PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Leblanc, 2014 NSPC 118

Date: 12222014
Docket: 2703958, 2703959, 2703060, 2703061, 2703062
Registry: Sydney

Between:

Her Majesty the Queen

- and –

Shawn Derrick Leblanc

DECISION on Application for Video Appearance
s. 741.1

Judge: The Honourable Judge Jean M. Whalen, J.P.C.

Heard: December 22, 2014 at Sydney, Nova Scotia

Charge: of the *Criminal Code*

Counsel: Steve Melnick, for the Crown
Alan Nicholson, for the Defence

Facts

[1.] Mr. Leblanc is scheduled for trial on January 26, 2015. He is facing several charges including: s. 152, 153.1(a), 271, 151(a) and 159 of the ***Criminal Code***.

[2.] The Crown called no witnesses to give *viva voce* evidence. Mr. Melnick did not file affidavits from R.H. or her son, J.H., the two (2) witnesses whose evidence is "material" to the Crown's case. I heard submissions on the circumstances behind the Crown's application.

[3.] Mr. Melnick stated the charges faced by the defendant are historical and are alleged to have occurred at or near North Sydney between January 1, 2006 and December 31, 2007.

[4.] The complainant, J.H., and his mother, R.H., reside in Lloydminster, Alberta, along with J.H.'s father and two other siblings ages 10 and 4 years of age. J.H. is 13 years old. He has issues with reading and comprehension but no health problems.

[5.] Mr. Melnick says J.H. "doesn't want to see the defendant."

[6.] If J.H. and his mother are required to travel to Nova Scotia it will create a hardship on the family. Mr. H. will be left at home to care for the other two children. This will require him to take time off work. J.H. will miss school.

[7.] Mr. Melnick estimates they could be here between three to five days, which includes preparation for trial. The Crown did not supply any specific costs regarding travel, accommodations and meals, but suggested all of the above would cost at least $2,000 plus.

[8.] The Crown even suggested, given the time of year, the weather may hamper travel for the witnesses and court should also take that into consideration.

[9.] Mr. Melnick stated when asked where the "video link" would take place, either at the Victims' Services office or from the court house. There were no costs given for this arrangement.

[10.] Mr. Melnick suggested a test link ten days prior to the trial date would confirm the availability and function of the "video link".

[11.] R.H. and her son are material witnesses. It is anticipated that J.H. will testify to certain acts committed by the defendant upon J.H. when he was four (4) years old. There is no forensic evidence and no physical evidence to be presented. The only exhibit that may be entered or referred to will be the complainant's statement.

[12.] Mr. Nicholson stated s. 486.2 does not apply because there is no need to protect the witness. He emphasizes s. 714.1(c) is the most important factor to be

considered. J.H.'s testimony is the crux of the Crown's case. "It's crucial; it's the whole case."

[13.] Credibility is the issue and Mr. Nicholson says it is "crucial the witness be present", "to see how he testifies."

Issue

[14.] (1.) Should the court grant an Order pursuant to s. 714.1 to allow J.H. to testify by means of a "video link" from Lloydminster, Alberta.

(2.) If the court does not grant an Order pursuant to s. 486.2, then the Crown seeks an Order pursuant to s. 486.2.

The Law

[15.] Section 714.1 of the ***Criminal Code*** indicates that a court may allow a witness to testify by means of technology from a location in Canada other than the court where the trial or order proceeding is being held. It states as follows:

> A court may order that a witness in Canada give evidence by means of technology that permits the witness to testify elsewhere in Canada in the virtual presence of the parties and the court, if the court is of the opinion that it would be appropriate in all the circumstances, including
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> (a) The location and personal circumstances of the witness;

(b) The costs that would be incurred if the witness had to be physically present; and

(c) The nature of the witness' anticipated evidence.

[16.] Section 486.2 of the ***Criminal Code*** states:

> **486.2** (1) Despite section 650, in any proceedings against an accused, the judge or justice shall, on application of the prosecutor, of a witness who is under the age of eighteen years or of a witness who is able to communicate evidence but may have difficulty doing so by reason of a mental or physical disability, order that the witness testify outside the court room or behind a screen or other device that would allow the witness not to see the accused, unless the judge or justice is of the opinion that the order would interfere with the proper administration of justice.
>
> Marginal note: Other witnesses
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> (2) Despite section 650, in any proceedings against an accused, the judge or justice may, on application of the prosecutor or a witness, order that the witness testify outside the court room or behind a screen or other device that would allow the witness not to see the accused if the judge or justice is of the opinion that the order is necessary to obtain a full and candid account from the witness of the acts complained of.
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> Marginal note: Application
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> (2.1) An application referred to in subsection (1) or (2) may be made, during the proceedings, to the presiding judge or justice or, before the proceedings begin, to the judge or justice who will preside at the proceedings.
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> Marginal note: Factors to be considered
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> (3) In making a determination under subsection (2), the judge or justice shall take into account the factors referred to in subsection 486.1(3).
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> Marginal note: Specific offences

(4) Despite section 650, if an accused is charged with an offence referred to in subsection (5), the presiding judge or justice may order that any witness testify

(*a*) outside the court room if the judge or justice is of the opinion that the order is necessary to protect the safety of the witness; and

(*b*) outside the court room or behind a screen or other device that would allow the witness not to see the accused if the judge or justice is of the opinion that the order is necessary to obtain a full and candid account from the witness of the acts complained of.

Marginal note: Offences

(5) The offences for the purposes of subsection (4) are

(*a*) an offence under section 423.1, 467.11, 467.111, 467.12 or 467.13, or a serious offence alleged to have been committed for the benefit of, at the direction of, or in association with, a criminal organization;

(*b*) a terrorism offence;

(*c*) an offence under subsection 16(1) or (2), 17(1), 19(1), 20(1) or 22(1) of the *Security of Information Act*; or

(*d*) an offence under subsection 21(1) or section 23 of the *Security of Information Act* that is committed in relation to an offence referred to in paragraph (*c*).

Marginal note: Same procedure for determination

(6) If the judge or justice is of the opinion that it is necessary for a witness to testify in order to determine whether an order under subsection (2) or (4) should be made in respect of that witness, the judge or justice shall order that the witness testify in accordance with that subsection.

Marginal note: Conditions of exclusion

(7) A witness shall not testify outside the court room under subsection (1), (2), (4) or (6) unless arrangements are made for the accused, the judge or justice and the jury to watch the testimony of the

> witness by means of closed-circuit television or otherwise and the accused is permitted to communicate with counsel while watching the testimony.

[17.] In ***R. v. Osmond***, 2010 NL No. 1309A, Pr.Ct. Judge Gorman granted the Crown's application and allowed a six year old to testify via "video link". He was a diabetic, but the evidence regarding the impact of travel upon his illness was "vague and uncertain". The court found the complainant's evidence was important but was satisfied that the "technology utilized will not have any effect on the accused's ability to make full answer and defence."

[18.] In ***R. v. Hinkley*** [2011] A.J. No. 1012, Marshall, J., granted the Crown application to have an expert toxicologist testify by video. At paragraph 15 he stated:

> Thus the central question is whether the proposed video teleconference impedes the Defence's ability to cross-examine…. demeanor is less critical for an expert…. The ***Criminal Code*** expressly indicates that the kind of evidence from a witness is relevant….

[19.] Later at paragraph 17:

> Effective communication is crucial, but the current state of video teleconferencing technology meets that requirement. Ms. Lehman is not the kind of witness for whom demeanour will likely be a crucial factor. Further, I agree with other judicial commentary, such as in ***R. v. Allen***, 2007 ONCJ 209 at para. 7, that a "face-on view" of a witness is often superior to the traditional physical arrangements found in many courtrooms when the judge views witness demeanour and assesses credibility.

[20.] In ***R. v. Young,*** 2000 SkQB 419, the Crown's application was dismissed.

The court cited a number of factors (not an exhaustive list) at paragraph 8:

> (1) will a video appearance by the witness impede or impact negatively on the ability of defence counsel to cross-examine that witness?
>
> (2) the nature of the evidence to be introduced from the witness and whether it is non-controversial and not likely to attract any significant objection from defence counsel, for example various police and technical witnesses who testify to routine matters with respect to exhibits and the like and other matters that would not attract any particular objection on the part of the accused's counsel;
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> (3) the integrity of the examination site and the assurance that the witness will be as free from outside influences or interruptions as that person would be in a public courtroom;
>
> (4) the distance the witness must travel to testify in person and the logistics of arranging for his or her personal appearance;
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> (5) the convenience of the witness and to what degree having to attend in person at a distant location may interfere with important aspects of the witness's life, such as his or her employment, personal life and the like;
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> (6) the ability of the witness to attend who lives in a country or area that makes it difficult to arrange for travel or travel in a reliable fashion;
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> (7) the cost to the state of having the witness attend in person; and
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> (8) a fact to consider also is that the witness is effectively beyond the control of the Court in the trial jurisdiction, and whatever powers a judge may have over such a person, they are certainly extraterritorial.

[21.] Then at paragraph 9:

> The above list is not exhaustive. The points are not arranged in order of importance. More importantly I should note that each application will depend on its particular facts and not all of the factors which I have outlined will have application in each case. Indeed, there may be

> only one or two that are of any real importance, such as the requirement that the accused be able to answer the Crown's case against him or her effectively, and not be deprived of that right by virtue of the utilization of "video-linking".

[22.] In discussing the application Wright, J., found there was no evidence the Crown witness (who was present in the apartment when the deceased was assaulted) would be inconvenienced, or not fully accessible. And the costs of his attendance were not significantly more than for the video.

[23.] In ***R. v. Chehil***, 2014 NSSC 421, Woods, J., allowed two of the four witnesses to testify by video at a jury trial (for the defendant). At paragraphs three to five he stated:

> **3** In cases where the witness' evidence does not raise issues of credibility and the cost of attendance is significant it is not unusual to have an order for them to testify by video link. An example of this is *R. v. Denham* 2010 ABPC 82. Where the witnesses' evidence is crucial to the case it is more likely that an order under s. 714.1 will not be granted although that is not always the case.
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> **4** When the trier of fact will be a jury, as is the case here, special considerations arise. For example, in ***R. v. Ragan***, *supra*, the Court noted as follows:
>
> > 57 I do not share the enthusiasm expressed by some other courts about allowing virtual presence testimony in cases where the nature of the evidence is contentious and credibility assessment is an important feature of the case. In those circumstances, courts should be reluctant to deprive the trier of fact of seeing the witness physically present in the courtroom. Compelling evidence would have to be presented to satisfy me otherwise.

> 58 The Crown in the present case has not produced compelling evidence for testimonial accommodation. Mr. Bissett is a critical witness. His evidence is controversial and credibility will be highly contested. Compounding the credibility assessment is that a jury, inexperienced in the fine points of making such assessments, will be undertaking the task. It is also a factor that, even with the best of cautions against prohibited reasoning, the jury might infer from Mr. Bissett testifying by video link that the accused was connected with his shooting.

5 Although demeanor is not viewed as a primary consideration in assessing credibility it is one aspect of the analysis that must be carried out by the trier of fact. I would echo the comments of the Ontario Superior Court of Justice in ***R. v. Petit*** 2013 ONSC 2901 at para. 7:

> 7 But the accused, the Crown and the witness are not the only participants in the trial process. The ability of the court to fulfil its truth-finding function is also important. Unlike the situation at the preliminary inquiry, credibility will be a major issue at the trial. While demeanour, by itself, is an unreliable way to determine credibility, it is nonetheless one facet of the way in which the court in a case like this must do so. In my view, when it comes to demeanour, there is no substitute for being near the witness as she testifies. It is no accident that witness boxes are placed next to or near the judge and jury in almost every courtroom across the country.

[24.] In deciding to have Mr. B. and Mr. S. testify in person he emphasized the importance of the witness stating: "The more important the witness, the greater the rationale for having them testify in person."

[25.] In ***R. v. Denham***, 2010 ABPC 82, Rosborough, J., granted the Crown's application to have an expert witness testify at trial via a "video link".

[26.] Beginning at paragraph 12, Rosborough, J., explains the purpose of s. 714.1:

The Purpose of Section 714.1 *C.C.*

12 Section 714.1 *C.C.* is remedial legislation designed to authorize the 'virtual presence' of witnesses who are located in Canada but not in the 'physical presence' of the parties and the court. It escorts other statutory provisions designed to modernize the criminal trial process and recognize the value of technology, both to the truth-seeking function and to access to justice. Litigation which might otherwise have been compromised or even terminated in the past may be continued through the use of this procedural aid.

13 It is also important to recognize that s.714.1 *C.C.* is not designed as an evidentiary tool that will benefit only one party to the litigation (i.e. either the prosecution or the defence). It is a neutral provision. As such, it ought not to be interpreted in such a way as to frustrate society's interest in the prosecution of crime or the accused's interest in making full answer and defence.

14 The fact that s.714.1 *C.C.* permits evidence to be received in a new way, does not, of itself, command a narrow or restricted application. Indeed, there appears to be a growing international trend toward the use of video technology for the administration of criminal justice. See the comments of Stuart, C.J. in ***R. v. Heynen***, 2000 YTTC 502 ('***Heynen***') at paras. 317-9, 326. In his view, the use of video testimony, " ... will soon become essential to the conduct of court business" (para.315). In ***R. v. Turner***, 2002 BCSC 1135 ('***Turner***') MacAulay J. stated in that regard:

> There can be no doubt that the taking evidence by video link is now increasingly a reality in our criminal and civil courts. Crown counsel has put before me several decisions from trial courts across the country in both civil and criminal matters in which such evidence has been permitted. At least one of the criminal cases, ***R. v. Dix***, predates the amendments to the *Criminal Code* with which I am concerned this morning.

It is only where doing so would be *inappropriate* that the court should decline the order.

[27.] He goes on to address the argument of “the right to confront witnesses” at paragraph 17 and 18:

> **17** Canada's constitution makes no reference to a right to confront witnesses. In ***R. v. Levogiannis***, [1993] 4 S.C.R. 475, the court considered whether the *Canadian Charter of Rights and Freedoms*, s.7 embraced such a right. The proposition was rejected, with the court stating (at para.31), "The intervener the Attorney General of Manitoba suggests that the importance of confrontation in truth seeking is a culturally biased version of human characteristics and, as a result, should not be viewed as part of our fundamental principles of justice. I tend to agree." More recently, the existence of such a confrontation right was considered in ***R. v. J.Z.S.***, 2010 SCC 1; aff'g. 2008 BCCA 401. After a brief review of jurisprudence on point, Smith J.A. concluded: "Under our criminal justice system, an accused has no constitutional right to a face-to-face 'confrontation' with the complainant."
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> **18** However desirable in-person confrontation of witnesses is thought to be, that practice is not fundamental to our system of justice. So, in ***R. v. Gibson***, 2003 BCSC 524 the court granted the order authorized by s.714.1 C.C. notwithstanding the stated importance of 'confronting' the witness (at para.7). See also: ***R. v. McLean***, 2002 YKTC 64 ('***McLean***') (at para.12). Stuart C.J. put this emphatically in ***Heynen*** where he stated (at para.325): "We can no longer hide behind our belief that only in the face-to-face confrontations of the courtroom can truth be discovered."

[28.] Then at paragraphs 20 to 22:

> **20** In ***R. v. L.(D.O.)***, [1993] 4 S.C.R. 419 the court was called upon to consider the constitutional validity of a statutory provision permitting the evidence of a child to be taken by videotape and tendered in evidence at trial. It was contended that such a provision violated the *Canadian Charter of Rights and Freedoms*, s.7. In responding to that criticism, L'Heureux-Dube J. noted that the principles of fundamental justice and our notion of a fair trial contemplate a spectrum of interests. In the courts own words (at

para.46): "Based on this Court's pronouncements that the principles of fundamental justice reflect a spectrum of interests from the rights of the accused to broader social concerns, a fair trial must encompass a recognition of society's interests. Our Canadian society has a vested interest in the enforcement of criminal law in a manner that is both fair to the accused and sensitive to the needs of those who participate as witnesses" (emphasis added).

21 This sensitivity is reflected in jurisprudence relating to video evidence. In ***R. v. Galandie***, 2008 BCPC 6 ('***Galandie***'), for instance, Blake P.C.J. stated that, " ... the legislation seeks to address not only the high cost of litigation, but also the inconvenience and disruption to the lives of witnesses upon whom the litigation process depends" (at para.10). In ***McLean***, video evidence was permitted from a witness who was at risk of relapsing into alcoholism if moved from her location in Nanaimo to give evidence at the village of Mayo in the Yukon territory.

22 A witness' personal circumstances need not be such as to make video evidence the only method by which their evidence can be secured. In ***Heynen*** the court stated: "Necessity does not require that video testimony be the only possible way to obtain the evidence. Conversely, video should not be used simply because a witness would prefer to appear by video. There must be a good reason. In some cases, a good reason can be constituted by significant inconvenience to a witness to appear. In other cases, a good reason may be the cost of appearing. Necessity in the use of video does not have to meet the same stringent standards governing exceptions to the hearsay rule, ..." (at para.323).

[29.] Later at paragraphs 28 to 30:

28 The search for the truth can be compromised, or even terminated, when the evidence of a material witness cannot be heard at trial. The 'usual' method of receiving the evidence of such a witness has been to require in-person testimony. See: ***Heynen*** at para.323. Thus, in ***R. v. Young***, 2000 SKQB 419 ('***Young***') the court declined to receive video evidence from a witness who was alleged to have been present at the time of a murder. See also: ***Raj*** and ***R. v. Cardinal***, 2006 YKTC 67 ('***Cardinal***'). Nevertheless, in ***Turner*** the court permitted

> video evidence from the "pivotal witness for the Crown" on the accused's trial for aggravated assault. And an eyewitness to the "extremely serious" sexual assault in ***McLean*** was permitted to give video evidence.
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> **29** Where the "nature of the witness' anticipated evidence" is technical or incidental to the issues being litigated, it would appear that courts are more amenable to authorizing the use of video evidence. It is also my view that expert opinion evidence should more readily be received by video than the evidence of an eyewitness to a crime, for instance. I accept counsel's submission that directed cross-examination of the witness may be necessary based upon certain assumptions which are disputed. Nevertheless, I am of the view for the reasons relating to credibility assessments which follow, that cross-examination of this expert witness will not be compromised by her virtual (as opposed to in-person) attendance.
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> **Seriousness of the Offence**
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> **30** It is difficult to gauge the importance of 'the seriousness of the offence' as a factor to be considered when exercising the discretion authorized by s.714.1 *C.C.* This may be due to the fact that this criterion is really a two-edged sword. On the one hand it is suggested that in-person testimony should be required for serious crimes. On the other hand, the prosecution of serious crime mandates extraordinary measures in the search for the truth, including virtual testimony.

[30.] And lastly at paragraphs 33 and 34 the court discusses cross examination and credibility assessments:

> **Cross-examination and Credibility Assessments**
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> **33** Stress has been placed upon difficulties attendant upon cross-examination of 'virtual' witnesses, especially where their credibility may be in issue. This objection rests at the heart of cases such as ***Raj*** and ***Cardinal*** where the courts felt that in-person observations of a witness were advantageous for either cross-examination or credibility assessments. Some cases have also noted difficulties arising where a witness refuses to testify or is absent from the 'virtual' courtroom during breaks. In one case (***Fleury***) the court declined to grant an

> order for video evidence as the court did not have appropriate video facilities.
> **34** It is helpful at the outset to comment on observations of a witness' 'demeanor' when making credibility assessments. In ***Turner***, the court stated in that regard: "As to the assessment of credibility, sometimes members of the public, lawyers and perhaps even judges make the mistake of concluding that the assessment of credibility depends on observations of physical demeanor during the course of the witness testifying. In my experience, those observations are rarely determinative of credibility, as a judge who relies solely on physical observations of demeanor is likely to err." These comments are amply supported in our jurisprudence. See, for example, ***R. v. Dehaan***, [2002] O.J. No. 430 (C.A.).

[31.] In ***R. v. Cardinal***, 2006 VKTC 67, Lilles, J., dismissed the Crown's application to have the complaint in an assault charge testify by "video link" during the defendant's trial. He considered all the factors but emphasized at paragraph 23:

> "… but particularly the importance of the trial judge seeing the complainant physically in the courtroom in order to make findings of credibility…."

[32.] In ***R. v. Chapple***, 2005 BCSC 383, Parrett, J. found that the defendant was denied his right to make full answer and defence, that is a cumulative effect of errors made at trial impaired the defendant's defence, including allowing video testimony of an officer without giving the defendant an opportunity to properly make submissions.

[33.] In considering the teleconferencing order pursuant to s. 714.1, Parrett, J. stated at paragraphs 50 to 52:

> **50** This provision does not replace the established procedure of calling witnesses to the witness stand in criminal cases or of allowing the accused to face his or her accuser, but rather, supplements that normal practice and allows the use of technology where it is appropriate. The order so authorized is discretionary but the court must, in the end, find that the particular circumstances are appropriate for the use of the technology. In my view, the presumption, or starting point, must be that, unless the circumstances warrant dispensing with the usual practice, the witness should be called to the witness stand to testify.
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> **51** In considering whether to dispense with the usual practice, and to take a witness' evidence by video link, the court must consider all of the circumstances of the particular case and the three enumerated factors. Cost savings, in and of themselves, cannot justify such an order without the other factors being considered.
>
> **52** The proper consideration of such an application must begin with a consideration of the nature of the witness' evidence. Where, as here, there are serious issues of credibility to be determined involving the credibility of the witness, a court should, in my view, be very reluctant to deprive the trial judge of seeing the witness physically present in the courtroom during his evidence.

[34.] Later at paragraph 55:

> **55** I do not for a moment suggest that courts should be reluctant to avail themselves of the benefit of modern technology, but rather, that careful consideration should first be given to the nature of the evidence, the issues in the particular case and the potential affect of the order on the courts' ability to assess the evidence and the accused's right to a fair trial. What is crystal clear, however, is that the proper test to be applied does not involve a determination of "the balance of convenience" as the learned trial judge found in the present case.

[35.] In ***R. v. Fleury***, 2004 SKPC 53, Bobowski, J. denied the Crown's application to have a police officer testify by video stating at paragraph 15:

> **15** I am not satisfied that it would be appropriate that the police officer testify by video link for the following reasons;
>
> (a) As a member of the R.C.M.P., it would be in the course of his duty to attend and give evidence, accordingly, I do not find that any great inconvenience would accord to the witness. It is not uncommon for police officers to travel great distances to give evidence as for example when a police officer is transferred to another jurisdiction and has to return to give evidence.
>
> (b) I do not accept the police officers wages as a necessary component of the costs herein. He will be paid as an R.C.M.P. officer on duty wherever he may be. Accordingly, the cost of requiring his attendance in person will not likely be as great as the cost of video conferencing.
>
> (c) To have video conferencing would require the hearing to be held in a facility other than this court room. I have heard no evidence with respect to the suitability of that location and I am not prepared to grant this application which would require the hearing to be heard at an unknown facility.
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> **16** As well, I am not satisfied that it would be appropriate for the police officer to testify pursuant to section 714.3 by telephone for the same reasons and for the reason hereinafter set forth.
>
> **17** This court room is equipped to facilitate telephone evidence but I conclude that since this officer is a key Crown witness and his evidence is vital to the Crown's case, it would be potentially prejudicial to the accused not to have the officer here to be seen by the accused and cross examined in person.

[36.] In ***R. v. Ragan***, 2008 ABQB 658, Topolniski, J. denied the Crown's application to have a witness testify via "video link" during the defendant's jury trial. The witness experienced "persistent anxiety" because he feared his life ws at

risk should he return to the area to testify. Even his doctor felt it would be in the best interests of the witness' mental health.

[37.] At paragraph 37 the court states:

> "The court must identify and weigh the competing interests at stake. In doing so, it must consider, how the use of technology might promote or hinder the efficient administration of justice, the accused's right to a fair trial and the accused's right to make full answer and defence."

[38.] Justice Topolniski in *Ragan (supra)* cites ***R. v. Heynen***, 2000 YTTC 502 at paragraph 39:

> **39** The court in ***Heynen*** (at para. 323) proposed the following guidelines for assessment under s. 714.1 of whether it would be appropriate in the circumstances to allow a witness to testify by means of virtual appearance:
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> (b) Basis for Evidence: While cost is a significant consideration, it cannot be the only consideration. Other factors to consider include:
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> (i) Ability or Willingness of a Witness to Attend: As in all cases, it is incumbent upon the courts to consider the interest of witnesses who often volunteer their time to attend as witnesses.
>
> (ii) Nature of Testimony: Is the testimony crucial to the case? An appearance in court remains the preferred method for receiving testimony, especially testimony that covers the essential elements of a case. The more crucial the testimony, the more it becomes incumbent on the applicant to establish the necessity of video.
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> (iii) Dependence upon Exhibits: Can video services enable a witness to use and effectively relate his or her testimony to

> exhibits in the courtroom? In most cases, exhibits can be made available to the witness. When that cannot be done, the limitations of presenting the exhibit to the witness by video must be considered. The use of a document camera as part of the video services can make the use of documents easier and can save time - easier because of the capacity to enlarge and focus on specific aspects of a document, and faster as all evidence can be stored and organized on a CD, making the evidence readily available by video to witnesses in other locations. Some preliminary indications suggest that trial times may be reduced by these services by up to 25 percent in cases dependent upon a significant number of documents (F. Lederer, *The Road to the Virtual Courtroom*, online: http://www.courtroom21.net/virtualcourtsinglesp ace.h tm).
>
> (iv) Necessity: Necessity does not require that video testimony is the only possible way to obtain evidence. Conversely, video should not be used simply because a witness would prefer to appear by video. There must be a good reason. In some cases, a good reason can be constituted by significant inconvenience to a witness to appear. In other cases, a good reason may be the cost of appearing. Necessity in the use of video does not have to meet the same stringent standards governing exceptions to the hearsay rule (***R. v. Dix***, [1998] A.J. No. 486, *supra*).
>
> (v) Reliability: Recent advances in technology solve most problems of the quality of the evidence received by video. The recent amendments cover off concerns that could arise from the administration and enforcement of an oath (ss. 714.5 and 714.6).

[39.] Then at paragraph 42 the court comments on the notion of "the right to face your accuser":

> "… the right to face one's accuser '... does not necessarily mean that the accuser must always be present in person. It does mean that the accused has the right to know what it is that the accuser says. In other words, to know the case against him, and further, the right to

> challenge the evidence of those accusers by way of cross-examination …'."

[40.] The court adopted the approach in ***Chappell*** stating at paragraph 56:

> "… while the courts should not shy away from the use of technology, s. 714.1 is intended to supplement rather than to replace the established procedure of witnesses testifying from the witness stand when giving evidence in criminal trials. The presumption ought to be that unless the circumstances warrant dispensing with the usual practice, the witness should be physically present to testify."

[41.] ***R. v. Levogiannis***, 62 CCC (3d) 59 was an application pursuant to s. 486(2.1). The court discussed the defendant's right to "face their accused". The Court of Appeal concluded there is:

> "…no basic tenant or principle in our judicial process or legal system that an accused person is entitled to be in the unobstructed view of a witness testifying against him or her… it is an accepted tradition of our legal system that judge, jury, witnesses, accused and counsel are all present in the sight of each other, an accused has the right to be in the sight of witnesses who testify against him or her. However, this is not an absolute right and it is subject to qualifications in the interest of justice."

[42.] In ***R. v. Allen***, 2007 O.J. No. 1353 the court considered the Crown application under 714.1 to have two witnesses testify by "video link" during the preliminary. Duncan, J. stated at paragraphs 26 and 27:

> **26** The defence further submits that it will be more difficult to get a sense of the witness's credibility without him being present. I don't think that can be assumed to be so. In some respects there are advantages in that the court will presumably have the benefit of a full

face-on view of the witness as opposed to the profile seen in court. The testimony will be taped and can be replayed at will. It is worth noting that video-linked evidence of children is routinely received in our courts and credibility assessments are not hampered by the procedure. Further some of the cases noted above dealing with section 714.1 have commented that video-linked evidence has been found to be superior in these respects: see for example R. v. Heynen, supra at para 315,327. Importantly, again, this is a preliminary where credibility is not in issue.

[43.] **27** The main objection is that the entire truth seeking process suffers by permitting the witness to "mail it in" - to give evidence at a distance without his being brought into the presence of those he is accusing and the solemn and majestic atmosphere of the courthouse. It is said that there is a right to confrontation that is infringed or at least diluted by the video-link process. However such right of confrontation as exists in Canada is a qualified right and can be subject to exceptions designed to achieve some valid purpose in the administration of justice: R. v. Levogiannis (1990), 62 C.C.C. (3d) 59 (Ont CA). Witness protection would undoubtedly qualify as a valid purpose. The Court in Levogiannis cited with approval the case of R. v. R.(M.E.) (1989), 49 C.C.C. (3d) 475 where the Nova Scotia Court of Appeal held that an order permitting a child's evidence to be received by video-link did not offend the accused's right to face his accuser. The Court said:

> The right to face one's accusers is not in this day and age to be taken in the literal sense. In my opinion, it is simply the right of an accused to be present in court, to hear the case against him and to make answer and defence to it.[3]

Analysis

[44.] R.H. and her son, J.H., are two material witnesses to be called by the Crown at trial. There is absolutely no indication they are not willing to attend at court to testify. The Crown requests pursuant to 714.1 they do so by “video link” where they reside in Lloydminster, Alberta.

[45.] The testimony from J.H. and R.H. is "crucial" to the Crown's case. J.H. is the complainant and R.H. is his mother to whom the complaint was disclosed. Mr. Nicholson says there is an absolute denial by his client and the testimony will be contentious.

[46.] The Crown states there will be one exhibit that may be referred to and that is the Complainant's statement. This can be sent to the witness and referred to if necessary.

[47.] The testimony will be given from either the office of Victims' Services or the courthouse in Lloydminster. The court can assure the integrity of the examination site by having a clerk of the court, sheriff or other court office in attendance while the witnesses testify.

[48.] J.H. and his mother must travel from Lloydminster, Alberta to Sydney, Nova Scotia. Even flying this would probably take a day. If they are here for three to five days, J.H. will miss school and his father will have to take time off work to care for his younger siblings. The Crown says the cost for each witness is at least $2,000.

[49.] The court has used video link on a regular basis, including bail appearances and witnesses testifying from elsewhere in Nova Scotia and Canada. With the

advances in technology the court, the lawyer, the clerk and the defendant have been able to clearly see and hear the witness testify. Defence counsel has been able to cross-examine without constraint.

[50.] Defence counsel says the evidence is contentious, crucial and the defendant wants to have the witnesses here, particularly, J.H., "to see how he testifies." Credibility is the issue and its "key he be present."

[51.] Review of the cases had a common theme regarding this issue of credibility. As Gorman, J., stated in ***R. v. Osmond***, 2020 NL No. 1309A at paragraph 23:

> …assessing the truthfulness or accuracy of a witness solely through a consideration of their demeanor while they were testifying is a dangerous method of assessing credibility…."

[52.] The court goes on to cite ***R. v. Taylor*** at the same paragraph:

> "As to the assessment of credibility, sometimes members of the public, lawyers and perhaps even judges make the mistake of concluding that the assessment of credibility depends on observations of physical demeanor during the course of the witness testifying…. In my experience, those observations are rarely determinative of credibility, as a judge who relies solely on physical observations of demeanor is likely to err."

[53.] Quoting from the annotation in ***R. v. S. (J.)***, 2008 BCCA 401, at page 3:

> The provisions at issue in ***S. (J.)*** created a presumption in favour of allowing children to testify with testimonial aids like screens, reversed the former presumption of testimonial incompetence for child witnesses and instituted a requirement that child witnesses testify no on oath but on a promise to tell the truth. As the court explained,

> these reforms reflect insights into children's testimony gleaned from the ***Child Witness Project*** at Queen's University. For example, the former practice of qualifying child witnesses by grilling them with questions about their understanding of such concepts as "truth", "lie", "oath" and "promise" was abolished because the research indicated no relationship between children's ability to answer these questions and the truthfulness of their testimony. Similarly, the former rules effectively contained a presumption that child witnesses should testify with an unobstructed view of the accused. Such an arrangement made it more difficult for children to testify without providing any apparent benefit in terms of the search for truth.
>
> The new rules regarding children's evidence stand as a model of how evidence rules can be incrementally improved. The reforms are empirically grounded and targeted to advance the search for truth. The ***Charter*** arguments against these reforms, by contrast, reduce to a narrow, conservative claim that an accused has a right to challenge and disqualify child witnesses using all the means that have traditionally been available. The Court of Appeal has firmly rejected this narrow view.

[54.] After considering all of the circumstances including prejudice to the defendant to make full answer and defence. I am prepared to grant the Crown's application pursuant to s. 714.1 and order the witnesses to testify by video link from Lloydminster, Alberta.

[55.] Alluring them to do so will reduce any hardships upon the family and have no impact upon the defendant's ability to make full answer and defence.

[56.] The order is granted subject to the following:

(1.) J.H. and R.H. shall testify by video link in a manner in which both can be seen and heard and questioned by all parties.

(2.) Their evidence will be given in a courtroom in the Provincial Court in Lloydminster, Alberta, or at the office of Victims' Services in the same jurisdiction.

(3.) To ensure their evidence is not influenced in any manner, during their testimony there shall be a police officer, deputy sheriff, court clerk or some other court officer acceptable to the court present.

(4.) There will be a "test" of the video link at least 10 days prior to the trial to satisfy the court the technology is working appropriately.

The Honourable Judge Jean M. Whalen, JPC