An ethical examination of re-victimization of a child victim/witness during cross-examination in criminal court proceedings in Ontario

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Abstract - Adult content warning

The issue of re-victimization of children by intimidation including ridicule during criminal court proceedings is still identified as a disputed topic debated in many articles in literature and in news articles. We may argue that this problem can nonetheless be diminished through one simple policy: a mandatory educational component related to the development of communication and ethical skills for all legal professionals involved with child and youth witnesses. This course of study would become part of the regulated mandatory training of those involved with the administration of justice, particularly the members of the Bar and the Bench. The rationale behind such mandatory training lies within the crucial ethical and professional responsibilities of lawyers and judges towards both the most vulnerable, *i.e.* children, who have a duty to provide a testimony during court proceedings, and towards the community they serve in general.

Bill C-2 was passed in 2005 and 2006 amending the Criminal Code of Canada and Canada Evidence Act to ensure additional consideration for the protection of the young and the vulnerable victims' rights during their testimony at court while offering provisions to accommodate their specific needs. Even though this endeavor was successful, there are still to this day, issues surrounding the lawyers, more specifically defence lawyers' behavior towards children and other vulnerable witnesses. This seems to originate from the lack of practical clarity in the existing theories that attempts to define lawyers' behavior during criminal court proceedings. Many moral disagreements have derived from different theorists which consequently create uncertainty amongst lawyers.

Nevertheless, moral rightness is the key in defining the appropriateness of behavior so that it shall overcome zealousness and intimidation of witnesses in any court of law.

The rules of professional conduct referring to the body of regulations as defined by the Law Society of Upper Canada cannot be disputed. For example, due to deontological reasons, lawyers for one must uphold their loyalty to their clients and towards due process. However, the implementation of a child-focused educational component pertaining to the development of communication and interviewing skills would not disregard or obstruct the legal procedures as defined by the notion of "loyalty" set forth in the above. On the contrary, it would enhance moral

decisions, complement the lawyers' role as an advocate of the betterment of society and would lessen the risk for further re-victimization. Judges would also be subject to this training. To their credit, this course of action would strongly demonstrate a higher level of moral awareness and integrity for all persons involved in the criminal justice system.

In what follows I will draw upon examples that were made public of unethical behavior by defense attorneys and judges that have been problematic where inappropriate and unprofessional conduct were at the source. This could have easily been avoided if the ability to empathize and foresee consequences had been developed.

Résumé - Avertissement contenu adulte

La question de la re-victimisation des enfants par l'intimidation, y compris le ridicule, au cours des procédures pénales est toujours identifiée comme un sujet litigieux débattu dans de nombreux articles dans la littérature et dans les articles d'actualités. On peut faire valoir que ce problème peut néanmoins être réduit grâce à une politique simple: un volet éducatif obligatoire lié au développement des compétences de communication pour tous les professionnels du droit ayant des entretiens avec des enfants témoins. Ce programme d'étude ferait partie de la formation obligatoire réglementée pour ceux qui participent à l'administration de la justice et plus particulièrement, les membres du Barreau et de la magistrature. La raison pour une telle formation obligatoire réside dans les responsabilités cruciales d'éthique et de professionnalisme des avocats et des juges envers les plus vulnérables, plus spécifiquement les enfants victimes/témoins, et envers la communauté qu'ils servent en général.

Le projet de loi C-2 a été adopté en 2005 et 2006 modifiant le Code Criminel du Canada et la Loi sur la preuve au Canada assurant un examen supplémentaire pour la protection de la jeunesse et des droits des victimes vulnérables lors de leur témoignage à la cour, tout en offrant des dispositions pour répondre à leurs besoins spécifiques. Même si ce projet est en vigueur, il y a encore à ce jour, des questions entourant les avocats, plus précisément le comportement des avocats de la défense envers les enfants et les témoins vulnérables. Cela semble provenir du

manque de clarté pratique dans les théories existantes qui tentent de définir le comportement des avocats pendant les procédures judiciaires pénales. Les différents théoriciens ne s'entendent pas sur les fondements moraux de cette question, causant de fait de l'incertitude parmi les avocats.

Néanmoins, la droiture morale est la clé qui définit le comportement idéal et approprié qui pourra surmonter le zèle et l'intimidation à l'endroit des témoins qui doivent se présenter devant un tribunal de droit.

Les règles de conduite professionnelle, qui se réfèrent à l'ensemble des règlements définis par le Barreau du Haut-Canada, ne peuvent pas être d'ailleurs contestées. Par exemple, pour des raisons déontologiques, les avocats doivent respecter leur devoir de loyauté envers leurs clients et envers une application régulière de la loi. Cependant, la mise en œuvre d'un volet éducatif axé sur l'enfant concernant le développement de la communication et les techniques d'entrevue n'ignorerait ou n'entraverait point les procédures légales telles que définies par la notion de «loyauté» énoncée ci-dessus. Au contraire, cela renforcerait les décisions morales, complémenterait le rôle des avocats en tant que défendeur de l'amélioration de la société et réduirait le risque de re-victimisation. Les juges seraient également soumis à cette formation. Au crédit de ces derniers, ce plan d'action aiderait à faire valoir ardemment un niveau plus élevé de conscience morale et d'intégrité pour toutes personnes impliquées dans le système de justice pénal.

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INTRODUCTION

When law professionals do not receive appropriate training as to the development of communication and interaction skills with children, appropriate and morally inclined relational inquiries become very challenging. This in turn, creates an environment of abuse and negligence, thus discrediting the law professionals as ethical beings.

Methods used during cross-examination by criminal defence lawyers more specifically in Provincial and Superior courts of justice in Ontario in many criminal court proceedings, lead to child/youth witnesses crying, getting angry and/or feeling guilty for which re-victimization becomes an issue. Similarly, ethical implications are of concern from the part of other law professionals, namely judges who hold an influential role in such cases.

It must be noted primarily that for all cases in Canada where a child under the age of 18 has been identified as the alleged victim, an application for a Publication Ban is made (Government of Canada, Department of Justice, 2015). For this reason, any information that could potentially identify the victim, the victim's family, his/her location and so forth has to be banned from public knowledge. The goal of these publication bans is to protect the sanctity of court proceedings to ensure a fair trial for the accused when it comes to the actual trial time (impartial jury, etc.). No publication ban is however aimed at protecting counsel. The criminal cases' factual information for this research will therefore be drawn from news articles, research papers appearing in peer-reviewed law journals and one young victim's testimony.

The research problem predominantly lies with the concern that surrounds consequences of cross-examination by defence lawyers using intimidation, aggression and ridicule which not only disadvantage the victim/witness, his family and society, but it also influences the fairness of due process during prosecution which is unequivocally critical in any criminal court proceeding.

An example of such experience comes from an Ottawa victim, now 23 years of age, who wished to have her thoughts and feelings published in this paper in order to assist us with the claim that judicial members have a considerable impact on the life of vulnerable witnesses. As a young

victim of a sexual assault against her by a 23 year old man the following is her assessment of her criminal court experience:

"The case took a year and a half when the incident lasted one night. I was 15 when the assault happened and I am now 23. I wouldn't want to experience this again at the age of 15 years because I would not want to relive how he made me feel. I will always remember how much the defence counsel made me feel guilty and terrible while saying that I had provoked him (the accused). "[1]

Moreover in current news, a Chatelaine magazine reporter Sarah Boesveld received an opportunity in March 2016 to speak with a young adult woman who had been a victim/witness in a sexual assault trial (R vs Ghomeshi). This case was found to be of crucial nature for this research topic since the victim was able to share with the public her experience as an adult with a female defence lawyer in a criminal court matter in Ontario. This is what she had to say:

"She yelled and sneered and talked down to me. I was thinking, 'Why is this allowed? Why am I sitting here while everyone looks on as she's mocking me? So many times I wanted to laugh because I was thinking, 'Is this real? It's 2016 and this is what they do?' I felt it was abusive. I was told that she wouldn't be, and that the judge would stop her if she ever got that way. But it felt like she was attacking the hell out of me.** It's not fair that someone gets assaulted, and has to go to court and get assaulted again. Why can't it be adults in a room, fact-finding and looking for truth? "[2]

Hence, if she felt this way but managed to speak and open up to the public, it seems very concerning as to how child victim/witness must feel in similar situations giving the fact that children do not have the necessary skills and knowledge to understand the defence's role in seeking the truth.

Many situations regarding the lack of ethical decision-making by lawyers can be observed in the Ontario provincial and Superior courts however, with much dismay, the truth of such behavior remains within the confines of the courtroom due to a Publication Ban.

[1] M. L., Personal communication, March 2015.

[2] Boesveld, Sarah, "What I wish I'd known before testifying in the Ghomeshi trial", online publication, http://www.chatelaine.com/news/what-i-wish-id-known-before-testifying-in-the-ghomeshi-trial/, Chatelaine News, March 2016, accessed on March 24, 2016.

An example of unethical and damaging behavior by defence lawyer in the Ottawa RCMP "*Mountie*" police case in recent news has been identified by reporting journalist Meghan Hurley of the Ottawa Citizen. A teenager's credibility was questioned by his own father's defence lawyer as he attempted to provide his testimony related to months of torture, starvation and escape when he was only 11 years old.[3] Ms. Hurley who followed this case wrote that once the youth managed to escape, he provided his testimony to police and had to be assessed by hospital staff due to the fact of displaying signs of malnourishment and experiencing severe abuse. Having been held captive for months, restrained naked to the basement wall, starved, burnt and beaten, his father, an RCMP officer admitted to this abuse. The father rationalized that he felt a power struggle between him and his son where he couldn't manage his child's behavior. The mother was also charged and had legal representation to defend her.

The problem identified here lies in the defence lawyers' unethical approach in defending their clients' right to a fair trial and a defence at the cost of this child's re-victimization and wellbeing ignored.

The lack of communication and interviewing skills by defence lawyers can prove to be intimidating and demoralizing to a child, especially for a youth who has been diagnosed and struggling with the Aperger's syndrome. In R. vs Harouya (Ottawa), the defence lawyer and the judge depicted the 15-year-old boy victim/witness as a liar. In articles related to this case, the reporter Tony Spears wrote: "Judge Annis found the teen diaper freak who said he was raped in a Westin Hotel men's room by Harouya, had lied throughout his testimony." The accused was later acquitted after questioning the youth for three long days. The judge's comments were reported as follows: "It would be unsafe to convict the accused, he said, citing the teen's 'general lack of reliability' and 'very major misstatements'."[4]

[3] Hurley, Meghan, "Defence Lawyer calls alleged child abuse victim a liar", online publication, http://ottawacitizen.com/news/local-news/defence-lawyer-calls-alleged-child-abuse-victim-a-liar, Ottawa Citizen, September 2015, accessed on February 22, 2016.

[4] Spears, Tony, "Despite acquittal, man stays locked up", online publication, http://www.torontosun.com/2011/07/04/judge-rejects-teens-testimony, Toronto Sun, July 4, 2011, accessed on Feb. 22, 2016.

Without going into specific details however, the defence lawyer and the judge knew that this child had been diagnosed with Asperger's syndrome. This disorder is similar to autism but not the same. A brief explanation of this Pervasive Developmental Disease is given in the following, and taken from the online ASPEN, Asperger Autism Spectrum Education Network (ASPEN 2016).

"Individuals with AS (Asperger's Syndrome) and related disorders exhibit serious deficiencies in social and communication skills. Their IQ's are typically in the normal to very superior range. They are usually educated in the mainstream, but most require special education services. Because of their naïveté, those with AS are often viewed by their peers as 'odd' and are frequently a target for bullying and teasing."[5]

Fundamentally, law professionals are ideally representatives of proficiency. To relay a statement undermining the child's reliability when a developmental disability has been proven provokes a query as to the level of expertise these professionals have prior to addressing a case of such nature.

Having had some training, wouldn't they have been sensitive to the victim's inability to provide accurate and timely information about the incident, especially to strange people in the law profession he had just met? Wouldn't they have acknowledged that individuals with this disability are unable to readily and rapidly open up and provide all the information needed to address these allegations?

The Model Code of Professional Conduct (2014) in section 3.1-2[5] specifically states that under no circumstance should a lawyer represent a client if he does not have the competencies to address the matter appropriately and professionally. If he does, he is not being forthcoming nor honest. This then becomes a compelling question of ethics, an issue of negligence.[6]

[5] ASPEN, "What is Asperger's Syndrome?", online publication, http://aspennj.org/what-is-asperger-syndrome, New Jersey, accessed on February 22, 2016.

[6] Federation of Law Societies of Canada, "Model Code of Professional Conduct", online publication, http://flsc.ca/wp-content/uploads/2014/10/ModelCodeENG2014.pdf, 2014, accessed March 2, 2016.

Another case begins with two young ladies with developmental disabilities who were sexually assaulted by the accused male hospital guard (R vs C. Russell, Ottawa). Spears reported that:

"The judge found 'instructive' the 2010 victim's 'total incomprehension' at a defence suggestion nothing had happened. The woman had greeted that suggestion with a 'dumbfounded look', as if she couldn't conceive why anyone would think she'd made up her tale of woe."[7]

One of the victims had received 5 dollars and the other chocolate milk money and cigarettes in exchange for fellatio.

Again the question to ask is: Even if this young woman had developmental disabilities, does she have to be ridiculed and re-victimized during cross-examination, especially when these witnesses were described as "*childlike*" in their behaviors? Where is the fairness for these vulnerable witnesses in these proceedings?

The diminished approach for the consideration of the wellbeing of a children, youth and vulnerable witnesses can be described as amoral since defence lawyers often devalue/demoralize the victim/witnesses by treating them as an "accused" during criminal court procedures; treating them as though they fabricated the allegations.

Several references from peer-reviewed journals articles have been consulted in order to defend and support the theoretical framework of consequentialism advocated in this research. David Layton as one of the authors, showed that an aggressive cross-examination strongly discriminates against a complainant. "This manner suggests that she is lying under oath, disconcerting her, which then leads to the tainting of her reputation."[8] He added that when contemplating this approach a little more, this fear would in turn discourage other actual victims from disclosing any more information. Fairness in the justice system would therefore be harmed.

[7] Spears, Tony, http://www.ottawasun.com/2014/01/22/ex-hospital-security-guard-guilty-of-second-sex-assault, Ottawa Sun, Jan. 22, 2014, accessed on March 6, 2016.

[8] Layton, David, "The criminal defence lawyer's role", Dalhousie Law Journal, Vol. 27, p. 8, Dalhousie University, Halifax, Fall 2004.

One would think that the development of communication and interaction skills when dealing with children and youth in criminal court hearings would be crucial and a foreseeable mandatory training for all legal professionals. This simple, yet revealing educational provision would enable lawyers to hear the evidence with empathy because of their understanding of the child's and teen's developmental stage. This consideration would put lawyers and judges in a better position to make appropriate ethical decisions based on what is the best outcome for the child without any disregard for the accused fair trial.

Driving knowledge to another level is our intent. Education is the key in reducing and hopefully eradicating re-victimization for good and developing moral decision-making abilities in all causes of justice.

MEMOIRE STRUCTURE

The foreground will be set where the research problem of the re-victimization of a child/youth witness during cross-examination by defence lawyers in Canada will be addressed.

In chapter one, the literature consulted to support this research will be as follows: the Law Society of Upper Canada's standards and legal requirements will be highlighted while providing a brief description of what is expected in all judicial proceedings in Canada; government official information from Ministry websites related to this research will be presented in order to assist the reader in understanding the rules and regulations that legal counsels and witnesses involved in a criminal court matter must observe. Then we will draw on legal ethical theories and the considerable stir or “disagreement” that has emerged amongst lawyers in the adoption of one specific ethical framework. Two philosophical frameworks namely consequentialism and non-consequentialism (a sense restricted to legal practice) will be featured in consideration of how lawyers should observe their ethical duties in a court of law when dealing with witnesses, more specifically child witnesses. Finally, a qualitative research study by Boost Child Abuse Prevention and Intervention will be revised in order to validate and sustain our proposal for an educational component in the training of these Canadian certified lawyers and judges.

In the second chapter, we will review different ethical and legal theories pertaining to the legal responsibilities of lawyers, judges and other professionals who deal with children in criminal court cases. Some theories may be acceptable to some lawyers while others will question their validity when it comes to being confronted with a moral dilemma. Where does the loyalty lie? is the question raised. Does it lie with the client, the law, the society or with moral obligations?

In the third chapter, we will proceed with the explanation of the two philosophical ethical frameworks namely consequentialism and non-consequentialism which will be introduced by means of their founders' viewpoints. An analyzed rationale for committing to a teleological framework when working with children, youth and the vulnerable sector will be justified.

The forth chapter will present several arguments to advocate the many benefits of a new educational training opportunity for lawyers, Crown and defence counsel, paralegals and judges involved with any witness under the age of 18.

We will conclude with the importance of continued involvement and awareness needed to ensure the best outcome for these child/young witnesses in the Ontario court system. Suggestions for future endeavors will lastly be offered.

CHAPTER 1 – LITERATURE REVIEW

1.1 General Information about the Justice System

An initial but brief outline of procedures when a complaint is made to the police has been drawn up in the following to assist the reader in understanding basic court proceedings. Additional, more concise information can be found on the Justice System and Services to Victims website.[9]

When a child protection concern is reported to the police in Ontario against an alleged offender, the following is what briefly occurs at the level of the justice system (a very concise explanation is provided):

1) The complaint
   - Child victim/witness makes a complaint of incident by alleged offender;
   - Child victim/witness provides a testimony within a reasonable time delay to an investigator.

2) The charge(s)
   - The investigator conducts an investigation of other potential witnesses;
   - The investigator then has to decide if and what charge(s) is/are going to be laid;
   - If no charge is laid, the caregiver and alleged offender are notified and no further action is taken;
   - **Or** if charge(s) is laid, caregiver is notified and a warrant for the arrest of the alleged offender is sought;
   - Alleged offender is arrested, charged and read his rights;
   - Alleged offender is offered the opportunity to provide a statement;
   - Alleged offender may provide a statement and/or request to contact a lawyer;
   - If alleged offender is incarcerated, a hearing can occur in a regulated time of delay;

[9] Government of Canada, Department of Justice, online publication, http://www.justice.gc.ca/eng/cj-jp/victims-victimes/vsd-rsv/index.html, March 2015, accessed March 20, 2016.

- **Or** if alleged offender is released, he/she is bound by an oath to attend court when required to do so and respect all release conditions indicated on the Recognizance of Bail or Promise to Appear;
- Alleged offender retains a defence lawyer (during the next few weeks, to several months; court is remanded until a decision is made with regards to his plea: guilty or not guilty);
- Alleged offender, through his defence lawyer, provides the court with his election: preliminary hearing, trial, mental health court (will not be discussed in this paper) or plea of guilt.

3) Hearings

- If alleged offender pleads guilty, a Victim Impact Statement is sought from the victim/witness and another sentencing date is scheduled;
- **Or** if alleged offender pleads not guilty, then other judicial proceedings occur to arrive at an election of a preliminary hearing or a trial.

3a) Preliminary hearing (Trial in Superior court)

- If preliminary hearing is elected, the main victim/witness complainant is provided a subpoena and later testifies before a judge in a Provincial court;
- The judge decides that there isn't sufficient evidence to go to trial, the case is then dismissed;
- **Or** the judge decides that there is sufficient evidence to go to trial, then the case goes to assignment court to schedule a trial date in a Superior Court of Justice;
- The main victim/witness complainant is provided with another subpoena and later testifies a second time. Other witnesses are also subpoenaed and later called to provide a testimony.

3b) Trial (Provincial court)

- If trial is initially elected, the case is tried at the provincial court level;
- The main victim/witness complainant is provided with a subpoena and later testifies. All other witness are subpoenaed and later called to provide a testimony.

4) Decision

- The judge finds the alleged offender not guilty, the case is then complete and the offender returns home (with possible conditions) ;

- **Or** the judge finds the alleged offender guilty and a sentencing date is scheduled providing an opportunity for the victim/witness to provide a Victim Impact Statement.

5) Sentence

- The victim/witness provides a Victim Impact Statement to the court. The offender is sentenced;
- The accused is either released with conditions or incarcerated for a period of time and released on probation or parole.

6) Appeal

- The accuser's defence counsel makes an application to appeal the judge's decision;
- The Supreme Court denies the application and the status remains status quo;
- **Or** the application is accepted and the victim/witness complainant is consulted to testify once more.

1.2 Rules and Regulations Governing Legal Professionals

1.2.1 Standards and Rules for Those Called to the Bar (Ontario Court of Justice)

"The Law Society of Upper Canada's Role Statement provides a governance and assistance to legal professionals to be accountable to the public interest and act in good faith. Not only should one commit to an honorable profession but additionally, one should advance and maintain the cause of justice while respecting all rules determined by law."[10]

Those called to the Bar have confirmed their advocacy of the Canadian legislation and regulations that the Law Society Act constituted.[11] There are three parts established in this Act however only Part II will be of concern to us for this research which entails:

"Conduct, Capacity, Professional Competence, Failure to comply with order, Summary order, Audits, Investigation, etc., Complaints Resolution Commissioner, Proceedings Authorization

[10] Legalline.ca, "The Law Society of Upper Canada (LSUC), LSUC Role Statement", online publication, http://www.legalline.ca/legal-answers/law-societies-of-canada/, accessed March 3, 2016.

[11] Law Society of Upper Canada, "Strategic Plan 2000-2003", online publication, http://www.lsuc.on.ca/media/StrategicPlan.PDF, p. 3.

Committee, Law Society Tribunal, Hearing Division, Appeal Division, Appeals to the Divisional Court Reinstatement, Freezing Orders and Trusteeship Orders and Outside Counsel."

Part II introduces a set of normative rules as a way to structure the behavior of legal professionals nonetheless, this research will prove that several rules and bi-laws are continuously being breached.

1.2.2 Criminal Rules of Ontario Court of Justice

Legal representatives, once assigned to a criminal court case, have to comply with Criminal Rules of Ontario Court of Justice in order to ensure that hearings are heard in regulation with the law. Such rules are as follows (Ontario Court of Justice, 2012):

Rule 1- In the General section the Fundamental objective address how proceedings should occur.

1.1 (1) "All proceedings are to be dealt justly and efficiently."

(2) "Dealing with proceedings justly and efficiently includes:

a) dealing with the prosecution and the defence fairly;
b) recognizing the rights of the accused;
c) recognizing the interests of witnesses and;
d) scheduling court time and deciding other matters in ways that take into account
i) the gravity of the alleged offence;
ii) the complexity of what is in issue;
iii) the severity of the consequences for the accused and for others affected, and
iv) the requirements of other proceedings."

(3) Refers to duty of counsel, paralegals, agents and litigants

"In every proceedings each counsel, paralegal, agent and litigant shall, while fulfilling all applicable professional obligations,

a) act in accordance with the fundamental objective; and
b) comply with
i) these rules,
ii) practice directions, and
iii) orders made by the Court."

Rule 2 - Refers to all applications required for the proper administration of justice of a criminal court case, which includes but is not limited to the statements, transcripts, affidavits, trial application and other applications as needed.

Rule 3 - Refers to the service regulations and exceptions.

Rule 4 - Refers to case management. This includes "Hearing and trial management, judicial pre-trial conference, materials, communications technology, judicial directions, record of pre-trial agreements and admissions, focus hearing, discovery hearing, preliminary inquiry and exception, vulnerable witnesses".

Rule 5 - Refers to practice directions, forms and non-compliance.

1.2.3 Professional Conduct for Lawyers (Federation of Law Societies of Canada)

Prior, during and following criminal court proceedings, lawyers are to conduct themselves in a manner that proves to be respectful to their own professional position, the courts and the community. The Law Society of Upper Canada's Model Code of Professional Conduct which has its own self governing body, covers professional conduct of lawyer-members and now paralegals who have rights to practice and thus are members of the Law Society. As there can be alleged breaches of professional conduct, such situations are to be reported to the Law Society. As for members of the legal profession, there is an implied duty to report misconduct or conduct unbecoming. This Model Code's main role is to ensure that such standards represent a normative value in professionalism and ethical behavior in this "self-regulated profession."[12]

A concise but descriptive model of behavior has been developed in order to provide the lawyers with a minimum standard framework easily achievable during their practice. Through its reflection, the above-mentioned Code's committee provided an indication of the lacks in the

[12] Supra note 6.

Canadian judicial system in the implementation of such rules affecting witnesses, more specifically child witnesses during their testimony.[13]

1.2.3.a) The Model Code of Professional Conduct (approved 2014)

This Model Code of Professional Conduct is a tool that assists law professionals in ensuring the protection of the public interest during their legal functions. As such, this means is supposed to clearly identify "a framework based on ethical principles that, at the highest level, is immutable, and a profession that dedicates itself to practice (sic) according to the standards of competence, honesty and loyalty."[14]

The subsequent descriptive of the Model Code is entailed to provide the reader with the lawyer's duties and ethical principles. Note that the articles having no direct correlation with the research problematic are not reflected below[15]:

1. Provides an interpretation of defined terms used in the document.

2.1-1. Refers to integrity: "A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honorably and with integrity."

2.2-1[1]. Refers to the lawyer's reputation and responsibility of trustworthiness towards his client.

2.2-1[2]. "The public confidence in the administration of justice and in the legal profession may be eroded by a lawyer's irresponsible conduct. Accordingly, a lawyer's conduct should reflect favorably on the legal profession, inspire confidence, respect and trust of clients and of the community, and avoid even the appearance of impropriety."

3.1. Refers to the lawyer's competence.

[13] Supra note 6.

[14] Ibid, p. 9.

[15] Ibid, p. 2-108.

3.1-1. “'Competent lawyer' means a lawyer who has and applies relevant knowledge, skills and attributes in a manner appropriate to each matter undertaken on behalf of a client and the nature and term of the lawyer's engagement”, and so forth.

3.1-2[2]. “Competence is founded upon both ethical and legal principles. This rule addresses the ethical principles. Competence involves more that an understanding of legal principles: it involves an adequate knowledge of the practice and procedures by which such principles can be effectively applied.”

3.1-2[3]. “In deciding whether the lawyer has employed the requisite degree of knowledge and skill in a particular matter, relevant factors will include:

a) the complexity and specialized nature of the matter;
b) the lawyer's general experience;
c) the lawyer's training and experience in the field;
d) the preparation and study the lawyer is able to give the matter; and
e) whether it is appropriate or feasible to refer the matter to, or associate or consult with, a lawyer of establishes competence in the field in question.”

3.1-2[4]. “In some circumstances, expertise in a particular field of law may be required; often the necessary degree of proficiency will be that of the general practitioner.”

3.2-1. “A lawyer has a duty to provide courteous, thorough and prompt service to clients. The quality of service required of a lawyer is service that is competent, timely, conscientious, diligent, efficient and civil.”

4. Refers to the marketing of legal services

5. Refers to the relationship to the administration of justice

5.4. Refers of the communication with witnesses giving evidence.

5.4-1. “A lawyer involved in a proceeding must not, during examination and a cross-examination, obstruct the examination and the cross-examination in any manner.”

5.4-2. “Subject to the direction of the tribunal, a lawyer must observe the following rules respecting communication with witnesses giving evidence: (5.4-2 a-c not included).”

5.4-2[2].“The term 'cross-examination' means the examination of a witness or party adverse in interest to the client of the lawyer conducting the examination.”

5.4-2[3]. “The opportunity to conduct a fully ranging and uninterrupted cross-examination is fundamental to the adversarial system.”

6. Refers to relationship to students, employees and others**.**

7. Refers to the Society and other lawyers**.**

7.1-3**.** “Unless to do so would be unlawful or would involve a breach of solicitor-client privilege, a lawyer must report to the Society

> (e) conduct that raises a substantial question as to another lawyer’s honesty, trustworthiness, or competency as a lawyer; and
> (f) any other situation in which a lawyer’s clients are likely to be materially prejudiced.”

7.1-4**.** “A lawyer must encourage a client who has a claim or complaint against an apparently dishonest lawyer to report the facts to the Society as soon as reasonably practicable.”

As defined in the previous paragraphs, a high level of accountability and responsibility is denoted throughout the Federation's Model Code of Professional Conduct for counsel. For this reason, expectations are high yet acknowledged and accepted once a Member of the Bar.

1.2.3.b) Other Ethical Obligations by Defence Counsel

During judicial proceedings, professionals have witnessed a lack in reaching the standards regulated by the Model Code of Professional Conduct. Elaine Craig, Assistant Professor of Law at Schulich School of Law in Halifax Canada, recognized that even though rules disallow any case related information to be made public, i.e., behavior, exhibited in the courtroom towards a witness, many rules were significantly neglected while lawyers sought justice. Craig provided a number of reminders that defence lawyers, in dealing with sex abuse cases, should retain. They should always be compelled to the rules of conduct by restraining themselves from irrelevant information or assumptions in order to mislead the witness. Duty-bound means refusing to advance any “harassment misrepresentation, repetitiousness or, more generally, from putting

questions whose prejudicial effect outweighs their probative value." This is what should be expected. [16]

Craig's position strongly stated that even though the law of evidence does not prevent such manners, she upheld that lawyers should repudiate any cross-examination of a witness that is abusive or offensive in any way. In addition, questions should be limited to relevancy, admissibility and based on good faith. An accused has the fundamental right to be defended against all allegations and receive full answers yet, there are some restrictions and these should be respected.[17]

Craig also attempted to encourage defence counsel to foresee the consequences of their behavior by considering the following questions:

"Will it cause humiliation to the complainant? Will allowing it discourage other complainants from reporting incidents of assault? Is its relevance outweighed by its potential to trigger discriminatory attitudes and bias? "[18]

Even with the agreement to follow the Model Code, many lawyers seem to be oblivious of the consequences that their actions and behavior can cause.

1.2.3.c) Duties and Responsibilities of Crown Counsel

Under the Public Prosecution Service of Canada Deskbook/ Guidelines of the Director Issues under Section 3(3)(c) of the Director of Public Prosecutions Act, the Crown has furthermore

[16]Craig, Elain, "The ethical obligations of defence counsel in sexual assault cases", Osgoode Hall Law Journal, Vol. 51, p. 451, York University, Toronto, http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=2729&context=ohlj,Winter 2014, accessed on February 13, 2016.

[17] Ibid, p. 449.

[18] Ibid, p. 450.

conduct related guidelines to observe. Only the conduct of criminal litigation will be highlighted for the purpose of this research. The guidelines are as follows[19]:

1. Introduction

"That as a delegated counsel of the Crown they are subjected to carry out the duties and responsibilities of the Director of Public Prosecutions Act (DPP Act)."

2. The Conduct of Criminal Litigation

As a mandated Crown counsel/law officers of the Crown, they are to "initiate and conduct prosecutions under and on behalf of the Crown." "As a result, Crown counsel are subject to certain ethical obligations which may differ from those of other litigants."

They must constantly be reminded of the public interest when "exercising judgment and discretion which go beyond functioning simply as advocates. Counsel appearing for the DPP are considered 'ministers of justice' more part of the court than proponents of a cause."

2.1 "The duty to ensure that the mandate of the Director is carried out with integrity and dignity."

Counsel fulfills this duty by:

- "complying with their bar association's applicable rules of ethics;
- complying with the Public Prosecution Service of Canada (PPSC) Code of Conduct;
- exercising careful judgment in presenting the case for the Crown, in deciding whether or not to oppose bail, in deciding what witnesses to call, and what evidence to tender;
- acting with moderation, fairness, and impartiality;
- conducting oneself with civility;
- not discriminating on any basis prohibited by s. 15 of the Canadian Charter of Rights and Freedoms (Charter);
- adequately preparing for each case;
- remaining independent of the police or investigative agency while working closely with it; and
- conducting resolution discussions in a manner consistent with the DPP guideline."

2.3. "The duty to be fair and to maintain public confidence in prosecutorial fairness."

[19]Public Prosecution Service of Canada Deskbook/ Guidelines of the Director Issues; additional information can be found at: "http://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p2/ch02.html ".

2.4. “The duty to maintain objectivity.”

2.4.1. “Inflammatory remarks and conduct.

Inappropriate negative comments about the accused’s or a witness’s credibility or character

- Such comments include characterizations of the accused as a liar, excessive use of sarcasm, ridicule, derision or exaggeration in referring to the accused or defence witnesses, excessive reference to the accused’s criminal record, native country;”

- and so on.[20]

That being said, lawyers have a strong role in defending the rights of their client. They have a duty to apply all knowledge that is applicable to the case while behaving with dignity and integrity, which should provide the client, the witness, the community and Law Society an idealistic environment for proper ethical decision-making[21]. Rules of ethics under this professional role which have strongly been imposed have persuaded Crown counsel to behave as a responsible and proud member of the Canadian Law Society.

How are these rules of professional conduct different than those of the defence lawyer's? Aren't litigators members of the Bar? How are these rules being closely monitored? What does this say about the public interest and their level of accountability?

1.2.4 The Requirements for Continuing Education for Legal Professionals (Code of Ethics for Lawyers and Paralegals - Canada)

The Law Society of Upper Canada assists in reminding of the importance of maintaining relevant knowledge to cases being handled. The Society's Continuing Professional Development Requirements stipulate that lawyers must acquire 12 hours of “Continuing Professional Development” in the following areas: 3 hours of “Professionalism Hours” on professional responsibility, ethics, and/or practice management and 9 hours of “Substantive Hours” per year

[20] Ibid.

[21] Supra note 6.

which can include substantive or procedural law and/or related skills. Other educational components are considered optional in order to enhance their practice: such include interviewing skills and techniques for interviewing clients and witnesses, knowledge of general principles and procedures, problem solving skills, analysis and ability, client service and communication skills.[22]

These requirements are monitored by the Law Society while each individual lawyer must self-report the number of mandated and optional hours of continuing professional development they have received throughout the year.

1.3 Canada's Evidence Act - The Testimony

1.3.1 Canada's Evidence Act and its procedures

Canada's Evidence Act assists in providing information related to the procedural requirements during a seizure of evidence for any case that is before a court of law, may it be evidence and/or witnesses. [23] The following explanation will be to introduce some of the tasks law professionals must uphold.

Part of the prosecutor's and defence lawyers' role includes a duty to serve a subpoena (explanation found under Article 47 of this section) on potential witnesses and to meet with these individuals prior to giving testimony. Moreover, when a child is being called to testify, regulation states that lawyers must verify that the young individual is capable of adequately providing a testimony.

Article 16.1(1) of Canada's Evidence Act (1985) denotes “where the child is presumed to have the capacity to testify” at the age of 14 or younger, he/she shall be proven to possess the ability

[22] The Law Society of Upper Canada, Continuing Professional Development Requirement, online publication, http://www.lsuc.on.ca/CPD-Requirement/, 2014, accessed March 2, 2016.

[23] Government of Canada, “Canada’s Evidence Act”, online publication, http://laws-lois.justice.gc.ca/eng/acts/C-5/FullText.html, accessed on March 28, 2016.

to comprehend and answer questions through a series of queries led by the prosecutor, the defence lawyer and/or the judge. Credibility and weight of the information has to be assessed before admitting the child's testimony as evidence.

In support, other rules and regulations were created in order to verify the admissibility of testimonies, witnesses and other materials as acceptable evidence in criminal and civil court matters. The rules related to this research problematic have been highlighted to demonstrate the level of accountability held by lawyers. In addition, this Act will offer guidance to the expectations of child witnesses, other parties, counsels, and judges to be met when involved in any judicial matter.[24]

Article 16.1 (5) indicates that "the court nevertheless, needs to be satisfied that this child possesses those capacities mentioned and he/she shall be tested by counsel or by the judge through an inquiry to determine whether he/she is able to understand and respond to questions."

Article 16.1 (6) adds that "the court shall, before permitting a proposed witness under fourteen years of age to give evidence, require them to promise to tell the truth."

Article 46 (2) states that a party member, such as a witness, may be permitted to utilize provisions such as the Closed Circuit Television (CCTV) to enable the provision of the testimony while having the virtual presence of the witness. This would also allow the witness to be heard and examined. However with Bill C-2, children shall be provided with those provisions in order to facilitate their testimony.

Article 47 mentions that a witness called to testify by means of a subpoena is ordered to attend court on a specific date, time and location noted on the official court order. Furthermore, a witness may not refuse attendance since this court order compels the individual with information related to the case being heard, to appear before the court and provide testimony.

[24] Government of Canada, "Canada's Evidence Act (1985)", online publication, http://laws-lois.justice.gc.ca/eng/acts/C-5/FullText.html, accessed on March 28, 2016.

1.3.1.a) Provisions for Children and Vulnerable Witnesses (Ministry of Justice)

The Ministry of Justice realized that children played a central role as witnesses in court cases and for this reason they focused on creating provisions allowed by law. Such provisions enabled court cases, which historically rarely proceeded due to the questionable reliability of a child or vulnerable witness, to go ahead since all criteria were met for a fair prosecution. Understanding that children would be treated like an adult during examination and cross-examination, the Ministry had to make sure the wellbeing of these young witnesses was considered by reducing the stress that came with being called to testify.

The Ministry of Justice highlighted that children could be affected by certain situations while testifying. Those would included:

"The imposing atmosphere of the courtroom; the repetition by the child in public of details of an event that is embarrassing or frightening; being in the presence of someone who may have abused the child and who may have threatened to harm the child or a family member if the abuse were disclosed; and the physical separation from a parent or trusted adult." [25]

Provisions needed to be implemented in order to reduce the trauma to the child witness and enable him to provide a full testimony.

Article 16.1 of Canada Evidence Act would assist in declaring children as competent witnesses through a series of preliminary questions while displaying comprehensive abilities in providing adequate answers.

Children and youth nonetheless face challenges when recounting an event as specifically and identically as an adult due to their cognitive abilities, their limited vocabulary, and their level of awareness being under development. For those reasons, the legal professionals are required to ensure that they are nevertheless competent witnesses and accept that a child's level of development be factored in for the prevalence of justice. Lawyers are required to ask questions in

[25]Ministry of Justice website, online publication, http://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/rr10_vic3/p2_22.html, "2.2 Accommodating Child Witnesses: Introduction", 2007, accessed on Feb. 26, 2016.

good faith by averting any tactics that could cause confusion or mislead, for lawyers know how this strategic approach of manipulation can be "useful" in a case for the defence.

Being concerned with such knowledge would assist lawyers including judges, in promoting a reliable testimony through appropriate lines of questioning.

"As recognized in R. *vs* J.W., by Tweedale, J., who quoted extensively from the Parliamentary debates leading to the enactment of Bill C-2, the use of closed-circuit television is intended 'to make it easier for child and youth witnesses to testify'. A television link permits the child to be examined and cross-examined from outside the court, in a smaller, less intimidating setting."[26]

Countless legal professionals acknowledge that intimidation may come in many forms.

1.3.2 Canadian Victims Bill of Rights (2015) and Bill C-2 (2006)

"On January 1, 2006, a number of amendments to the Criminal Code came into effect as a result of Bill C-2.This bill expanded upon already existing legislation that was passed in 1988 (Bill C-*15*, An Act to amend the Criminal Code of Canada and the Canada Evidence Act), regarding the testimony given by children and vulnerable adults."[27]

Many barriers were consequently addressed with this new Bill. Parliament realized that the stress heightened for children who had to recount the incidence(s) that occurred against a parent or someone they considered close. As many did not possess the social abilities to openly discuss with a stranger they just met, the emotional intelligence and cognitive abilities to understand the defence lawyer's role in search for the truth, the psychological abilities to manage their own emotions in addition to their own family's emotions, traumatic experience occurred, even with an available support person by their side. Without such intervention, psycho-socio-emotional problems for the children, the caregiver and the community would have continuously increased.

[26] Ministry of Justice website, online publication, http://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/rr10_vic3/p2_22.html, "2.2.2.1 Closed-circuit Television", 2007, accessed on Feb. 26, 2016.

[27] Northcott, M., "Facilitating testimony for child victims and witnesses", section " Background", Victims of Crime Research Digest, Issue 2, 2009.

Bill C-2 included the provisions of testimonials aids such as the CCTV, screens, support person, Publication ban orders, orders excluding public members out of the court and hearing amplifiers. Under this provision, the child was additionally given the opportunity to meet with a Child and Youth Witness Support Worker / Victim services advocate to address concerns and receive preparation for their testimony in court.

CHAPTER 2 – ETHICAL AND LEGAL THEORIES

2.1 Ethical and Existing Legal Theories

Alice Woolley, Professor and Associate Dean with the Faculty of Law, University of Calgary stated that there were an unreliable amount of theories of lawyers' ethics that justify "normative foundations". Some have supported certain theories while others created arguments keeping lawyers from adhering to the application of one specific framework. A theorist's role is nevertheless concerned with channeling the lawyers' behavior towards the conception of a well-guided approach to ethical dilemmas during legal practice and promoting a good natured public policy pertaining to the regulations of legal professions. Woolley added that their intentions and desires are to encourage a sound "well-lived life". Apparently conflicts between theories have created disagreements and confusion. While providing an example of such dilemma, she wondered if lawyers would consider a philosophy more focused on loyalty and morality towards clients and law as a plausible approach to ethical decision-making. She knew that an answer would not be forthcoming or easy to achieve since it would create plausible concern and lack of understanding especially for young lawyers.[28]

There are undoubtedly many approaches to address ethical decision-making situations from which great perplexity is generated. Woolley, therefore, initiated her own questions as to how disagreements are addressed when lawyers await an answer as a final fundamental approach to situational unease and uncertainty during their duties.

As a solution, she focused on a better use of theorists' scholarly resources by recommending a change in public policy that would affect the practice of law on a public level rather than on an individual level.[29]

Woolley discussed three theoretical approaches to the problem of lawyers' legal ethics which pertained to how lawyers put them into action:

[28] Woolley, Alice, "The problem of disagreement in legal ethics theory", Canadian Journal of Law and Jurisprudence, Vol. 26, p. 2, Cambridge University Press, UK, Winter 2013.

[29] Ibid, p. 2.

The first approach was the "political philosophers' defence" of the standard conception of the lawyer's role. In this law professional's view, the promotion of the innocence of the client and the strict uphold of the law and its limitations are needed to fulfill professional duties. The moral role however, is sought in the "legitimacy and authority of the system of laws". Throughout, the lawyer may invite his client to arrive at a moral goal rationale nevertheless, it is the "client's best interest and the requirement imposed by the legal system" that overrule any lawyer's personal decision. [30]

When considering this approach, Craig stated that a debate raged in "…the use of bias, stereotypes, and discriminatory tactics to advance the position of one's client."[31]

Craig (2014) acknowledged that the client requesting a defence needed to be well represented and defended against allegations. In doing so, she claimed that the law professionals had a duty to remain ethical and base their inquiries on an unfailing commitment to loyalty.[32]

The second approach tended towards a Dworkinian conception of the lawyer's role. William Simon, Arthur Levitt Professor of Law at Columbia University, stated that lawyers must view their actions as complying with "the internal morality of the law"; meaning that fundamentally, all decisions and actions made during legal functions must be based on the promotion of justice. In A. Woolley's article "The problem of disagreement in legal ethics theory", he denied any difference between law and morals.[33] Both were equal in value.

Simon added that the major role of a lawyer as an administrator of justice is to rely on "principles, policies, and informal norms." As such, the legal framework is structured by those important crucial decisions. Actions taken by those leaders define the integrity of the courts and

[30] Woolley, Alice, "The problem of disagreement in legal ethics theory", Canadian Journal of Law and Jurisprudence, Vol. 26, p. 10, Cambridge University Press, UK, Winter 2013.

[31] Supra note 16.

[32] Ibid.

[33] Simon, William, "Role Differentiation and Lawyers' Ethics: A Critique of Some Academic Perspective", Georgetown Journal of Legal Ethics, Vol. 23, p. 987, 2010.

the legal system, consequently introducing man as being capable of defining the future of all men. Clearly, Simon drew on the significance of doing justice through moral action which inevitably is supported by the written law. Morals and laws are two of the same, inseparable. Morals are viewed to be an innate notion that constitutes law for Simon, and this consequently leads man towards the realization of justice.[34]

David Tanovich, Professor at the Faculty of Law for the University of Windsor and co-editor of the Canadian Bar Review, highlighted in A. Wooley's article that moral action had to be made prominent. Meaning that fairness and the absence of discrimination should be at the forefront of any legal process dictated by law. Ideally, Tanovich believed that even though the law exists, man should strongly assess his ability to promote justice, reflective of equality and harm reduction. He added that our history brought the legal system to where it is today, based on remaining aware of our duty to avoid discriminatory treatment of witnesses and man's aptitude for all the above.[35]

The third approach relied on the "Ordinary morality critique". This theoretical approach identified discrepancies between the law and morality. It denoted that all functions and/or obligations related to law must be conducive to the experience of moral good at all times. Woolley added "when professional [role] and serious moral obligation conflict, moral obligation takes precedence."[36]

The relationships between those frameworks are conflicting and pose much debate as to which approach will help fulfill one's legal professional duties. Is it "that law and morality can be reconciled and together determine right conduct; or that law is divergent from morality and only

[34] Ibid.

[35] Tanovich, David M., " 'Whack' no more: Infusing equality into the ethics of defence lawyering in sexual assault cases", Ottawa Law Review, Vol. 45, p. 499, University of Ottawa, Ottawa, 2014.

[36] Woolley, A., "The problem of disagreement in legal ethics theory", Canadian Journal of Law and Jurisprudence, Vol. 26, p. 11, Cambridge University Press, UK, Winter 2013.

morality can determine ethics"[37]? As such, this provokes an interrogative response in deciding how to guarantee the best legal ethical decision expected from lawyers.

For Simon, even though ethics and law co-exist, he strongly argues that "all legal ethics problem have everything to do with issues within the law".[38] This conclusion proves that with the existence of many fundamental theories and ethical practices, more disagreements rise where the Law itself is concerned.

How can legal professionals develop an ability to rely on legal ethical frameworks and morality when disagreements are constantly being created?

Woolley uncovered the fact that Canadian law societies have lacked in providing guidance in the application of ethical rules. She added that some of the theoretical solutions were unfavorable to law governing lawyers as they created more confusion. This conclusion raises the question as to what specific doctrine or explicit ethical guideline should anyone rely on. What must lawyers then decide when faced with a challenging legal ethical situation that would offer them the possibility of becoming "civil disobedient" to professional obligations? Woolley stated that since there is no reassuring standard for law professionals, values, rules and regulations are therefore jeopardized and may result in "moral emptiness".[39]

2.1.1 A Non-Consequentialist Approach

The behavior of defence lawyers during court procedures has been studied from the points of view of different ethical frameworks including consequentialism and non-consequentialism.

Abbe Smith, Director, Criminal Defence and Prisoner Advocacy Clinic and Professor of Law at Georgetown University, derived a definition of what it meant for her to be a good defence

[37] Ibid.

[38] Ibid.

[39] Ibid.

lawyer. She viewed as acceptable in a fair prosecution, the use of whatever means in defending her client, even if this meant demoralizing and intimidating a witness; this is what a zealous criminal defence lawyer does.[40]

Abbe Smith can be thought of as belonging to the non-consequentialists, a deontological framework supporting an act which she would judge as good which nonetheless neglects the outcome of the defence lawyer's behavior during legal procedures. More specifically, she stated that while defending a client, making use of discriminatory remarks did in no way infringe ethical principles but demonstrate an interest for a client's cause. She added that one could not represent a client fairly while being zealous and inclined to acknowledge others' feelings. She said that "defence lawyers should recognize that prejudice is a fact of life and use whatever strategies are available to them."[41]

Another true fact which drew attention approximately fifteen years ago was explained by Tanovich in a *Lawyer Weekly* article. He stated that defence lawyers were directed to act in the following manner: "Whack the complainant hard at the preliminary inquiry" as to ensure that the witness would not return and be able to provide a complete testimony of her truth.[42]

The statement from which Tanovich was referring to was written by C. S Schmitz in 1998:

"Generally, if you destroy the complainant in a prosecution…you destroy the head. You cut off the head of the Crown's case and the case is dead. My own experience is the preliminary inquiry is the ideal place in a sexual assault trial to try and win it all. You can do things…with a complainant at a preliminary inquiry in front of a judge, which you would never do for tactical, strategic reasons – sympathy for the witness, et cetera – in front of a jury… you've got to attack the complainant with all you've got so that he or she will say I'm not coming back in front of 12 good citizens to repeat this bullshit story that I've just told the judge."[43]

[40] Smith, Abbe, "Defending defending: the case for unmitigated zeal on behalf of people who do terrible things", Hofstra Law Review, Vol. 28, p. 954, Hofstra University, Hempstead, NY, USA, 2000.

[41] Ibid.

[42] Supra note 35.

[43] Schmitz, Cristin, " 'Whack' Sex Assault Complainant at Preliminary Inquiry", The Lawyers Weekly, Vol. 22, p. 741, 1988.

Considering all the work involved in ensuring a fair and honorable practice through rules and regulations, he added that to this day, this type of behavior is still ongoing. To want to "destroy" another human being during a testimony with such distressful impact is unbelievable but persistent in criminal court proceedings thus due to incompetence and/or ignorance. This type of behavior and this level of awareness for the other, more specifically for the integrity of the human being is lost through this zealousness. Why such a display of harshness to win a court case? Is that a fair prosecution? Is this what it means to represent a client only to destroy another? Tanovich realized that this "style of advocacy" held an unfair treatment for the witness as well as the justice system. [44]

He reassured that the culture of defence has discouraged men and women of the Law to pass on their abilities for proper ethical decision-making by becoming zealous at defending their client. He acknowledged that the law reform has failed by not making professionals accountable for their actions in court settings, hindering any denouncements to ensure fairness in the prosecution of sexual assaults. He felt that the present was the time to confront the discrimination and the decline of access to justice that is occurring in these cases.[45]

Craig held the opinion that being zealous did not infringe on one's loyalty to his duties but the repeated unethical behavior did contravene the ethical responsibility of the legal professional.[46] Craig knew that lawyers needed to promote justice by defending the innocence of their client, nevertheless, an ethical approach invalidating bias, stereotypes and discriminatory tactics would not violate the advocate's role but would ensure that everyone's constitutional rights were respected. A consequentialist approach is hence, more favorable in ascertaining this goal.

[44] Supra note 35.

[45] Ibid.

[46] Supra note 16.

2.1.2 A Consequentialist Approach

Contrary to the previously identified approach, the article authored by Elaine Craig concluded that ethical obligations taken by defence lawyers should be at the forefront, and even the most zealous lawyers are to recognize the importance of eliminating any aggressive or discriminatory attitudes during cross-examination of witnesses. David Layton, a defence lawyer in 2004 but has since become a member of the Law Society of British Columbia disciplinary hearing panel pool stated that "Defence lawyers must sometimes promote values other than their client's best interest, and routinely bring their own judgment and perspective to bear in addressing ethical issues" [47] Consistent with the above view, Tanovich underlined that: "Defence lawyers have largely escaped scrutiny despite the fact that they have significantly contributed to the systematic problems with our treatment of sexual assault and those victimized by it."[48] His ethical framework for defence lawyering included equality, which consequently promoted balancing between the interests of the accused and the complainant.

These authors strongly inferred that the Canadian victims' rights (Bill C-2), which protects victims from intimidation, could easily be devalued through a lack of ethical decision making abilities during court proceedings.

Contrary to non-consequentialism, the underlined ethical approach of the latter authors relied mostly on a teleological framework, where moral goodness is found in its consequences.

The present study will reiterate what has previously been acknowledged by some authors, including Woolley who concluded that law professionals should not rely exclusively on doctrine or others to provide them with the appropriate actions or proper ethical decision-making.[49] What document, jurisprudence or norms should defence lawyers therefore rely on in order to make sound ethical decisions? Moreover, when the defence lawyers do not consent or respond fairly to

[47]Layton, David, "The criminal defence lawyer's role", Dalhousie Law Journal, Vol. 27, p. 379, Dalhousie University, Halifax, Fall 2004.

[48] Supra note 44.

[49] Supra note 36.

their ethical obligations during the examination of a witness, how shall the judge address this issue? Michael Code, Professor and recently appointed to the Superior Court of Justice, expressed that the Law Society needed to recommit "to the ideals of civility, both for pragmatic reasons of trial efficiency and for normative reasons relating to public respect for the administration of justice."[50] Throughout his research, this legal scholar promoted a strong view with regards to ideal practices by lawyers underlining a consequentialist approach.

Trevor Farrow, Professor and Associate Dean at Osgoode Hall Law School stated that this profession must initially examine how law professionals "ought to act" as a part of a fundamental approach to ethics, namely legal ethics.[51] When a profession is recognized for its expertise on the meaning of justice, then consequently the motives behind a behavior is predetermined by such an understanding.

In the same context and adding to the concerns, Craig emphasized on the lack of training judges had in the wake of the highly inappropriate and distasteful comments made by Manitoba Superior Court Judge Dewar in R vs K. Rhodes which could have prevented the re-victimization of witnesses. A brief synopsis included comments Justice Dewar stated after the accused was found guilty of sexually assaulting an aboriginal woman:

"Penetrating her vagina with his fingers and his penis, penetrating her anally with his penis, and assaulting her genitals with his mouth that 'this is a case of misread signals and inconsiderate behavior'. He added that the victim was wearing a tube top without a bra, makeup, and high heels and then suggested that 'sex was in the air'. He emphasized that all of the parties had been drinking heavily, that there was no violence knowingly imposed by the accused and that the complainant did not run away."[52]

Craig captured explicitly what this research's concerns are. She highlighted that words are powerful and can be extremely damaging not only to witnesses but to the judicial system;

[50] Code, Michael, "Counsel's duty of civility: an essential component of fair trials and an effective justice system" Canadian Criminal Law Review, Vol. 11, p. 97, Carswell, Toronto, February, 2007.

[51] Farrow, Trevor C. W., "Sustainable professionalism", Osgoode Hall Law Journal, Vol. 46, p. 61, York University, Toronto, Spring 2008.

[52] Supra note 16.

especially the Canadian Judicial Council, a highly regarded institution known for training and raising competent law professionals.

Knowing how to communicate with the vulnerable sector, is essential and crucial in ensuring that an ethical environment is created during the administration of justice. When the judicial system can override legal ethical responsibilities when it comes to the intimidation of children, something needs to be done.

Code understood that the Law Society, the courts and lawyers should build on civility in order to promote fairness in trials and "public respect for the administration of justice."[53]

2.1.3 Ethical Decision-Making and Legal Theoretical Disagreements

Legal ethics derive from theories that frame a lawyer's behavior in such a way that favors acceptable norms of practice and "helps lawyers achieve a well-lived life", as Alice Woolley expressed.[54] This is wonderful in theory, however, there are many disagreements continuously being raised within the professional legal practice. A virtuous profession demands appropriate moral response but when such isn't given a normative value in the eyes of the law, the conclusion is left to one's limited beliefs and training. She stated:

"Whether the problem of disagreement creates an actual problem for guiding ethical decisions by individual lawyers depends not only on the fact of irreconcilable disagreement between the theories, but also on the nature of how individual lawyers perceive and respond to moral problems."[55]

Woolley underlined that the theorists are not able to provide a sense of direction and normative model for the lawyers to rely on since all theories are found to be in disagreement with one

[53] Supra note 50.

[54] Supra note 36.

[55] Supra note 36.

another. Despite the will to provide certain theoretical reasoning when lawyers encounter ethical dilemmas, there are still no solutions providing them with a strong course of action.

2.2 A Qualitative Study

2.2.1 Boost Child Abuse Prevention and Intervention (Toronto)

A two year study (2006-2008) by Boost Child Abuse Prevention and Intervention (Victims of Crime Research Digest, 2009) in Toronto was conducted in order to find out how child victims managed during their testimony as witnesses with the provisions as set out in Bill C-15. Results showed that in general the child witnesses did well with the provisional supports specific to their needs; however there were important variables that were not considered that could have rendered this study just. These variables will be further discussed. The following information has been taken from the Victims of Crime Research Digest 2009.[56]

"The study involved children under the age of 18 over the age of 6 and the use of provisions such as the CCTV room, the screen and a support person to facilitate their testimony. Volunteers were trained to conduct and record observations of the child witnesses during their testimony at the preliminary hearing and again at trial."

"There were 96 recorded events with 67 "unique cases before the court "; 87% in Ontario Courts of Justice and 11% in Superior Courts and 2% in Youth Courts. 30% of the children had the opportunity to testify in child-friendly courtrooms."

"The majority of witnesses were females (61%). 96% of the accused were male and 1% youth where 30 % of the charges were against a biological family member and 7% were against a non-biological family member. Pertaining to sexual assault charges, 21% were against a biological family member and 16% against a non-biological family member."

"Provisions of testimonials aids such as the exclusion of witnesses was used for 91% of the children, publication ban with 70%, voice amplifier with 65%, witness screen with 40% and the

[56] For additional information please consult: Victims of Crime Research Digest 2009, http://www.justice.gc.ca/eng/rp-pr/cj-jp/victim/rd09_2-rr09_2/toc-tdm.html

CCTV with 24%. A support person was requested for 64% of the children while 54% were ordered by the judge."

"Children spent an average of 146 minutes (2hrs, 26min) testifying; the majority spending between 90-120 minutes (1.5hrs-2hrs). They spent most of their time in cross-examination with the defence lawyer, approximately 83 minutes in average, followed by the examination-in-chief (with the prosecutor) for 40 minutes."

"There was no difference between the age groups with regard to likelihood of being re-examined, nor was there a difference in duration of the re-examination between the age groups."

"In 17% of the cases an inquiry in the child's, under 14, ability to testify was rendered. In only 1 case did the defence lawyer raise an issue with the child's ability to testify."

"60% of the children were observed focused, composed and calm while viewing their video statement while 38 appeared restless and 7% crying."

"For the children observed during examination-in-chief, 75% seemed calm and composed, 41% were asked to speak louder and 29% asked for additional explanation of the question. In 13% of the cases, children were subjected to language beyond their development and 9% were observed crying."

"During cross-examination by the defence lawyer, 82% were observed as calm and composed, 55% were asked for additional explanation of the question and 44% were asked to speak louder. 28% of the children were subjected to language beyond their development and 18% were observed crying."

"Some children were asked questions that were beyond their 'language acquisition', more particularly by the defence lawyer; this is likely a consequence of the adversarial nature of the defence's role and of the fewer opportunities defence counsel may have had for training and awareness on working with child and youth victim/witnesses."

For the purpose of this research, the characteristics of the charges will not be discussed.

Their conclusion warns that due to "A number of missing values in some cases, the preceding analysis must be interpreted with some caution and the results cannot be generalized to all children and youth …." It was observed that while many children cope well while testifying, some were uncomfortable with the judicial process.

2.2.1.a Boost Study Critique

It is not enough to solidify conclusions relating to the effects of cross-examination on victims solely based on observational results. Realistically speaking, how many times do accidents occur and witnesses differ in their versions of the events? Observations are subjective. What one person observes, others may not. Add a professional background with expertise in child development and the results will be different.

Furthermore, the individuals involved in this study were recruited volunteers. Making a qualified observation is an acquired skill and is developed in time. This skill cannot be attained through a brief training such as what was received by these volunteers. An expert with a background in child studies to understand child development, language acquisition and the similar would be required to make this study valuable. In addition, one must not be misled by the absolute conclusion of an observation, for many children are very intelligent and skilled at providing a false "image" when managing stress, being questioned or confronted by strangers and so on; this also depends on the age and the times they were exposed to situations of moral concern. Child studies show that children will behave in a manner that is acceptable to their caregiver (see 2.2.2 - L. Kohlberg- Pre-Conventional Morality theory - Stage 1). Therefore, when they are told to be "strong" they will just portray that.

It is also important to consider the frequency and duration of "breaks" the children in this study were given during these interviews. Have any of the children made a request for breaks? If so, how many? What was the length of the breaks? Nevertheless, the attention span of a child varies and is influenced by many issues such as needing to go to the washroom, wanting a snack or even needing to relax. It is therefore not clear whether all the young children involved in this study remained sitting for hours without some type of distraction, lack of focus and so on.

In addition, how an observer with no professional experience or ongoing training in child development would recognize that the child who was seen as calm when in fact the child could have been daydreaming, losing focus or perhaps even disassociating from the stressful situation? Any person without the proper education or training observes a child through their own lens and not through the lens of a qualified early childhood educator, teacher, social worker or therapist.

Before the examination-in-chief (a time during court proceedings when the prosecutor's role is to prove beyond a reasonable doubt the allegations of the crime committed by the accused), the Crown prosecutor would have met and gotten to know his witnesses. Why were there still 13% of children asked questions that were observed to be beyond the scope of their age and 29% who needed clarification of the question being asked? The Crown would have evidently known his client's developmental level and been elemental with his questions.

While in cross-examination (a time after the Crown prosecutor's queries when the defence lawyer asks the witnesses for additional clarification and becomes suggestive), wouldn't have he observed the child's responses and been more sensitive to the child's level of comprehension? Acknowledging that these lawyers are all supposed to be experts in the field, why the same issues exist with both lawyers? The defence lawyer used a vocabulary that was unclear to the child in 28% of the cases and in 55% of the cases, the children asked for clarification of the question asked.

Under the Model Code of Professional Conduct, lawyers must abide by all regulations, not just the ones that come easy to them. From this study, it is concluded that the following articles 2.2-1[2]; 3.1-1 and 3.1-2[2] were breached.

This would mean that if a lawyer does not have the necessary skills to conduct a sensitive interview with a child, he/she must either acquire the knowledge or assign the interrogation to someone else.

Have either lawyers followed these specifics in articles 3.1-2[3] and 3.1-2[4] accordingly?

If any law professional does not know how to address and talk to a child appropriately, one must acquire training.

Moreover, there are other unanswered questions :

If the median age of witnesses testifying is 13 and only 17% of the children were queried as to their ability to provide reliable testimony, doesn't this mean that there is an important number of children who weren't queried?

Where are the specifics on the re-examination? How long was the duration of the questions on the child on average? How did the child seem after being asked questions of similar nature three times over?

What happened with the observational study during the break(s)? Were the volunteers provided with a break while the children were still restricted from leaving and had to remain in the anti-room or hallway? Wouldn't this have been a crucial time to observe the children in a "safe environment" close to his caregiver to see how they fared? Most children in a strange environment will often ask questions as to, if they can leave, how long do they have to stay, why do they have to be there, and even break down to possibly release some tension to be told they weren't done being questioned. These important factors would have been central in promoting a genuine study.

What about those observations once the hearing has been completed? The children are evidently faced with more emotional outcomes, wondering and questioning how they did, what will happen next, once they left the courthouse would they be followed by the accused or the accuser's family/friends, when would the accused be found guilty? Wouldn't these queries prompt emotions from the child victim/witness? What are the experiences lived by the children after such a stressful situation? What were their questions pertaining to how they felt while being questioned?[57]

These important concerns confirm that this study is not a reliable document. A consequentialist approach would have considered these previous questions. The wellbeing of the child should not only be evaluated through observation but must include an active interaction between the child and the assessor; treating the child as a moral agent capable of sharing reactions and anxieties. Professionals with the appropriate educational background and training would have been able to approach this study differently.

[57] For additional information on the psychological effects of providing a testimony as a child see Rimer, P., and McIntyre, B., "The court observation study: collaborations beyond expectations", Victims of Crime Research Digest, Vol. 1, p. 28, 2008.

2.2.2 Moral Development Theory (L. Kohlberg)

"What is moral reasoning? It is the ability, demonstrated by all cognitively typical human beings, to reason through to, and explain, moral conclusions in terms of moral concepts." "Thus, as documented by Kohlberg, people begin as pre-conventional moral reasoners, resolving moral problems by reference to the power of someone in authority ('you'll be punished if...' -- Stage 1 reasoning), or to self-interested transactional or bargain-based concerns ('if I act well for others, they'll act well to me...' -- Stage 2 reasoning)."[58]

These first two stages reflect Level I: Preconventional Morality. Human beings begin at this level and then graduate to the following.

Level II, Conventional Morality, is comprised of Stage 3 which looks at the essence behind any decision, the principles used and the good that it brings to the other; a decision that would reflect rights and justice and be shared by the community. Then Stage 4's "emphasis is on obeying laws, respecting authority, and performing one's duties so that the social order is maintained" [59] for the whole as a whole; which is for Kohlberg, the last stage people will reach.

Level III's Stage 5, Postconventional Morality, focuses on discovering a universal principle of working towards a concept of the good for the whole. Kohlberg mentions that the way to achieving this goal is through empathy, seeing the other through one's own eyes while ensuring full and equal respect. Kohlberg believed that achieving justice had to be done impartially while respecting the dignity of every individual. While pledging to protect one's own individual rights, the violation of any law on the principle of morality for example, through civil disobedience was allowed. Kohlberg noted during his study that Martin Luther King believed that the higher principle of justice required such disobedience .[60]

[58] Supra note 36.

[59] Crain, W.C., "Theories of Development". Prentice-Hall, pp. 118-136, 1985. Online publication http://www.cs.umb.edu/~hdeblois/285L/Kohlberg%27sMoralStages.htm, accessed on May 31, 2006.

[60] Ibid.

Woolley stated that studies have found lawyers and law students to be more prone to Stage 4 reasoning (Maintaining Social Order) which consists of taking into consideration the law for which they are bound to when providing a response to a moral problem. [61]

Even grounded in justice, this does not mean that a law professional, or any individual owns the right to disregard the good of the other, moreover the good of the society. It may be challenging to disobey the law to support the right to justice since ranking in the legal community, the society's opinions and the approach taken to deal with a case and the lives affected by such decisions might verily affect how the law professional is perceived. One's own insecurities could additionally create inner struggles that could stem from ethical decision-making. That being said, implementing moral judgment which is charged with "good", may be an important risk to take in view of the fact that compliance is necessary to respect the dignity and integrity of all human beings. A consequentialist approach ensures that the result is focused on the other, where morals are the foundation of such ethical-based decisions.

[61] Supra note 36.

CHAPTER 3 – ANALYSIS OF THEORETICAL FRAMEWORK

The main sources of information and data for the present research will be peer-reviewed journal articles which will include but not limited to research papers appeared in "Canadian Criminal Law Review", "Canadian Journal of Law and Jurisprudence", "Hofstra Law Review", "Osgoode Hall Law Journal", "Ottawa Law Review", "The Advocates' Journal", "University of British Columbia Law Review" and "Windsor Review of Legal and Social Issues". Other resources will include government reports or supplementary public domain reports prepared by or for reliable, non-government organizations in addition to the works of Aristotle and Jeremy Bentham on their philosophical frameworks on consequentialism and virtue ethics.

3.1 Ethical Frameworks

3.1.1 Consequentialism vs. Non-consequentialism

Sopinka in R vs. Stinchcombe stated:

"The tradition of Crown counsel in this country in carrying out their role as 'ministers of justice' and not as adversaries has generally been very high. Given this fact, and the obligation on defence counsel as officers of the court to act responsibly, these matters will usually be resolved without the intervention of the trial judge. When they do arise, the trial judge must resolve them."[62]

The non-consequentalist tendency is where the problem seems to derive. Judges, who are given the responsibility of ensuring that lawyers remain ethically professional at all times, have neglected to pursue an adequate ethical framework in courts of law. Moreover, the required level of competency for swiftly refuting any behavior that would contradict Bill C-2 of the Criminal Code of Canada and Canada Evidence Act, a legislated endeavor meant to protect victims from intimidation through aggressive cross-examination, should be of prominence. It is therefore pertinent and necessary to rectify this situation since we are still being alerted of such re-

[62] Supreme Court of Canada, https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/808/index.do, 1991, p. 326, accessed on Feb. 3, 2016.

victimization in our daily court proceedings. Formal training should therefore be reassessed. A non-consequentialist approach in the previously mentioned incidences has permitted much damage to individuals and society i.e. victim witnesses and the Canadian Judicial Council. A consequentialist approach in similar circumstances would have considered the outcome of a lawyer's and the judge's conduct. The impact and ripple effect on the lives of all involved would have been defined. As Kohlberg previously stated, when a person can see himself through the other, another level of awareness becomes apparent which creates a need to do good.

3.1.2 Teleological Approach (Jeremy Bentham)

Teleological ethics has been used throughout this study as the framework in which the problem of revictimization of children in criminal court proceedings is examined. The teleological approach, one that was originally founded by Jeremy Bentham is supported by Ronald White, Professor of Philosophy at College of Mount St. Joseph, who stated that:

"… Moral theories locate moral goodness in the consequences of our behavior and not the behavior itself. According to teleological (or consequentialist) moral theory, all rational human actions are teleological in the sense that we reason about the *means* of achieving certain *ends*. Moral behavior, therefore, is goal-directed."[63]

In relation to understanding moral goodness, Bentham explained that the meaning and the importance of knowing the interest of his community was of great importance but the implementation of such concept had been neglected by many community leaders.

"One thing is said to promote the interest or having the interest of an individual when it tends to add to the sum total of his pleasures: or what is the same, to reduce the sum total of his pains."[64]

[63] White, Ronald F., "Moral Inquiry", College of Mount St. Joseph, p. 11, online publication, http://faculty.msj.edu/whiter/ethicsbook.pdf, accessed on Feb. 1, 2016.

[64] Bentham, Jeremy, "An Introduction to the Principles of Morals and Legislation", Oxford: Oxford University Press, 1907, Section 1.6, online publication, http://www.econlib.org/library/Bentham/bnthPML1.html , accessed on March 7, 2016.

Lawyers' behavior puts directly and indirectly into cause possible future effects on the lives of the complainant and on the society. Based on such ethical framework, lawyers would be seen as conducting themselves in a manner considerate of the young victim/witness' vulnerabilities (cognitive, emotional and developmental limitations). The development of such appropriate behavior can only be done through a continued educational process. This approach would then provoke a focused-end result that is good and desirable for all in the end. Acknowledging that members of society, more specifically children, attempt to secure a "normal lifestyle" after criminal court proceedings, this approach would assist these individuals in knowing that they no longer have to fear being victimized by ardent defence lawyers whose priority lies solely with their client.

Bentham believed that in order to reach the "greatest good for the greatest number"[65], laws needed to be established through prioritized reasoning since most problems are created by moral feelings. Understandably, emotions should not take precedence. Reason should define principles after which morality can surge from this enlightened process.

Therefore once law professionals understood the client's emotional, psychological development and how to communicate with them, a better position to observe vulnerabilities and become morally inclined to do good would emerge. Craig pressed on the fact that it was essential for lawyers to be ethical in their approach since their aggressive and discriminatory attitudes hindered their commitment to justice and their capacity for appropriate decision-making.[66] Deterrence to a fair trial and to a victim's right not to be intimidated manifests itself when such awareness is ignored. This said, education needs to supersede in order for a moral outcome to take place.

This theoretical approach would additionally support judges and their tasks to enforce justice. This *means* would provide a framework that would ensure that all judicial proceedings are fair while endeavoring to oblige all law professionals to be responsible for appropriate ethical

[65] Archie, Lee and Archie, John G., "Reading for philosophical inquiry: a brief introduction", Chapter 23, p. 252, online publication, 2004, http://philosophy.lander.edu/intro/introbook.pdf , accessed on March 7, 2016.

[66] Supra note 16.

decision-making through an understanding of children. The judges would consequently be supported by a ruling that would mandate them to quickly refute any behavior that would harm the victim witness. Part of this discernment could come by learning the difference between pleasure and pain and understanding the gains individuals attribute to each.

Years ago, Bentham managed to explain in *Principles of Morals and Legislation* how to take account of the pleasure and pains behind an act meant towards the subject individual and reduce it to its fundamental value as a quest to perceive how the interest of a community is affected.[67] Bentham thought that all persons should take part in this exercise since everyone could personally benefit from its value. Relating this concept to the legal aspect of things, the pleasures taken by the accused or by the defence lawyer should not in any way eclipse the victim's pleasure in the calculation of its means. However, to consider all judgments for a moral decision to take place, time and patience are necessary since this can prove to be a very tedious task to accomplish. This should nevertheless always "be kept in view" as Bentham would say.[68]

3.1.3 Virtue Ethics

It is essentially not enough for moral beings to look at future effects on children, since a fundamental approach to behavior begins with virtues. This ethical framework would additionally and evidently enhance the professional framework of Law by trying to help lawyers recognize their individual responsibilities.

Aristotle was an eager philosopher on the subject of virtue who emphasized his reflections through his work in Nicomachean Ethics. W.D. Ross paraphrased Aristotle who maintained that morals and politics could not disassociate, for man was a moral agent living in a political society which made him a political animal. Aristotle understood that his approach did not constitute a

[67] Bentham, Jeremy, "An Introduction to the Principles of Morals and Legislation." Oxford: Oxford University Press, 1907, Chapter 4, online publication, http://www.econlib.org/library/Bentham/bnthPML1.html , accessed on March 7, 2016.

[68] Ibid.

theoretical framework but an examination of what it is to be good, what we ought to do in order to "determine also the nature of the states of character that are produced…."[69]

Contemplating on a proper definition of what virtues meant, Aristotle came up with the following as cited by Ross in Nicomachean Ethics:

"Virtue, then, being of two kinds, intellectual and moral, intellectual virtue in the main, owes both its birth and its growth to teaching (for which reason it requires experience and time), while moral virtue comes about as a result of habit, whence also its name (ethike) is one that is formed by a slight variation from the word ethos (habit). From this it is also plain that none of the moral virtues arises in us by nature; for nothing that exists by nature can form a habit contrary to its nature."[70]

To put an emphasis on this rationale, Aristotle believed that to become a virtuous individual, one had to be compelled to develop a habit of performing virtuous behaviours since this way of being was not natural to man. Conscious of this, Aristotle reminded that it was nevertheless, the community leaders' responsibility to train its members of the importance of virtue. Ross supported Aristotle by stating that the members were only as good as the community legislators since they are the ones shaping and promoting adequate ways of being. The societies who "miss their mark" and do not support the *good* are the ones neglecting the performance of their community.[71] This is exactly what is occurring in the judicial system today. In addition, the legislators and the legal ethical theorists do not provide a strong support benefiting the wellness of the community members.

To impress on this notion of virtue, Ross who stated Aristotle explained that individuals had to undergo a thorough interview of themselves by looking at the felt emotions and the possible reactions all the while determining how to achieve the best outcome for the common good. In the end Aristotle stated that this way of being was a voluntary assignment since making good

[69] Ross, W. D., "Nicomachean Ethics, Aristotle, Book II", p. 22, online publication, http://socserv2.socsci.mcmaster.ca/econ/ugcm/3ll3/aristotle/Ethics.pdf, "Nicomachean Ethics of Aristotle PDF", 1999, accessed on March 2, 2016.

[70] Ibid, p. 20.

[71] Ibid, p. 21.

decisions was about facing pain. Nonetheless, decisions of this nature would result in the educational process of a virtuous being.[72]

For these reasons, there needs to be mandatory training of such kind in the law professionals' educational requirements. The *means* could easily lead to the development of a skill that could illicit an end that would consequently reap continuous benefits for the good as a whole. Explicit training on the topic of virtue seems nonetheless fundamental for any community member to develop.

3.2 Rationale for a Consequentialist Approach

Lawyers, more specifically defence lawyers, regularly seem to take on a non-consequentialist approach when a situation involves the vulnerability of a child victim/witness because their *means* rarely justify their *ends*. Their approach tends towards supporting the written law and defending their client at all cost without considering the impact of their behavior on the witness. To elaborate, some would argue that fairness or justice is what counts in a court of law since it is concerned with what is right and what can be generated by a rational individual. As Smith previously mentioned, the ability to empathize or involve emotions is something that should be contained and absent from any decision-making process since it impedes on the legal obligations of a client's fair representation. A consequentialist approach on the other hand, suggests a willingness and an investment of time and morality towards the *good*. This involves an evaluation of the happiness and the pain the act(s) could create in order to conceive a foreseeable outcome benefiting all concerned. Consequentialism engages individuals to a personal account and assessment of one's behaviors creating an atmosphere of responsibility for all action taken. A challenge however rises in what Aristotle calls a "*refuge in theory*".[73] People do not necessarily take action when required to do so. Individuals tend to rationalize situations prior to engaging in any act, attempting to weigh the benefits for one's self instead of acting on what is morally right.

[72] Ibid, p.75.

[73] Ibid, p. 25.

Individuals claim to want to do good, have good intentions but do not necessarily follow through. In the legal world, legal professionals are stunned back due to wanting to defend their client, neglecting to consider what is the responsible act towards the common good. Throughout, taking pleasure in destroying a witness or evidence in order to win a case is what regularly takes over.

However, when a consequentialist approach is taken, a lawyer becomes aware of the costs and benefits of his actions on the whole and on himself as part of the whole. As this level of awareness is being developed, the lawyer attempts to observe and consequently respect the vulnerabilities of a child witness during his duties as an ethical representative of the law. By remaining conscious of his ability to be zealous in his approach, he can move to reduce the occurrence of re-victimization by then becoming empathetic. This teleological approach which enables a person to generally predict the effects that legitimize certain behaviors helps to determine certain *means* to gain a certain moral *end*. Therefore, a change in approach would have to be encouraged or willed in order to obtain a good or desirable result for the all concerned.

In this twenty first century, there exists an even greater realization of the people's connection to each other which reflects a conscious mutual concern of responsibility and accountability towards one another. This approach seems therefore, feasible to realize.

The late Superior Court judge Lax stated that from her experience, lawyers have thus far built their own community and have resolved to respect this way of being and behaving since forever. The refuge in theory is very prominent at this level of organization since lawyers have succeeded in creating their "own standards of professionalism and ethics."[74]

A consequentialist approach is what Beverley McLachlin, Chief Justice of Canada also confirmed in her thinking. She underlined a need for openness and contribution towards a better way of addressing witnesses; an evolution built on "new models of lawyering that may challenge

[74] Lax, Joan L., "Professionalism: An old idea but a new ideal", The Advocates' Journal, Vol. 28, p. 13, The Advocates' Society, Toronto, Summer 2009.

what we perceive to be our core values but may better address our aspirations –equality, access to justice, protection of the public interest."[75] She added that the concern for others is what needs to be sought and to deny such view would warrant a decline in justice.[76]

Defence lawyers' professional responsibilities are clearly stated by the Law as a condition of their practice; hence they treat these as being absolute and they follow these imperatives categorically. This is of concern. A new consequentialist approach to moral responsibilities of law professionals therefore needs to be implemented and exercised in order to provide witnesses with a more acceptable and proper experience of the criminal court justice system: one that considers both children's vulnerabilities and professional educational opportunities as a *means* to minimize the risk of immoral practice in the court of law.

By educating law professionals on the child's and youth's levels of development, law professionals including judges would be subject to developing an enhanced understanding of different communication and interviewing skills in relation to children's cross-examination. These professionals would consequently be in a better position to acknowledge what is morally acceptable, ensuring the realization of an *end* that is good and desirable and in such, acquired through a teleological ethical framework.

[75] McLachlin, Beverley, "The challenges we face" (Remarks to the Empire Club of Canada), University of British Columbia Law Review, Vol. 40, Toronto, October 2007, http://speeches.empireclub.org/62973/data, accessed February 3, 2016.

[76] Ibid.

CHAPTER 4 – ARGUMENTS AND DISCUSSION

What makes the present work a novelty is its unique approach in the introduction of the concept of basic education for lawyers and judges which has been proven to work. Formal training of the children and youth developmental stages with a focus on communication and interviewing skills in order to obtain a more comprehensive interview is the consequence we are looking for. This would allow professionals the time to learn to respect all aspects of children and youth consequently promoting fairness, justice and equality in the Canadian judicial system. This approach is the underlying framework of consequentialism.

The conclusion of the Toronto Boost study from 2006-2008 strongly suggested that one of the factors as for why children were traumatized was the lack of training by defence lawyers in the area of communication.

"This is likely a consequence of the adversarial nature of the defence's role and of the fewer opportunities defence counsel may have had for training and awareness on working with child and youth victim/witnesses."[77]

Due to the fact that many of the child witnesses were asked questions that reflected an interaction with a lawyer with a vocabulary level beyond their years, this caused concern.

We have confirmed that it is a requisite to have the expertise to be able to conduct specific matters with proficiency in a legal system. If the Law Society Act, 2013, the Model Code of Professional Conduct stipulate on competency, who verifies this knowledge? Genuineness and good faith doesn't seem to be of priority for some many law professionals. This is of grave concern.

In fact, how is a defence lawyer not being intimidating when sitting within proximity of the child victim/witness being confrontational about the deficiencies in his testimony? When this strange person in a suit actively staring at the child while making attempts at intimidating, ridiculing and minimizing the experience of their trauma, isn't this not re-victimization? A moral individual

[77] Northcott, M., "Facilitating testimony for child victims and witnesses", Victims of Crime Research Digest, Issue 2, p. 22, 2009.

aware of the child's vulnerabilities, abilities and of his own behavior would nonetheless know the potential impact that he could have on a child.

As previously mentioned, Bentham explicitly stated that in order to serve the community's best interest, one must know its members. How can expert legal professionals not acknowledge the impact of their behavior on a child victim/witness? Throughout this research, the interest of the community was tailored as a fundamental concept to respect by every member of the judiciary, Societies, Foundations and Government. Conceiving a strong notion of child and youth vulnerabilities would therefore create greater awareness and ultimately eliminate the introduction of re-victimization *means*.

The opinions presented by many legal experts indicate that the dedication of lawyers to defend their client through an aggressive examination is necessary and acceptable in creating a reasonable doubt. This has been verified but, reasonable doubt can nonetheless be created by methods other than bullying. This is not advancing the cause of justice in good faith.

Much emphasis in legal theoretical approaches has its focus on the reasons behind certain behaviors displayed by lawyers. Many disagreements have consumed hours of debate amongst these “experts” which consequently have paralyzed and stumped moral growth by allowing rationalization and normalizing of intimidation. Such demeanor has disabled lawyers from making good ethical decisions, developing the crucial aptitude called ethical decision-making and made children victim of their ignorance.

The novel approach presented in this study reconciles with these theories by acknowledging the value of a child. The proposed fundamental training allows for fewer discrepancies since it foresees its benefits once the knowledge is applied regularly to the legal practice and forgoes any concern for not doing the “right” thing. This in fact is a teleological approach.

Canada Evidence Act states on one hand that children are placed "…on a more equal footing to adult witnesses by presuming testimonial competence."[78] On the other hand, the government has properly acknowledged that, by requiring children to give crucial evidence during court proceeding, adjustments had to be considered in order to facilitate this process. Unquestionably provisions were consequently made available for the child witnesses. Tanovich has nonetheless showed concern with the fact that even though certain provisions were put in place, he demonstrated that "Defence lawyers have largely escaped scrutiny despite the fact that they have significantly contributed to the systematic problems with our treatment of sexual assault and those victimized by it."[79]

Scrutiny has evidently been dismissed in a court of law, or at least disregarded with the changes of Acts. Abiding by provincial laws that allow children to be put at equal value as an adult when it comes to their testimony is outrageous. Without any objection from any of the judiciary members, these children are expected to survive the same experience as an adult with the knowledge, skills, cognitive and physical development and to come out of it strong and healthy. Is this what the parliament desires legislation to promote and its legal professionals to support? The manner in which legislation is applied shows a lack of comprehension from the legislators when children and youth are put on the same level as an adult, clearly obstructing children's rights of freedom from intimidation. A consequentialist framework would conceive that Section 16.1of Canada's Evidence Act be underlined with an assurance to properly address a child through appropriate communication and interviewing competences.

With due respect, when judges do not receive training that would enable them to perceive or observe the intimidation made towards a child witness during the cross-examination, this is concerning. Moreover while many changes with regards to victims' rights have been endorsed, judges are still mandated to implement what is stated in legislation; however the judges seem to

[78] Government of Canada, Department of Justice, "Testimonial Support Provisions for Children and Vulnerable Adults (Bill C-2): Case Law Review and Perceptions of the Judiciary", 2.1.4 Constitutionality of Section 16.1 of the Canada Evidence Act, (52), online publication, http://www.justice.gc.ca/eng/rp-pr/fl-lf/famil/rr10_vic3/p2_213.html, accessed on March 28, 2016.

[79] Supra note 35.

be conditioned by a lack of awareness when it comes to promoting a child/youth and vulnerable person witness' wellbeing in their courtroom. It is therefore apparent that there is a need for some instruction to ensure healthier examinations and prompt responses to irresponsible *means* when dealing with children compared to what is occurring in the justice system at the present time. For such reasons, Elaine Craig (2014) did not shy away from emphasizing on the lack of training judges had in the wake of the highly inappropriate, distasteful comments made by a Superior Court judge when his behavior precluded the re-victimization of witnesses.

Under a similar impression, Tanovich concluded that the culture of defence had encouraged men and women of the law to deter from proper ethical decision-making by becoming zealous at defending their client. He acknowledged that "with the failure of law reform initiatives to improve reporting and the fair prosecution of sexual assault cases, it is time to address the discriminatory lawyering and denial of access to justice that is taking place in these cases."[80] The present is the best time to end re-victimization and introduce fairness in justice.

Developing a fundamental approach based on education can help stimulate ethical decision-making, promoting a sense of moral goodness to a moral end. The response to such decisions depends on the individual's guidance, which in this case only derives from a disciplined training.

An openness to this educational component would alleviate many concerns and assist lawyers to reveal in their practice, their highest potentiality. As a result, the fairness of the victim's rights against intimidation would be exemplified with this understanding of a child's capacities and vulnerabilities. A child's wellbeing should be primordial and alerted when such zealousness can easily undermine the legal normative value of fairness required by law.

Even the Federation's Model Code of Professional Conduct, a code that is supposed to guide its members, cannot explicitly implement with confidence, appropriate procedures and direction when law professionals are faced with ethical decision making situations.[81]Hence the reason to create common standards for a fair administration of justice which would include mandatory

[80] Supra note 35.

[81] Supra note 6.

training for lawyers and judges. This endeavor would promote, what Aristotle would say, a consequentialist framework sensible to education for the best outcome of the common good.

4.1 A New Approach to Ethical Responsibility for Lawyers and Judges

McLachlin had it right when she stated that there needs to be openness to new approaches when it comes to representing justice and the best interest of people as lawyers.[82] The main concern lies with the fact that there are no courses mandating lawyers and judges involved in children's and youth matters to complete an annual "child development program". This is ridiculous.

The government sends parents to take parenting courses to better understand their child's behavior when there are protection issues, yet it lets legal counsel confront, intimidate, ridicule child witnesses as though they were adults, notwithstanding the psychological effects such an interaction has on a child itself and the community.

This new approach to ethical professional responsibility could decrease child witness re-victimization during cross-examination through a pressed consciousness of this young person's developmental characteristics with a thorough understanding of the stages of development in comparison to an adult. This would build a platform for an increased awareness and a heightened level of morality when the desire to introduce any intimidating strategies arises. Morality could increase if the lawyer and the judge demonstrated an openness to learning in order to achieve the ultimate goal of minimizing re-victimization. Being virtuous, as Aristotle communicated through Ross, can only come about "…*as a result of habit*" since man has an inner *potential* requiring a will to exhibit its virtues.[83] This way of being can be only be affected through an educational process.

This study is not here to challenge the rules defined by the Law Society of Upper Canada, but to reveal that an educational component focused on the child and the development of

[82] Supra note 75.

[83] Supra note 69.

communication skills implemented mandatorily within the professional requirements in order to form good habits and create a standardized ethical legal environment.

This approach does not ignore or impede on legal procedures. Rather, it realizes the following:

An improvement in the lawyers' moral decisions-making;

A compliment to counsels' and judges' role in their own betterment, in the eyes of the society;

A better understanding of the child and youth during judicial proceedings;

An improved interview with children and youth (and the vulnerable);

A reduction in the risk of further re-victimization through intimidation.

In criminal cases where children are involved, defence lawyers must understand the consequences of their behavior and the effects of their influential powers. As a credit to lawyers and this highly-regarded profession, this approach would produce a higher degree of integrity and level of moral consciousness for vulnerable people in society, as previously stipulated in the Model Code of Professional Ethics for Professional Conduct.

Communicating with vulnerable people, especially with children is essential and crucial in ensuring that an ethical environment is created during the administration of justice. A sense of responsibility and morality should consistently be present.

Since studies show that the majority of law students and lawyers compose the majority of individuals who literally follow what is written in legislation, it is without a doubt that so many children's rights and needs are being neglected. Yearly mandatory re-training of legal professionals is as crucially important since there are currently very few mentors with appropriate conduct capable of taking this supportive role in teaching morality in Ontario courthouses.

In order to maintain a high level of professional responsibility, only standards derived from ethical responsibilities should govern the practice of law and must precede all other considerations. Education is the strongest approach to proficiency and individual responsibility.

4.2 The Proposed Training Initiative

The ability to communicate and understand the child's language of development is an essential acquisition of information for lawyers since it promotes a certain degree of respect and integrity for individuals, more specifically for children and youth. This proposed training should be introduced in the Standards and Rules for those called to the Bar in Ontario.

The training should involve the following:

1. Stages of development (psychological, physical, emotional, intellectual)

    a) Children (2-12 yrs)

    b) Teens (13-18 yrs)

2. Bridging communication gaps

    a) How to talk to today's child

    b) How to talk to today's teen

3. Challenging times

    a) Solutions for those difficult moments with a child and/or a teen;

    b) Setting and upholding limits in a firm and friendly way as a law professional;

    c) Diffusing power struggles and learning to manage your own emotions;

d) Understanding why children protect their parent/caregiver, relative or friend who is accused.

4. The impact of intimidation (psychological, emotional)

a) Short term effects

b) Long term effects

The study performed by Toronto Boost (2006-2008) suggested that the child witnesses were traumatized due to the lack of training by defence lawyers in the area of communication. This previous approach would eradicate those concerns if this training would be properly administered. Through this training, Aristotle would agree that a regular revision of personal accountability would assist in raising awareness of one's own behaviours and develop the reaction hence, create the habit of reflecting on possible ethical outcomes. This would be fair administration of justice when considering the Model Code of Professional Conduct and Canada's Evidence Act.

4.3 Viability and Implications of the Proposed Plan

We are proposing a new feasible approach that is realistic and inexpensive when considering the cost of children's wellbeing as a whole. All it would take is some will and the recognition that lawyers and judges must remain responsible of their professional ethical duties when working with child witnesses.

Lawyers, paralegals and judges have a main objective and that is to seek justice however doing so, this research showed that training in the field of child development and communication for these professionals involved with children and youth should be supported by the majority and voted as a mandatory component of a lawyer' professional and ethical responsibility.

In addition, courses in child development have been determined as optional in most Juris Doctor Program requirements in Canadian law schools. The Law Society cannot presently impose

anything to law schools therefore an application to the governing bodies of college and universities would have to be endeavored and endorsed by the Ministry of Education, since law schools have their own governing body for their respective universities.

A wonderful goal for Canadian judicial system and the community it serves is to present "well-educated" students to the Law Society. They would follow in a curriculum that the Law Society would approve and become the responsibility of Law Society as prospective members (pre-requisites, i.e., follow courses on child development, etc.). The students who have the desire to become lawyers would have to pass Bar exams, which are governed by respective Law Societies (different governing bodies for different provinces and territories) to be considered for employment. Even though this approach may seem unattractive and demanding, this is where consequentialism would declare to foresee an awareness of the children's wellbeing protected and ignorance disappeared.

The Federation of Law Societies being a consultative body, acts as an advisor and cannot impose rules as if they were laws to their members. However the Law Society's Board of Directors can call for input on a proposal for an amendment to Rules and Regulations for lawyers and paralegals. Several readings would proceed before the regulation stipulating mandatory annual training is amended. Then it only takes the will of a few individuals in the Federation of Law Societies to support this endeavor and implement this strategy.

The outcome of such an endeavor is nothing but positive. The cost of a child's wellbeing in the end would avoid future expenses, i.e., health care costs. The inverted pain from intimidation could cost a child his self-esteem, loss of school years, pain and suffering of his/her parents and so on. Conflict-affected and traumatized children are at greater risk of health problems which is another good reason to educate professionals. At this time, the statistics to this effect in Ontario are unknown. It seems to us that the results of this research are enough to act now and to prevent the re-victimization of other children.

CHAPTER 5 – CONCLUSIONS AND RECOMMENDATIONS

The opinion presented by many legal experts that the dedication of lawyers towards their client's defence is such that an aggressive cross-examination is required and acceptable in creating a reasonable doubt may be true in theory however, such reasonable doubt can also be created by methods other than aggression and intimidation.

In criminal cases where children are involved, defence lawyers must develop an awareness of the consequences of their behavior as they are highly regarded and influential professionals. Many lawyers support the disagreements led by legal ethicists in such that: "When doctrinal law and regulation do not provide clear of meaningful guidance, and normative accounts of legal practice are exclusive and irreconcilable in their foundation, there is a risk that legal practice and practitioners abandon norms and morals altogether."[84] For this reason, the educational component of child/youth development and the introduction to communication and interviewing skills with children is simple yet, key in forming a moral understanding of vulnerable witnesses. That being said, the ability to communicate and understand the language of children is crucial, since it safeguards and respects the child's integrity. The development of such communication skills would assist not only the judges in developing a critical view of the defence lawyers' approach during the cross-examination, but teach lawyers and judges a justifiable technique when approaching children during court proceedings.

As a consequence to such skills, lawyers and judges will have a teleological inclination in the creation of a healthier, more ethical approach in dealing with a child/youth victim/witness and where the behavior will have a desirable end. Ethical decision-making abilities will also eradicate the violation of children's rights, promote fairness in judicial proceedings, and have a moral impact on the community as a whole.

This study has therefore attempted to present a novel understanding of ethical responsibilities of criminal lawyers and judges towards child/youth and vulnerable victims/witnesses, the community and the criminal judicial system.

[84] Supra note 36.

A study program on child development, communication and interviewing skills as an integral component of the mandatory annual training for lawyers, paralegals and judges involved with child victims/witnesses would make a positive impact on the wellbeing of the children, the community they serve and on their duty to be ethically responsible professionals.

Future work is limitless; however with regards to this particular research topic, a thorough study on the impacts of being a child witness should be realized. This inquiry would observe behavior before testifying, during court recess and then after the completion of their testimony; observation would also include behavior at school and at home. It is simple, children may seem strong while testifying as they have a need to impress the judge whom they relate to as "the principal at school" and to be of best behavior, which is part of normal child development. Even so, once their day at court is over, the outcome of their involvement with the judicial court process is unknown. It would be interesting to know what do parents/ caregivers report. In addition to understanding the impacts behavior, were any additional supports sought to facilitate the process when the child is called to testify? Are other support services needed to assist the child or a family member to face this ordeal? Have the children been exposed to counseling, psychotropic drugs, etc., therapy or hospital visits in order to cope with their part in the judicial proceedings? All is unknown to the public. This information should be made public in order to create an awareness and addressed where necessary.

Another proposal would involve the development of program incentives to assist lawyers in developing the practice of virtue. This practice would have no impediments on the legal aspect of matters. As a result, the lawyers would become more efficient by developing the necessary skills for ethical decision-making. Behavior would be affected on an individualistic level and have an influence throughout the community on a political level. This could nevertheless be unjustifiable if the will and the belief that such approach works, are absent. As Saguil writes, "Being virtuous involved practical wisdom, which can only be acquired and developed through experience and a conscientious existence" [85] He adds that the prospect lawyers should be educated on the

[85] Saguil, Paul J., "A Virtuous Profession: Re-Conceptualizing Legal Ethics from a Virtue-Based Moral Philosophy", Windsor Review of Legal and Social Issues, Vol. 22, p. 1, University of Windsor, Windsor, Winter 2006.

significance of legal ethics and its instruction since many challenges may be invoked in their professional and personal lives. Legal ethics should not only be theoretical but a way of life that ought to be lived with the aspiration of a committed endeavor.[86]

One last recommendation would invite the Law Society of Upper Canada to create a rule that would allow cameras in courtrooms to ensure that appropriate behavior by all professionals is exhibited. The Society would also randomly choose cases to be reviewed without the counsels' knowledge. An opportunity for lawyers to be carefully scrutinized and be given constructive feedback and recommendations to follow by the Law Society in order to better their practice would hence be created. Lawyers would not only be accountable to the public interest while advancing and maintaining the cause of justice but, would furthermore be inclined to remain ethical with child victim/witnesses at all times.

[86] Ibid, p. 2.

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