adults when offering evidence in allegations of sexual abuse. Based upon the findings of the social-scientific literature, should children still be required to go through an enquiry before they are allowed to testify? At what *age* can children understand the nature of the oath and have the minimal capacity to perform as a witness - to observe, comprehend, recollect and narrate observations? Through an analysis of the scientific literature on child and adult eyewitness testimony, as well as the body of research on perception and memory and its applicability to the testimony of sexually assaulted children, the aforementioned questions may be answered.

Further, this thesis will examine the degree to which the legislators, in the House of Commons Legislative and Standing Senate Committee on Legal and Constitutional Affairs, explicitly addressed the social-scientific literature and empirical findings vis-à-vis the competence and credibility of the sexually assaulted child witness. If the legislators had carefully examined the scientific literature on the capabilities of the sexually assaulted child witness, would Parliament continue to treat this group of witness as being less competent than sexually assaulted adult witnesses? Through an analysis of the social-scientific literature on child and adult eyewitness testimony, a relationship may be drawn between the current knowledge of the competence and credibility of the sexually

assaulted child witness and the attendance to this literature during the Parliamentary hearings on Bill C-15.

CHAPTER II

THE BODY OF LITERATURE ON THE CHILD WITNESS

The scientific literature vis-à-vis the competence and credibility of the sexually abused child witness relative to the adult witness will be presented in this chapter. Through an examination of the social-psychological evidence on the capabilities of the child witness, it will be determined whether there is justification for considering children to be less credible and competent than adults when offering evidence in allegations of sexual abuse. With respect to credibility, at what *age* do children have the knowledge and powers of observation, judgement and memory? With respect to competence, at what *age* can children understand the nature of an oath and have the minimal capacity to perform as a witness - to observe, comprehend, recollect and narrate observations? Through an analysis of the scientific literature on child and adult eyewitness testimony, as well as the body of research on perception and memory and its applicability to the testimony of sexually assaulted children, the aforementioned questions may be answered.

Introduction

In the early part of this century, scholars became interested in the developmental differences between children and adults and whether these differences affected the credibility of

children as witnesses (Berliner, 1985:168). Currently, scholars are conducting studies that will allow them to understand more systematically the issues relating to the capability of child witnesses to testify at trial.¹ In any case where witnesses are giving evidence, there are difficulties in terms of memory,² perception,³ and understandings (Bala and Anweiler, 1986:353). Psychologists have become interested in the real world knowledge of material in memory. "In order to understand what happens when children try to remember, it is necessary to understand the content and structure of their knowledge base" (Nelson et al., 1983: 52). As stated by Nelson et al. (1983:52) "it is not enough to understand what children do not know; it is also essential that one understand what children do know and in what form their knowledge is stored".

¹If is of importance to note that the majority of children who serve as witnesses in a court of law have been sexually assaulted.

²"A. The recall of past experiences that are assumed to be stored in unidentified biological structures, most probably neural. B. Remembering, that is, behavioral sequences in which ongoing, prior, and later experiences are synthesized. C. The treatment of past experiences in a manner analogous to electronic information processing" (Popplestone and McPherson, 1988:234).

³"A. The quick unwitting appreciation and integration of immediate stimulation with prior experiences. B. An appreciation of objects and events that is primarily determined by the configuration or pattern of the stimuli. C. An apprehending of events that is colored by prior cognitive and affective experiences. D. A synonym for sensation" (Popplestone and McPherson, 1988:263).

Human Memory And Its Development

The "Four Factor" Model

A concern of modern researchers is the determination of processes that mediate the developmental trends that have been observed (Schneider and Pressley, 1989:195). "What has emerged from the research to date is a model that explains memory development in terms of changes in functional memory capacity, use of verbal memory strategies, nonstrategic knowledge, and metamemory" (Schneider and Pressley, 1989:195).⁴ It is conceded that most studies of memory development focus on one of the four factors in isolation; they maintain:

[that]...relatively little is known about how the four factors interact, although the situation is improving (Schneider and Pressley, 1989:199).

Factor One: Functional Memory Capacity

Schneider and Pressley (1989) argue that older children can hold more information in short-term memory⁵ than can younger children because the former execute cognitive operations more efficiently than do the latter. Case (1985) maintains that older children have used cognitive operations more than younger children, and the more an operation has been used, the greater its automatic and efficient use. Dempster (1981) suggests that,

⁴"The knowledge of facts about memory and children's memory monitoring" (Schneider and Pressley, 1989:198).

⁵"The distinction between short term and long term memory (STM and LTM) was made by Melton in 1962: STM was defined as retention over intervals of up to five minutes; while LTM referred to retention over longer intervals" (Harre and Lamb, 1983:378).

regardless of practice, there are developmental increases in the execution of cognitive operations. A developmental invariance in total memory capacity exists which is important when trying to explain individual differences in memory performance (Schneider and Pressley, 1989:196).

Factor Two: Strategies

Developmental psychologists in the past decade suggested that much of the process of memory development could be explained as the development of increasingly flexible and more general memory strategies (Schneider and Pressley, 1989:196). Schneider and Pressley (1989) suggest that strategy development begins before the grade-school years and continues into adulthood; the researchers found that preschool children intentionally utilize memory strategies when they are dealing with familiar tasks or contexts (e.g., hide-and-seek tasks). Siegler (1986) suggests that the heightened use of memory strategies play an important role in memory development. Siegler (1986:240) stated that:

the utilization of effective strategies, adjusting procedures to task demands, and children's greater content knowledge makes it easier for them to use strategies which contribute to the improvement of a child's memory.

Factor Three: Nonstrategic Knowledge Base

The knowledge-base hypothesis states that "most developmental improvements in memory are not mediated by shifts in strategy use, but rather reflect changes in the extent and accessibility of the nonstrategic knowledge base" (Schneider and

Pressley, 1989:197). Researchers have concluded that nonstrategic knowledge is a powerful determinant of performance when comparing child experts and adult novices (Chechile and Richman, 1982; Chi, 1978; Frankerl and Rollins, 1985).

Factor Four: Metamemory

Researchers have found that it is difficult to study and measure metamemory, the knowledge of facts about memory. Researchers (Flavell, 1985; Wellman, 1983) suggest that "memory facts can be divided into knowledge about persons, tasks, strategies, and the interactions between persons, tasks, and strategies" (Schneider and Pressley, 1989:198). Schneider and Pressley (1989:198) state that:

The person category refers to whether children understand qualities of their own memories and those of other people; the task category consists of knowledge about what makes one task more difficult than another; the strategy category covers verbalizable knowledge about various encoding and retrieval strategies.

Current metamemory research suggest that "knowledge of facts about memory is more impressive in the primary-grade years, and much more complete by 11 or 12 years of age" (Schneider and Pressley, 1989:107). With increasing age comes increasing knowledge of memory strategies.

Cognitive Developmental Research

Parker et al. (1986) address the child's cognitive capabilities, particularly with respect to memory. Early studies (Rouke, 1957; Varendonck, 1911) have suggested that children are

inferior to adults in their recall of witnessed events, and for many years there was an underlying skepticism toward children as eyewitnesses (Parker et al. 1986:288). Nelson (1983:53) states:

the assumption is widespread-even among those who deal with young children-that the knowledge base of the young child is disorganized, idiosyncratic, fragmented, and even amusing in its beliefs about the nature of reality.

Currently, the prevailing viewpoint is changing, with psychological researchers and legal scholars taking a more positive viewpoint (Goodman, 1984; Melton, 1981).

Schneider and Pressley (1989) state that the basic neurological architecture that supports memory development is established in the first five years. A small number of strategies are utilized by preschoolers; they have little knowledge of memory or variables affecting memory (Schneider and Pressley, 1989 :199). It is maintained that some of the knowledge that preschoolers possess is 'wildly inconsistent with reality'. Schneider and Pressley (1989) conclude that, during grade school (i.e., 5 to 11 years of age), speed of information processing increases; a number of memory strategies emerge and develop with the development of rehearsal and organizational strategies. Factual knowledge about memory increases during this period, and monitoring improves. Schneider and Pressley (1989) suggest:

[that] processing speed continues to increase during adolescence; more strategies are acquired during this interval (e.g., rehearsal, organization) which continue to develop and are used more flexibly (Schneider and Pressley, 1989:199).

Although eighteen-year-olds are thought to be more cognizant of

memory than 12-year-olds, good strategy use is a rare commodity even among adults.

A Reconstructive View Of Memory

Saywitz (1987:36) states:

[that] researchers have not found a simple relation between age and witness performance, but a growing body of literature in memory development suggests that the interaction between age and other factors (i.e. knowledge base, task demands, situational factors) is important for eyewitness memory... the type of memory often involved in testimony is currently characterized not as an instant replay of the event, but as a reconstruction (and at times construction) of the facts based on context cues, past experiences, inferences, and existing world knowledge (Chi, 1983; Loftus, 1979; Paris and Lindauer, 1977).

Studies of children's memory for real-life events, televised action-adventures, and stories support this reconstructive view of memory.

Children may differ from adults in both constructability and discriminability. In general, "discriminability may concern the identification of a target event in memory within a search set⁶ of related events" (Ackerman, 1985:39). It has been suggested that, concerning saliance, children may not encode context and target information in interactive ways, or in highly specified ways. Ackerman (1985) concludes:

⁶"Search: To scan through one's memory for some specific fact or other piece of information" (Reber, 1985:672); "Set: Any condition, disposition or tendency on the part of an organism to respond in a particular manner. Note that the term 'respond' here may encompass a number of acts, thus, one may have an attentional or perceptual set for particular kinds of stimuli" (Reber, 1985:689).

[that] there may be little basis for using cue information to identify one privileged event in memory among other similar events. The search set, in this sense, is undifferentiated vis-a-vis the cue...because of differences in psychological cohesiveness, some sets that are functional for adults may not be functional for children (Ackerman, 1985:39).

It has been maintained that because of differences in the number and variety of sampled episodic features,⁷ the basis for sampling compatibility may be greater in adults than in children. The general constraints on children's use of cues to describe events in memory are as follows:

(1) Because of knowledge or activity differences, children may encode context and event information less interactively than do adults.

(2) Deficits in associative structure in memory may constrain children's use of superordinate categorical information to describe events, or the use of interitem associations to retrieve and reinstate aspects of the episodic context.

(3) Trace mutability⁸ may limit children's use of cues more than that of adults, perhaps because concept representations are less stable or solidified in children than in adults.

(4) For the same reason, children may encode cue information between acquisition and retrieval more variably than do adults (Ackerman, 1985:39).

Nurcombe (1986:474) suggests that with maturation the child acquires more efficient strategies for recording, storing,

⁷"Description of personal memories, as distinguished from general knowledge or semantic memory. The memory trace contains not only a certain content but also the context in which it was established. Originally all memory traces have a personal episodic character, though some traces become decontextualized as a function of repeated exposure" (Harre and Lamb, 1983:378).

⁸"A by-product of whatever perceptual or cognitive processing has occurred. The more meaningful the processing, the more the processing involves relating one item to others or to pre-existing memory traces, the more memorable the processing" (Harre and Lamb, 1983:381).

recalling and reproducing episodic memories; and, as hierarchically organized cognitive structures develop, semantic memory becomes more complex". Assimilation of new experiences occurs according to the child's organized preconceptions of the world, or entrain the accommodation of preexisting structures (Nurcombe, 1986:474). A child's capacity to store, recall and reproduce an event is influenced by the construction that was, or can be, placed on the event (Nurcombe, 1986:474).

Nelson et al. (1983) propose that children's knowledge is organized around sets of expectations for familiar objects, people, places and events. This idea has several implications for how children remember. "Schema models stress the dynamic and constructive use of schemas in organizing comprehension and memory" (Nelson et al., 1983:53). In a situation in which there is a lack of information to instantiate a variable, the following is said to occur:

...the values of the other variable as well as expectations about allowable and probable values can lead to the assignment of default values. Comprehension and recall of schematically organized material is therefore highly inferential in nature and can even produce distortions in memory (Nelson et al. 1983:53).

Nelson et al. stress that children do operate with organized knowledge about their world which they can use in memory tasks when the material to be remembered matches the organization of the knowledge base. "A script⁹ for a familiar event may provide

⁹"Predetermined sequences of actions that characterize situations; they include information about the range of situations in which the script might apply, about actors and events that must appear in these situations, about the actors' purposes and activities, and about distinctions between the

a framework for what happens in general (allowing prediction) as well as what happened on a particular occasion" (Nelson et al., 1983:62). One possible effect may be that, instead of remembering the specific event, the episode may become filtered into the general script so that it is no longer remembered as a particular episode.

In an earlier study, Nelson's (1971) results were analyzed in relation to a conception of 'memory' task performance, a complex of many component processes, including perception, storage, decay, retrieval, and report of information. He concludes:

[that] the rate of forgetting across varying retention intervals,¹⁰ does not seem to change with development...in contrast to the data supporting age-equivalent rates of forgetting, present evidence indicates that skill in executing complex test or report responses increases with increasing age (Nelson, 1971:347).

These findings indicate that "differences between recognition and reconstruction response modes contributed somewhat to the contrasting developmental result patterns for the two tasks in the study" (Nelson, 1971:348).

Nelson and Gruendel (1980) and Nelson (1978, 1981) carried out a series of studies that required children to report on some very familiar and personally meaningful events as well as some

⁹(cont'd) script and related ones" (Schneider and Pressley, 1989:112).

¹⁰"Research on memory includes observations of the period between the experience and its recall. Traditionally this interval was construed as merely retention, most often a static phase but sometimes interrupted by episodes of rehearsing" (Popplestone and McPherson, 1988:235).

relatively unfamiliar and personally uninvolved events; "to act out events with props; to arrange pictures in sequence and to tell stories about them" (Nelson et al., 1983:56). It was found that children infer on the basis of the script, but this inference is representational, not logical. Nelson et al. (1983) submits that children construct 'causal sequences' based on their own experiences; and in using these representations to predict, interpret, and act, there is little evidence that they manipulate elements that are not personally meaningful in the same way as adults.

The development of schemata that guide the construction of memory for children and adults has been measured by developmental scientists. Findings suggested that "memories of very young children are not fragmented or jumbled, but are highly organized (Nelson, 1978, 1981; Nelson et al., 1983; Nelson and Gruendel, 1980)" (Saywitz, 1987:37). Saywitz (1987:37) found that:

children from 3 to 8 years of age showed the same basic structure of scripts as adults...although the descriptions of 3-to-4 year-olds were shorter and skeletal, the basics of the script were evident...older children, aged 5 to 8 years, gave longer, more detailed accounts and used more complex language than younger children.

Saywitz (1987:38) maintains that, "while the predominant memory error for both children and adults is one of omission, the addition of new information and the distortion of original material also occur in the memories of both children and adults". The tendency to make errors by modifying recall in this

way, with information from general knowledge, is well documented for both children and adults. The question that Saywitz (1987:38) asks is: "Given that children and adults both tend to modify memory with information from general knowledge, do children make such errors more frequently?" The researcher found that:

although 8-to-9 year-olds did not exhibit a greater proportion of distorted to accurate recall, they did add significantly more extraneous information to their recall than older subjects; younger children were particularly likely, at both immediate and delayed testings, to produce recall errors by adding information not in the original stimuli (Saywitz, 1987:46).

Saywitz explains these findings as the difficulty in distinguishing between what actually occurred and what might have occurred, based on one's expectations or schemata. From the outset, younger children may have "a less well-developed ability to discriminate original material from additionally activated pieces of information that might not have been part of the original material" (Saywitz, 1987:48). Their schemata may be less enriched and less elaborate due, in part, to inexperience.

Johnson and Foley (1984) examine a set of common assumptions about children's memory. In particular, children are often supposed to have more trouble than adults in distinguishing real from imagined events, and to be especially susceptible to errors produced by suggestion. Surprisingly, there is little experimental evidence to support these assumptions (Johnson and Foley, 1984:34; McEwan, 1988:816). Much of this literature investigates purposeful remembering; it indicates that younger

children do not deal with memory tasks in a strategic fashion (do not rehearse, generate images or other mediators, spontaneously organize, etc). "The ability to produce information voluntarily depends critically on the encoding factors that operate when information is initially processed" (Johnson and Foley, 1984:35). The researchers found that, even when children and adults are encouraged to encode information in a similar fashion, adults typically recall more.

Kobasigawa (1974) found that 6-year-olds remembered as much as 11-year-olds when the experimenter directed the recall process by telling them not only what category the to-be-remembered items belonged to, but how many times per category they should try to recall. Thus, "developmental differences in recall may be substantially reduced when the remembering occurs especially from directive (but nonsuggestive) questioning" (Johnson and Foley, 1984:35). The young children's memories might well be underestimated unless the situation in which the remembering occurs provides the child with external memory cues.

Eyewitness Research

A common theme in eyewitness testimony literature is that children notice less than adults (Clifford and Hollin, 1981; Lipton, 1977; Loftus, 1979; Tapp, 1976; Yarmey, 1979). "Recent research indicates that children, by at least the age of four

years can be quite accurate in reporting the main actions witnessed or experienced in real-life events" (Goodman et al., 1989:5). Neisser (1979) found that young children sometimes notice potentially interesting things that older children and adults miss. Neisser's results suggest that young children's reporting of 'irrelevant' events are at times better than an adult's; these 'irrelevant' events are potentially relevant in the courtroom.

Diamond and Carey (1977) maintain that the acquisition and remembering processes responsible for the recognition of familiar disguised faces are more likely to develop with age. These processes may involve the integration of separate elements into an integrated whole and thus be much like the organizational processes necessary for recall. Chi (1978) states that such organizational activity depends on several things; most importantly a viewing of scenes as representative of complex events rather than accidental collections of objects, and the relevant prior knowledge that allows one to comprehend the interrelations and meaning attached to a scene. When children have the relevant prior experience, their recognition should, like their recall, surpass that of adults who do not.

In "Distortions In The Memory Of Children", Loftus and Davies (1984:62) arrive at the following conclusions:

- (1) Children are less efficient than adults in recalling events they have witnessed; this can be attributed to:
 - (a) a combination of encoding and retrieval

inefficiencies caused by a dearth of mnemonic skills,¹¹ and (b) lower levels of comprehension springing from the child's more limited knowledge base;

(2) There is no clear developmental trend which emerges on the effects of leading questions; this may be a result of: (a) studies' utilization of different age groups making comparisons across studies difficult, (b) the differing intervals of time between the initial event, the suggestive information, and the final test, (c) the variant types of stimuli employed.

Loftus and Davies suggest that no single factor can by itself explain the discrepant findings of these studies. Age alone is the wrong focus for these studies. Memory, regardless of a person's age, is not entirely accurate.

In "Eyewitness Testimony Of Children", Parker et al. (1986) compared adult and child performance on objective questions after a witnessed event. The multiple choice questions used were similar to laboratory recognition tests, and such research typically reports no age differences (Brown and Scott, 1971; Brown and Campione, 1972; Nelson, 1971). "Forty-eight elementary school children and forty-eight college students viewed a slide sequence of a mock crime; this was followed by photo identification of the suspect, descriptive and peripheral objective questions related to the crime, and a second photo identification of the suspect" (Parker et al., 1986:287). Parker et al. maintain that, in the eyewitness situation, developmental research evidence for these tasks is both minimal and

¹¹"Mnemonics are rules of learning that improve recall. Mnemonic techniques generally rely on facilitating two processes basic to memory: chunking (that is, forming higher-order subjective units of the material to be learned) and retrieval. Efficient retrieval systems employ prelearned, automatized structures to which the learning material is tied and which serve as a guide for retrieval" (Harre and Lamb, 1983:396).

conflicting. With close-ended questions, Marin, Holmes, Guth, and Kovac (1979) found no differences in performance, from kindergarteners to university students. It must be noted that Cohen and Harnick (1980) observed that third graders were inferior to adults on such questions, and Duncan, Whitney and Krenen (1982) found a significant improvement on factual questions from first grade to college students.

It is suggested by Parker et al. (1986) that the type of information probed in questions might differentially affect performance across age groups. Children and adults were equally accurate in photo identification per se, but children were less stable in their choices from test to retest. The researchers point to the importance of categorizing the content of questions administered to adult and child eyewitnesses; consequently, there will be greater accuracy in the testimony of both groups. Clifford and Scott (1978) found that action information was better recalled than descriptive information; while Wells and Lieppe (1981) observed a negative correlation between correct thief identification and accuracy on questions peripherally related to the witnessed crime.

Parker et al. (1986) suggest that child and adult eyewitnesses may appear similar on superficial measures but when a closer examination is made in terms of type of information requested and stability of response, developmental differences emerge. The results on objective questions clearly differentiate adult witnesses from child witnesses. Parker et al.

(1986:297-299) conclude as follows:

(1) The descriptive questions were answered better than peripheral questions for children. This finding suggests that adults are more likely to focus their attention on the relevant details of the suspect and ignore extraneous information whereas children appear to encode incoming information without discrimination;

(2) For adults, attention to one type of information necessarily reduces attention to other information. The results of the present study suggest a developmental continuum ranging from very little selectivity in children to moderate levels of central focusing in the elderly;

(3) The objective questions yield data that differentiate male from female eyewitnesses. The finding that males answered the descriptive questions better than the peripheral questions, whereas there was no difference across questions for females, is inconsistent with Powers, Andriks, and Loftus (1979) finding that males do better with male-oriented details and females with female-oriented details;

(4) Confidence ratings were similar across age groups, and correlations of identification accuracy with confidence were significant for both age groups;

(5) The test-retest method of measuring reliability of choice showed that children clearly were less stable than adults and changed their choices from test to retest. This instability in identification choice is critical since the typical court situation involves repeated questioning before diverse bodies.

Parker et al. (1986) maintain that these findings do not suggest the exclusion of children as eyewitnesses but rather the sharpening of the system variables as advocated by Wells (1978).

Goodman and Helgeson (1985) maintain that children often retain and report less than do adults. Laboratory studies indicate that, when asked open-ended questions such as "What happened?," young children tend to say relatively little, and their reports are not always completely coherent. Low error rates indicate that children's reports are seldom wrong. Goodman (1984), Marin et al. (1979) and Cohen and Harnick (1980)

recognize that while children can be reasonably accurate compared to adults in answering open-ended and objective questions, they do have difficulty remembering certain types of information; for example, "a child's ability to report the order of events is probably more crucial than his or her ability to report peripheral detail" (Goodman and Helgeson, 1985:190). Brown (1979) conclude that children can order simple, familiar events quite well but have difficulty ordering more complex, less familiar events. It is noted by Goodman and Helgeson (1985) that misorderings do not imply that the rest of the report is inaccurate; preschool children's responses can be as accurate as those of an adult.

Sheehy and Chapman (1982) state that differences between adults as witnesses and children as witnesses are complex. It is not known whether adults and children are equally affected by variables which influence the accuracy and completeness of witnesses' accounts (e.g., motivation to be helpful and correct, consequences of trauma). The researchers state:

[that] research on eye-witness phenomena as 'problem directed' lacks theoretical cohesion and conceptual lucidity. This has led to the proliferation of seemingly conflicting data which are difficult to evaluate unless they can be tied to a generative theory...established theories of perception and memory are not immediately applicable (Sheehy and Chapman, 1982:345.).

Loftus (1982) recognizes that while the schism between problem-directed and theory-directed research has been properly recognized, few serious attempts have been made towards a rapprochement between theory and practice.

List (1986) maintains that, from a legal standpoint, age is a particularly relevant variable in eyewitness testimony. The researcher investigated the reliability of eyewitness testimony as a function of three factors: (a) age, (b) probability of occurrence, and (c) type of memory test. The findings are summarized as follows:

(1) For recall, children and older adults provided less complete testimony than college students, but only older adults were less accurate than younger adults.

(2) For recognition scores, children gave reports that were as complete as younger adults', but they were less accurate in their accounts.

(3) The prediction that subjects would demonstrate more complete memory for high than low probability-of-occurrence items was supported for all age groups, in both recall and recognition completeness measures.

(4) Developmental predictions concerning schematic effects on memory were not supported in the present investigation. High probability-of-occurring information did not require less processing effort because it fit within a schematic framework vis-a-vis age effects than information that required more effortful processing.

(5) At every age level, memory assessed under recognition test instructions was more complete, although less accurate than memory assessed under recall test instructions (List, 1986:56-57).

Capabilities Of The Child Witness

Suggestibility

Over the years, social scientists and members of the legal profession have been concerned with the susceptibility of children to potential biases (Lofus and Davies, 1984:51). It is well established that the testimony and accounts of children are particularly susceptible to the prejudicial influences of leading and suggestive questioning (Whipple, 1912). It has been suggested that adults are similar to children in that they are susceptible to the influences of leading and suggestive questioning (Loftus and Palmer, 1974; Lipton, 1977; Swann, Gialiano and Wegner, 1982).

In a study conducted by Loftus and Davies (1984:53), 'suggestion' was defined as "the extent to which individuals, whether children or adults, can be made to believe events occurred that did not, or that details were different than they really were". In order to assess age trends in suggestibility, it is necessary to know the extent to which adults are also suggestible to suggestion (Loftus and Davies, 1984:53). Whether children are more susceptible to suggestive information than adults probably depends on the interaction of age with other factors. If an event is understandable and interesting to both children and adults, and if their memory for it is equally strong, age differences in suggestibility may not be found. Simply:

if the event is not encoded well to begin with, or if a delay weakens the child's memory relative to an adults', then age differences may emerge. In this case, the fragments of the event that remain in the child's memory may not be suggestion, especially from authoritative others (Loftus and Davies, 1984:63).

Cohen and Harnick (1980), after having investigated the capacity of children and college students to recall events from a film in the face of misleading questions, concluded that third grade children accepted false suggestions more readily and were less observant of detail than sixth grade or college students (who were roughly equivalent in suggestibility and recall of detail). As cited in Nurcombe (1986), Hoving et al. (1969) found an interesting relationship between task difficulty, age and susceptibility to the influence of peers. The researcher maintains that conformity increased with age in complex tasks, but it decreased with age if the task was less ambiguous. Simply, when careful judgment was required, younger children were less susceptible to peer pressure than older children.

One noticeable difference between adults and children is that children often say so little in response to questioning, that adults are tempted to ask suggestive questions of them (Goodman and Helgeson, 1986:187). Goodman et al. (1987) and Rudy (1986) conclude that young children are surprisingly resistant to suggestive questions concerning actions associated with abuse, such as being hit or having one's clothes removed. Cohen and Harnick (1980:201) state:

while children are not necessarily more suggestible than adults, they can be when their memory is weaker or the

questioner is of a relatively high status... even though laboratory research indicates that children can be more suggestible than adults, it is important to note that, in most of these studies, the children and adults were asked suggestive questions about relatively peripheral information.

Neither children nor adults retain peripheral detail well (Goodman and Helgeson, 1986:189).

Feher (1988:28) state that "it is apparent that all humans are more susceptible to suggestive influences when their memory is incomplete because of poor encoding or memory deterioration, or when they perceive that the interviewer has a high status in relation to themselves". Feher maintains that child [sexual] abuse investigations typically involve:

(1) Sexual acts that children do not encode well; (2) lapses of time that cause more memory deterioration in children than in adults; and (3) interviewers with a highly-perceived status (Feher, 1988:228).

Consequently, Feher suggests that children are more susceptible to suggestion than are adults.

Credibility And Truthfulness

Misconceptions about the competency of child witnesses lead to the questioning of the credibility of children's testimony; the child's memory, level of suggestibility, and ability to tell the difference between fact and fantasy are examined. One issue that arises when children allege sexual abuse, is the uncertainty over the credibility of child witnesses, or their ability to separate fact from fiction (Bala and Answeler, 1986: 392). Goodman et al. (1987) maintains that there may be reasons,

based on children's cognitive abilities, for not believing them; young children may be seen as highly suggestible, easily confused, or having poor memories.

Goodman et al. (1984) maintain that trustworthiness, consistency, certainty, confidence, and objectivity are frequently suggested and confirmed to be witness factors that positively affect jurors' impressions. Children appear less powerful than adults and this 'powerful', as opposed to 'powerless', style typically has a greater impact on jurors (Lind and O'Barr, 1979). Yun (1983) states that requiring a child victim to testify negatively affects his or her perception and memory and yields poor and unconvincing evidence. Goodman et al. (1984) conclude that negative biases about children's abilities may receive confirmation when a child takes the stand. Children may provide what is, or appears to be, inconsistent, incomplete, and easily led testimony. On the other hand, some positive biases may also receive confirmation: children are likeable and honest.

In a study conducted by Goodman et al. (1987) the jurors' impressions of the children's credibility were not reliably influenced by the children's accuracy; they were influenced by their age. Goodman et al. (1987:10) state:

[that] because of the children who happened to be included in the study, their accuracy in answering the questions and their age were actually inversely related ($r = -.26, n.s.$ with $n=5$). Thus, the jurors seemed to be assuming that the older children were more accurate witnesses when in fact they were not.

The findings of this study indicated that "subject-jurors were unable to discriminate between accurate and inaccurate testimony presented by child victim/witnesses" (Goodman et al., 1987:12).

Myers (1985-1986) contends that judges and attorneys cite examples of child testimony that have a special ring of veracity, a believability that is actually enhanced because the witness is a child. Meehl (1971) suggests that, with respect to the moral ability to tell the truth, jurors may believe that children are more likely to lie than are adults. Melton (1981) states that the courts' concern with the ability of children to tell the truth is misplaced since there is, in fact, little correlation between age and honesty. Burton (1976) and Strichartz (1987) conclude that, "under most circumstances, young children are truthful and that children as young as four years approximate an adult understanding of the difference between the truth and lies" (Duggan et al., 1989:75).

Fact Or Fantasy?

An issue relating to credibility is the assumption that children have a tendency to fantasize (Avery, 1983:12). Berliner (1985) contends that children run into societal misperceptions that they frequently fantasize sexual assault experiences and are unable to distinguish innocent behavior from deviant sexual contact. Avery states:

[that] these fantasies are based on their daily experiences since the basis for fantasy is the child's knowledge through observation or hearing. For this reason a child is unlikely to fantasize about sexual

activity because it is not within the child's realm of experience (Avery, 1983:12).

Johnson and Foley (1984) recognize that events may be confused in remembering, but one event does not replace another. "A good deal of developmental theorizing would lead us to expect that children are generally unable to identify the sources of their memories" (Johnson and Foley, 1984:44). The researchers found that children in the study:

did not appear to be more likely to confuse what they had imagined or done with what they had perceived. On the other hand, young children did have particular difficulty discriminating what they had done from what they had only thought of doing (Johnson and Foley, 1984:45).

This confusion is not considered to be a generalized confusion in children about fact and fantasy; nonetheless, it is thought to be important.

Terr (1986) states that current psychological studies indicate that school-age children are able to separate fantasies from memories of real events almost as well as those of adults. Despite conventional wisdom, there is no evidence that children are more prone to lie than adults, and no evidence that they are more prone to confabulate or fabricate complex allegations (Myers, 1985-1986; Nurcombe, 1986). McCord (1986) maintains:

[that] despite the fact that there has been very little empirical research concerning the extent to which children lie or fantasize in making claims of sexual abuse, and the fact that it is difficult to see how such empirical research could be conducted, the feeling in the scientific community that deals with sexually abused children is that it is indeed rare for this to happen (McCord, 1986:54).

McCord (1986:54) states further that "there has been a

recognition in behavioral scientific literature that false reports can happen and discussions of reasons they might happen, but none of the discussions indicates the belief that false reports are anything other than isolated occurrences".

Ability To Communicate

Although numerous experiments have examined differences in the memory of child eyewitnesses and adult eyewitnesses, Wells et al. (1989:26) suggest that "those experiments have not actually examined how children testify orally, but instead have simply scored the witnesses' accuracy on tasks of recognition or recall". Wells et al. collected data from 294 subject-jurors on several measures of the perceived credibility of forty-two videotaped direct and cross-examinations of eyewitnesses to a filmed abduction. It was found that:

although a negative stereotype of the young eyewitness probably exists, we propose that this stereotype is mitigated when triers-of-fact observe actual testimony delivered by young eyewitnesses...in other words, our findings are not inconsistent with the idea that a negative stereotype exists in how people imagine a young child's testimony; however, the actual testimony by the average eight-year-old is at odds with this stereotype. Indeed, the eight-year-old and twelve-year-old eyewitnesses in our study gave much better testimony than we had anticipated, and we think this was the general impression among subject-jurors as well (Wells et al., 1989:33).

It can be concluded from this study that there is a discrepancy between people's abstract view of the credibility of child eyewitnesses and how they judge the credibility of actual, concrete cases of child testimony. Goodman et al. (1984) suggest that children probably appear more powerless than adults,

especially in the stressful atmosphere of the courtroom; their voices are not as audible as adults', and they probably use more powerless expressions such as "uh" and "um".

Nigro et al. (1989) measured the power of an eyewitness' speech style, a variable that was believed to mediate the effects of age on jurors' reactions to a child eyewitness. The eyewitness in the study delivered his testimony in either a powerful¹² or powerless speech style. It was found that "speech style appears to be a potent factor mediating the effects of eyewitness age on adults' perceptions of eyewitness credibility and the defendant's guilt" (Nigro et al., 1989:64). The researchers state that adults do not seem to discount a child's speaking style; on the contrary, they generously "reward" the child who delivers testimony in a powerful style and "punish" the child who speaks in the powerless style probably more typical of children. Nigro et al. (1989:67) conclude:

[that] a characteristic of the eyewitness-speech style-mediated the effects of age on jurors' reactions to a witness. When the eyewitness was a child, mock jurors' ratings of a defendant's guilt depended on the child's presentational style. Style did not have a similar effect when the eyewitness was an adult.

¹²"The powerless style is characterized by hedges (e.g., "kind of," "I guess"), hesitation forms (e.g., "uh," "well"), intensifiers (e.g., "surely," "definitely"), and a questioning intonation in normally declarative contexts. These features are less common in the powerful style" (Nigro et al., 1989:57).

Perception

Saywitz (1989:132) contends that "the study of children's perceptions is important to understand fully the factors that affect children's competence and credibility as witnesses and the potential for preventing revictimization by the system". The literature on discourse processes suggests that the effectiveness of communicative acts, such as testimony, rest on the interaction between the unspoken expectations, attitudes, and knowledge of both the listener (e.g., juror) and the speaker (e.g., witness) (Saywitz, 1989:132). The goal of the study was "to describe developmental differences in children's conceptualizations of the legal system and to begin to identify factors that contribute to the acquisition of legal knowledge and competence" (Saywitz, 1989:138). The conclusions are as follows:

Four-to Seven-Year-Olds: For the most part, children in this age group reasoned on the bases of what they saw and their own egocentric view of the world. The lack of differentiation within and between people and their social roles was pervasive. Although legal personnel were viewed as benign and helpful, the court process was seen as treacherous and potentially leading to jail;

Eight-to Eleven-Year-Olds: By the age of eight to nine years, typically third grade, accurate concepts of court and the roles of judges, witnesses, and attorneys began to emerge. Generally...[this] group showed substantial increases in differentiating between people, social roles, processes and functions;

Twelve-To Fourteen-Year-Olds: Only this oldest age group demonstrated a sense of a societal role for the legal system beyond the one-to-one relationships of the individuals they described. They understood that decisions may, in fact, be based on inaccurate information, and that winning the case is not always synonymous with finding truth (Saywitz, 1989:151).

Children of different ages and varying amounts of experience

bring different expectations to the courtroom (Saywitz, 1989; Warren-Leubecker et al., 1989). Child witnesses have a limited and at times faulty understanding of the system in which they are participating; they do not accurately understand what is happening around them (Saywitz, 1989:153).

The Child Sexual Abuse Accommodation Syndrome

"It is perhaps one of the most tragic ironies of modern court procedure that renders the court both the child protector of last resort and one of the most serious perpetrators of child abuse" (Parker, 1981-1982:643). The psychological damage to the child witness and how this may affect the testimonial capacity and presumed competence of the child witness is often overlooked. Summit's (1983) *Child Sexual Assault Accommodation Syndrome* is an important contribution to the literature in that it outlines the dynamics of a sexually assaulted child's disclosure.

A critical problem, currently facing the criminal justice system, is the handling of cases pertaining to the physical, sexual, emotional abuse of children and the effect this has on children's disclosure. "What emerges through the clinical study of large numbers of children and their parents in proven cases of sexual abuse is a typical behavior pattern or syndrome of mutually dependent variables which allows for immediate survival of the child within the family but which tends to isolate the

child from eventual acceptance, credibility or empathy within the larger society" (Summit, 1983:178). The sexual abuse accommodation syndrome is a result of contact with thousands of child victims and an analysis of their reports. Summit (1983:178) maintains:

[that] clinical awareness of the sexual abuse accommodation syndrome is essential to provide a counterprejudicial explanation to the otherwise self-camouflaging and self stigmatizing behavior of the victim.

The following five categories represent the reality of the child sexual abuse victim.

Secrecy

Summit (1983:179) contends that "initiation, intimidation, stigmatization, isolation, helplessness and self-blame depend on a terrifying reality of child sexual abuse: It happens only when the child is alone with the offending adult, it must never be shared with anyone else; the child is, therefore, entirely dependent on the intruder for whatever reality is assigned to the experience". The author maintains that "of all the inadequate, illogical, self-serving, or self-protective explanations provided by the adult, the only consistent and meaningful impression gained by the child is one of danger and fearful outcome based on secrecy" (Summit, 1983:179). Unless the victim can find some guarantee of an engaging, non-punitive response to disclosure, the child is likely to spend a lifetime in what comes to be a self-imposed exile from intimacy, trust and self-validation.

Helplessness

Summit suggests that the adult expectation of child self-protection and immediate disclosure ignores the basic subordination and helplessness of children within authoritarian relationships. The researcher contends that:

the prevailing reality for the most frequent victim of child sexual abuse is not a street or schoolground experience and not some mutual vulnerability to oedipal temptations, but an unprecedented, relentlessly progressive intrusion of sexual acts by an overpowering adult in a one-sided victim-perpetrator relationship... the fact that the perpetrator is often in a trusted and apparently loving position only increases the imbalance of power and underscores the helplessness of the child (Summit, 1983:180).

Entrapment And Accommodation

The child faced with continuing, helpless victimization must learn to somehow achieve a sense of power and control (Summit, 1983:181). Summit (1983:181) suggests that "the child cannot safely conceptualize that a parent might be ruthless and self-serving; such a conclusion is tantamount to abandonment and annihilation". The child begins to believe that he or she is responsible for the 'painful encounters'. Summit submits:

[that] in the classic role reversal of child abuse, the child is given the power to destroy the family and the responsibility to keep "it together...since the child must structure her reality to protect the parent, she also finds the means to build pockets of survival where some hope of goodness can find sanctuary (she may turn to imaginary companions for reassurance, she may develop multiple personalities, assigning helplessness and suffering to one, badness and rage to another, sexual power to another, love and compassion to another)(Summit, 1983:181).

The author suggests that these survival skills or accommodation

mechanisms can be overcome through noncontingent acceptance and caring that is reflective of a secure environment.

Delayed, Conflicted, And Unconvincing Disclosure

Most ongoing sexual abuse is never disclosed, at least not outside the immediate family. Summit (1983:182) maintains that:

disclosure is an outgrowth either of overwhelming family conflict, incidental discovery by a third party, or sensitive outreach and community education by child protection agencies...unless specifically trained and sensitized, average adults, including mothers, relative, teachers, counselors, doctors, psychotherapists, investigators, prosecutors, defense attorneys, judges and jurors, cannot believe that a normal, truthful child would tolerate incest without immediately reporting or that an apparently normal father could be capable or repeated, unchallenged sexual molestation of his own daughter.

The author suggests that an expert advocate would ensure that the child does not become 'the helpless custodian of a self-incriminating secret which no responsible adult can believe'.

Retraction

Once again, the child bears the responsibility of either preserving or destroying the family; "the role reversal continues with the "bad" choice being to tell the truth and the "good" choice being to capitulate and restore a lie for the sake of the family" (Summit, 1983:183). Summit (1983:183) states that:

unless there is special support for the child and immediate intervention to force responsibility on the father, the girl will follow the "normal" course and retract her complaint.

The author maintains that retraction by the child is suggested to carry more credibility than the most explicit claims of incestuous entrapment in that it confirms adult expectations that children cannot be trusted. Summit (1983:184) states that:

Consequently, the children learn not to complain; the adults learn not to listen; and the authorities learn not to believe rebellious children who try to use their sexual power to destroy well-meaning parents.

Research And The Child Witness: A Cautionary Note

"While much of the clinical literature is flawed by the lack of a systematic approach in the generation of information, the empirical research is generally well controlled and systematically carried out" (Yuille et al., 1988:19). The ecological validity of the empirical literature has been viewed as being somewhat problematic. Turtle and Wells (1987:236) state:

[that] central to [the discussion of the relative benefits and disadvantages of various experimental techniques with respect to their suitability for investigating child eyewitness memory] is that such research is lacking in ecological validity.

Children's disclosure following a 'staged event' becomes generalized to instances in which children are eyewitnesses. Children are often asked questions after having viewed a staged event; these findings are, in turn, generalized to the type of situation in which children typically serve as eyewitnesses. Yuille et al. (1988:19) maintain that "what is assessed is the child's memory for stories or films or slides, not eyewitness

memory". Clearly, this is an ecological validity problem in which the author interprets the results of a study 'in terms of their implications for real-life child witnesses'. "In spite of an increased interest in these ecologically valid studies, however, eyewitness researchers could never hope to simulate every possible set of circumstances involving children with which the courts will have to contend in the future" (Turtle and Wells, 1987:236). Turtle and Wells (1987:236-237) advocate:

that [the] existent theory in the developmental literature be utilized by eyewitness researchers to fill in the gaps between the conditions that have been simulated in the laboratory and those encountered in actual cases.

The utilization of live, staged events is also problematic. The centrality of the stressfulness of the event is crucial in the measurement of trauma experienced by the child; Yuille et al. (1988) suggests that the stressfulness of these events to the child is never evaluated. The researchers state:

[that] indeed, these staged events are usually benign, so that trauma plays no role in determining eyewitness behavior (Yuille et al., 1988:19).

Researchers have recently become cognizant of the need to measure the memory abilities of children in various environments.

Of further concern is the employment of interview procedures utilized by the researchers. "A frequently overlooked consideration in these studies is whether or not the interviewer is present when the child witnesses an event" (Yuille et al., 1988:20). Another problem with the experimental interviews is

their use of standard questions instead of open dialogue:

the specific questions are developed beforehand and probe for knowledge of specific features of the event...while interviews using standard questions result in real-life interviews of children; typically the interviewer may have only sketchy knowledge of the event (Yuille et al., 1988:20).

With the reliance on standard, specific questions, come findings that are limited in their generalizability.

The following discussion will address the Legislative and Senate Committee witnesses' and members' utilization of social-scientific evidence vis-à-vis the credibility of the child witness. If the legislators had carefully examined the scientific literature on the competence and credibility of the sexually abused child witness, would Parliament continue to treat this group of witness as being less competent than sexually assaulted adult witnesses? Did the legislators examine the empirical research to determine at what *age* children can understand the nature of the oath and have the minimal capacity to perform as a witness - to observe, comprehend, recollect and narrate observations? Further, did the Parliamentary participants attend to the social-scientific literature when determining whether children should be required to go through an enquiry before they are allowed to testify? The relationship between the current knowledge of children's memory and cognitive development and the Section 274 and Section 16 amendments to Bill C-15 will be explored in the following chapter.

CHAPTER III

THE UTILIZATION OF SOCIAL-PSYCHOLOGICAL EVIDENCE IN THE HOUSE OF COMMONS

Introduction

Following the second reading of Bill C-15 in the House of Commons, a legislative committee was formed to examine the subject matter of the Bill. On November 18, 1986, the legislative committee met for the first time; it was to be the first of twelve meetings. The Committee proceeded in the consideration of its Order of Reference dated Tuesday, November 4, 1986, which read:

ORDERED,-That Bill C-15, An Act to amend the *Criminal Code* and the *Canada Evidence Act*, be referred to a Legislative Committee.

The Subject Matter Of Bill C-15

In his opening remarks to the legislative committee, Ramon John Hnatyshyn, Minister of Justice and Attorney General of Canada, maintained that the assumption underlying the theme of the bill was:

...to take appropriate legislative measures as quickly as possible to correct the existing imbalance in the justice system which has denied our children and adolescents adequate protection from the psychological and physical harm that is sexual abuse (The Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15, First Meeting:18).

He suggested further that it was essential that children be able

to get accounts of their experiences of sexual abuse before the court. In his address to the committee, Hnatyshyn acknowledged that, prior to the legislative amendments, children had been denied rights; with the amendments to the *Criminal Code* and the *Canada Evidence Act*, the obstacles to the prosecution of child abuse cases have been removed (The Minutes and Evidence of the Legislative Committee, First Meeting:24). The Minister of Justice and Attorney General of Canada proposed that rules be put in place which would not be discriminatory against children, which would allow the prosecution of cases and which would permit the child's testimony to be accepted in a court of law with minimal rules with respect to admissibility (The Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15, First Meeting:28).

Interest Groups And Legislative Witnesses

At the committee stage, there were numerous influential participants called before the legislative committee to present evidence on the subject matter of Bill C-15. The legislative participants, or representatives of interest groups, presented evidence to the legislative members which were often conflicting as to the relative competency and credibility of the child witness and, further, were divergent in the extent of their reliance on social-scientific literature to support these assumptions. The interest groups which grounded their testimony in, or made reference to, the body of social-scientific

literature vis-a-vis the competency of the child witness will be outlined in the following discourse. The interest groups represented are as follows: the Canadian Bar Association, the Canadian Council on Children and Youth, the Canadian Association of Criminal Defense Lawyers, Wendy Harvey (Crown Attorney and Child Witness Expert), Pediatric Specialists, the Canadian Child Welfare Association, and the Metropolitan Toronto Special Committee On Child Abuse.

The Canadian Bar Association

On December 04, 1986, the Canadian Bar Association came before the legislative committee and recommended that there be no amendments to the current law. With respect to the child witness, it was maintained that the elimination of the requirement of corroboration was not warranted; the CBA failed to recommend that children be entitled to the same evidentiary safeguards as adults (The Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15, Second Meeting:11).

Joel Pink, the Chairman of the Committee on Pornography and Prostitution and Sexual Abuse of Children raised concerns about children's testimony during the second legislative committee hearing. Pink stated that children, as witnesses, were prone to use their imagination and to fantasize (The Minutes and Evidence of the Legislative Committee, Second Meeting:17). Although Mr. Kaplan instructed all legislative witnesses to look at statistics and evidence vis-a-vis the competency of the child

witness, Mr. Pink failed to cite articles or studies which supported his testimony before the committee (The Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15, Second Meeting:11). When pressed by legislative member Mr. Robinson to provide empirical evidence to back up the contention that children of younger ages have a tendency to fabricate, Mr. Pink suggested:

[that] in researching the paper I prepared for a conference in Halifax, I have come across articles and studies, the names of which I cannot recall right off - which I will be more than happy to send to you if necessary - which show that this is in fact not a false fallacy...there are studies which show that there have been cases documented and children of younger ages have a tendency to fabricate. (The Minutes of Proceedings and Evidence of the Legislative, Committee on Bill C-15, Second Meeting:17).

The CBA and their presentation before the legislative committee reflected a lack of documentation and empirical support for their position on the competency of the child witness. In the absence of empirical evidence to support the assumption that children are more prone to fantasy and to use their imaginations in a way which might give rise to problems from the perspective of the accused, Mr. Robinson questioned whether the committee members should not be doing everything possible to ensure that the 'truth' is uncovered vis-a-vis the competency of the child witness. As suggested by legislative member Ms. Collins, the CBA's representation clearly reflected the lack of sensitivity and appreciation of the public policy issue that was dealt with in this piece of proposed legislation (The Minutes of Proceedings and Evidence of the Legislative Committee on Bill

C-15, Second Meeting:18).

The Canadian Council On Children And Youth

On December 11, 1986, Nicholas Bala, professor of Law from Queen's University, Director of the Canadian Council on Children and Youth (hereafter referred to as the CCCY), also the chairman of the Council's committee which viewed the Badgley committee report, Bills C-113, C-114, and C-15 offered testimony before the legislative committee on Bill C-15. Accompanying Mr. Bala was Dr. Marcia Smith of the CCCY, the medical consultant with the Canadian Institute for Child Health, a member of the Canadian Pediatric Society, and formerly the chairperson of the child protection team of the Janeway Child Health Centre in St. John's Newfoundland. The third witness to offer testimony was Brian Ward, the Executive Director of the CCCY.

Firstly, professor Bala spoke to the issue of child witnesses and the issues surrounding the competency of child testimony as well as the corroboration of children's evidence. Bala contended that it was of the utmost importance for the committee members to note that the present rules of evidence were developed over 100 years ago, at a time when there was very little understanding of child psychology and child development (The Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15, Third Meeting:6). Bala presented to the legislative committee members the basic position taken by the CCCY; children should be allowed to testify, and their voice

must be heard. Bala suggested that the concerns held by the legislators as to the reliability of children's evidence should not be upon its admissibility, but rather on its credibility. He maintained that there have been cases where adults testify for the Crown or for the accused and they are not telling the truth, that in virtually every criminal case which goes to trial there is at least someone who is not telling the truth and yet these people are allowed to go forward and testify.

Bala concluded that, in some ways, adults are more sophisticated and credible as liars than are children; children should be able to testify and that there should not be artificial rules about competency or about corroboration (The Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15, Third Meeting:6). It is important to note that, although Bala contends that 'children should be able to testify', he did not present any empirical evidence which supported his thesis; the committee members were to accept his evidence based only upon his personal experience.

The second witness from the CCCY to offer testimony with regard to the child as witness was Dr. Marcia Smith. Smith maintained that, in everyday life in Canada, a child's word has generally been accepted; parents believe their children and listen to children's complaints of illness, teachers investigate children's complaints, doctors, psychologists, psychiatrists, social workers, and other persons accept that children can communicate what has happened to them (The Minutes of

Proceedings and Evidence of the Legislative Committee on Bill C-15, Third Meeting:13). Smith suggested that even police officers use a child's information to apprehend suspects, and to persist in regarding a child as inadequate as a witness to his or her victimization in the area of sexual abuse was anachronistic. Dr. Smith's testimony suggested that child sexual abuse professionals unconditionally accept the spoken word of the child, with no other justification than that it must be accurate and thus reliable. At no point in Smith's presentation to the committee is there reference made to the social-scientific body of literature on the competency of the child witness.

In his address to the Legislative Committee, Brian Ward made reference to a number of empirical studies which supported the Council's position vis-a-vis the competency of the child witness (The Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15, Third Meeting:5). Ward highly recommended to the legislative members that they attend to the articles written by Gail Goodman,¹ the director of the dual degree program of psychology and law at the University of Denver. Ward described Goodman's work as:

empirical and case study research on children's memory, their suggestibility and accuracy, as well as jurors' reactions to child witnesses as an indication of the degree to which the jury considers a child a credible witness (The Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15, Third Meeting:5).

¹Refer to Bibliography for full citations.

It was unfortunate that Ward did not provide the committee members with a full citation of Goodman's work. The second reference made by Ward to a social-scientific empirical work was the article by David P. Jones,² an abstract of a speech he gave to the seventh national conference on child abuse and neglect entitled *Reliable and Fictitious Accounts of Sexual Abuse of Children* (The Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15, Third Meeting:5). In this article, Jones argued that children were indeed as accurate as adults in court cases; Ward adopted the contents of this article and the assumptions underlying it - that children are competent witnesses.

The third and final reference to social-scientific literature made by Ward was to Rolund Summit's *Child Sexual Abuse Accommodation Syndrome*,³ in it the latter described the five categories of the syndrome, secrecy, helplessness, entrapment and accommodation, delayed and conflicted disclosure, and retraction. Ward concurred with the author's conclusion that the clinician, with an understanding of child sexual abuse accommodation syndrome, is able to offer the child a right to parity with adults in the struggle for credibility and advocacy. Although the Badgley Report is not considered to be an empirical work, Ward referred to it and those sections dealing with the evidence which was to be part of the Committee's deliberations.

²Note: The full citation was not located.

³See Summit (1983) The child sexual abuse accommodation syndrome. *Child Abuse and Neglect*, 7, 177-192.

On December 16, 1986, Bob Wakefield, President of the Canadian Association of Criminal Defense Lawyers and member of the Criminal Lawyers Association of Ontario, provided testimony in the fourth legislative hearing on the subject matter of Bill C-15. Wakefield adopted the 'collective judicial wisdom' of the courts over the years which concluded that children's evidence was unreliable and that some caution should be used in admitting it (The Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15, Fourth Meeting:33). Wakefield noted that some extra caution should be exercised in looking at children's evidence:

there have been different categories of witnesses with which the law has seen fit to exercise a little more caution in dealing with their evidence; it seems over the years, traditionally, to have been a safeguard none questioned; now it is being questioned and it will have to be evaluated (The Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15, Fourth Meeting:33)

Wakefield did not refer to or examine the social-scientific literature and studies vis-a-vis the child witness in his evaluation of the rules of law surrounding this category of witnesses. Instead, he relied upon his own experience when he concluded that generally, child witnesses are very excellent witnesses, that they had good recall and recollection, and that they expressed themselves accurately and clearly and were able to clarify contradictions in their evidence and were at times extremely good witnesses - often better than adults (The Minutes

of Proceedings and Evidence of the Legislative Committee on Bill C-15, Fourth Meeting:20). And yet, Wakefield maintained that when dealing with certain categories of witnesses, corroboration becomes more important. Wakefield stated:

that when we deal with certain categories of witnesses, we would like to see some independent piece of evidence that suggests they are telling the truth...it is not absolutely essential in all cases, but it is certainly desirable; it is desirable from a common sense point of view (The Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15, Fourth Meeting:25).

Although Wakefield maintained that children can generally be considered to be very excellent witnesses, he suggested that the acceptance of uncorroborated evidence "smooths the road to conviction, removes many of the evidentiary obstacles which now stand as a safeguard to the accused and invites convictions" (The Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15, Fourth Meeting:5). These conclusions were made by a defense lawyer, not by a social scientist specialized in the cognitive and memory development of the child as witness. One must question whether Wakefield, as a defense lawyer, is learned in the social-psychological arena of memory and cognitive developmental research and thus able to draw such conclusions vis-a-vis the child witness.

Wendy Harvey: Crown Attorney And Child Witness Expert

Wendy Harvey was invited to speak before the legislative committee on December 16, 1986. In her opening statement to the Committee members she stated that she was not representing any particular group, but was rather a Crown counsel who had

specialized in the area of child sexual assault since 1981. At the time, she was prosecuting adult sexual assault cases as well as prosecuting in the youth court in Surrey, British Columbia. Harvey maintained that many children suffer at the hands of defense lawyers, at the hands of prosecutors, and at the hands of judges themselves. She suggested that these criminal justice system officials have no expertise in interviewing children or in assessing the credibility of children (The Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15, Fourth Meeting:7). Harvey maintained that legal scholars use values and inferences and presumptions that have normally been applied to very different issues, and that what is needed in the criminal justice system are social-scientists such as Dr. Yuille of the University of British Columbia and Dr. Jones from Denver Colorado, who devised methods for the assessment of allegations of child sexual assault (The Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15, Fourth Meeting:22).

Social-scientists' participation in the criminal justice system vis-a-vis the sexually abused child is considered by Harvey to be extremely valuable; the former are able to consider the dynamics of children and children's memory, the emotion that the child showed during disclosure and the consistencies and inconsistencies of such testimony and how it correlates with what other people are saying. Harvey advocated social-science expertise as a tool for law-makers:

This makes more sense than putting the child, like a piece of litmus paper, in the wrong chemical to decide whether or not [child sexual assault] happened...that is what is happening in our court system (The Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15, Fourth Meeting:22).

Wendy Harvey cited general references to the social-scientific literature on the child witness; she stated that the literature and the research concluded that kids are not lying about [sexual abuse], and thus it cannot be assumed that children are inherently incompetent as witnesses (The Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15, Fourth Meeting:34). Harvey testified that as witnesses, the literature emphasized that children should not be placed in a separate category.

Pediatric Specialists

On December 17, 1986, Dr. Marcellina Mian, Director of the Suspected Child Abuse and Neglect Program (therein referred to as the SCAN program) was called before the legislative committee to provide evidence on the subject matter of Bill C-15. At the time of the legislative committee hearings, Dr. Mian had built up 11 years' experience in working with children who had been abused and 6 years' experience, particularly in the area of child sexual abuse. Her testimony centered around the issue of the competence of the child witness. Mian stated that there was no evidence that children make worse witnesses than adults; she suggested that they might be a little bit more suggestible to direct questioning but, other than that, they are able to recall

and relate 'pretty much' as well when their developmental stage is taken into account (The Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15, Fifth Meeting:9). She suggested that specific criteria be applied to test children's development, their ability to recall, their ability to relate, and their credibility in their allegations of sexual abuse. Mian advocated that a competency requirement in a court of law would exclude a significant number of children simply on the perceived ground of insufficient intelligence.

Dr. Mian cited a report study conducted in Colorado which indicated that in only 1.8% of cases did the false allegations originate with the child and these were adolescents who had been traumatized in their past⁴ (The Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15, Fifth Meeting:25). Also cited by Mian was Roland Summit's Child Sexual Abuse Accommodation Syndrome,⁵ the following is a summary of the accommodation syndrome and its five stages or phases of abuse:

What is looked at are called embedded responses, and it is here where pediatricians and other professionals see triggers that normally happen in day-to-day life that would bring back memory of the abuse to the child and would have the child tell more details because the event came back out; the amount and quality of the child's story; the evidence of the child's emotional state as being disclosed, so if he or she talks about being embarrassed one can believe that these emotions were actually felt (The Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15, Fifth Meeting:28).

Mian concluded that the evidence that she brought to the

⁴Note: The full citation was not located.

⁵See footnote 3 for the full citation.

legislative committee established that the child is at a developmental level of being able to recall events and of being accurate in the recall of such events (The Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15, Fifth Meeting:30).

The National Association Of Women And The Law

On January 20, 1987, Nicole Tellier, member of the National Association of Women and the Law (therein referred to as NAWL), offered testimony before the Legislative Committee on the subject matter of Bill C-15. NAWL's concern with the bill were in terms of its contents and its omissions in relation to problems of both procedure and evidence. As a representative of NAWL, Tellier called for the removal of the current and proposed requirements with respect to the competency of the child witness; a presumption of competence was made by Tellier for the testimony of all witnesses, regardless of their age. Tellier cited the work of Gail Goodman, more specifically, her paper which illustrated that a child's memory of traumatic events is no less reliable than that of an adult.⁶ A full citation was not provided by Tellier. The NAWL rejected the notion that children's testimony is inherently unreliable and supported the position taken by several other interest groups which recognize that children only need to demonstrate an ability to communicate the evidence in order for their testimony to be received. No

⁶For a full citation refer to: Goodman, G.S. (1984). Child witness-conclusions and future directions for research and legal practice. *Journal Of Social Issues*, 40, No. 2, 157-175.

empirical work or body of social-scientific literature on the child witness was cited which supported that the 'ability to communicate' was a valid predictor and measure of the competency of the child.

The Canadian Child Welfare Association

On January 1, 1987, representatives from the Canadian Child Welfare Association offered evidence to the Legislative Committee on the subject matter of Bill C-15. The Association represented approximately 1,000 agencies. The following representatives participated in the legislative hearing; Michael Farris from the Youth Emergency Shelter Society of Edmonton, Linda Smith from the IWK Hospital in Halifax, Laurier Boucher from the Centre de services sociaux Ville-Marie in Montreal, and Jennifer Blishen from the Children's Aid Society Of Ottawa - Carleton. The aforementioned individuals' comments and responses were made on behalf of the children, the youth, and the families with whom they work. Representatives of the Association conveyed to the committee members the importance of action directed towards the reduction of the primary victimization of young people by perpetrators of sexual abuse; their urgency was a reflection of the reality of human casualties of abuse which the professionals encountered daily.

The first speaker, Michael Farris, maintained that children are individuals who must have their rights recognized and protected (The Minutes and Evidence of the Legislative

Committee, Seventh Meeting:42). He suggested that children deserved special consideration due to their young years and not fully developed capacities and that children have a right to be heard in the court process when decisions affect them. Farris maintained that the child's ability to testify had been supported by clinical experience (The Minutes of Proceedings and Evidence of legislative Committee on Bill C-15, Seventh Meeting:42). He contended:

[that] when comment is made with regard to children telling the truth, I think we would indicate with consistency in this field [that] a young person has the same degree of capability of being truthful or being untruthful as an adult...we think it is important for the trier of fact to make some sort of determination upon the evidence presented; there is not some sort of predetermination as to an individual's capability of reciting evidence or fabricating testimony (The Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15, Seventh Meeting:42).

Clearly, the evidence that Farris offered to the legislative committee was based upon his personal experience as a professional child welfare practitioner; his instruction to the committee members was not grounded in social-scientific literature.

Not unlike Farris, the witnesses, Smith, Boucher and Blishen, provided testimony which was based upon their experience as professional child welfare practitioners. Boucher suggested that there was evidence of children who exaggerated certain realities or misinterpreted certain facts, such as describing abuse when in fact it was not abuse or describing sexual molestation when in fact it was not sexual molestation

(The Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15, Seventh Meeting:53). Similarly, Smith maintained that young children are certainly capable of lying but that they tend to lie about something they have had experience in (The Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15, Seventh Meeting:52). Finally, Blishen stressed to the legislative committee that children are not necessarily less truthful than their adult counterparts; she referred the members to the submission by the Canadian Medical Association and its discussion of the above issue (The Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15, Seventh Meeting:54). At no time during the hearing did the practitioners make reference to the social-psychological body of literature vis-a-vis the competency of the child witness.

The Metropolitan Toronto Special Committee On Child Abuse

On January 20, 1987, Lorna Grant, the Executive Director of the Metropolitan Toronto Special Committee On Child Abuse offered testimony on the subject matter of Bill C-15. Grant failed to make reference to any social - scientific literature; rather, she critically analyzed the Bill C-15 amendments to the *Criminal Code* and the *Canada Evidence Act*. She suggested to the committee that the criminal justice system did not accommodate, nor was it believed to accommodate, under the provisions of Bill C-15, an entire population of victims - a population who, by virtue of their age and the nature of the crimes committed

against them, had been subject to denial, disbelief, and minimization at every turn (The Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15, Seventh Meeting:71). Grant stated:

[that] Bill C-15 will unfortunately not significantly alter 'that reality' because it is based on several fundamentally faulty assumptions, both about the capacity of children and about child sexual abuse itself; this is particularly evident, in our view, in the proposals which maintain a competency test for children and preclude additional evidence from credible third parties (The Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15, Seventh Meeting:72).

Grant contended that there were compelling and credible reasons to propose further amendments to this legislation - most particularly in the area of children's competency as witnesses and the reception of additional evidence to support their testimony (The Minutes of Proceedings and evidence of the Legislative Committee on Bill C-15, Seventh Meeting:72). She concluded that the bill did not follow up on the Badgley report recommendations vis-a-vis the admissibility of the out-of-court statements of a child concerning sexual abuse; the amendments to Bill C-15 failed to address this issue.

For ease of analysis, refer to Table 1: **Summary of Legislative Committee Witness' Utilization of Social-Scientific Evidence** on the following page.

Table 1: Summary of Legislative Committee Witness' Utilization of Social-Scientific Evidence

<i>Witnesses</i>	The Issues Addressed	Reference to Social-Scientific Evidence
<i>Canadian Bar Association</i> Joel Pink	(a) Imagination and fantasy	(a) General reference to 'studies'
<i>Journal of the Royal Society of Medicine</i> Nicholas Bala	(a) Competency (b) Reliability (c) Corroboration	(a) No references
<i>Journal of the Royal Society of Medicine</i> Marcia Smith	(a) Credibility	(a) No references
<i>Journal of the Royal Society of Medicine</i> Brian Ward	(a) Children's memory (b) Accuracy	(a) Gail Goodman (b) David Jones (c) Rolund Summit's Child Sexual Abuse Accommodation Syndrome (d) The Badgley Report
<i>Journal of the Royal Society of Medicine</i> Bob Wakefield	(a) Reliability (b) Corroboration	(a) No references
<i>Crown Attorney General's Office</i> Wendy Harvey	(a) Competency (b) Secondary victimization	(a) Dr. Yuille and Dr. Jones (b) general reference to 'the literature'
<i>Journal of the Royal Society of Medicine</i> Marcellina Mian	(a) Competency (b) Suggestibility (c) False allegations	(a) General reference to 'a study conducted in Colorado' (b) Rolund Summit's Child Sexual Abuse Accommodation syndrome
<i>Journal of the Royal Society of Medicine</i> Nicole Tellier	(a) Competency (b) Reliability (c) Corroboration	(a) Gail Goodman
<i>Journal of the Royal Society of Medicine</i> Michael Farris	(a) Children's rights (b) Fabrication (c) Truthfulness	(a) General reference to 'clinical experience'
<i>Journal of the Royal Society of Medicine</i> Laurier Boucher	(a) Exaggeration (b) Misinterpretation	(a) General reference to 'evidence'

↳ *Linda Smith*

(a) Reliability
(b) Truthfulness

(a) No references

↳ *Jennifer
Blishen*

(a) Truthfulness

(a) The submission by the
Canadian Medical
Association

*The Metropolitan Toronto
Lorna Grant*

(a) Faulty
assumptions about
children and child
sexual abuse
(b) Secondary
victimization

1988 on Child Abuse
(a) The Badgley Report

Introduction

On November 20, 1986, the Standing Senate Committee on Legal and Constitutional Affairs met, it was to be the first of fifteen meetings. The Committee considered its Order of Reference dated November 4, 1986 which read:

ORDERED, -The Standing Senate Committee on Legal and Constitutional Affairs be authorized to examine the subject matter of the Bill C-15, An Act to amend the *Criminal Code* and the *Canada Evidence Act*, in advance of the said Bill coming before the Senate or any matter relating thereto.

Background To Bill C-15

Richard Mosley, General Senior Counsel of the Department of Justice provided the background of the bill and various committee reports and studies leading to the drafting of the present bill. Mosley stressed before the Standing Senate Committee that the amendments itself were only part of a program of activities which the Government was instituting to deal with the serious problem of the sexual abuse of children (The Minutes of Proceedings and Evidence of the Standing Senate Committee on Legal and Constitutional Affairs, Second Meeting:5). The first part was to reform the sexual offences which applied to the problem of sexual abuse and to ensure that they more appropriately and more fully cover the field of conduct which has been associated with the sexual exploitation of children and young persons. The second major area that the bill was to deal

with was those amendments which concerned the reception of children's evidence.

Legal And Constitutional Affairs: The Witnesses

Representatives from the Department of Justice, the Children's Hospital Child Protection Centre (Winnipeg), the Canadian Council on Children and Youth, the Erikson Institute, the American Bar Association, and the Quebec Bar Association were called as witnesses before the Standing Senate Committee on Legal and Constitutional Affairs; these witnesses offered social-scientific evidence as to the competency of the child witness. The nature of each of the witness' evidence will be examined individually as to the degree to which it is based upon social-scientific literature and thus serves as a guide for policy-making.

The Department Of Justice

On November 20, 1986, Neville Avison, the Senior Criminal Justice Policy Co-ordinator, Policy, Program and Research Branch offered testimony before the Senate Committee. Senator Doyle queried Avison as to whether the latter felt that there should be some study undertaken by a Canadian agency, or by some authorities in Canada, as to the various means of assessing how children of four or five years of age might respond [in a court of law] and how dependable that response might be (The Minutes of Proceedings and Evidence of the Standing Senate Committee on

Legal and Constitutional Affairs, Second Meeting:23). Senator Doyle expressed concern before the committee that the criminal justice system had gone along for so many years with the opposite situation where, unless there was verification, a child's testimony was of no value at all. It was maintained by Senator Doyle that there should be some kind of study conducted to assess the competency of the child witness when the child is placed in the situation where his or her testimony could determine the guilt or innocence of the party charged (The Minutes of Proceedings and Evidence of the Standing Senate Committee on Legal and Constitutional Affairs, Second Meeting:23). Avison retorted that it was the habit of the Government of Canada to provide arrangements for the assessment and evaluation of new laws as they are set in place, and that 'it was fair to say' that funds had been set aside within the Department of Justice for the assessment of any proposed change in the law, particularly with reference to the offering of evidence by children (The Minutes of Proceedings and Evidence of the Standing Senate Committee on Legal and Constitutional Affairs, Second Meeting:23). He maintained that there was already a substantial amount of evidence available, in both laboratory settings and in court settings in other jurisdictions based on common law traditions, as to the circumstances and validity of children's evidence. No references or specific studies were cited by Avison. He maintained that:

While I would not wish to summarize the findings of those results in under two or three minutes, it would be possible for that material to be made available to this

committee for its review, if that was helpful, although I must say that it is quite a substantial quantity of material (The Minutes of Proceedings and Evidence of the Standing Senate Committee on Legal and Constitutional Affairs, Second Meeting:23).

One must question whether the "material" was ever made available to the Standing Senate Committee for its review.

The Childrens' Hospital Child Protection Centre (Winnipeg)

On December 10, 1986, Dr. Laura Mills, clinical psychologist for the Child Development Clinic and Child Protection Centre in Winnipeg offered evidence before the Senate Committee. Dr. Mills reviewed for the Honourable Senators some issues faced by child victims and directed the former to a body of research that was emerging from the United States. She suggested to the Senators that some children who have been assaulted from a very young age perceived that that is part of normal child-rearing. (The Minutes of Proceedings and Evidence of the Standing Senate Committee on Legal and Constitutional Affairs, Third Meeting:10). Mills noted that it takes a while for them to reach a level of development where they appreciate that this does not happen to their friends and neighbours. She stated that the research findings, which were emerging from the United States at the time of the hearing, suggested that children have a different perception of their sense of responsibility about the abuse and the degree of trauma that it causes, depending on whether they were passive victims of the assault or whether, somehow, they had been coerced to actively do something to the offender.

Mills neglected to cite specific empirical evidence as to the competency of the child as witness (The Minutes of Proceedings and Evidence of the Standing Senate Committee on Legal and Constitutional Affairs, Third Meeting:17). She maintained that, by the time a child gets to court, the child has had to tell a fairly consistent story about what happened; the child has had to explain it fairly clearly in order to convince the welfare people, the police and the Crown that something happened to them. For Mills:

that should be sufficient...from what we know about children's ability to tell the truth and about adults' ability to tell the truth, there do not seem to be great differences...from what we know from research and from our own experience, it does not seem that children are less capable than anyone else of telling the truth (The Minutes of Proceedings and Evidence of the Standing Senate Committee on Legal and Constitutional Affairs, Third Meeting:17).

In her testimony to the Standing Senate Committee, Mills directly referred to American research which concluded that children who have been sexually assaulted display behavioral symptoms (The Minutes of Proceedings and Evidence of the Standing Senate Committee on Legal and Constitutional Affairs, Third Meeting:31). She maintained that some of the 'big researchers in the U.S.' have come upon clusters of symptoms that seem to go along with sexual assault and mental health professionals would be more likely to see these kinds of symptoms if a child had been assaulted than if he or she had not. It is unfortunate that Dr. Mills failed to cite this particular piece of literature; if she had, her concluding

remarks could have been critically analyzed against the social-scientific findings. Mills concluded:

[that] you could have a child who makes an allegation of a sexual assault, but if they do not have certain other symptoms such as helplessness, betrayal, anxiety and being stigmatized by that kind of experience, then you have to start looking at it and questioning it (The Minutes of Proceedings and Evidence of the Standing Senate Committee on Legal and Constitutional Affairs, Third Meeting:31).

Brenda Gravenor, Senior Therapist from the Children's Hospital Child Protection Centre (Winnipeg), made reference to an American empirical study in her December 10, 1986 address to the Senate Committee. She commented on a recent study that had been conducted in the U.S. that examined juries and their perception of the competence of the testimonial capacity of the child witness (The Minutes of Proceedings and Evidence of the Standing Senate Committee on Legal and Constitutional Affairs, Third Meeting:22). Gravenor assumed that the defences of juries would melt because their hearts would reach out to the child who had allegedly been sexually assaulted. This assumption was not supported by the conclusion of the study. Gravenor attributed the reaction of the jury to the behaviors of some jurors who had children who were troublesome and perhaps told stories and made up lies. Not unlike her colleague, Dr. Mills, Gravenor failed to produce a full citation for the Senate Committee members.

On December 17, 1986, Professor Nicholas Bala, Faculty of Law, Queen's University and Member of the Board of Directors, Canadian Council on Children and Youth offered testimony to the Standing Senate Committee on Legal and Constitutional Affairs. Before he made his formal remarks, he commented that Bill C-15 was a reflection of the work of the Badgley and Fraser reports and that this particular hearing represented the last days of a process which had begun four or five years ago. He contended that the rules of evidence must be changed, and advocated that children with 'relevant evidence' should be able to testify in court proceedings, whether they are victims or not (The Minutes of Proceedings and Evidence of the Standing Senate Committee on Legal and Constitutional Affairs, Fourth Meeting:8). Bala supported the view that the so-called common law rule, that a trier of fact must be cautioned about the reliability of child witnesses, should be eliminated by legislation. He further stated:

[that]that does not mean that in a specific case where a child witness is testifying there must be a caution about the unreliability of children's evidence...we think that that rule is not supported by any empirical evidence that child witnesses are inherently unreliable (The Minutes of Proceedings and Evidence of the Standing Senate Committee on Legal and Constitutional Affairs, Fourth Meeting:10).

Bala suggested that the 'evidence' did not conclude that child witnesses are inherently unreliable, and thus it was inappropriate to have that kind of rule because it would mislead juries about the significance of the child's evidence. In his

testimony, Bala cited a passage from an article by Berliner and Barbieri⁷ which stated that some of the most powerful evidence in cases of child sexual abuse lies in the child's prior out-of-court statements (The Minutes of Proceedings and Evidence of the Standing Senate Committee on Legal and Constitutional Affairs, Fourth Meeting:18). Unfortunately, Bala failed to articulate to the committee members the full citation. Bala generally referred to 'material that dealt with the reliability of child witnesses' and concluded that children who were victims of sexual abuse or other aggression were actually, on the whole, quite accurate in remembering that happened (The Minutes of Proceedings and Evidence of the Standing Senate Committee on Legal and Constitutional Affairs, Fourth Meeting:17). When asked by Senator Nurgitz as to the 'passing grade' of child evidence, Bala made reference to a number of papers and social - scientific literature which served as a guide for the policy-makers; studies by David Jones⁸ and Gail Goodman⁹ on the reliability of child witnesses were cited (The Minutes of Proceedings and Evidence of the Standing Senate Committee on Legal and Constitutional Affairs, Fourth Meeting:25).

Bala concluded his presentation with a discussion of the alleged phenomenon, The Child Abuse Syndrome. He briefly

⁷See: Berliner, L. & Barbieri, M. (1984). The testimony of the child victim of sexual assault. *Journal Of Social Issues* 40, No. 2, 125-137.

⁸Note: The full citation was not located.

⁹Refer to footnote 3 for the full citations.

outlined the syndrome as a situation in which the child's testimony and memory is not as questionable as is the reliability, credibility and honesty of that testimony. It is important to note that Brian Ward, the Executive Director of the Canadian Council on Children and Youth in his testimony before the Committee on December 17, 1986, also made reference to the Child Accommodation Syndrome. He encouraged the Senators to read Summit (1988) because it was 'terribly important' to understand that child sexual abuse exists because of secrecy which is maintained by threats.

The Erickson Institute

On February 4, 1987, Dr. James Garbarino, the President of The Erickson Institute for Advanced Study of Child Development in Chicago, Illinois offered testimony to the Standing Senate Committee. He was asked to speak of both the sexual abuse side of Bill C-15 and the evidentiary charges with respect to children as witnesses; he began with some thoughts about sexual abuse:

Child abuse is a judgment, a social judgment that we make as a community; it reflects two sources that are kind of in an equation. These two sources of the judgment reach a negotiated settlement...on the one side we have the professional knowledge, the scientific expertise, if you will, and the research and theory about children and parents that tells us what is likely to harm a child and what is good for children ...but that is only part of the answer, the other side is that there be something in the community's values, or in the culture, that says that this is inappropriate for children (The Minutes of Proceedings and Evidence of the Standing Senate Committee on Legal and Constitutional Affairs, Sixth Meeting:6(A)).

Dr. Garbarino suggested that it is of vital importance that a 'negotiated settlement' be found between saying 'knowledge or experts tell us this is dangerous or harmful' and having the community willing to recognize that this kind of behaviour is inappropriate (The Minutes of Proceedings and Evidence of the Standing Senate Committee on Legal and Constitutional Affairs, Sixth Meeting:6(A)).

In reference to the capacity and credibility of the child witness, Garbarino maintained that one theme that had clearly emerged in the social-scientific literature was that the bulk of the problem is not the child's limited capacity; the major problem is not that children cannot be good reporters, good witnesses or good observers of experience (The Minutes of Proceedings and Evidence of the Standing Senate Committee on Legal and Constitutional Affairs, Sixth Meeting:8(A)). Garbarino cited a research study completed at an unidentified American university which suggested that the bulk of the problem is with the adults as recipients of information from children. He cited work by Mahoney¹⁰ on the issue of 'confirmatory bias'; it is unfortunate that a full citation was not provided for the Senators of the Standing Committee (The Minutes of Proceedings and Evidence in the Standing Senate Committee on Legal and Constitutional Affairs, Sixth Meeting:9(A)). In his article, Mahoney stressed that in our thinking processes as adults we form hypotheses and these hypotheses may become very resistant

¹⁰Note: The full citation was not located.

to disproof, even when the 'facts' we are confronted with are to the contrary. Dr. Garbarino adopted Mahoney's conclusions and maintained that a mal-intentioned person who is skillful can destroy a child's capacity to give uncontaminated information.

With respect to the reception of children's evidence in the courtroom, Garbarino concluded that the main research findings were that if the courtroom is set up to accommodate the needs of children, even very young children can be excellent witnesses (The Minutes of Proceedings and Evidence of the Standing Senate Committee on Legal and Constitutional Affairs, Sixth Meeting:10(A)). Garbarino stated that:

there is a growing body of knowledge-some of it is a kind of folklore knowledge; it is not empirically validated knowledge-is beginning to show us that it is possible to arrange those situations to get the best from children (The Minutes of Proceedings and Evidence of the Standing Senate Committee on Legal and Constitutional Affairs, Sixth Meeting:11(A)).

Garbarino stressed that it must be recognized that children, even at age eight - or nine, are very vulnerable in terms of their ability to tell the difference between fantasy and reality.

Garbarino made a general reference to various empirical studies vis-a-vis the reliability of children's evidence; he also made a direct reference to a study conducted in Michigan in which researchers gave lie detector tests to 147 children¹¹ (The Minutes of Proceedings and Evidence of the Standing Senate Committee on Legal and Constitutional Affairs, Sixth

¹¹Note: The full citation was not located.

Meeting:14(A)). Of those 147 tests, only one child failed and it was suggested that if 147 adults were given lie detector tests, the failure rate would have been much higher. Garbarino maintained:

[that] adults perform no better, and if anything worse, than children in many experiences...the situation must be set up to permit a gentle probing of the child's account [of sexual abuse]...and people experienced in children are reasonably confident that they can disentangle that (The Minutes of Proceedings and Evidence of the Standing Committee on Legal and Constitutional Affairs, Sixth Meeting:14(A)).

Garbarino concluded his presentation to the Standing Senate Committee with a reference to an article published in the *American Journal of Child Psychiatry* which laid out five or six facts that are likely to be characteristic of coached tales versus tales that are genuine¹² (The Minutes of Proceedings and Evidence of the Standing Senate Committee on Legal and Constitutional Affairs, Sixth Meeting:20(A)). A full citation was not offered.

The American Bar Association

On February 10, 1987, Howard Davidson, the Director of The Legal Resource Center in Washington D.C. offered testimony to the Standing Senate Committee. Davidson's comments on Bill C-15 were based upon his experience at the ABA Resource Center as well as on his own personal involvement with the legal aspects of child welfare and child protective service issues. In his address to the Senators, Davidson maintained that, under the

¹²Note: The full citation was not located.

leadership of Ms. Josephine Bulkley, the ABA child sexual abuse research and publications had exerted considerable influence in the emergence of both state and federal legislation on these topics (The Minutes of Proceedings and Evidence of the Standing Senate Committee on Legal and Constitutional Affairs, Eighth Meeting:6). Davidson:

[was] dismayed that a special cautionary instruction can still be given by the judge to the jury regarding the care with which it should assess the credibility of the child witness, even though researchers have found that children make just as honest, accurate, and reliable witnesses as adults (The Minutes of Proceedings and Evidence of the Standing Senate Committee on the Legal and Constitutional Affairs, Eighth Meeting:8).

Davidson noted that the research, to date, suggested that even preschool age children cannot be assumed to be more suggestible than adults and that they may, in fact, be less susceptible to some forms of suggestion, and with respect to a child's memory:

although very young children may have difficulty with free recall, the recognition ability is generally as good as that of an adult (The Minutes of Proceedings and Evidence of the Standing Senate Committee on Legal and Constitutional Affairs, Eighth Meeting:8).

Davidson's reference to the body of social scientific literature on the competence of child witnesses led him to conclude that children's recall is relatively accurate (The Minutes of Proceedings and Evidence of the Standing Senate Committee on Legal and Constitutional Affairs, Eighth Meeting:12).

The Quebec Bar Association

On February 11, 1987, Serge Menard, President of the Quebec Bar Association offered evidence to the Standing Senate Committee. In approaching the subject matter of Bill C-15, Menard kept in mind both the rights of the minors who were protected by the law in these cases and the rights of the accused. Menard maintained:

that if we realize that witnesses in a certain category, for some reason, are not reliable, it is right that the law should acknowledge that they are not reliable and that the judge should be required to tell the jury this, although the witness may look very convincing (The Minutes of Proceedings and Evidence of the Standing Senate Committee on Legal and Constitutional Affairs, Nineth Meeting:19).

Menard suggested that, if there were strong and unanimous opinions in the field of psychology and psychiatry that young children are as reliable as adults, the Quebec Bar Association's position would have been different (The Minutes of Proceedings and Evidence of the Standing Senate Committee on Legal and Constitutional Affairs, Nineth Meeting:19). Through direct personal experience, Menard recognized that even crown attorneys admit that they do not treat these young witnesses in the same way as adult witnesses. The Association's position was believed by Menard to be a justifiable compromise due to the lack of 'definite' psychological and psychiatric evidence that a young children's testimony is always reliable. In his discourse, Menard failed to cite empirical findings which supported or contradicted his thesis.

For ease of analysis, refer to Table 2: **Summary of Senate Committee Witness' Utilization of Social-Scientific Evidence** on the following page.

Table 2: Summary of Senate Committee Witness' Utilization of Social-Scientific Evidence

<i>Witnesses</i>	The Issues Addressed	Reference to Social-Scientific Evidence
<i>Neville Avison</i>	(a) Validity of children's evidence	(a) General reference to 'a substantial amount of evidence available'
<i>Laura Mills</i>	(a) Perception of responsibility (b) Truthfulness (c) Behavioral symptoms	(a) General reference to 'the body of research emerging from the U.S.'
<i>Brenda Gravenor</i>	(a) Jurors' perception	(a) Reference to 'a recent study'
<i>Nicholas Bala</i>	(a) Reliability (b) Importance of out-of-court statements	(a) General reference to 'empirical evidence' (b) Berliner and Barbieri (c) David Jones (d) Gail Goodman (e) "The Child Abuse Syndrome"
<i>Brian Ward</i>	(a) Secrecy	(a) Rolund Summit's Child Sexual Abuse Accommodation Syndrome
<i>James Garbarino</i>	(a) Credibility and capacity (b) Fantasy and reality (c) Reliability (d) 'Confirmatory bias' (e) Persuasion	(a) General reference to 'the main research findings' (b) 'a study conducted in Michigan' (c) 'the theme that had emerged from the social-scientific literature' (d) 'work by Mahoney' (e) an article published in 'the American Journal of Child Psychiatry'

<i>Howard Davidson</i>	(a)Credibility (b)Reliability (c)Suggestibility	(a)General reference to 'the ABA child sexual abuse research and publications' (b)the 'research to date' (c)'findings of the researchers'
<i>Serge Menard</i>	(a)Reliability	(a)Reference to the 'lack of definite psychological and psychiatric evidence'

CHAPTER IV

ANALYSIS

The Literature On The Capabilities Of The Child Witness

The research to date on the capabilities of the child witness suggest that there is no simple relationship between age and witness performance. It has been concluded that most children are capable of satisfying minimum competency requirements and providing reliable testimony (Goodman, 1984; Melton, 1987; Marin, Holmes, Guth & Kovac, 1979). As stated by McWilliams (1990:34-16.1):

Subject to some specific exceptions, the basic test of the competency of a person to testify is his ability to understand the nature of an oath... and to accept the obligation thereof that they become so; the witness must also have some minimal capacity to perform as a witness, that is to observe, comprehend, recollect and narrate observations.

In terms of competence, the social-scientific literature on the capabilities of the sexually assaulted child witness suggest that children understand the nature of the oath and have the minimal capacity to perform as a witness, that is to observe, comprehend, recollect and narrate observations. Much of the new research supports the reform to abolish competency requirements by challenging commonly held myths, or assumptions regarding children's poorer memories, greater suggestibility, and intermingling of imagination and reality (Bulkley, 1989:213). In terms of credibility, the research to date supports the claim that children have the knowledge and powers of observation,

judgment and memory as reflected by their testimony.

The body of literature on witness performance suggests that, in certain circumstances, a child witness can be as competent as an adult witness. Current research suggests that the overemphasis on the differences between children and adults in developmental psychology results in an underestimation of a child witness' abilities and an overestimation of those of adults. The body of literature on the capabilities of the sexually assaulted child witness suggest that this group of witness is as competent as sexually assaulted adult witnesses. There is little empirical data to support the claim that children are less competent and credible than adults when offering evidence in allegations of sexual abuse. And yet, even with the amendment to Section 246, sexually assaulted children are not treated under the law as being as competent as a sexually assaulted adult witness. In terms of competence, children are still differentiated from adults by procedural and evidentiary standards; Parliament suggests that not all children are as competent as adults to give evidence in cases of sexual assault.

Most limitations on children's rights, including the requirement of corroboration in cases of child sexual assault, have been based on the traditionally held belief that this category of witness offers inherently flawed testimony; that children are considered to be less competent than adults when offering evidence in allegations of sexual abuse. In light of

the empirical social-psychological evidence there is justification for considering children, in certain situations, to be as competent as adult witnesses. The literature on the sexually assaulted child witness fails to support the traditionally held belief that this category of witness offers inherently flawed testimony.

The body of literature on witness performance suggests that the interaction between age and other factors (i.e. knowledge base, task demands, situational factors) is important for eyewitness testimony. Researchers have found that a functional memory capacity exists for both adults and children (Case, 1985; Dempster, 1981; Schneider and Pressley, 1989; Siegler, 1986). There are developmental increases in the execution of cognitive operations; a greater use by 'older' children of cognitive operations and a heightened use of memory strategies which are said to play a role in memory development. A witness' memory for a particular event may be a reconstruction of the facts based on context cues, past experiences, inferences and existing world knowledge.

Children and adults 'memory performance' has been found to differ in terms of constructability and discriminability. With maturation, the child acquires more efficient strategies for recording, storing, recalling and reproducing episodic memories and, as hierarchically organized cognitive structures develop, semantic memory becomes more complex (Nurcombe, 1986:474). Simply stated, a child's capacity to store, recall and reproduce

an event is influenced by the construction that is placed upon that event. It has been empirically demonstrated that younger children do provide less complete and accurate testimony, although the deficit is small and depends on the type of questions posed (Dunning, 1989:231).

A child's 'knowledge' has been found to be organized around sets of expectations for familiar objects, people, places and events; this category of witness has greater difficulty ordering complex, less familiar events than simple, familiar events (Brown & Finklehor, 1986; Gruendel, 1980; Nelson 1978, 1981; Nelson et al., 1983; Parker et al., 1986). Children construct 'causal sequences' based on their own experiences and in using these representations to predict, interpret, and act, there is little evidence that they manipulate elements that are not personally meaningful in the same way as adults. Both adults and children provide testimony that is believed to be more accurate when their disclosure is centered around sets of expectations for familiar objects, people, places and events.

There has been criticism directed at the research on eyewitness testimony; namely, that this area of research is 'problem directed' and lacks theoretical cohesion and conceptual lucidity (Sheehy & Chapman, 1982:343). This has led to the proliferation of seemingly conflicting data that are difficult to evaluate due to a lack of a generative theory. Children and adults may appear similar on superficial measure of eyewitness testimony, but with closer examination of the type of

information requested and the stability of response, the findings are less conclusive.

Children recall less than adults and yet the former add significantly more extraneous information to their recall than do older subjects, adding information not in the original stimuli (Clifford & Hollin, 1981; Johnson & Foley, 1984; Lipton, 1977; Loftus, 1979; Saywitz, 1987; Tapp, 1976; Yarmey, 1979). When adults and children are encouraged to encode information without directive or suggestive questioning, adults recall more. Frequent explanations for the disparity in recall between children and adults are as follows: encoding and retrieval inefficiencies, the limited knowledge base of the child and hence a lesser comprehension of the memory task at hand, and the type of information probed in questions which differentially affect the performance across age groups.

Of concern to child witness researchers is the allegation that a child's disclosure is inherently less credible than an adult's vis-a-vis the suggestibility of the former. This area of research has produced conflicting data. Feher (1988) suggests that all witnesses, whether they be adults or children, are susceptible to suggestive influences. Factors such as incomplete memory - due to poor encoding and memory deficiencies - and the high status of an interviewer may result in a greater likelihood of the witness's disclosure being altered by suggestive questioning. Because children's response to questioning is considered to be economical in terms of its depth, researchers

believe that suggestive questioning is more likely to occur when children disclose and when the questioner is of a higher status (Cohen & Harnick, 1980; Goodman & Helgeson, 1986).

Dunning (1989:232) maintains that younger children remember less in free recall, are more easily misled, and are more likely to fail to distinguish reality from imagination than older children and adults. The following researchers conclude that there is in fact little correlation between the age and honesty of a witness (Burton, 1978; Goodman et al., 1987; Melton et al., 1981; Silas, 1985; Strichartz, 1987). Children can be believed but because of repeated questioning and inconsistencies in their disclosure, others are often left with the impression that the testimony is not truthful.

In reference to the debate as to the ability of children to separate fact from fantasy, it has been concluded that school-age children are able to separate fantasies from memories or real events almost as well as those of adults (Avery, 1983; Berliner, 1985; Johnson & Foley, 1984; Myers, 1985-1986; Nurcombe, 1986; Terr, 1986). False reports are believed to be isolated occurrences. McCord (1986:54) states:

[that] despite the fact that there has been very little empirical research concerning the extent to which children lie or fantasize in making claims of sexual abuse, and the fact that it is difficult to see how such empirical research could be conducted, the 'feeling' in the scientific community that deals with sexually abused children is that it is indeed rare for this to happen.

Factors that affect adults' (e.g., jurors', judges' and attorneys') perceptions of the child witness include characteristics of the child witness themselves; speech style, as well as adults' beliefs concerning children's memory capabilities, including whether or not the child's testimony is "scripted" (i.e., whether it is a prepared script of their testimony or their own words) (Ceci et al., 1989:1). Although there is no empirical data to support the claim that children's testimony is less powerful than adults', a child's disclosure probably appears more powerless than adults and thus is met with greater suspicion (Bailey & Rothblatt, 1971; Ceci et al., 1989; Goodman et al., 1984).

Legislative Witnesses' Utilization Of Empirical Research

In light of the empirical social-psychological evidence there is little justification for considering children to be less credible and competent than adults when offering evidence in allegations of sexual abuse. The following discourse will address the relationship between the current knowledge of children's memory and cognitive development and the changes in the legislation; legislators and legislative witnesses of Bill C-15 and their utilization of social and behavioral empirical evidence will be explored. Further, there will be an examination of the legislators' and policy-makers' explicit attendance to the social-scientific literature on the competence and credibility of sexually assaulted child witnesses relative to

adult witnesses when amending Bill C-15. If the legislators had carefully examined the scientific literature on the capabilities of the sexually assaulted child witness, would Parliament continue to treat this group of witness as being less competent than sexually assaulted adult witnesses? Through an analysis of the scientific literature on adult and children's eyewitness testimony, a relationship is drawn between the current knowledge of the competence and credibility of the sexually assaulted child witness and the attendance to this literature during the Parliamentary hearings on Bill C-15.

Amount Of Referenced Literature

"Integrative reviews summarize past research by drawing overall conclusions from many separate studies that are believed to address related or identical hypotheses" (Cooper, 1989:13). The Legislative and Senate Committee witnesses, in their presentation of evidence to the committee members, cited one or two studies at most which supported their theses; they did not qualitatively synthesize the body of literature on the child witness. The danger in the citation of single experiments or studies in the social and behavioral sciences is that they:

rarely provide definitive answers to research questions...rather, if science in the social and behavioral domains is to progress, it must be through the discovery of underlying trends and refinement of a large body of studies (Wolf, 1986:5).

The witnesses called before the Legislative and Senate Committee provided data that was not representative of the body

of literature on the competence and credibility of the child witness. The witnesses focused upon a small number of studies chosen from a large body of literature, thus failing to allow for the discovery of underlying trends and refinement of a large body of literature. In the legislative committee hearing, few empirical studies were cited. Mr. Ward referred to work undertaken by Gail Goodman, Dr. David Jones and Roland Summit, and yet full and complete references were not made available to the legislative committee members so that they may analyze these 'works'. Ms. Harvey cited Dr. Yuille of the University of British Columbia and Dr. Jones of the University of Denver as participants in significant work vis-à-vis the codification of procedures in the disclosure of the sexually assaulted child. No references to the work of further researchers conducting similar procedures in this area of research were provided which would have demonstrated the accumulated state of knowledge.

Dr. Mian briefly cited Roland Summit as a clinician working in the field of child sexual abuse and the individual responsible for producing the *Child Sexual Abuse Accommodation Syndrome*, a cluster of behavioral symptoms allegedly found in children who have been sexually assaulted. Mian did not make reference to the vast amount of literature in the area of the child witness and secondary victimization but instead adopted the overall findings of this single paper. Ms. Tellier cited 'the work of Gail Goodman' but did not refer to the title of this work; instead, she described it as 'her paper which

illustrated that a child's memory is no less reliable than that of an adult'. Empirical work by Saywitz (1987; 1989), Nurcombe (1986), Nelson et al. (1971; 1973; 1978; 1981), Johnson and Foley (1984), Kobasigawa (1974), Loftus (1979) and Yarmey (1979) represent important evidence in the area of 'children's memory' and yet were not cited.

The Senate Committee hearings were similar to the Legislative hearing in that the witnesses selectively referred to studies or prototype studies as representative of all studies. Professor Bala cited the conclusions of Berliner and Barbieri, that 'the most powerful evidence [as to the sexual abuse of a child] is prior out of court statements'. The findings of Jones and Goodman vis-`a-vis the child witness' memory capabilities were cited and served to sum up the body of literature on children's eyewitness testimony. Bala referred to Roland Summit's Child Sexual Abuse Accommodation Syndrome as representing the reality of the sexually abused child victim; a typical behavioral pattern or syndrome of mutually dependent variables which allow for the immediate survival of the child within the family but which also tends to isolate the child from eventual acceptance, credibility, or empathy within the larger society. Bala did not refer to the volume of available literature on the child victim and the potential for secondary victimization by the criminal justice system, but instead relied upon this single paper without the attendance to the proliferation of studies that address this common area of

research.

Dr. Garbarino cited Mahoney's research on 'confirmatory bias' and his findings that if the courtroom is set up to accommodate the needs of children, even very young children can be excellent witnesses. Garbarino cited this single experiment to provide a definitive answer to the research question: Are children competent and capable witnesses? No effort was made to accumulate more than one study which supported this thesis.

Incomplete Referenced Literature

A number of legislative witnesses in both the Legislative and Senate Committee hearings cited social-psychological empirical work to support their thesis but did not provide a complete citation; consequently, it was problematic to locate and integrate results from existing studies to "reveal patterns of relatively invariant underlying relations and causalities, the establishment of which would constitute general principles and cumulative knowledge" (Hunter et al., 1982). As stated by Wolf (1986:14) "with full citations, conclusions could more easily be made by comparing and aggregating studies that include different measuring techniques, definitions or variables (e.g. treatments, outcomes) and subjects". Conflicting interpretations of the evidence are not uncommon, while even consistent interpretations by independent reviewers may be built on similar biases and misreadings of the literature (Light and Smith, 1971; Pillemer and Light, 1980; Jackson, 1980). With the complete

reference, the Legislative and Senate Committee members would be able to analyze the definitions, variables, procedures, methods and samples and thus the validity of the findings. The weight or importance of the findings of the particular study could thus be determined.

As a witness for the Legislative Committee, Dr. Mian referred to 'a study in Colorado' which indicated that in less than 2% of cases did the false allegations originate with the child and these were adolescents who had been traumatized in their past. Similarly, Dr. Garbarino in his address to the Senate Committee, cited 'a study in Michigan' in which researchers gave lie detector tests to 147 children and of those 147 tests, only one child failed; Garbarino suggested that if 147 adults were given lie detector tests, the failure rate would have been much higher. Garbarino concluded his presentation to the Standing Senate Committee with 'a reference to an article published in the *American Journal Of Child Psychiatry*' which laid out five or six facts that are likely to be characteristic of coached tales versus tales that are genuine. No further information was offered to the committee members.

With the enormous amount of social-psychological literature on the capabilities of the child witness, considerable attention has been drawn to the lack of standardization in how reviewers arrive at general conclusions from series of related studies. Cooper (1989:83) maintains that "reviewers face problems when they consider the variations among the results of different

studies with disparate definitions, variables, procedures and samples". An accurate understanding of the capabilities of the child witness is possible only when the results from existing studies are integrated so that patterns of underlying relations and causalities and general principles are discovered. This is not attainable unless the committee members are supplied with sufficient and complete references.

General Reference To Research

Perhaps the most common utilization of social-psychological empirical evidence by Legislative and Senate Committee witnesses was to refer loosely to the body of literature on the child witness as 'the research'. Wolf (1986:9) states that "studies use disparate definitions, variables, procedures, methods, samples and so on, but their conclusions are often at odds with each other". Due to the disparate and at times inconsistent conclusions, it is inappropriate and inaccurate to suggest that the enormous volume of research and body of literature on the capabilities of the child witness could be referred to as 'the research'.

As a witness called before the Bill C-15 Legislative Committee to offer evidence as to the competency of the child witness, Dr. Mian stated that 'there was no evidence' that children make worse witnesses than adults. She suggested that they might be a little bit more suggestible to direct questioning but, other than that, they are able to recall and

relate 'pretty much' as well when their developmental stage is taken into account. Mr. Farris maintained that the child's ability to testify 'had been supported by clinical experience' which would indicate with consistency that a young person has the same degree of capability of being truthful or untruthful as an adult. Boucher also referred to 'the research' when he suggested that there was evidence of children who exaggerated certain realities or misinterpreted certain facts, such as describing abuse when in fact it was not abuse or describing sexual molestation when in fact it was not sexual molestation.

A number of Senate Committee witnesses referred to the enormous volume of research and body of literature on the child witness as 'the research'. Mr. Avison maintained that there was already a substantial 'amount of evidence' available, in both laboratory settings and in court settings in other jurisdictions based on common law traditions, as to the circumstances and validity of children's evidence. Dr. Mills, a Senate Committee witness, stated that the 'research findings' which were emerging from the United States at the time of the hearing, suggested that children have a different perception of their sense of responsibility about the abuse and the degree of trauma that it causes, depending on whether they were passive victims of the assault or whether, somehow, they had been coerced to actively do something to the offender. Further, she suggested that from what we know from 'research' and from our own experience, it does not seem that children are less capable than anyone else of

telling the truth. Mills directly referred to 'American research' and some of the 'big researchers in the U.S.' which concluded that children who have been sexually assaulted display behavioral symptoms.

Professor Bala maintained, in his discussion of the so-called common law rule that a trier of fact must be cautioned about the reliability of child witnesses, that the rule is not supported by any empirical evidence, to the effect that child witnesses are inherently unreliable. Bala generally referred to 'material that dealt with the reliability of child witnesses' and concluded that children who were victims of sexual abuse or other aggression were actually, on the whole, quite accurate in remembering what happened.

Dr. Garbarino, in his address to the Senate Committee members, made reference to the capacity and credibility of the child witness and maintained that 'one theme that had clearly emerged in the social-scientific literature' was that the bulk of the problem is not the child's limited capacity but rather with adults as recipients of information from children. With respect to the 'main research findings', if the courtroom is set up to accommodate the needs of children, even very young children can be excellent witnesses. Mr. Davidson, a witness called before the Senate Committee, noted that 'the research to date' suggested that even preschool age children cannot be assumed to be more suggestible than adults and that they may, in fact, be less susceptible to some forms of suggestion. Mr.

Menard, the final witness to generally refer to the body of literature on the child witness, maintained that due to the 'lack of definite psychological and psychiatric evidence' that a young children's testimony is always reliable, the law should acknowledge that they are not reliable.

Failure To Utilize Empirical Research

The Legislative and Senate Committee witnesses, in their presentation of evidence to the committee members, cautiously utilized the theories and procedures of experimental psychology in the arena of legislative analysis and decision-making. Such caution proved to be prudent in that the Parliamentary witness' expertise did not fall within the area of social-psychology. Much of the evidence vis-`a-vis the competency and credibility of the child witness was based upon personal and professional opinion, not empirical data.

The majority of the Legislative and Senate Committee witnesses did not utilize or refer to the body of literature on the child witness. Legislative witness Mr. Pink, stated that children, as witnesses, were prone to use their imagination and to fantasize. Professor Bala, in his address to the Legislative Committee, suggested that adults are more sophisticated and 'effective' as liars than are children; that children should be able to testify and that there should not be artificial rules about competency or about corroboration. Dr. Smith, a Legislative witness from CCCY, did not ground her testimony in

social-psychological research when she maintained that it was anachronistic to regard a child as inadequate as a witness to his or her victimization in the area of sexual abuse. Similarly, Mr. Wakefield's conclusions vis-`a-vis the child witness' inherently unreliability, was not based on empirical evidence.

CHAPTER V

CONCLUSION

Children as witnesses have traditionally been considered to be a category of witnesses who offer inherently flawed testimony and, consequently, their competence and credibility were often questioned. In the past, the legal system reflected the assumption that to be a child is to be incapable of offering reliable and credible testimony in a court of law.

Prior to 1954, the rule of practice for rape was that the judge was required to instruct the jury that it was unsafe to find the accused guilty in the absence of corroboration. This rule was incorporated into the *Criminal Code* of 1953-1954. However, this rule was repealed in 1976. In 1983, in order to prevent judges from reviving the common law practice, Parliament enacted the requirement that the judge shall not instruct the jury in cases of sexual assault, that it is unsafe to find the accused guilty in the absence of corroboration. These actions of Parliament in 1976 and 1983 reflected the belief that the testimony of adult sexual victims was no longer considered by Canadian law to be inherently untrustworthy. However, the repeal of Section 659 of the *Criminal Code*, R.S.C. 1985 (that required corroboration of child complainants of sexual assault and other offences) was not proclaimed in force until the Bill C-15 amendments in January of 1988. Even with the repeal of Section 659 which had required corroboration, sexually assaulted

children still are not treated as being as competent as sexually assaulted adult witnesses. The Legislative and Senate Committee members, as well as the witnesses to these committees, placed little weight on social-scientific and empirical evidence vis-à-vis the competence and credibility of the child witness. The legislative amendments were not significantly based on the proliferation of scientific knowledge of child development. Despite the lack of support of the scientific knowledge of child development, the enactment of Section 274 of the *Criminal Code*, R.S.C. 1985, and Section 16 of the *Canada Evidence Act* were nevertheless consistent with that knowledge.

In the process of the formulation of legislation, the Legislative and Senate Committee witnesses, or representatives of interest groups, communicated their concerns and recommendations on Bill C-15 to the Committee members. Each witness brought to the Parliamentary hearings a unique perspective and invaluable insight. The Legislative Committee held fourteen hearings to discuss the proposed amendments to Bill C-15 and the Standing Senate Committee met seventeen times; during these meetings an exhaustive amount of information was presented to the committee members. Vallance (1988:198) documented the response of Mary MacDougall, clerk of the legislative committee on Bill C-15, to the situation:

you would not believe the amount of information that goes into an MP's office...they are swamped with it...there are things they simply do not have time to look at.

Vallance (1988:197-198) further states:

...that one of the realities of the committee system is that MP's are inundated with information... even if a brief is concise, balanced and circulated through the right channels there is nothing guaranteeing that it will be read by everyone involved...the volume of written documentation can be beyond the human bounds of many MP's and Senators.

Numerous influential participants, all with a variety of expertise and ideologies, were called before the Parliamentary committees to guarantee the recognition of their interests by policy-makers. Vallance (1988:164) suggested that the:

Canadian interest group strategies are based on the fact that interest groups serve two politically relevant functions: communication and legitimation...the communication function includes everything from furnishing technical data to communicating the intensity of members' views to the government; the legitimating function results from the communication function. Interest groups broaden the base of information to the people involved in discussing policy problems.

It would be accurate to conclude that the interest groups' presentation to the Bill C-15 committee members was powerful in both its persuasiveness and impact; each participant brought invaluable information and knowledge to the committee members. The legislative and senate committee witness' nonattendance to the social-scientific literature does not in any way diminish their value. Legislative committee member, Mrs. Finestone, stated that:

These...witnesses are perhaps somewhat more objective about the legislation than we are, and see it from another point of view because of their own experiences (The Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-15, First Meeting:15).

Differing ideologies and evidence were heard by the Parliamentary members, evidence which proved to be an invaluable

contribution to the amendments to the *Criminal Code* and *Canada Evidence Act*. Yet, there lacked an adequate presentation of the body of literature on the capabilities of the child witness; a lack of social-scientific theories and empirical findings. It is the author's contention that the literature on the capabilities of the child witness can provide the legislature with valuable information, but only if it is presented in an efficient, accurate, and scientific manner. This did not occur in the Legislative and Senate Committee hearings on Bill C-15.

The Legislative and Senate Committee members were presented with the findings of a small number of empirical studies¹ vis-à-vis the capabilities of the child witness; however, the presentation of the evidence was unscientific. As outlined in Chapter 2: *The Body Of Literature On The Child Witness*, the last decade has seen an enormous amount of social-scientific evidence produced in the area of the capabilities of the child witness; the majority of this evidence was not brought to the attention of the committee members. The studies which were presented in the committee hearings were not assessed and analyzed against the findings of other researchers conducting studies in this area. As stated by Wald (1976:2):

lawyers [and policymakers] need the insights and expertise of persons doing research on child development in order to decide what the goals of legal policy should be...we need to have the best possible guidance in defining the term 'best interest'.

¹Refer to Table 1: *Summary of Legislative Committee Witness' Utilization of Social-Scientific Evidence* and Table 2: *Summary of Senate Committee Witness' Utilization of Social-Scientific Evidence*.

The Parliamentary witnesses did not 'go far enough' in their reliance upon empirical evidence in clarifying the 'true' capabilities of the child witness. However, it can be argued that it is not the responsibility of social workers, lawyers, pediatric specialists etc., to present social-scientific literature to the Parliamentary members. These Parliamentary witnesses are not trained social-scientists and are therefore not cognizant of the body of literature on the competence and credibility of the child witness. Through their experience with children, the Parliamentary witnesses formed conclusions as to the capability of child witnesses relative to adult witnesses. The validity of the conclusions offered by the Parliamentary witnesses vis-à-vis the competence and credibility of the child witness are not questioned by the author. What is questioned is why a witness cognizant of the current body of social-scientific literature on the capabilities of the child witness was not invited to present this relevant evidence to the legislative and senate committees on the subject matter of Bill C-15.

Social-psychology can provide an invaluable contribution to decision-making; "psychology can offer important insights, throw doubt on established beliefs, or clarify dimensions of a problem without necessarily prescribing the solution" (Lloyd-Bostock, 1988:168). Haney (1980:155) advocates psychology as a tool for decision-makers and states:

To the extent that people will not tolerate a jurisprudence founded on erroneous assumptions about human behavior, psychology can provide an impetus for change; when legal decisions are based on behavioral

assumptions that are wrong, they can be challenged.

Behavioral assumptions can be challenged, but if legislators and policymakers are not adequately informed as to the current and existing literature relevant to the proposed changes in legislation, the social-psychologically informed legislative amendments are impossible. "A legal system that embodies erroneous assumptions about people - in terms of their capacities to perform certain acts or their reactions to certain legal standards - will find its ability to elicit appropriate behavior undermined and the quality of its justice questioned" (Haney, 1980:163).

The existing social-scientific literature vis-à-vis the capabilities of the child witness must be attended to and evaluated when making changes to the existing law surrounding the reception of children's evidence. The parliamentary witnesses were not trained social-scientists and thus can not be expected to provide social-psychological evidence to support their testimony. Consequently, there was a sparse amount of referenced social-psychological evidence on the capabilities of the child witness which was inadequate in sufficiently "broaden[ing] the base of information to the people involved in discussing policy problems" (Vallance, 1988:164). The legislature did not make a social-psychologically informed legal change when enacting Section 274 of the *Criminal Code* and Section 16 of the *Canada Evidence Act*.

The Legislative and Senate Committee witnesses were called before the committees to provide invaluable and indispensable opinions obtained from the context in which they worked; such contexts did not necessarily allow the witnesses to become familiar with the social-scientific knowledge vis-`a-vis the capabilities of the child witness. Great value was placed upon the witness' expertise with real-world situations which cannot be measured by the scientific knowledge of the capabilities of the child witness. The Legislative and Senate Committee witnesses' nonattendance to the social-scientific literature does not in any way diminish the value of their experiences, attitudes and ideologies. In recognizing the importance of attending to the social-scientific evidence and existing literature relevant to the proposed changes in legislation, it is not the author's intention to ignore the reality of the decision-making process. Social-scientific evidence is only one of the many factors which are considered with the formulation of legislation; its significance and usefulness must not be overstated at the expense of undervaluing the experience and knowledge of the witnesses. And yet, the social-scientific body of literature on the child witness was not adequately nor fully presented to the Parliamentary members.

It can be maintained that it is not the responsibility of the Legislative and Senate Committee witnesses to provide the policy-makers with an adequate or systematic review of the exhaustive amount of social-scientific literature on the

capabilities of the child witness. If the witnesses had presented the body of literature to the committee members, it is questionable whether they would have found time to attend to it. Committee members are unable to scientifically analyze and assess the limitations of social-psychological research because "courts and other legal decision makers have no mechanisms by which they can weigh scientific evidence" (Haney, 1980:185); they simply have not been trained to critically analyze the social-psychological evidence brought before them. Bryan Williams, the President of the Canadian Bar Association and Senate Committee witness stated that:

...it can be recognized that we do not pretend to be social-scientists or policymakers, and that we have tried to balance these competing interests in making our suggestion on the specific provisions (The Minutes of Proceedings and Evidence of The Standing Senate Committee On Legal and Constitutional Affairs, Fifth Meeting:28).

The Legislative and Senate Committee members have no knowledge of how to weigh empirical evidence. Because social-psychological findings are often contradictory, (certainly the case in this area of research), and the conclusions to such studies lend themselves to a variety of interpretations, it is imperative that a professional with expertise in social-psychology and methodology follow certain criteria to guide the analysis of data. The importance and significant contribution of meta-analysis has proven effective in challenging sweeping conclusions regarding correctional treatment effectiveness. In Andrews et al. (1990) the meta-analysis "revealed considerable order in estimates of the magnitude of the impact of treatment

upon recidivism" (Andrews et al. 1990:384).

What is needed is an expert to objectively and accurately analyze the social-scientific literature on the capabilities of the child witness and present the evidence to the committee members in an economical and simplified form. I advocate a 'model for decision-making' which will serve the function of 'furnishing technical data' to the legislature in an efficient and effective manner. One method which may be utilized is an 'integrative research review':

integrative reviews summarize past research by drawing overall conclusions from many separate studies that are believed to address related or identical hypotheses...the integrative reviewer hopes to present the state of knowledge concerning the relation(s) of interest and to highlight important issues that researchers left unresolved (Cooper, 1989:13).

It is irresponsible to make changes in legislation based upon results from single experiments, as stated by Cooper (1989:82-83):

focus[ing] on 1 or 2 studies (a traditional strategy) chosen from dozens or hundreds, fails to portray accurately the accumulated state of knowledge...relying upon the results of 1 or 2 studies or prototype studies as representative of all studies may be seriously misleading...this type of selective attention is open to confirmatory bias: a particular reviewer may cite only studies that support his/her position.

The application of social research methods, meta-analysis, is a viable alternative to 'selective attention' and 'confirmatory bias'. Meta-analysis "...is the application of statistical procedures to collections of empirical findings from individual studies for the purpose of integrating, synthesizing, and making sense of them" (Wolf, 1986:5).

Both an 'integrative research reviewer' and a 'meta-analyst', employed as expert witnesses, before the Legislative and Senate Committees, would serve a legitimating function by 'broaden[ing] the base of information to the people involved in discussing policy problems'.

In the present analysis of expert witness testimony, it was concluded that a majority of individuals appearing before the various committees presented a fairly consensual (if somewhat limited) view of the social-psychological literature on child witness testimony. That is, their translation and screening of the information for testimony made reference to primarily supportive evidence from the literature. Indeed the legislative reforms derived from this testimony can be deemed consistent with the view that the child is as competent as the adult witness, and in that sense, one can state that the research did make an impact. But it could be argued that it was a selective and incomplete presentation of evidence which was compatible with the context of the "times". Child sexual abuse had been clearly defined as a critical social problem in the earlier Badgley and Fraser Reports; the Minutes from the Legislative Committee urged expedition in bringing about needed reforms in the legislation dealing with child sexual abuse. Legislative member, Mr. Gerin stated that "we have been told repeatedly that it is urgent to get this bill passed as quickly as possible" (The Minutes of Proceedings and Evidence of the Legislative Committee On Bill C-15, First Meeting:12). There was much

pressure to balance perceived injustices in the acceptance of child witness testimony.

It is not within the scope of this thesis (nor appropriate) to place a value judgment on the ultimate reforms made; however, it is intriguing to consider what form the changes to the legislation might have taken had some of the conflicting research findings been highlighted. The statutory inquiry into competence might have been different if child witnesses had been categorically differentiated according to their *age*. As reflected by the body of literature on the capabilities of the child witness, children of 14 and 3 or 4 years of age have significantly different levels of functioning in terms of observation, comprehension, recollection and cognition. If social-scientific evidence vis-à-vis the competence of the child witness is to contribute to policy analysis and decision-making, a meta-analyst is needed to categorically differentiate between the capabilities of children at every age.

In any case, it is imperative that the limitations of the dynamics of interest groups' participation in the process of legislative formulation be recognized, and more objective and innovative models considered. Decision-making surrounding legislative reform - based upon these models that provide a comprehensive review of social-scientific research - should result in better balanced and just reforms.

APPENDIX

Human Memory And Cognitive Development

The earliest work on memory development was conducted at the end of the last century and early in this century (Schneider and Pressley, 1989:194). Memory is believed to be neither an isolated mental faculty nor a passive storehouse of experience (Paris and Lindauer, 1977:35). For this reason, then one analyzes the memory of children, the study must be embedded in an examination of perception, comprehension, and problem-solving. Paris and Lindauer (1977) summarize the central tenets of constructive cognitive processes in memory as follows:

(1) Exact reproduction or recall¹ of an event, especially a meaningful stimulus is rare; memory usually involves transformations of an input.

(2) These transformations can involve either the omission of information and abstractive processing (cf. Zangwill, 1972) or the embellishment of the given information with supplemental and implied relationships. Although memory is characterized as holistic² and schematic,³ particular details and figurative information can be remembered and play an important role in memory.

(3) Constructive processes are determined jointly by the immediate context, and cognitive abilities, and the

¹"Remembering is stimulated both by a general instruction to remember and by a request to remember specific details" (Poppstone and McPherson, 1988:235).

²"An approach emphasizing the organic or functional relation of parts and wholes rather than an atomistic approach to the study of culture, and human behavior" (Heidenreich, 1968:69).

³"Body of knowledge that provides a framework within which to locate new items of knowledge. Artificial intelligence emphasizes the importance of large schema-like data structures that have been termed 'frames' or 'scripts'" (Harre and Lambe, 1983:544).

sociohistorical milieu of the individual.

(4) Memory schemata are dynamic and changeable. Information can be recomprehended and transformed during any retrieval⁴ of that event or by temporal and structural changes in the schemata to which the event is assimilated. Remembering involves reciprocal interactions between the individual's cognitive schemata and the new information (Paris and Lindauer, 1977:37).

The Tripartite Model

The human memory process can be divided into three stages: the acquisition stage, the period during which an event is perceived; the retention stage, the period between acquisition and recollection; and the retrieval stage, the period during which a person recalls stored information (Saunders, 1984:193). Distortions occur in each of these three stages.

Stage One: Acquisition

Information that is to serve as the basis for remembering must first be acquired. Wingfield and Byrnes (1981) maintain that not all information available to an individual will necessarily be incorporated into some mental representation or 'memory code'. The code will represent only part of the information that could have been derived from the situation. When material is perceived to be relevant and salient, fitting

⁴"Memory requires both encoding (or storage) and retrieval (or production). Retrieval failure appears to be the main cause of forgetting; it is believed that all memory traces that are successfully stored in longterm memory, but only a fraction of them are retrievable. Retrieval depends on how successfully the context of encoding is reinstated at the time of retrieval. In an efficient retrieval system, each retrieval cue produces not only the memory trace that it was designed to contact, but also another retrieval cue, which leads to the retrieval of further information" (Harre and Lambe, 1983:536).

well with our prior knowledge, the code is quickly established as being invariably effective (Wingfield and Byrnes, 1981:7). Practice is the most obvious variable affecting acquisition. Through the addition of cues⁵ and additional modes of representing the information, the mental representation⁶ is enriched (Paris and Lindauer, 1977:51).

Stage Two: Retention

It would be inaccurate to assume that memory is static; memory is not a repository for experiences that are encoded and recalled on one occasion only. Information acquired from experience must be retained if we are to use it as the basis of a later act of remembering (Wingfield and Byrnes, 1981:7). Through the recalling and rehearsing of events, existing information is modified through the deletion and addition of relevant pieces of information. Retention problems are problems in the storage of information that has been adequately coded (Wingfield and Byrnes, 1981:7). Paris and Lindauer (1977) state that memory can be expected to be transformed during storage if the individual acquires qualitatively new, different and efficient ways of interpreting and analyzing the stored information. New learning affects the maintenance of the old

⁵"A. A signal for an action; that specific portion of a perceptual field or pattern of stimuli to which an animal has learned to respond. B. An identifying mark that permits discrimination or recognition of a stimulus pattern" (English and English, 1958:132).

⁶"The view that psychic process (especially perceiving) is a representation of an external world" (English and English, 1958:458).

memory code (Wingfield and Byrnes, 1981:8).

Stage Three: Retrieval

Information held in memory can be transformed during retrieval from storage. Retrieving stored information is preeminently a strategic process;⁷ it is in the retrieval stage where individuals use cues and strategies to derive information from storage (Wingfield and Byrnes, 1981:8). Wingfield and Byrnes (1981) suggest that if information has been adequately encoded at the time of presentation and successfully retained over time, we may still have a problem in retrieving this information when we try to remember. Successful memory performance depends on a compatibility between the strategies of retrieval and the strategies of the original encoding (Wingfield and Byrnes, 1981:8).

⁷"Cognitive or behavioral activities that are under the deliberate control of the subject and are employed so as to enhance memory performance" (Schneider and Pressley, 1989:22).

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