

The Top Five 2010

Each year at OJEN's Toronto Summer Law Institute, a judge from the Court of Appeal for Ontario identifies five cases that are of significance in the educational setting. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.



R. v. J.Z.S., 2010 SCC 1

<http://scc.lexum.org/en/2010/2010scc1/2010scc1.html>

In this case, the Supreme Court of Canada (SCC) upheld the provisions in place to facilitate a child's testimony during a trial, while still protecting the rights of the accused.

Date Released: January 19, 2010

The Facts

In 2006, J.Z.S. was accused of sexually assaulting his two children. At trial, the Crown applied to have J.Z.S.'s children, aged 8 and 11, testify from behind a screen and with a support person, as provided for under s. 486.2 of the *Criminal Code of Canada (CCC)* and under s. 16.1 of the *Canada Evidence Act*. Where the prosecutor applies for such testimonial aids, the judge is required to order it unless it would "interfere with the proper administration of justice."

Criminal Code of Canada

486.2 (1) ...in any proceedings against an accused, the judge or justice shall, on application of the prosecutor, of a witness who is under the age of eighteen years or of a witness who is able to communicate evidence but may have difficulty doing so by reason of a mental or physical disability, order that the witness testify outside the court room or behind a screen or other device that would allow the witness not to see the accused, unless the judge or justice is of the opinion that the order would interfere with the proper administration of justice.

Canada Evidence Act

16.1(1) A person under fourteen years of age is presumed to have the capacity to testify.

The defence argued that the provisions under those two acts violated J.Z.S.'s right to a fair hearing under ss. 7 and 11 of the *Canadian Charter of Rights and Freedoms*. In particular, he argued that he has a right to face his accused, and that not requiring the prosecutor to provide case-specific evidence of a need for testimonial aids prevents a fair trial. The effect of the provisions is that he is unable to confront his accused unless he shows that it would interfere with the administration of justice. In addition, J.Z.S. argued that it is unsafe for a court to automatically receive the evidence of a child witness unless he or she demonstrates an understanding of the moral obligation to tell the truth.

Canadian Charter of Rights and Freedoms

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

11. Any person charged with an offence has the right

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal

The trial judge rejected this claim, convicted J.Z.S. and sentenced him to 24 months in jail. J.Z.S.'s appeal to the British Columbia Court of Appeal was dismissed.

The Decision

In a one-sentence judgment, the SCC unanimously stated: "We are all of the view that this appeal must be dismissed for the reasons given by the British Columbia Court of Appeal."

The Court of Appeal considered whether s. 486.2 of the *CCC* or s. 16.1 of the *Canada Evidence Act* violated J.Z.S.' rights under ss. 7 or 11(d) of the *Charter*. In looking at these provisions, the Court emphasized that they are meant to facilitate children's testimony while still protecting the rights of the accused. However, the Court still needed to weigh this consideration against an accused's right to a fair trial and right to make full answer and defence.

In analyzing this issue, the Court stressed that an accused's rights under the *Charter* must be weighed against broader social interests. As such, the Court found that an accused does not have an absolute right to have an unobstructed view of the witness testifying against him or her. Justice Smith wrote: "Under our criminal justice system, an accused has no constitutional right to a face-to-face 'confrontation' with the complainant." Rather, that accused's rights are balanced against the need to protect and encourage children who are testifying in court. Additionally, the Court found that admitting child testimony was not unconstitutional, since a child's moral understanding and cognitive abilities (credibility and reliability) may be challenged by defence counsel in the same way that adult testimony often is.

Ultimately, the Court of Appeal found that neither the *CCC* nor the *Canada Evidence Act* provisions in question violated the *Charter* rights of the accused. In hearing this appeal and then firmly agreeing with the Court of Appeal's findings, the SCC affirmed the validity of children's testimony in Canada.

Discussion Issues

1. Do you think that children testifying in court deserve accommodations different from those that adult witnesses receive? Do you think that adult victims could also benefit from being able to testify behind a screen? If yes, in what cases?
2. What do you think of the accused's arguments that his ss. 7 and 11(d) *Charter* right were violated by these provisions? Do you agree or disagree?
3. Do you agree that it is important for an accused to face someone who is testifying against him or her? Why or why not? How does this relate to trial fairness?