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**The Disruption of COVID-19: How a Virtual World Creates  
Opportunity for Improvement in the Criminal Justice System's  
Treatment of Complainants of Sexual Violence**

Leah Roberston

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Leah Robertson\*

The Disruption of COVID-19: How a Virtual World Creates Opportunity for Improvement in the Criminal Justice System's Treatment of Complainants of Sexual Violence

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I. *Introduction.*

This paper argues that the COVID-19 pandemic has normalized video conferencing within the legal system such that survivors ought to be able to routinely testify outside of the court environment. Though there have always been high rates of sexualized violence, the onset of the pandemic has led to increased rates of sexualized violence, which could lead to

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greater numbers of trials prosecuting perpetrators.<sup>1</sup> However, only a small amount of complainants turn to the court as a form of justice.<sup>2</sup> This is likely due to the inhumane conditions inflicted on complainants during the trial process.<sup>3</sup> The pandemic has revealed that the court has the capacity to operate differently, with one opportunity being video conferencing, which allows complainants to testify from a location outside of the court environment.

In the criminal context, the word video conferencing can have two conflated definitions and applications under the *Criminal Code of Canada* (the *Code*).<sup>4</sup> Video conferencing in this proposal is defined as the process where the complainant testifies outside of the court environment altogether. This can be confused with closed-circuit television (CCTV), which also uses video technology but is traditionally utilized within the courthouse but outside of the courtroom.<sup>5</sup>

Courts now frequently use video conferencing to conduct trials, which could be leveraged to create a more trauma-informed process for survivors.<sup>6</sup> Prior to the pandemic, the implementation of this proposal would have required a large shift in perceptions and practices. Now, it is an incremental and logical step in the interest of survivors. It will be demonstrated that virtual testimony from a safe place lessens trauma to survivors and furthers the aims of the criminal justice system to produce full and candid testimony. This proposal intends to positively impact one area of sexual assault law, using tools that already exist within the courts' means.

### II. *The harms of the courtroom*

The courtroom produces harm to survivors of sexualized violence.<sup>7</sup> Far from offering a safe place where they can recount the trauma to which

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1. Andrea Gunraj & Jessica Howard, "Why is the COVID-19 Pandemic Linked to More Gender-Based Violence?" (9 April 2020), online (blog): *Canadian Women's Foundation* <[www.canadianwomen.org/blog/covid-19-pandemic-gender-based-violence/](http://www.canadianwomen.org/blog/covid-19-pandemic-gender-based-violence/)> [perma.cc/JHZ9-YPD9].

2. Elaine Craig, "The Brutality of the Sexual Assault Trial" (30 March 2016), online (blog): *University of Toronto Press Journals* <[blog.utpjournals.com/2016/03/30/the-brutality-of-the-sexual-assault-trial/](http://blog.utpjournals.com/2016/03/30/the-brutality-of-the-sexual-assault-trial/)> [perma.cc/3KM6-FGJ3].

3. *Ibid.*

4. See generally *R v JWT*, 2020 NSSC 300 [*JWT*].

5. Shanna Hickey & Susan McDonald, "Testimonial Aids Knowledge Exchange: Successes Challenges and Recommendations" (2019), online: *Justice Department* <[www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rd12-tr12/p5.html](http://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rd12-tr12/p5.html)> [perma.cc/L3TR-6TF4].

6. LexisNexis, "Justice Adapting- The Ontario Courts" (24 April 2020) at X, online (video): *Youtube* <[www.youtube.com/watch?v=ksT5iPubWxE&fbclid=IwAR04XXEANVQyPYDfIdywKnn0GsKgCW6u3BH\\_kvASnYx9SWNZQybA8XCiM&app=desktop](https://www.youtube.com/watch?v=ksT5iPubWxE&fbclid=IwAR04XXEANVQyPYDfIdywKnn0GsKgCW6u3BH_kvASnYx9SWNZQybA8XCiM&app=desktop)> [Justice Adapting Webinar] [perma.cc/FQ6V-BRL6].

7. Elaine Craig, "The Inhospitable Court" (2016) 66:2 UTLJ at 208.

they were subjected, the courtroom is a place of strict rules and deeply ingrained hierarchy.<sup>8</sup> However, the negative impacts on survivors of sexualized violence can easily be reduced by altering the place and processes in which they testify. This proposal examines three main points when reflecting on the physical space and the processes of the courtroom. The structure of the court will first be discussed, followed by the matter of complainants facing their perpetrator during the trial process, and, finally, the harmful stereotypes which impact complainants.

First, consider the physical structure of the courtroom itself, which places the complainant in a subordinate position not only to the judge but also to the jury members and lawyers.<sup>9</sup> At trial, complainants are forced into a process where they have little control and the courtroom structure situates the complainant within an unspoken hierarchy.<sup>10</sup> The physical space of the courtroom tells a complainant that they are subordinate to judge, jury, and lawyer.<sup>11</sup> Judges sit above the complainant, and lawyers sit at the front unless speaking.<sup>12</sup> Lawyers have the ability to move while examining a stationary witness.<sup>13</sup> Throughout the duration of what is often a gruelling cross-examination, the witness must remain still and only speak when permitted.<sup>14</sup> A complainant is often pressed if she raised a 'hue and cry' or fought back in any fashion.<sup>15</sup> Paradoxically, a complainant is simultaneously chastised for her prior behaviour of remaining still and silent while demanding she perform this exact behaviour before the court. For Indigenous complainants, the courtroom is a reminder of colonial domination, steeped with representations of the monarchy and the government, including flags, paintings and crests.<sup>16</sup> There is a long history of Indigenous women being subjected to higher rates of sexualized violence.<sup>17</sup> The position of the complainant reflects the larger gender hierarchy in society and the absurd expectations we place on survivors of sexualized violence.<sup>18</sup>

Second, the courtroom setup invites encounters between the complainant and the accused. Confronting the accused is usually a source

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8. *Ibid* at 218.

9. *Ibid* at 222.

10. *Ibid* at 219.

11. *Ibid* at 203.

12. *Ibid* at 221.

13. *Ibid* at 220.

14. *Ibid* at 220, 227.

15. Amna M Qureshi, "Relying on Demeanor Evidence to Assess Credibility during Trial: A Critical Examination" (2014) 61:2 Crim LQ at 260.

16. Craig, *supra* note 7 at 219.

17. *R v Barton*, 2019 SCC 33 at 198 [*Barton*].

18. *Ibid* at 227.

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of anxiety and trauma for complainants.<sup>19</sup> This is especially problematic with children witnesses who, when seeing the accused, often become frozen and have difficulty responding to questions, usually saying “I don’t know.”<sup>20</sup> When witnesses are threatened by the accused, they are less candid in their testimony.<sup>21</sup> The presence of the accused and the trauma associated can impact the functioning of the brain and nervous system of complainants.<sup>22</sup> It makes memory retrieval difficult, if not impossible.<sup>23</sup> Families and friends of the accused present at the court can also be a source of intimidation for complainants.<sup>24</sup>

Many complainants only want to testify if they cannot physically see the accused, through the form of a statutory aid.<sup>25</sup> Testimonial aids are not automatic for witnesses and survivors of sexualized violence.<sup>26</sup> Witnesses have little rights in the court process, relative to the constitutionally enshrined rights for the accused.<sup>27</sup> Testimonial aids come in a variety of forms, including screens, support persons, and testifying via CCTV.<sup>28</sup> However, testimonial aids are more likely to be granted to witnesses with a disability or witnesses under the age of 18.<sup>29</sup> There is a presumption that they will be granted upon application.<sup>30</sup> For adults, the basis for granting testimonial aids is discretionary, but there are enumerated factors that guide the judge’s decision.<sup>31</sup> Even if a complainant is given some form of testimonial aid to limit contact during trial, this does not apply outside the courtroom. The complainant could still see the accused in any of the common areas of the courthouse.

Third, complainants often feel that they have to conform to a specific standard to fit into the court environment.<sup>32</sup> Complainants feel pressure that they must dress or appear in a certain way to be deemed acceptable to

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19. Hickey & McDonald, *supra* note 5.

20. N Bala, RCL Lindsay, & E McNamara, “Testimonial Aids for Children: the Canadian Experience with Closed Circuit Television, Screens and Videotapes” (2000), 44 *Crim LQ* 461 at 486.

21. Hickey & McDonald, *supra* note 5.

22. Lori Haskell, “The Impact of Trauma on Adult Sexual Assault Victims” (2019) at 5, online (pdf): *Justice Canada* <[www.justice.gc.ca/eng/tp-pr/jr/trauma/trauma\\_eng.pdf](http://www.justice.gc.ca/eng/tp-pr/jr/trauma/trauma_eng.pdf)> [perma.cc/3CJ9-JKYL].

23. *Ibid.*

24. Alison Cunningham & Pamela Hurley, “Testimony Outside of the Courtroom” at 4, online (pdf): *Centre for Children and Families in the Justice System* [on file with author].

25. Hickey & McDonald, *supra* note 5.

26. *Criminal Code*, RSC 1985, c C-46, s 486.2(1) [*Criminal Code*].

27. See *Canadian Charter of Rights and Freedoms*, s 7. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, (UK), 1982, c 11 [*Charter*]; *Ibid* at s 11(d)

28. *Criminal Code*, *supra* note 26 at ss 486-486.2.

29. *Criminal Code*, *supra* note 26.

30. *Ibid.*

31. *Ibid* at ss 468.2(3)(a-h).

32. Qureshi, *supra* note 15 at 259.

the court.<sup>33</sup> Judges and lawyers wear gowns whereas the complainant is in plain clothes.<sup>34</sup> This disparity is pronounced when complainants are cross-examined about their clothing at the time of the assault and its purported implications on their consent, or lack thereof.<sup>35</sup> While a complainant is testifying, it is possible their choice of clothing continues to be judged while officers of the court are afforded standardized uniforms. If counsel for the accused is drawing attention to how the complainant was dressed, undoubtedly, the jury will draw their own conclusions. Racialized and Indigenous complainants experience heightened fears of not conforming to the largely white and colonial court environment.<sup>36</sup> Regardless of how racialized complainants dress, they will not fit in against predominately white judges and juries.<sup>37</sup> The appearance of the complainant places a superficial standard that has no connection with the quality or candour of testimony and yet will inevitably have an impact on the finding of the decision-maker.<sup>38</sup>

Overall, the courtroom is excessively formal and thereby not designed as a place of comfort or safety for complainants.<sup>39</sup> In this subordinate position, a complainant is placed on display to recount their traumas publicly.<sup>40</sup> The process of the courtroom brings out feelings of shame and powerlessness in survivors.<sup>41</sup> For women, and especially Indigenous women, these processes have never been built for their protection and justice, but rather for their domination.<sup>42</sup> The option to virtually testify outside of the courthouse could help to minimize harm to complainants. This paper will assess the viability of virtual testimony long-term by examining opportunities and obstacles in light of the disruption of a pandemic.

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33. *Ibid.*

34. Craig, *supra* note 7 at 220.

35. *Ibid* at 225; referencing a rape myth that women who wear provocative clothing are more likely to consent.

36. Qureshi, *supra* note 15 at 259.

37. *Ibid.*

38. Qureshi, *supra* note 15 at 259.

39. "Child-friendly Justice: Perspectives and Experiences of Children Involved in Judicial Proceedings as Victims, Witnesses or Parties in Nine EU Member States" (2017) at 31, online(pdf): *European Union Agency for Fundamental Human Rights* <[fra.europa.eu/en/publication/2017/child-friendly-justice-perspectives-and-experiences-children-involved-judicial](http://fra.europa.eu/en/publication/2017/child-friendly-justice-perspectives-and-experiences-children-involved-judicial)> [perma.cc/5GHH-RSP7].

40. Craig, *supra* note 7 at 219.

41. *Ibid* at 223.

42. Barton, *supra* note 17 at 198.

### III. *The status quo of sexual assault*

#### 1. *The pre-pandemic status quo*

Sexualized violence is a gendered crime, with women subjected to a disproportionately higher rate.<sup>43</sup> With that being said sexualized violence is often not reported, with eighty-three percent of sexual assaults going unreported to the police.<sup>44</sup> Survivors have very low confidence in the court process and the criminal justice system.<sup>45</sup> For survivors who do report to police, a mere forty-eight percent of prosecutions result in a finding of guilt.<sup>46</sup> This does not consider cases which are considered ‘unfounded,’ as many reports of sexual assault are discounted at the reporting stage by police.<sup>47</sup> Sexual assault has a ‘justice gap,’ where systemic issues have kept survivors from viewing the court as a place of justice.<sup>48</sup>

Sexual assault is usually a traumatic experience with a deep neurological impact on survivors.<sup>49</sup> It is a unique crime where often the only evidence is the testimony of the complainant-witness.<sup>50</sup> The process of testifying has been described as a “second rape” by some survivors.<sup>51</sup> As recently as November 2020, a woman was jailed for refusing to testify. It was reported that “[she] had been at home drinking beer since the morning to find the courage to testify as the main witness against the man she feared.”<sup>52</sup> For other survivors, the trial process elicits anguish so severe that hospitalization is required to prevent self-harm.<sup>53</sup>

#### 2. *The pandemic status quo*

Rates of sexualized violence are anticipated to rise with pandemic conditions.<sup>54</sup> Public health measures have resulted in isolation and restricted

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43. See *R v Osolin*, [1993] 4 SCR 595, 109 DLR (4th) 478.

44. “JustFacts: Sexual Assault” (2019), at 1-2 online: *Justice Department* < [www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2019/apr01.html](http://www.justice.gc.ca/eng/rp-pr/jr/jf-pf/2019/apr01.html) > [perma.cc/5XUF-WJU7].

45. *Ibid.*

46. *Ibid.*

47. Jordon Press, “1 in 7 Sexual Assault Cases in 2017 Deemed ‘Unfounded’: StatsCan” (23 July 2018) online: *Canadian Press* <[www.cbc.ca/news/politics/sexual-assault-unfounded-stats-1.4757705](http://www.cbc.ca/news/politics/sexual-assault-unfounded-stats-1.4757705)> [perma.cc/74YD-7QBY].

48. Craig, *supra* note 7 at 243.

49. Haskell, *supra* note 22 at 6.

50. *Ibid* at 7.

51. *Ibid* at 32.

52. Elizabeth Chiu, “She Was Too Afraid to Testify at Her Ex’s Domestic Abuse Trial. She Was Jailed Instead” (9 November 2020), online: *CBC News* <[www.cbc.ca](http://www.cbc.ca)>; this case dealt specifically with gender-based violence, as opposed to sexualized violence but it is still highly applicable [perma.cc/V8HG-VTEW].

53. Craig, *supra* note 7 at 198.

54. “Gender-Based Violence and COVID-19, UN Development Programme” (2020) at 1, online (pdf): *UN Women* <[www.undp.org/content/undp/en/home/librarypage/womens-empowerment/gender-based-violence-and-covid-19.html](http://www.undp.org/content/undp/en/home/librarypage/womens-empowerment/gender-based-violence-and-covid-19.html)> [UN Women] [perma.cc/D2KN-7S5A].

movement, and in conjunction with pre-existing toxic social norms, have created a climate where many women and children are not safe in their homes.<sup>55</sup> These conditions are an inevitable fallout from pandemic-related stressors such as job loss, reduced income, food insecurity, disrupted routines, and many other facets of everyday life being interrupted.<sup>56</sup> Relationships which are predisposed to control, as well as misogynistic attitudes are the most at risk for sexualized violence to occur.<sup>57</sup> Many countries are predicting a thirty percent increase in domestic and sexual violence, and Canada is not an exception to this increase.<sup>58</sup> Sexualized violence during the COVID-19 pandemic has been dubbed the “shadow pandemic” with changes in the prevalence and severity of violence already being documented.<sup>59</sup>

#### IV. *Disruption*

##### 1. *COVID-19 as a disruption to the status quo of the court*

There is an opportunity to disrupt the status quo of how complainants are treated in the justice system. The COVID-19 pandemic caused a near complete shutdown of the courts, and has paved the way for virtual legal proceedings.<sup>60</sup> This disruption forced the legal community to embrace technology and operate online at an unprecedented rate.<sup>61</sup> Video conferencing was rapidly adopted in many levels of court to facilitate this achievement.<sup>62</sup> Entirely virtual trials for criminal cases have been facilitated during the pandemic.<sup>63</sup> The pandemic has revealed that there is capacity within the legal system to operate differently. Post-pandemic, this wave of video conferencing culture should continue to be utilized to allow

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55. *Ibid.*

56. Gunraj & Howard, *supra* note 1.

57. *Ibid.*

58. UN Women, *supra* note 54 at 4.

59. AnnaLise Trudell & Erin Whitmore, “Pandemic Meets Pandemic: Understanding the Impacts of COVID-19 on Gender-Based Violence Services and Survivors in Canada” (2020) at 9, online (pdf): *Anova* <[www.anovafuture.org/wp-content/uploads/2020/08/Full-Report.pdf](http://www.anovafuture.org/wp-content/uploads/2020/08/Full-Report.pdf) Ending violence> [perma.cc/VT3H-257A].

60. Luis Millan, “Virtual Justice in COVID Era Comes at a Heavy Costs, Legal Scholars Say” (14 September 2020), online: *The Lawyer’s Daily* <[www.thelawyersdaily.ca/articles/20827/virtual-justice-in-covid-era-comes-at-a-heavy-cost-legal-scholars-say?category=news](http://www.thelawyersdaily.ca/articles/20827/virtual-justice-in-covid-era-comes-at-a-heavy-cost-legal-scholars-say?category=news)> [perma.cc/JNS6-R28J].

61. Maggie Vourakes, “How COVID-19 will Change Legal Innovation” (14 September 2020), online: *The Lawyer’s Daily* <[www.thelawyersdaily.ca/articles/20955/how-covid-19-will-change-legal-innovation?category=analysis](http://www.thelawyersdaily.ca/articles/20955/how-covid-19-will-change-legal-innovation?category=analysis)> [perma.cc/SVKT-RNCL].

62. Justice Adapting Webinar, *supra* note 6.

63. Michele Mandel, “Virtual Trial for Toronto Van Attack Accused Expected to be Confirmed” (22 October 2020), online: *The Toronto Sun* <[www.torontosun.com/news/local-news/virtual-trial-for-toronto-van-attack-accused-expected-to-be-confirmed](http://www.torontosun.com/news/local-news/virtual-trial-for-toronto-van-attack-accused-expected-to-be-confirmed)> [perma.cc/WCR6-UJUT].



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sexualized violence complainants to virtually testify in a safe non-court environment.

### V. *Opposition/Obstacles*

#### 1. *The operation of testimonial aids*

The Supreme Court of Canada in *R v Levogiannis* determined that the accused does not have the right to face their accuser which is in accordance with the open court principle.<sup>64</sup> In *Levogiannis* the accused argued that a testimonial aid limiting his ability to confront the child complainant infringes on section 7 and 11(d) *Charter of Rights and Freedoms* (the “*Charter*”).<sup>65</sup> Since *Levogiannis*, there have been multiple reforms to testimonial aids.<sup>66</sup> While testimonial aids have been in the *Code* since 1988, the *Canadian Victims Bill of Rights* made contributions to strengthen protections for survivors.<sup>67</sup> This newer legislation has also withstood constitutional validity in *R v S(J)*, which is the authority for upholding *Code* section 486.2, allowing for use of CCTV.<sup>68</sup>

No doubt, any frequent use of video conferencing as a form of testimony could be challenged constitutionally under section 7 or section 11(d) of the *Charter*. Despite the finding in *Levogiannis*, some judges still believe that the accused has the ability to confront their accuser in an open court setting, simply because that was the norm for so long.<sup>69</sup> This paper will not explore the implications of the *Charter* on testimonial aids in depth, but it is expected that use of video conferencing would withstand constitutional scrutiny.

#### 2. *Lack of clarity in the Code provisions as an obstacle*

There is no section in the *Code* which explicitly allows video conferencing as a testimonial aid. To allow a complainant to virtually testify, both section 486.2 and section 714.1 are cited by judges.<sup>70</sup> Section 486.2 speaks directly to testimony outside of the courtroom as a form of testimonial, whereas section 714.1 encapsulates video and audio evidence including

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64. *R v Levogiannis*, [1993] 4 SCR 475, SCJ no 70 at 31 [*Levogiannis*].

65. *Ibid* at 8.

66. Joan Barrett, “*R. v. S. (J.): Facilitating Children’s Testimony Through the Presumptive Use of Screens and CCTV*” (2011) 57 Crim LQ 370 at 375.

67. “*Testimonial Aids*” (13 September 2018), online: *Justice Department* <[www.justice.gc.ca/eng/cj-jp/victims-victimes/factsheets-fiches/aids-aides.html](http://www.justice.gc.ca/eng/cj-jp/victims-victimes/factsheets-fiches/aids-aides.html)> [perma.cc/GYG2-77AV] [*Testimonial Aids*].

68. Barrett, *supra* note 66 at 375; this also accounted for screens which are not covered in any depth in this paper.

69. *R v Ochoa*, 2020 ONCJ 432 at 25 [*Ochoa*].

70. See *R v JWT*, *supra* note 4.

use of video conference.<sup>71</sup> The language in the *Code* is not precise in where complainants may testify.

The *Code* expressly provides for testimony outside of the courtroom as a means of aid in section 486.2(1) and section 486.2(2), for children and adults respectively.<sup>72</sup> While the *Code* does not list video conferencing from an alternative location as a means of testimonial aid, it also does not prohibit it. Further, the language of section 486.2(5) provides:

a witness shall not testify outside of the courtroom in accordance with an order made under subsection (1) or (2) unless arrangements are made for the accused, the judge or justice and the jury to watch the testimony of the witness by means of closed-circuit television **or otherwise** and the accused is permitted to communicate with counsel while watching the testimony” [**emphasis added**]

This “or otherwise” language opens up the possibility that video conferencing is permissible. However, the express mention of CCTV may create an embedded assumption that the testimony would proceed via this process. Recall, the *Code* does not specify where a complainant must testify once they are granted the ability to testify outside of the courtroom itself. This indicates that if a complainant is permitted to be outside of the courtroom, it may be arbitrary where they conduct their testimony. Therefore, the complainant could testify from a familiar place including a support service or at home.

Adult witnesses without documented disabilities have the right to request testimonial aids under section 486.2, but there is no guarantee that such a request will be granted.<sup>73</sup> The court may consider a number of factors in determining whether or not to allow the use of a testimonial aid.<sup>74</sup> These factors include age of the witness, nature of the offence, relationship of the witness to the accused, and whether it is in society's interest to encourage reporting of offences.<sup>75</sup> Puzzlingly, judges seldom give weight to the last factor.<sup>76</sup> More women would report instances of sexualized violence if they knew that testimonial aids could be granted with certainty.<sup>77</sup>

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71. *Criminal Code*, *supra* note 26 at ss 486.2, 714.1.

72. *Ibid* at s 486.2(1).

73. *Ibid* at s 486.2(2).

74. Testimonial Aids, *supra* note 67.

75. *Criminal Code*, *supra* note 26 at ss 486.2(3)(a-g).

76. Natasha Bakht, “What’s in a Face? Demeanour Evidence in Sexual Assault Context” in Elizabeth Sheehy, ed, *Sexual Assault in Canada: Law, Legal Practice and Women’s Activism* (Ottawa: University of Ottawa Press, 2012) 591 at 606.

77. Susan McDonald, “Helping Victims Find their Voice: Testimonial Aids in Criminal Proceedings” (2018), online: *Justice Department* <[www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rd11-rr11/p2.html](http://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rd11-rr11/p2.html)> [perma.cc/48YP-NVYA].

Section 714.1 of the *Code* has also been cited frequently to evaluate if a witness ought to be able to testify via video conference.<sup>78</sup> Similar to section 486.2, there are factors to consider in granting a section 714 application.<sup>79</sup> However these factors differentiate from those under section 486.2, as they consider the location of the witness, costs to the witness appearing in court, nature of the evidence, the location they will give evidence, the accused's right to a fair hearing, the nature of the offence, and potential prejudice to the parties.<sup>80</sup> None of these factors consider if the application should be granted to lessen the stressors of testimony which seems that this section is meant to be applied when the witness is not physically or practically available. This section disserves complainants as it does not consider any effect in-person testimony may have on their health or ability to give full and candid testimony.<sup>81</sup>

It is difficult to gather quantitative evidence on which *Code* provisions are used to facilitate remote testimony because they are applied inconsistently. Section 714.1 is most commonly relied on to grant remote testimony, even for sexual assault cases.<sup>82</sup> The benefit of a section 486.2 application is for the judge to consider factors which affect the complainant, yet this provision is less frequently used by Crown counsel.<sup>83</sup> This could be due to some judges taking a restrictive approach in interpretation of section 486.2.<sup>84</sup>

Some judges adopt a purposive approach to interpreting both section 486.2 and 714.1.<sup>85</sup> In *R v SLC*, the judge determined that nothing in section 714.1 precludes considering a complainant's circumstances.<sup>86</sup> It was reasoned that taking into consideration the intimidating presence of the accused on the witness is in line with the broad reading required of section 714.1.<sup>87</sup> Section 486.2, was interpreted that once granted, a complainant can testify anywhere "outside of the courtroom."<sup>88</sup> Once section 486.2 was granted there was no practical difference for the trial where the complainant is actually located, whether in the same building or

78. *R v KS*, 2020 ONCJ 328 at 14 [KS]; see also *Ochoa*, supra note 69 at 1; see also *JWT*, supra note 4 at 2.

79. *Code*, supra note 26 at ss 714.1 (a-g).

80. *Ibid.*

81. *R v SDL*, 2017 NSCA 58 at 32 [SDL].

82. *KS*, supra note 78 at 15; See also *Ochoa*, supra note 69 at 1,3; See also *R v Leblanc*, 2014 NSPC 116 at 56.

83. *R v Mattu*, 2019 ONCJ 517 at 2 [Mattu]; See also *R v M(G)*, 2013 BCPC 113 at 22 [M(G)].

84. *M(G)*, supra note 83 at 22.

85. *R v SLC*, 2020 ABQB 515 at 62 [SLC].

86. *Ibid.*

87. *Ibid.*

88. *Ibid* at 69.

another location.<sup>89</sup> Contrastingly, in *R v M(G)* the judge determined that if section 486.2 were granted, it would facilitate testimony in an “AV” room within the courthouse.<sup>90</sup> In this case, only section 714.1 would allow the complainant to testify from any location.<sup>91</sup> Therefore, some judges do not see section 486.2 as capable of granting video conferencing.

The lack of clarity in the *Code* allowing for video conferencing has resulted in inconsistency in the application of section 486.2 and section 714.1. Ideally section 486.2 should be used to grant video conferencing, to facilitate a fulsome approach in considering the impact on the witness. In any scenario, a legislative amendment giving a clear indication of the permissibility of video conferencing is needed. Otherwise the confusion around permissibility, combined with the threat of interpretation to limit video conferencing, are obstacles.

### 3. *Perceptions of CCTV/Video conferencing by judges*

Historically, the use of testimonial aids including CCTV were wrought with negative judicial perceptions.<sup>92</sup> Judges felt that testimonial aids coddled complainants or allowed them to enjoy the status of ‘playing victim.’<sup>93</sup> The power of trauma is often underestimated and best evidenced by the reasons given to deny testimonial aids.<sup>94</sup> For example, “there is no evidence that she [13 year old complainant] will be in any physical danger if she testifies in open court.”<sup>95</sup> To assess if a testimony aid should be granted, judges often lack the understanding of what a vulnerable witness is, and how sexualized violence can impact trauma, mental health, or any form of pre-existing disability.<sup>96</sup> Even for children, despite the presumptive regime testimonial aids are not consistently used across the country.<sup>97</sup>

Judges may also deny applications, simply because testifying from another location is deemed unnecessary and may create difficulties with participation.<sup>98</sup> This resistance has continued to persist despite the longstanding statutory basis and the strengthening of these testimonial aid

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89. *Ibid.*

90. *M(G)*, *supra* note 83 at 22.

91. *Ibid.*

92. Bala, *supra* note 20 at 470.

93. *Ibid.*

94. See generally *R v NSD*, 2017 SKPC 71 at para 24 [*NSD*].

95. *Ibid.*

96. McDonald, *supra* note 77.

97. Pam Hurley, “The Use of Closed-Circuit Television: The Experiences of Child and Youth Witnesses in Ontario’s West Region” (2015), online: *Justice Department* <[www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rd8-rr8/p1.html](http://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rd8-rr8/p1.html)> [perma.cc/5HU5-NFVR].

98. *R v P(NH)*, 2011 MBQB 31 at para 24.

provisions.<sup>99</sup> In a study by the Department of Justice, half of the judges using CCTV reported some kind of technical or logistical challenge.<sup>100</sup> This reinforces negative beliefs about the challenges of CCTV over other forms of testimonial aid. While this study does not speak directly about video conferencing, it is anticipated these same negative beliefs of CCTV would arise with video conferencing. The ability to deny an application for a multitude of reasons creates uncertainty for survivors relying on being granted CCTV or video conferencing.

Jurisprudence can limit the ability for judges to grant video conferencing.<sup>101</sup> In *R v Dessouza* it was concluded that only in the “rarest of cases” should a complainant be able to testify using video conferencing.<sup>102</sup> In *R v SDL* constant interruptions to video, such as freezing and delays, caused detrimental impacts to meaningful cross-examination.<sup>103</sup> As a result, *SDL* creates a precedent that evidence should be taken from a local courtroom to prevent disruption.<sup>104</sup> Cases like *SDL* have reinforced negative perceptions about video conferencing and create legal barriers for complainants.<sup>105</sup> A recent example is *R v JWT*, a 2020 Nova Scotia Supreme Court case which was a sexual assault case where the complainant was a child and requested videoconferencing.<sup>106</sup> The complainant and their mother were in British Columbia, and in addition to reducing harm to the child, were seeking to avoid travel to Nova Scotia during the COVID-19 pandemic.<sup>107</sup> Public health measures in Nova Scotia included a 14 day isolation period for any travellers, which included the child and mother.<sup>108</sup> *SDL* was used as a basis for denying the application.<sup>109</sup> This demonstrates that even during a public health crisis some judges grant video conferencing on an exceptionally narrow basis.<sup>110</sup>

#### 4. *Gathering demeanour evidence as a barrier to video conferencing*

Demeanour evidence is the process by which the trier of fact determines the apparent truthfulness based on the wordless language of a witness.<sup>111</sup>

99. Hickey & McDonald, *supra* note 5.

100. *Ibid.*

101. *R v Dessouza*, 2012 ONSC 145 at para 26.

102. *Ibid.*

103. *SDL*, *supra* note 81 at para 32.

104. *SDL*, *supra* note 81 at para 63.

105. *R v Miliken*, 2020 ONCJ 356 at 47-48 [*Miliken*], see also *JWT*, *supra* note 4 at 30.

106. *JWT*, *supra* note 4 at 1-2.

107. *Ibid* at 2.

108. *Ibid.*

109. *Ibid* at 9, 30.

110. *Ibid* at 2.

111. Barry R Morrison, Laura L Porter & Ian H Fraser, “The Role of Demeanour in Assessing the Credibility of the Witness” (2007) 33:1 *Advoc Q* 170 at 180.

Assumptions about credibility are based on the body language, tone, emotion and other physical characteristics of the witness.<sup>112</sup> There is growing evidence that demeanor evidence does not demonstrate truthfulness, even though it has long been relied.<sup>113</sup> Laypersons, as well as judges and lawyers, do not have the ability to assess if someone is telling the truth based solely on demeanor.<sup>114</sup> Despite this, demeanor evidence is still relied on to assess witness credibility.<sup>115</sup> It is a dangerous precedent to rely on this form of evidence.<sup>116</sup> There is often an overestimation of how the ability to detect deception, with too much reliance on appearance and cultural norms.<sup>117</sup>

Inclusion of demeanor evidence is particularly harmful for complainants of sexualized violence. This is due to historical and modern distrust of complainants.<sup>118</sup> In sexual assault trials women are expected to react in the “appropriate way” despite the fact this is directly fueled by stereotypes, racism, and misogyny.<sup>119</sup> The trial process demands that complainants show the right balance of emotion while recounting a personally-experienced violent crime: upset but not hysterical.<sup>120</sup> If complainants do not demonstrate this expected behaviour, there is a risk their testimony will be discredited due to their demeanor.<sup>121</sup> Demeanor evidence favours superficial considerations rooted in misogyny.<sup>122</sup> It benefits women who are considered attractive within western standards of beauty and those who appear more affluent based on their clothes.<sup>123</sup> Demeanor evidence hinders the truth seeking process by reinforcing stereotypes of how a complainant ought to behave and look in court rather than focusing on full and candid testimony.<sup>124</sup>

There are outdated notions that virtual testimony causes difficulties in assessing demeanor of the complainant.<sup>125</sup> Recall, in *JWT*, that despite the risks and difficulties travelling to Nova Scotia during the pandemic,

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112. *Ibid* at 170.

113. Qureshi, *supra* note 15 at 257.

114. *Ibid*.

115. Bakht, *supra* note 76 at 595.

116. Qureshi, *supra* note 15 at 258.

117. Morrison, Porter & Fraser, *supra* note 111 at 177.

118. Qureshi, *supra* note 15 at 260.

119. See *R v Seaboyer*, [1991] 2 SCR 577.

120. Lise Gotell, “The Ideal Victim, the Hysterical Complainant and the Disclosure of Confidential Records: The Implications of the Charter on Sexual Assault Law” (2002) 40:3 Osgoode Hall LJ at 274.

121. Qureshi, *supra* note 15 at 260.

122. *Ibid*.

123. *Ibid* at 258.

124. *Ibid* at 261.

125. *NSD*, *supra* note 94 at 28.

the judge held that it would be better to be able to assess the witness in person.<sup>126</sup> The judge determined that video conferencing would prejudice the accused's case.<sup>127</sup> While this view is not held universally by judges, the perception that demeanour evidence should be gathered in person can be a limitation to granting video conferencing.<sup>128</sup>

5. *Availability and investment in testimonial aids remains an issue*

Ability to access testimonial aids is inconsistent due to lack of investment.<sup>129</sup> An initial barrier may be that testimonial aids are not available for complainants, even if there is a convincing application for their use.<sup>130</sup> Testimonials aids are often not present outside of urban centres.<sup>131</sup> Furthermore, even if testimonial aids are granted and available, there is still a possibility for technological issues.<sup>132</sup> Even if video conferencing is not impacted by availability or technology issues, these problems reinforce beliefs that testimonial aids are difficult or inefficient.

The frustrations that arise in using CCTV or video conferencing are often preventable.<sup>133</sup> Lack of court staff training and investment in the equipment itself is a common issue with virtual testimony.<sup>134</sup> At the Calgary & Area Child Advocacy Centre ("Calgary CYAC") they had prepared extensive practice sessions with a particular court clerk to ensure that virtual testimony would run smoothly.<sup>135</sup> On the day of testimony, there was a sudden change to an untrained court clerk, which resulted in extensive technological challenges.<sup>136</sup> These frustrations could be easily remedied, and proper training and equipment can build confidence in utilizing technology in the trial process.

Geographical location of the complainant is a logistical barrier to accessing testimonial aids like video conferencing.<sup>137</sup> Rural and remote

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126. *JWT*, *supra* note 4 at 30.

127. *Ibid.*

128. *R v Ozorka*, 2018 ABPC 162 at 23; *JWT*, *supra* note 4 at 30.

129. Hickey & McDonald, *supra* note 5.

130. *Ibid.*

131. Hickey & McDonald, *supra* note 5; this presents an obvious access to justice issue which will not be covered in this proposal but could be the topic for future research.

132. Hickey, *supra* note 56.

133. Interview with Calgary & Area Child Advocacy Centre (12 November 2020) (personal correspondence, on file with author) [Calgary CYAC].

134. *Ibid.*

135. *Ibid.*

136. *Ibid.*

137. See generally Eileen Skinnider & Ruth Montgomery, "Enhancing Access to Justice for Women living in Rural and Remote Areas of British Columbia: Reviewing practices from Canada and Abroad to Improve our Response" at 46-47, online (pdf): *The International Centre for Criminal Law Reform and Criminal Justice Policy* <[www.icclr.org/wp-content/uploads/2019/06/BCLF-WA2J-Report-Final.pdf?x77055](http://www.icclr.org/wp-content/uploads/2019/06/BCLF-WA2J-Report-Final.pdf?x77055)> [perma.cc/9AUP-H5LH].



areas are impacted by lack of reliable service.<sup>138</sup> This is as a result of remote areas in Canada not having the necessary infrastructure, like broadband communication and information technology.<sup>139</sup> When testimonial aids are not operable, it results in delays and uncertainty if they should be utilized at all.<sup>140</sup> This is not a new issue, as circuit courts in Canada's north have long standing and persistent technological barriers when conducting proceedings.<sup>141</sup> Modernization in video conferencing infrastructure should be done equitably, to ensure rural and remote areas have access.<sup>142</sup>

## VI. Opportunities

### 1. *Shifting views of virtual proceedings present an opportune time to allow testimony via video conferencing for complainants*

The pandemic has forced Canadian courts to adapt to virtual proceedings.<sup>143</sup> For the first time in the courts' history, the Supreme Court of Canada conducted a fully virtual hearing.<sup>144</sup> This occurred in spite of initial reluctance towards a remote sitting.<sup>145</sup> In Nova Scotia, the courts acknowledged virtual court as necessary to court recovery.<sup>146</sup> Best said by Justice Corbett of the Ontario Superior Court of Justice, "the court is faced with an unprecedented challenge to maintaining institutions essential for the continuation of the Rule of Law in the face of the COVID-19 crisis, and recourse to electronic hearings is a key aspect of the court's response."<sup>147</sup> Additionally, key voices in the legal community continue to push for technology as a solution in the legal system, such as former Chief Justice Beverley McLachlin.<sup>148</sup>

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138. *Ibid.*

139. Ricardo Ramirez, "Appreciating the Contribution of Broadband ICT with Rural and Remote Communities: Stepping Stones Toward an Alternative Paradigm" 23:2 *The Information Society* at 89.

140. *R v Etzel*, 2014 YKSC 50 at 4.

141. Naomi Sayers, "Court Tech Lessons From Those Who've Been Conducting Remote Trials for Years" (22 May 2020), online: *The Lawyer's Daily*: <[www.thelawyersdaily.ca/articles/19181/court-tech-lessons-from-those-who-ve-been-conducting-remote-trials-for-years-naomi-sayers](http://www.thelawyersdaily.ca/articles/19181/court-tech-lessons-from-those-who-ve-been-conducting-remote-trials-for-years-naomi-sayers)> [perma.cc/W55K-AC6E].

142. *Ibid.*

143. Kate Puddister & Tamara A Small, "Trial by Zoom? The Response to COVID-19 by Canada's Courts" (2020) CAN J Polit Sci at 2.

144. "The Court's First-Ever Hearing Fully by Video-Conference" (2020), online: *Supreme Court of Canada* <[www.scc-csc.ca/judges-juges/spe-dis/rw-2020-06-09-eng.aspx?](http://www.scc-csc.ca/judges-juges/spe-dis/rw-2020-06-09-eng.aspx?)> [perma.cc/XGH2-Q3V3] [Virtual SCC].

145. Puddister & Small, *supra* note 143 at 1.

146. Courts of Nova Scotia, "Virtual Court Open House" (22 July 2020) at 00h: 2m:33s, online (video): *Webinar Nova Scotia Courts* <[www.courts.ns.ca/Virtual\\_Court\\_Open\\_House\\_July\\_22\\_Afternoon\\_Session.mp4](http://www.courts.ns.ca/Virtual_Court_Open_House_July_22_Afternoon_Session.mp4)>.

147. *Association of Professional Engineers v Rew*, 2020 ONSC 2589 at para 7.

148. Beverley McLachlin, "Access to Justice: A Plea for Technology in the Justice System" (17 July 2020), online: *The Lawyer's Daily* <[www.thelawyersdaily.ca/articles/20104/access-to-justice-a-plea](http://www.thelawyersdaily.ca/articles/20104/access-to-justice-a-plea)>.



Select courts have been piloting video conferencing projects since well before the pandemic. The Ontario Superior Court of Justice in 2015 began a video conferencing project for certain family and civil matters.<sup>149</sup> While the pandemic has been a catalyst for fast movement to the online realm, it certainly was not the only driving factor to utilize technology. There has been longstanding pressure on the Canadian justice system to modernize by incorporating technology.<sup>150</sup> Using technology generally allows for greater access to justice and more expedient resolutions. For example, research has indicated that technology ought to be used to reduce cost and delay in mediations, facilitate translation services, recording, increase public accessibility to courts, and other forms of online dispute resolution.<sup>151</sup> Other areas of the law have embraced online practice, with family law conferences allowing for full participation, but spare participants the difficult task of face-to-face contact with an “ex.”<sup>152</sup>

Use of technology has been out of necessity for circuit courts in Northern Canada.<sup>153</sup> This is primarily due to a lack of resources, including accessibility to physical courtrooms, and less as a result of piloting innovations for improvement.<sup>154</sup> Many rural areas do not have stable internet access to properly participate in an online court setting.<sup>155</sup> Any movement towards online testimony must include improved access to stable internet, computers, and other rudiments of being able to participate in a virtual court setting.

## 2. *Complainants testifying using video conferencing had precedence prior to the pandemic*

Children are at greater risk of experiencing traumatic effects from testifying as a result of their brain’s development.<sup>156</sup> Over the last number of decades there were successful movements to humanize the adversarial process for

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for-technology-in-the-justice-system-beverley-mclachlin-?spotlight=1> [perma.cc/EV8E-B2CL].

149. “Superior Court of justice Video Conferencing Pilot Project”, online: *Ontario Superior Court of Justice* <[www.ontariocourts.ca/scj/practice/video-conferencing/questions-answers/](http://www.ontariocourts.ca/scj/practice/video-conferencing/questions-answers/)> [perma.cc/6P7Q-Y3SG].

150. Jane Bailey & Jacquelyn Burkell, “Implementing Technology in the Justice Sector: A Canadian Perspective” (2013) 11:2 CJLT at 254.

151. *Ibid* at 256.

152. Gary Joseph, “After COVID-19 We Can Never Go Back” (5 August 2020), online: *The Lawyer’s Daily* <[www.thelawyersdaily.ca/articles/20402/after-covid-19-we-can-never-go-back-gary-joseph/](http://www.thelawyersdaily.ca/articles/20402/after-covid-19-we-can-never-go-back-gary-joseph/)> [perma.cc/YK9H-TPQ3].

153. Sayers, *supra* note 141; See also Justice Adapting Webinar, *supra* note 6 at 00h:15m:05s.

154. Sayers, *supra* note 141.

155. *Ibid*.

156. Alison Cunningham and Lynda Stevens, “Helping a child be a witness in court” at 17, online (pdf): *Centre for Children & Families in the Justice System* [on file with author].

children.<sup>157</sup> The majority of these efforts have focused around testimonial aids, with the most progress being when children are removed from the court room altogether and give evidence via CCTV.<sup>158</sup> Still though, it must be reiterated that CCTV does not prevent an unanticipated meeting with the accused or other stressors of being in the courthouse.<sup>159</sup> Video conferencing removes these potential encounters while still being able to facilitate candid testimony.

*R v NSD* is a 2017 Provincial Court of Saskatchewan case where the accused is charged with sexual interference of a thirteen year old girl.<sup>160</sup> The judge determined that it would be better for the complainant to testify virtually outside of the court environment to ensure full shielding from the accused.<sup>161</sup> The judge acknowledged that testifying from another location alleviates risks and anxieties of encounters with the accused.<sup>162</sup> Before the pandemic, the Calgary Child and Youth Advocacy Centre had arranged for five witnesses to testify from their video conferencing room at the centre.<sup>163</sup> Two of these testimonies included professionals for test-run purposes, and the other three involved children complainants.<sup>164</sup> Though these applications and testimonies actually proceeded during the pandemic due to delays, they were granted without any prior consideration of the necessity to shift to virtual proceedings.

### 3. *Child and Youth Advocacy Centre's are leading the way for video conference testimony*

Child Youth and Advocacy Centres ("CYACs") were created to provide a coordinated response for children who are involved in the criminal justice system.<sup>165</sup> These CYACs are effective for prosecuting crimes against children, and it lowers stress for children throughout the process.<sup>166</sup> These CYACs provide wrap-around services, including but not limited to early reporting, interviews, medical evaluation, counselling, and now a place of

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157. Hurley, *supra* note 97.

158. *Ibid.*

159. *Ibid.*

160. *NSD*, *supra* note 94 at para 1.

161. *Ibid* at para 27.

162. *Ibid.*

163. Calgary CYAC, *supra* note 133; the Calgary CYAC defines it as a "CCTV" room but for simplicity and reducing confusion around the terms, it is referred to as videoconferencing throughout this paper.

164. *Ibid.*

165. Heather L Price, Jacinthe Dion, Beck Earhart, & Sonja P Brubacher, "The Role of Crown Prosecutors in Child Advocacy Centres in Canada" (2019) at 2, online (pdf): *Justice Department* (personal correspondence, on file with author).

166. *Ibid.*

testimony.<sup>167</sup> Currently, there are about 40 CYACs in Canada.<sup>168</sup> Due to the vast geographical scope of Canada, virtual models have been developed as a solution for many CYACs.<sup>169</sup> As a result of CYAC virtual models, many centres were adept with delivering online services prior to the pandemic.

The Calgary CYAC created a permanent video conferencing room for the purpose of having children testify at their centre.<sup>170</sup> This room includes a Webex kit, sound proofing on the walls, and an aesthetic designed to be “child-friendly.”<sup>171</sup> Complainants are able to utilize a safe and familiar space, including the ability to use the washroom and take breaks at ease when they are not actively testifying.<sup>172</sup> On October 9, 2020, the centre reached a milestone in having the first child testify from their video conferencing room.<sup>173</sup> With the positive experience of utilizing the room for testimony, the Calgary CYAC intends to support more applications for its continued use.<sup>174</sup> Since the onset of the pandemic, they have had dozens more applications to utilize the room.<sup>175</sup> While this service is predominantly meant for children, an adult complainant of gender based violence testified virtually for a jury trial from the video conferencing room in one rare circumstance.<sup>176</sup>

Other CYACs across the country have begun to have successes with video conference testimony during the pandemic. Even for CYACs which do not have established video conferencing rooms, they have been able to facilitate testimony from their offices.<sup>177</sup> This past summer, BOOST Child & Youth Advocacy Centre in Ontario and Sea Star in Nova Scotia were successful in facilitating video conferencing testimony.<sup>178</sup> The hearing occurred in an interview room in the local children’s hospital and was coordinated alongside BOOST as it was an Ontario case.<sup>179</sup> The testimony

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167. *Ibid.*

168. *Ibid.*

169. *Ibid.*

170. Calgary CYAC, *supra* note 133.

171. *Ibid.*

172. *Ibid.*

173. Calgary & Area CYAC, “We reached a milestone at the #CCAC, for the first time, a child testified from our Closed-Circuit Television (CCTV) Room. This space was designed to provide kids & youth who have experienced abuse with a safe space to share their story #childabuse #wraparoundservice,” (9 October 2020 at 12:17) online: *Twitter* <[www.twitter.com/calgarycac/status/1314404547943636994?s=12&fbclid=IwAR37e0why6CWCzwFYRVQuEtTKxkuswa22pGDJm2q5O9nPICzJSddW1eT4Xo](https://www.twitter.com/calgarycac/status/1314404547943636994?s=12&fbclid=IwAR37e0why6CWCzwFYRVQuEtTKxkuswa22pGDJm2q5O9nPICzJSddW1eT4Xo)> [<https://perma.cc/K478-H2YJ>].

174. Calgary CYAC, *supra* note 133.

175. *Ibid.*

176. *Ibid.*; this trial occurred during the pandemic with the necessary shift for online proceedings.

177. Interview of BOOST Child Advocacy Centre (3 November 2020) (personal communication, on file with author) [BOOST].

178. *Ibid.*

179. Email from Sea Star Child Advocacy Centre (3 November 2020) (personal correspondence, on

proceeded seamlessly and was the first time using this technology for the Sea Star CYAC.<sup>180</sup> In contrast, the precedent set by *SDL* was previously a barrier for Sea Star CYAC.<sup>181</sup> Previously, *SDL* was cited in denying the application for video conferencing testimony.<sup>182</sup> Investment in technology lessens the potential for more egregious technology issues, limiting the applicability of *SDL*. There is promise in video conferencing testimony becoming normalized through funding and use. CYACs hope to offer these services, and that it will become automatic for complainants to testify from their location built for support.<sup>183</sup>

Increasingly CYACs are finding success in facilitating video conferencing from their facilities with minimal problems.<sup>184</sup> The technology and logistics are feasible with proper support and preparation.<sup>185</sup> This requires extensive staffing, leading to unexpected cost and time commitment.<sup>186</sup> This limitation of resources would need to be addressed for a comprehensive approach to conducting children's testimony at other CYACs in Canada.

4. *The government is financially demonstrating that preventing and mitigating sexual assault and gender-based violence is a budget priority*

The Government of Canada and the Status of Women have acknowledged the unprecedented challenge COVID-19 has placed on survivors. As a part of their pandemic economic response plan in May 2020, the federal government provided \$50 million for organizations supporting survivors.<sup>187</sup> While this funding was non-descript in how sexual assault services should allocate it within their budget, the government could provide similar funding and earmark it for technology upgrades.

Due to the variety and structure of adult services, a challenge may be determining which organizations have the capacity and the mandate to carry out testimony video conferencing.<sup>188</sup> Unlike CYACs, adult services

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file with author) [Sea Star]; the Sea Star Child Advocacy Centre was not able to specify the year this occurred.

180. *Ibid.*

181. *Ibid.*

182. *Ibid.*

183. *Ibid.*

184. BOOST, *supra* note 177; Sea Star, *supra* note 177; and Calgary CYAC, *supra* note 133.

185. *Ibid.*

186. Calgary CYAC, *supra* note 133.

187. "Supporting Women and Children Experiencing Violence During COVID-19" (last modified 3 February 2020), online: *Status of Women Canada* <[www.cfc-swc.gc.ca/fun-fin/shelters-refuges-en.html](http://www.cfc-swc.gc.ca/fun-fin/shelters-refuges-en.html)> [Status of Women Canada].

188. *Ibid.*; demonstrated by the hundreds of organizations given out to with differing mandates and services offered to women.

do not provide the same level of continuity and commonalities in the services offered. Adult sexualized violence services can have various mandates, capacities, and supports offered.<sup>189</sup> Lack of structural continuity for adult sexualized violence supports could be a barrier to disseminating funds to support video conferencing testimony. Ideally, these services could be similar to the CYAC model that provides wrap around services.

Despite certain cost and mandate challenges, the present remains the opportune time to leverage government for financial support. The current government sees supporting women and children experiencing violence during COVID-19 as a social interest but also an economic recovery priority.<sup>190</sup> Cost may continue to be a barrier, as an illustration the Calgary CYAC video conference room cost upwards of \$50,000.<sup>191</sup> However, any upgrades in technology would have a dual use, as it could also be used to improve delivery of online services. Video conferencing can both increase the reach to remote areas that do not have a physical service and increase the capacity for facilitating court testimony virtually.

##### 5. *The pandemic has caused increased use of video conferencing testimony*

Since the pandemic, there are dozens of cases at all levels of court which have used virtual proceedings.<sup>192</sup> Many of these cases have used section 714.1 of the *Code* to permit video conferencing testimony.<sup>193</sup> In many of these cases, it is because the witness does not need any form of testimonial aid but for public health reasons cannot testify in person.<sup>194</sup> However, there are many serious criminal trials which the witness has been permitted to utilize video conferencing from their homes or elsewhere.<sup>195</sup>

*R v SLC* is a Alberta Court of Queen's Bench case involving multiple complainants of sexual assault.<sup>196</sup> Recall, that the judge determined video conferencing was permitted under both section 714.1 and section 486.2 of the *Code*.<sup>197</sup> Allowing complainants to testify outside of the courtroom

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189. *Ibid.*

190. *Ibid.*

191. Calgary CYAC, *supra* note 133.

192. Justice Adapting Webinar, *supra* note 6.

193. *KS*, *supra* note 78 at para 14; see also *Ochoa*, *supra* note 69 at para 1; see also *JWT*, *supra* note 4 at para 2.

194. *R v Cameron*, 2020 CarswellOnt 13500, 167 WCB (2d) at 32; this is because it was a drunk driving case and the witness could not physically appear in person due to public health measures as a result of the pandemic.

195. Mandel, *supra* note 63; the case where ten people were murdered in Toronto by a van attack fueled by misogyny is proceeding virtually due to pandemic conditions.

196. *SLC*, *supra* note 85 at para 1; there were other enumerated charges including robbery, kidnapping, and trafficking.

197. *Ibid* at para 62.

can make them feel more confident, which in turn facilitates the interests of justice in producing full and candid evidence.<sup>198</sup> This is supported by *R v Burns*, where it was suitable for all witnesses to virtually testify, even significant witnesses in serious offence trials.<sup>199</sup> There is often no evidence that the use of video conferencing for complainants limits the ability to cross-examine.<sup>200</sup> The Supreme Court of Canada has also proceeded with multiple virtual criminal law hearings, where arguably, the considerations for the accused are the greatest.<sup>201</sup>

*R v Singh* is a Newfoundland and Labrador Provincial Court case where the accused sought an adjournment for charges of sexual assault.<sup>202</sup> This adjournment was requested because the accused would have to appear virtually, as he could not enter Newfoundland and Labrador due to public health restrictions.<sup>203</sup> The judge denied the adjournment, and determined the accused can still fully participate in their own trial even if they are appearing virtually.<sup>204</sup> Appearing by video conference has no substantial difference than being physically present.<sup>205</sup> Given that the accused has *Charter* entrenched rights in the criminal justice process, if a fair trial can proceed with the accused virtually present, it should make no discernable impact to have sexual assault witnesses testify via video conference.<sup>206</sup>

### Conclusion

The COVID-19 pandemic has forced courts all over Canada to do what they said could not be done for sexual violence survivors—adopt and facilitate virtual testimony.<sup>207</sup> For years when survivors spoke of the trauma of having to face their assailant in open court, the courts said it didn't warrant a testimonial aid.<sup>208</sup> Video conferencing is becoming normalized where public health directives impact the ability of witnesses to testify in person, but it can and should also be used as a trauma-informed approach for survivors testifying.

Video conferencing as a testimonial aid for survivors is in the interest of justice. It has little discernible effect on the trial process as a whole, but it would also have a great impact on encouraging survivors to come

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198. *Ibid* at para 117.

199. *R v Burns*, 2020 SKQB 228 at para 27.

200. *Ibid*.

201. Virtual SCC, *supra* note 144.

202. *R v Singh*, 2020 CarswellNfld 223, 165 W.C.B. (2d) 320 at 1 [*Singh*].

203. *Ibid* at para 49.

204. *Ibid* at para 58.

205. *Ibid* at 41.

206. *Ibid* at 35, 40, 55.

207. Justice Adapting Webinar, *supra* note 6 at 00h:13m:02s.

208. Hickey & McDonald, *supra* note 5.

forward by eliminating some of the structural harms of the courtroom.<sup>209</sup> By appearing over video, the complainant-witness is physically removed from a space which would otherwise feel aggressive and unsafe.<sup>210</sup> They would still be visible to all parties, including the judge, jury, and accused, but would not be subjected to the same hierarchical placement as they would on a traditional witness stand. The removal of the accused from the complainant's physical presence does more than just put the complainant at ease; it facilitates memory retrieval by removing stressors that might otherwise cause a post-traumatic reaction.<sup>211</sup> Being in an alternative location mitigates this harm, while still supporting full and candid testimony of a witness. While CCTV is a positive step for complainants, only video conferencing can prevent any physical encounters with the perpetrator during the court process.

Finally, virtual testimony allows the court to watch the complainant give their testimony and still be able to evaluate the witnesses' demeanor alongside their verbal testimony.<sup>212</sup> Although this type of evidence is inherently flawed, it cannot be ignored that many judges and jurors alike still believe it is an important aspect of evaluating the full weight of the witness's testimony. Video conferencing also allows for complainants to be in a safe place. While this cannot eliminate the gender or racial harms a complainant may be subjected to during testimony, supports can minimize some of the inevitable traumas testifying elicits.<sup>213</sup>

Video conferencing is at least able to mitigate some of the issues with demeanor evidence. If the camera is focused on the face of the complainant, it allows for a limited frame of view of the complainant, i.e. it allows for a limited frame of view of the complainant, which lessens the ability for judging appearance, and any socioeconomic prejudices that may come along with it. Regrettably, video conferencing cannot prevent the legitimate fears of stereotyping for racialized complainants. However, conducting testimony in a CYAC or adult service equivalent allows supports upon completion of testimony, including counselling. Video conferencing produces a more equitable, humane, and just form of testimony for complainants.

Through proper investment and access, video conferencing could eventually be considered not only presumptively permissible, but the norm for survivors of abuse and violence. It should always be in the

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209. *Mattu, supra* note 83 at 12; to elucidate the former portion of the sentence.

210. *Haskell, supra* note 22 at 17.

211. *Ibid.*

212. *Mattu, supra* note 83 at 12.

213. *Ibid* at 17.

interest of justice to take whatever steps necessary to encourage full and honest testimony. The fact that the courts are still allowing complainants to be forcibly brought to the stand to face the subject of their trauma goes against many societal benefits that the criminal trial purports to remedy.<sup>214</sup> Complainants should not have to self-sacrifice in order for societal justice to be served, nor has this been shown to be necessary.<sup>215</sup>

The pandemic has forced courts into using video conferencing.<sup>216</sup> There are many factors to support video conferencing testimony such as the increased use of video conferencing, governments seeing gender-based violence as a budget priority, and CYACs leading the way in witness testimony. Considering the positive benefits to survivors, action should be taken to utilize these opportunities to create permanent change for the benefit of sexualized violence survivors.

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214. Chiu, *supra* note 52.

215. *Ibid.*

216. Justice Adapting Webinar, *supra* note 6 at 00h:13m:49s.