

SUPREME COURT OF NOVA SCOTIA

Citation: *R v Young*, 2021 NSSC 214

Date: 2021-06-23

Docket: Sydney No. 504931

Registry: Sydney

Between:

Her Majesty the Queen

v.

Georgette Young, Lydia Saker, Nadia Saker, Angela MacDonald and Latatia Advertising Incorporated, The Spaghetti Benders Limited, 25132004 Incorporated, 25132002 Incorporated, Kishk Incorporated, Maddie and Bella's Children's Clothing Incorporated, Artisan Hair Loss Therapy Incorporated, Housewives in Heels Incorporated, Juliette and John Incorporated and New and Chic Incorporated

Judge: The Honourable Justice Robin Gogan

Heard: June 22, 2021, in Sydney, Nova Scotia

Counsel: Mark Donahue and Constantin Draghici-Vasilescu for the Crown

Georgette Young, self-represented Defendant
Angela MacDonald, self-represented Defendant
Nadia Saker, self-represented Defendant
Lydia Saker, self-represented Defendant

By the Court:

Introduction

[1] Today I am prepared to deliver a decision with respect to the outstanding s. 714.1 applications brought by the Crown in relation to the evidence of Helena Evans, Joe Ricketts and Carol Power. In each case, the Crown seeks to have these witnesses testify in this trial by way of videoconference.

[2] The accused are opposed to these applications. They wish to have the witnesses present for cross-examination. They are concerned about the potential for fraud, and they wish to be able to assess the body language of the witness as they testify. During supplemental submissions yesterday, they raised an issue about the identification of Carol Power. There was reluctance to provide details of this issue that quite frankly makes it difficult to assess.

Background

[3] The decisions I make today are in the context of an ongoing trial in which the accused are charged with a multitude of *Criminal Code* and *Excise Tax Act* offences alleged to have occurred between January 1, 2011 through to July 31, 2015. I have

previously issued a decision with respect to other s.714.1 applications made by the Crown. These reasons should be read in conjunction with those reasons.

[4] At the time of the earlier decision, I reserved my decision on Helena Evans, Joe Ricketts and Carol Power in anticipation of changes to public health restrictions and travel. Changes have occurred. For example, the witnesses from Newfoundland, Carol Power and Joe Ricketts, no longer need to isolate coming into Nova Scotia or returning to their home province. This change only came into effect today. Other restrictions are ongoing and travel logistics remain challenging. The Crown requests a decision now so that it may make arrangements for the testimony of these witnesses.

[5] What follows is my decision.

Issue

[6] The sole issue I must determine is whether it is appropriate that Helena Evans, Joe Ricketts and Carol Power should be allowed to testify by videoconference.

Analysis

The Law and Authorities

[7] The authority for these applications is s. 714.1 of the *Criminal Code* which provides a broad discretion to a Court to permit videoconference testimony if it appropriate “having regard to all the circumstances”. A list of considerations are contained in the section but those are not exhaustive. I must consider the following:

- (a) The location and personal circumstances of the witness;
- (b) The costs that would be incurred if the witness were to appear personally;
- (c) The nature of the witnesses anticipated evidence;
- (d) The suitability of the location from where the witnesses will give evidence;
- (e) The accused right to a fair and public hearing; and
- (f) The nature and seriousness of the offence;

I have reviewed and relied upon the following authorities: *R. v. S.D.L.*¹, a 2017 decision of the Nova Scotia Court of Appeal, *R. v. J.W.T.*², a 2020 decision of the Supreme Court of Nova Scotia, *R. v. Chow*³, a 2021 decision of the Provincial Court of NS, *R. v. Mischuk*⁴, a 2021 decision of the Ontario Court of Justice, *R. v. Morgan*⁵, a 2020 decision of the Ontario Court of Appeal, and the very recent decision from the Newfoundland and Labrador Provincial Court in *R. v. Rowe*⁶. I

¹ 2017 NSCA 58

² 2020 NSSC 300

³ 2021 NSPC 16

⁴ 2021 ONCJ 20

⁵ 2020 ONCA 279

⁶ 2021 NLPC 1321PA00147

mention the dates to place each decision in time. The decision in *S.D.L.* is important and binding but was released before the COVID–19 pandemic and does not consider the implications of it. Subsequent decisions have been increasingly focused on pandemic considerations.

The Evidence and Other Considerations

[8] The Crown has provided an evidentiary basis for its applications and I presided over hearings during which each of the witnesses appeared virtually and were cross-examined. The witnesses appeared by way of the conferencing platform MS Teams. In all instances, the platform operated well during the s. 714.1 hearings, providing high quality video and audio performance. Following the hearings, as noted, I granted a number of the Crown’s applications. Some of those witnesses have now testified in the trial providing a further opportunity for me to observe the operation of the technology and the ability of the parties to conduct their examinations and cross-examinations. Based upon my observations, I have no concerns about the videoconferencing technology. In fact, in some ways that I will discuss, it has advantages over the present state of our “in person” witness attendance.

[9] Let me explain by making several further observations at the outset of this decision that applies to all of the outstanding applications.

[10] The first is in relation to the layout of the courtroom in which proceedings are taking place. The standard layout has been modified to accommodate public health restrictions, the electronic display of evidence, and to account for the fact that we have four accused and two Crown counsel spread amongst several tables. The courtroom is equipped with a central video conference unit along with several individual monitors for the parties. This permits the main videoconference display to be mirrored on each of the parties' individual screens. The system is set up to also display the party asking questions back to the witness as would be the case if the witness was present.

[11] I have the same form of display available so I am able to monitor the quality of the testimony or evidence display the parties are hearing and seeing at their computer stations in real time. The modified layout allows the parties to be much closer to the person testifying than would usually be possible, while still providing the same kind of interaction between witness and examiner that is central to the examination of witnesses and ultimately the truth seeking function.

[12] I note here that under the Court's current Safe Services Model of operation, those in the courtroom, including witnesses, are heavily encouraged to wear masks at all times. Mask wearing allows us to proceed with an increased level of safety but obviously interferes with the ability to see facial expressions. I also consider

that I have been advised that the accused Lydia Saker has trouble hearing and that her ability to hear me improves when I remove my mask to speak. It seems to me in this context that there is an obvious benefit to having virtual testimony that allows witnesses to testify without wearing a mask.

[13] Moving on, one cannot escape the overriding consideration that we remain gripped by a global pandemic and this province remains in a State of Emergency. As we were set to begin this trial, Nova Scotia and Canada were in the midst of a third wave and we were yet again subject to strict public health restrictions. The Court moved to an Essential Services Model preventing in person attendance. Travel even within the Province was restricted. As a result, the beginning of this trial was delayed for several weeks.

[14] The third wave is now waning, restrictions are easing, and the Court now operates under a Safe Services Model. We are permitted to operate if it can be done safely and in compliance with public health restrictions. But we remain in a time where travel is still difficult. The flight schedules are only just resuming and remain limited. Travel is now starting to be possible, but risk remains. All of these circumstances are rapidly changing as the pandemic eases, but the risk of variants persists. For a trial that is scheduled to continue for weeks, the situation that exists

now may be very different in the near future. It has already changed significantly since I heard the s. 714.1 applications.

[15] Notwithstanding, the accuseds are opposed to virtual testimony while not waiving their right to be tried within a reasonable time. This court is now tasked with considering and balancing these overriding considerations against its ultimate responsibility to provide a fair trial.

Decisions

[16] Helena Evans, Joe Ricketts and Carol Power are all employees of the Canada Revenue Agency. They will be testifying in their professional capacity. Helena Evans and Carol Power were auditors and Joe Ricketts was a Team Lead or supervisor that would have been consulted on the progress of work but not directly involved. It is anticipated that evidence of these witnesses will lean heavily on documentary evidence that they acquired, reviewed, interpreted, or generated in their professional capacities. All have the potential to be called to testify during an upcoming *Jarvis voir dire* as well as in the trial proper. If they were to come in person, the Crown is proposing that the evidence of each of these witnesses be given in one sitting, encompassing both *voir dire* and trial evidence, meaning that it may be necessary to move in and out of *voir dire*s to accommodate in person attendance. While every effort would be made to be clear about the nature of the evidence, I

have some concern that this has the potential to be challenging for the self represented accused to navigate. In my view, this consideration favours virtual testimony.

[17] In terms of the nature of the evidence to be given, I understand that aspects of the testimony of each witness may raise a credibility issue, particularly in the case of Carol Power. However, I also note the nature of this case, and the anticipated evidence, is much different than what was considered by the Nova Scotia Court of Appeal in *S.D.L.* or by Justice Wright in *J.W.T.*

[18] I note for the record that I am satisfied with the proposed location of each of these witnesses' testimony. Although none of these witnesses testified at the hearing from a courtroom, they all appeared in neutral locations that I considered appropriate for someone testifying in a professional capacity, while working from home, as a result of pandemic related restrictions.

[19] Beyond these overriding considerations, I move to individual considerations.

[20] In the case of Helena Evans, I am advised that she resides in Ontario and that her evidence will be relatively short. If required to attend, she would face challenging and risky travel for a brief appearance in court. She would be required to isolate in Nova Scotia before testifying. She has young children who are finishing

a school year from her home where she also works. There would be relatively large cost for the Crown to absorb as a result of the requirement for isolation and a high level of undue hardship to the witness. I am satisfied that balance of convenience favours granting a s. 714.1 Order for the evidence of Helena Evans. Given the state of the pandemic, the ongoing public health restrictions, and the evidence of Ms. Evans personal circumstances, I would be satisfied that the order is appropriate even it requires exceptional circumstances.

[21] Both Joe Ricketts and Carol Power are in Newfoundland and Labrador. As of today, they need not isolate to enter Nova Scotia. I understand that they would not now need to isolate upon return to Newfoundland and Labrador. Being permitted to travel without isolation does not mean that travel would be easy or without risk. For example, there is no direct flight from their location to the place of this trial in Sydney, Nova Scotia. Travel would require several flights in each direction with extended layovers in airports or hotels. Any and all flights could contain connecting passengers coming from other locations in Canada where the rise of COVID-19 variants is a concern. I must consider the personal risk to these potential witnesses.

[22] I have considered the costs that the crown would incur to have these witnesses travel and testify in person. The costs would be significantly reduced now that

isolation is no longer required. But they would still be significant, involving flights, hotels charges, and the cost of other personal expenses.

[23] The evidence the Crown would offer from Mr. Ricketts would take approximately two hours. He had no direct interaction with any of the accused. Rather, he acted in a supervisory capacity. He will testify about conversations with Carol Power about her audit work. There is evidence that Mr. Ricketts' personal circumstances would make travel a hardship for him and his spouse. As with Helena Evans, I am satisfied that the balance of convenience favours allowing virtual testimony. But I would also be satisfied if it required exceptional circumstances.

[23] Carol Power is a more challenging decision. She is a key witness. Her evidence is anticipated to be lengthy – perhaps three days or more. In the Crown submissions, her testimony was described as follows:

Carol Power (NFLD) was the main auditor on the file. She will be asked to testify about the purpose of a GST/HST audit by the Aggressive GST Planning Section. She will be asked specifically about the conduct of her audit of the defendants including testifying about the information she received and reviewed from all sources including the defendants and the decisions she made on the file during and after the audit was completed. She will also testify about any interactions she had with the accused and admissions made by them.

[24] The Crown has forthrightly identified that aspects of Carol Power's evidence may require a credibility assessment. It is fair to anticipate a lengthy cross-examination. Traditionally, the preference would be that a key witness of some length be present to testify in person.

[25] I consider that although a credibility assessment may be required, this case is not analogous to a trial where such an assessment takes place in the context of a lone complainant's evidence about a traumatic and personal event to be assessed on its own or against a lone defence witness. In the present case, the witness is a professional testifying to work she carried out for her employer that will rely heavily on documentary evidence. She will be but one of more than twenty Crown witnesses in what is scheduled to be a five week trial.

[26] And I consider the potential benefit of virtual testimony. Ms. Power would be able to testify at length without wearing a mask and be much closer to the witnesses (albeit virtually) than she would be if she testified in person.

[27] Carol Power's provided affidavit evidence and testified about her reasons for wanting to testify virtually. She is retired from her former work with the Canada Revenue Agency. She cares for her husband who has a chronic medical condition and provides support to her ninety-three year old mother. She has concerns about

travelling in the circumstances. She considers the logistics of travel difficult and with risk. I find her concerns reasonable.

[28] The authorities require consideration of either a balance of convenience or exceptional circumstances. If exceptional circumstances are required, then I find that they exist. I also note the analysis of Gorman, P.C.J. in *R. v. Rowe* at para. 4 which adopted his earlier reasons in *R. v. Laing*:

[4] In *R. v. Laing*, 2021 NLPC 1321PA001381, I held that the word “appropriate” and the inclusion of “all of the circumstances” in section 714.1 of the Criminal Code “must be interpreted in the context of the hearing of matters during a pandemic and the difficulties and potential dangers which travelling can cause for witnesses ... Thus, an expansive judicial view of the operation of section 714.1 is, in the present circumstances, appropriate”.

[29] Judge Gorman went on to express the opinion that modern technology can allow for trials that are simultaneously fair and safe. I agree. Carol Power will be permitted to testify by videoconference.

Conclusion

In conclusion, I find it appropriate to grant the Orders sought by the Crown. Helena Evans, Joe Ricketts and Carol Power shall all be permitted to testify by videoconference. They shall testify from the location of their hearing testimony using the MS Teams platform. They shall be alone during their testimony and shall not have access to a cell phone for the duration of their testimony. This Order shall

be subject to any further testing that may be requested or required. The Order shall be subject to review if there are any difficulties with the technology or transmission of the evidence at the time it is being offered.

[30] Order accordingly.

Gogan, J.