PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Chow*, 2021 NSPC 16

Date: 20210329
Docket: 8407122-26
Registry: Kentville

Between:

Her Majesty the Queen

v.

Adam Michael Chow

Judge:	The Honourable Judge Ronda van der Hoek
Heard:	March 29, in Windsor, Nova Scotia
Decision	March 29, 2021
Counsel:	William Fergusson, for the Crown Thomas Singleton, for the Defendant

By the Court:

Overview:

[1] This is a Crown application seeking leave of the Court to allow an essential witness, Mrs. Chow, to testify from a secure location in a Windsor, Ontario courthouse. The application, brought pursuant to s. 714.1 of the *Criminal Code*, is based on Covid-19 travel-related public health concerns given the currently high level of disease in Ontario, a requirement for the witness to quarantine for 14 days before trial, and the cost of housing the witness and her three children for 26 days until a second scheduled trial.

[2] Defence opposes the application arguing the Crown has failed to provide a sufficient foundation. In particular, he is concerned about Mr. Chow's fair trial interest because Mrs. Chow is the primary Crown witness whose credibility is at stake and the Crown has failed to establish compelling exceptional circumstances for granting the application.

[3] While there is an assumption all involved in the criminal justice system will attend court in person, that presumption has been regularly displaced over the course of the pandemic. More and more often parties have sought recourse to

infrequently used *Criminal Code* provisions aimed at reducing the need for personal attendance, with the goal of moving matters along safely and avoiding a breach of *Charter* protected rights. Section 714.1 is such a provision aimed at permitting virtual testimony of witnesses.

Issue:

[4] The only issue in this case is whether the Crown has met its application burden and if so, will the Court agree to receive Mrs. Chow's evidence in the requested manner because it will not unfairly limit a credibility assessment of her testimony.

Decision:

[5] After reviewing the Crown's affidavit, the Operational Plan Guidelines for Court Approved Participants from Outside Nova Scotia (March 19, 2021), the briefs and cases filed by the parties, and hearing the submissions of counsel, I decline to grant the application. There is insufficient information before the court to meet the test.

The Crown's Position:

[6] The Crown filed a personal Affidavit in which he attests that Mr. Chow has two trials scheduled for Windsor Provincial Court on April 12 and 23, 2021. Both require testimony from Mrs. Chow, his estranged wife. The matter before this Court involves four counts of breaching an undertaking and one of engaging in harassing communications. The application does not relate to the second trial.

[7] The Crown confirms Mrs. Chow lives in Ontario with the couple's three children and is the primary witness in both trials. In oral submissions, the Crown says common sense suggests it is best for witnesses from Ontario to testify remotely given the global pandemic and the level of disease present in that province. He says Mrs. Chow would suffer a hardship if required to travel to Nova Scotia with the children as all would have to quarantine for 14 days before April 12, 2021. Once in the province, the family would be required to remain here, at taxpayers' expense, until completion of the second trial.

The Defence Position:

[8] Defence counsel filed a helpful brief setting out his opposition to the application. He says the Crown's affidavit is somewhat unorthodox and contains "precious little information" about Mrs. Chow's personal circumstances. He says there should have been before the Court an affidavit from Mrs. Chow.

[9] He points out the 14-day quarantine is a requirement of the Court and the Operational Plan Guidelines for Court Approved Participants from Outside Nova Scotia (March 19, 2021) does not displace the test in s. 714.1 or the law in this province. Finally, he says granting the Order would impact Mr. Chow's fair trial interest and affect Mrs. Chow's credibility assessment.

[10] In support of the former position he relied upon two Nova Scotia decisions, the leading case from our Court of Appeal and a Supreme Court trial decision applying it. Before reviewing those cases and the ones submitted by the Crown, I will first consider the requirements of section 714.1 CC.

The Law:

[11] Section 714.1 reads as follows:

> 714.1 A court may order that a witness in Canada give evidence by audioconference or videoconference, if the court is of the opinion that it would be appropriate having regard to all the circumstances, including
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> (a) the **location** and **personal circumstances of the witness**;
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> (b) the **costs** that would be incurred if the witness were to appear personally;
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> (c) the **nature of the witness' anticipated evidence**;
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> (d) the **suitability of the location** from where the witness will give evidence;
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> (e) the **accused's right to a fair and public hearing**;
>
> (f) the **nature and seriousness of the offence**; and

> (g) any potential prejudice to the parties caused by the fact that the witness would not be seen by them, if the court were to order the evidence to be given by audioconference.

[12] The wording of section 714.1, as amended in 2019, admits of a discretionary decision by the trial judge "having regard to all the circumstances", including those factors listed at (a)-(g). The last factor is inapplicable in this case because the Crown Attorney is not seeking leave for the witness to testify by audioconference. Instead he seeks testimony by videoconference defined in s. 2 of the *Criminal Code* as "any means of telecommunication that allows the judge … and any individual to engage in simultaneous visual and oral communication in a proceeding".

[13] Almost ten years ago in *R. v. Denham*, 2010 ABPC 82, Rosborough J. described section 714.1 in prophetic language as:

> ... 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.* [emphasis added] (at para.12)

[14] After judicially considering that decision, the Court in *R. v. K.S.*, 2020 ONCJ 328, said:

> [16] A second guiding principle I distill from the caselaw is that the witness seeking the accommodation of ss 714.1 must have a reason to invoke the section.

> It is not the law of Canada that witnesses have the option to give virtual evidence simply because they would prefer to do so. Implicit in this principle is the recognition that the best evidence – in-person testimony – remains the default standard for taking evidence in a criminal proceeding. (See *R. v. Heynan*, 2000 YTTC 502 (Yukon Territorial Court))

[15] Prior to the global pandemic, our Court of Appeal released *R. v. SDL*, 2017 NSCA 58, a decision setting "appropriate parameters" constraining the wide judicial discretion of trial judges in their use of s. 714.1 aimed at avoiding inconsistencies and uncertainties in its application, and at worse miscarriages of justice (at paragraph 8).

[16] After reviewing the authority to set such parameters and the history of the section, Justice MacDonald, proposed seven guiding principles.

> [32] With this background, I would propose the following guiding principles for Nova Scotia trial judges, when considering s. 714.1 applications:
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> 1. As long as it does not negatively impact trial fairness or the open courts principle, testimony by way of video link should be permitted. As the case law suggests, in appropriate circumstances, it can enhance access to justice.
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> 2. That said, when credibility is an issue, the court should authorize testimony via 714.1 only in the face of exceptional circumstances that personally impact the proposed witness. Mere inconvenience should not suffice.
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> 3. When the credibility of the complainant is at stake, the requisite exceptional circumstances described in #2 must be even more compelling.
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> 4. The more significant or complex the proposed video link evidence, the more guarded the court should be.
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> 5. When credibility will not be an issue, the test should be on a balance of convenience.

> 6. Barring unusual circumstances, there should be an evidentiary foundation supporting the request. This would typically be provided by affidavit. Should cross examination be required, that could be done by video link.
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> 7. When authorized, the court should insist on advance testing and stringent quality control measures that should be monitored throughout the entire process. If unsatisfactory, the decision authorizing the video testimony should be revisited.

[17] Although this decision predated the 2019 amendments to section 714.1, which added to the list of 'considerations', the guidelines continue to have relevance.

[18] In granting the appeal and overturning the decision of the trial judge, the Court concluded her decision to allow the complainant and his mother to testify via video link denied the accused his right to make full answer and led to a miscarriage of justice. The trial judge had granted the application not because of the personal impact on the witnesses, but rather the difficulties associated with travel from Alberta, and there was no evidentiary basis for the Crown's request.

[19] The SDL guidelines were recently applied in *R. v. JWT*, 2020 NSSC 300, where Wright J. decided an application similar to the one before me that also included pandemic related concerns. The application was denied due to an inadequate factual foundation, a failure to satisfy the Court the fair trial interest was protected, and a lack of evidence of exceptional circumstances for the witness.

[20] Other courts in the country were sufficiently moved by the guidance from our Court Appeal, to adopt the guidelines.

[21] In one such case, *R. v. Humberto Dapena-Huerta*, 2017 ONSC 7530, Healey J. described the principles as "a balancing exercise to ensure trial fairness". Following a *voir dire* with testimony from the proposed witness and an affidavit from her treating physician, the Court granted the Crown's application for video testimony.

[22] In *R. v. Lawrence*, 2021 NLSC 7, that Court did not adopt the Nova Scotia guidelines but considered them, concluding the fact a "witness is a complainant is a factor to be considered, as the nature of the witness' evidence is a factor, but there is no special test under s. 714.1 for complainants as opposed to other witnesses" (para 21). It did grant the Crown application for testimony from the Dartmouth Provincial Court after considering all the evidence on the application including the witness' anxiety heightened by Covid-19, as set out in his affidavit, and that of his treating physician.

[23] The theme of the forgoing cases certainly supports the need for an evidentiary record, perhaps a *voir dire*, but certainly information as recommended

in *SDL* at paragraphs 27 and 32. Even admissions and an agreed statement of facts could suffice, but the stricter approach requiring formal evidence is to be preferred.

[24] While the guidelines represent strong recommendations, I am prepared to accept some oral submissions from the Crown in the absence of testing – that the children need to travel with their mother. That said, it is more concerning the lack of clarity available when I queried the proposed arrangements made with an Ontario court location from which the witness would testify.

[25] In *R. v Murrin*, 2021 CanLII 20363 (NL PC), Gorman J. rejected the Crown's application concluding it had failed to establish a proper foundation to allow the Court to properly evaluate the application – there was no detailed evidence of the proposed location from which the two witnesses would testify per ss. 714.1(d). In reaching this conclusion, Gorman J. also reviewed two of his recent decisions where he reached a similar conclusion and decried the Crown's lack of regard for the need to establish a foundation for these important applications. See: *R. v. Musseau*, [2019] N.J. No. 324 (P.C.) and *R. v. Kervian*, [2020] N.J. No. 47 (P.C.).

[26] He concluded the pandemic has not altered the obligation to comply with the requirements in section 714.1 and the court still requires "an evidentiary foundation through *viva voce* evidence or affidavits" (*Musseau* at paragraph 8).

[27] While an affidavit was filed, defence counsel also took issue with information therein summarizing MacDougall J. reasons for granting a s. 714.1 application in an unreported decision. A letter to the Crown Attorney with carriage of that ongoing matter was also attached containing the conditions under which the Order was granted. The typed version of the unreported decision is not attached, and defence counsel says the summary is hearsay and should not persuade the Court to grant the instant application.

[28] Hearsay on applications such as this is often accepted, as the rules of evidence are less stringent in a pre-trial application where the accused's guilt is not at issue. I am not overly concerned about this particular hearsay. The recommendations for ensuring effectiveness of a granted s. 714.1 Order are detailed and well-considered. However, the summary of MacDougall J's. decision I do find concerning since it is not properly before the Court in this form, and I accept defence counsel's concern that he cannot respond to such a summary. Not to worry, I intend to apply the test in section 714.1(a) –(f).

The location and personal circumstances of Mrs. Chow:

[29] Mrs. Chow resides in Ontario, an area of the country that has never been included in the "Atlantic Bubble", where case numbers are considered shockingly high to residents of the Atlantic Provinces. In addition, most of our Public Health notices suggest the disease arrives with the flying public and is therefore described as "travel related".

[30] That Mrs. Chow must travel here with her children leads to the conclusion she cannot leave them in Ontario in the care of others. However, there is no information about the ages of the children, whether they are school age, if Mrs. Chow is employed, etc. There is no evidence of fear, frailty, or health concerns that "preclude or raise a significant barrier to their testifying in person" (*R. v. Ragan*, 2008 ABQB 658 at para 32).

The costs that would be incurred if Mrs. Chow were to appear personally:

[31] There is no information about the anticipated costs of bringing the family to Nova Scotia, housing them, or providing meals. While it is certainly appropriate to conclude the financial cost might be high, no information was presented on the application.

[32] In addition, I cannot infer there are additional “costs” in the form of family disruption for Mrs. Chow and the children – school, work, friends, etc., of which there was likewise no evidence.

The nature of the witness’ anticipated evidence:

[33] I am told she is a primary witness, and her credibility is crucial, but otherwise there was no summary of the case before the Court or an indication of the nature of the evidence other than to surmise it involved a domestic relationship between the two.

The suitability of the location from where Mrs. Chow will give evidence:

[34] A courthouse in Windsor Ontario is proposed, but there was no assurance there could be a clerk to swear the witness or attend to the technology, just an assumption that would be available.

[35] While I am certainly supportive of receiving witness testimony by video, the test must be met for doing so. Recently I granted a Crown’s application for a member of Canada’s military to testify from a base in another part of Canada. His evidence on cross-examination was so compelling the trial halted and the accused entered into a peace bond. Unfortunately, there were occasions during his

testimony, as well as that of witnesses in other trials I have heard, that almost led me to halt the process because of "freezing" technology issues such as those experienced in *SDL* that our Court of Appeal warned could, if they occurred during crucial parts of the testimony, risk imperilling trial fairness. That said, I am aware that the technology is increasingly effective and benefits from a trial run which should certainly be achievable between courthouses in this country.

The accused's right to a fair and public hearing:

[36] This is the crux for the defence. Other than saying the application does not turn on the issue, I am generally satisfied the current technology, when operating properly, can support the right to fair trial and public access to the hearing. In *SDL* at paras 19-21, the Court addressed the issue.

> Constitutionally, while the accused has a right to be present for his trial and to make a full answer and defence, it is not necessary that witnesses testify in the accused's presence. For example, Macdonald, J.A. for this Court in *R. v. R. (M.E.)*, [1989] N.S.J. No. 248 at para. 28 explained:
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> > 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 person to be present in court, to hear the case against him and to make answer and defence to it. In *R. v. Lee Kun* (1915), 11 Crim. App. R. 293 at p. 300, the Lord Chief Justice of England said:
> >
> > > "... The reason why the accused should be present at the trial is that he may hear the case made against him, and have the opportunity, having heard it, of answering it. The presence of the accused means not merely that he must be physically in attendance, but also that he must be capable of understanding the nature of the proceedings."

> In fact, even the right to cross examine your accuser is not absolute. See *R. v. Hart*, 1999 NSCA 45at para. 19 (leave to appeal to SCC refused, [2000] S.C.C.A. No. 109).
>
> That said, an accused's right to face his or her accuser in the courtroom remains a fundamental aspect of most criminal trials.

The nature and seriousness of the offences:

[37] I can discern nothing other than the charges are summary and they involve former domestic partners.

Analysis:

[38] Not unlike *Murrin*, this Court also faces a dearth of information on which to consider the appropriateness of granting the application having regard to the above noted circumstances.

[39] Mrs. Chow is an important Crown witness, and her credibility is at stake. Her circumstances are not sufficiently explained such that I can find they are exceptional in their impact upon her. In the absence of an evidentiary foundation I am not prepared to speculate.

[40] The Operational Plan addresses witnesses coming into the province to testify, not applications for virtual testimony. That our province has such a

comprehensive plan should remind counsel of the need for timely applications, whether that is for personal attendance or a 714.1 application.

[41] It is perhaps worth saying, if this application had been brought in a timely manner, both trials could have been rescheduled to proceed on consecutive dates with different judges, thus reducing Mrs. Chow's need to be in the province for 26 days. As it stands the application was made on March 29, 2021 for a trial on April 12, 2019, she would have needed to fly today.

[42] I cannot conclude the application meets the test in s. 714.1. I cannot rule out that the request is based on mere convenience to the witness, which is not a proper foundation to grant it. Likewise, the foundation does not rise to the level of exceptional circumstances. While Covid-19 remains an important consideration, it is not "common sense" that it alone is sufficient to support granting such an application. In future, not unlike Gorman J., I conclude it is best to bring these applications with a supporting foundation of the kind guided by the section and our Court of Appeal decision in *SDL*.

[43] Application denied.

van der Hoek J.