

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Colegrove*, 2022 NSSC 9

Date: 20220117

Docket: *Hfx.* No. 500238

Registry: Halifax

Between:

Her Majesty the Queen

v.

Jeffrey Colegrove

-and-

Phillip Hickey

Decision
Video Appearance
Voir Dire #3

Judge: The Honourable Justice Christa M. Brothers

Heard: October 20, 2021, in Halifax, Nova Scotia

Oral Decision: October 22, 2021

Counsel: David Schermbrucker and Jill Hartlen, for the Crown
Lucie Joncas and Jennifer MacDonald, for Mr. Colegrove
Eugene Tan and Madeline Smiley-Sharpe, for Mr. Hickey

By the Court:

[1] On October 20, 2021, Mr. Colegrove’s counsel filed a Notice of Application pursuant to sections 715.23 and 650(2)(b) of the *Criminal Code* for him to appear by video at the *Charter* applications scheduled to begin on October 25, 2021,

[2] Mr. Colegrove is currently located at the Springhill Institution and proposes to appear from a secure room at the Institution by way of the video conferencing system that is regularly used for court appearances at the Supreme Court of Nova Scotia.

[3] This application was before me on October 20, 2021. Both Ms. Joncas and Ms. MacDonald made submissions on behalf of Mr. Colegrove. Ms. MacDonald filed an affidavit sworn by her on October 20, 2021, setting forth information that she received from Mr. Colegrove. The relevant portions of the affidavit include:

3. Jeffrey Colegrove (“Mr. Colegrove”) has informed me, and I verily believe, that he wishes to waive his procedural right to be present in person for the *voir dire* hearing of his *Charter* application, scheduled to begin on October 25, 2021.
4. Mr. Colegrove has informed me, and I verily believe, that he understands evidence will be taken as part of the *Charter* application.
5. Mr. Colegrove is currently serving a federal sentence at Springhill Institution.
6. Mr. Colegrove has informed me, and I verily believe, that his appearance in person for the hearing of the *Charter* application would require that he be transported to the Central Nova Scotia Correctional Facility.
7. Mr. Colegrove had informed me, and I verily believe, that upon arriving at the Central Nova Scotia Correctional Facility he understands that he will be required to quarantine for the duration of his time there (or up to 15 days) as a result of rules related to the current Covid-19 pandemic.
8. Mr. Colegrove has informed me, and I verily believe, that he has had to follow this procedure in the past, specifically, when he appeared in person for the preliminary inquiry for this matter, and that his experience was that he was required to quarantine in solitary confinement in a small cell with a mattress on the floor. During this period of quarantine, he was only permitted time outside of the cell every few days and was not permitted out to use a phone (but rather, a phone was occasionally brought to him in the cell).

9. Mr. Colegrove has informed me, and I verily believe, that upon being transferred back to Springhill Institution following the hearing of the *Charter* application he will be required to quarantine for an additional 15 days.

10. Mr. Colegrove has informed me, and I verily believe, that although the quarantine accommodations at Springhill Institution are more comfortable than at the Central Nova Scotia Correctional Facility, he will still be limited to one hour outside every other day and half an hour to use the phone (both of which are subject to adequate staffing levels).

11. Mr. Colegrove has informed me, and I verily believe, that he is familiar with the current quarantine arrangements at Springhill Institution as he was required to complete 15 days quarantine in September 2021 following a visit with his family.

12. Mr. Colegrove had informed me, and I verily believe, that if he is to appear at the hearing of the *Charter* application in person it will likely result in him having to spend upwards of 60 total days in quarantine over a period of less than 3 months as he is scheduled to have another family visit in mid November, which will result in an additional 15 days in quarantine.

13. Mr. Colegrove has informed me, and I verily believe, that shortly after the preliminary inquiry, while in quarantine upon his report to Springhill Institution, he was informed that he has a cyst on his brain. Mr. Colegrove regularly attends medical appointments in relation to this discovery and it is actively being monitored for growth.

14. Mr. Colegrove has informed me, and I verily believe, that both his medications and his condition cause him serious side effects (i.e., dizziness and vision loss). He has expressed to me that he is worried about the impact that being in solitary confinement for an extended period of time will have on both his mental and physical health.

15. Mr. Colegrove has informed me, and I verily believe, that he would feel safer being closer to his medical team given they are familiar with his condition and know his treatment.

16. Mr. Colegrove has informed me, and I verily believe, that he has not received either dose of the Covid-19 vaccine. Mr. Colegrove explained to me that due to his various allergies and conditions his doctors have advised him to wait to take the vaccine until he is able to be in the hospital for observation.

17. Mr. Colegrove has informed me, and I verily believe, that he is worried about potential exposure to Covid-19 due to his medical condition.

[4] At the hearing, counsel advised that they had researched this issue to determine the necessary building blocks for a successful application. They said the first requirement is an informed waiver and consent from the accused. Counsel represented that both Ms. Joncas, a very experienced defence lawyer and Ms. MacDonald spoke with Mr. Colegrove at length about what he was asking for in

relation to appearing via video for the *Charter* motions. They advised the court that the accused is fully informed of the procedural right he is waiving in this instance. In addition, on October 22, 2021, with counsel's consent, I made specific inquiries of Mr. Colegrove directly to satisfy myself that he had an adequate opportunity to consider what he was waiving, that the waiver was informed, and that he was freely providing his consent. He answered those questions and said he did so "completely". He also waived the issue of his personal absence from the courtroom as a future ground of appeal.

[5] Due to time constraints, I did not have sworn affidavits or a signed waiver before me at the time of the hearing on October 20, 2021. I now have a signed waiver and consent executed by Mr. Colegrove after he received legal advice and was informed of the impact of the execution of this document. I have a sworn affidavit from Ms. MacDonald who deposes to the information reviewed earlier.

[6] In addition, at the initial hearing I advised that while I had some reservations those could be assuaged by a more substantial foundation for the request. I indicated that I needed more from Correctional Services and Mr. Colegrove to ground my decision. Since then, I have received additional information from Ms. MacDonald who spoke to Correctional Manager David Deegan at Springhill. He advised that:

- Any unvaccinated inmate who leaves Springhill Institution for more than 24 hours is required to quarantine for 15 days upon their return. During quarantine the inmate is held in isolation and is only permitted outside for an hour every other day, and a ½ hour per day to use the phone.
- Mr. Colegrove would fall within this category as he is unvaccinated. Mr. Colegrove would be required to quarantine at Springhill upon his return from Court in Halifax.
- The video booth is available for all of next week except for the afternoon of Thursday, October 28, starting at 1pm when the three booths are already booked. He said availability is subject to change as orders come in, so the Court/Court staff need to advise the facility as soon as possible that a booth will be required for the duration of the week to ensure that it is properly set aside.
- There is a phone in the video room, and Mr. Colegrove will have full access to it during breaks in the proceedings to communicate with his counsel.

[7] Also, Mr. Colegrove signed a consent to obtain/disclose personal information and one Melissa Bailey executed a Correctional Service Canada form confirming that Mr. Colegrove is not vaccinated from Covid-19. This obviously adds to his vulnerability.

[8] The Waiver and Consent executed by Mr. Colegrove states:

I, Jeffrey Colegrove, born on the [...] of March 1966, confirm that I am represented by counsel and am providing this Waiver and Consent of my own free will and after having had ample opportunity to discuss this request with my lawyers.

I expressly waive my procedural right to be present in person at the *Charter* application *voir dire* scheduled to begin on October 25, 2021. I understand that pursuant to section 650 of the *Criminal Code of Canada* I am entitled to be present in person any time that the evidence of a witness is being taken as part of the trial proceedings, but I am informedly, clearly, and unequivocally waiving my right to be present in person.

I consent to an Order being made under s. 715.23(1) of the *Criminal Code* for me to appear by videoconference if this Honourable Court finds that to be appropriate in the circumstances.

I acknowledge that if this Honourable Court grants my request to appear by video at the *Charter* application *voir dire* scheduled to begin on October 25, 2021, my personal absence from court will not form the grounds of any future appeal.

[9] Lastly, and importantly, the Crown does not oppose this request. The Crown agrees that I have jurisdiction under s. 650(2)(b) and s. 715.23 to grant this application

Law and Analysis

[10] Section 650 of the *Criminal Code* is clear that an accused should be present in the courtroom for the whole of their trial. This is a procedural right and the court risks losing jurisdiction if this important provision is not complied with. The right to be present is a fundamental right of an accused. As noted, there are certain exceptions. Subsections (1.1) and (1.2) provide:

650 (1.1) If the court so orders, and if the prosecutor and the accused so agree, the accused may appear by counsel or by closed-circuit television or videoconference, for any part of the trial other than a part in which the evidence of a witness is taken.

(1.2) If the court so orders, an accused who is confined in prison may appear by closed-circuit television or videoconference, for any part of the trial other

than a part in which the evidence of a witness is taken, as long as the accused is given the opportunity to communicate privately with counsel if they are represented by counsel.

[11] None of the exceptions in s. 650 (1.1) and (1.2) apply. Mr. Colegrove frames his request as an application under s. 650 (2)(b) and s. 715.23. Section 650(2) provides:

650(2) The court may:

- (a) cause the accused to be removed and to be kept out of court, where he misconducts himself by interrupting the proceedings so that to continue the proceedings in his presence would not be feasible;
- (b) permit the accused to be out of court during the whole or any part of his trial on such conditions as the court considers proper; or
- (c) cause the accused to be removed and to be kept out of court during the trial of an issue as to whether the accused is unfit to stand trial, where it is satisfied that failure to do so might have an adverse effect on the mental condition of the accused.

[12] Although the plain wording of s. 650(2)(b) appears to create an open-ended discretion, the section has historically been applied with restraint. As Benotto J. observed in *R. v. Drabinsky* (2008), 2008 CanLII 40225 (ON SC), 235 C.C.C. (3d) 350 (Ont. S.C.J.) at para. 7:

[7] The use of the word “permit” makes it clear that the court is being responsive to a request. An accused has no absolute right to be absent. Permission must be sought because the right of the accused to be present is also a duty.

[13] In *R. v. Pazder*, 2015 ABQB 493, Germain J. undertook a comprehensive review of the jurisprudence at para. 241. I have considered the helpful summary he provided of the applicable principles, along with his remarks at para 249:

[249] As is obvious from this survey, the first fundamental principle is that *Criminal Code*, s 650(2)(b) should only be used sparingly, and with caution. An accused’s absence should only occur where there is a valid and legitimate reason that does not offend public policy, and that is beneficial to the accused without prejudicing the fair trial rights of the accused and other trial participants.

[14] The application is also brought pursuant to s. 715.23. The history of s. 715.23 and the other provisions dealing with remote attendance was reviewed in *R. v. Jeffries*, 2021 ONCJ 98, as follows:

[12] On September 19, 2019, Bill C- 75 brought in significant changes aimed at expanding the use of video and audio technology to “ensure fair and efficient proceedings while enhancing access to justice”. Part XXII.01 dealing with remote attendance by certain persons was added to the *Criminal Code* in ss. 715.21-715.26. Remote witness testimony is still governed by the amended ss. 714.1, 714.2 and 714.3.

[15] In *R. v. Jeffries*, the court was deciding whether to continue the trial in person, remotely by video, or in a hybrid fashion. In that case, the accused was not in custody and did not consent to proceeding via video. The court’s analysis of the relevant Code provisions is helpful:

25. Section 715.22 provides the following:

The purpose of the provisions of this Act that allow a person to appear at, participate in or preside at a proceeding by audio conference or videoconference, in accordance with the rules of the court, is to serve the proper administration of justice, including by ensuring fair and efficient proceedings and enhancing access to justice.

26. Section 714.1 and 715.23 – 15.26 contain detailed criteria that must be considered when assessing whether a matter should proceed by video conference. The court must consider the particular criteria set out in the Code provisions for each participant.

27. The new provisions of the Code appear to allow and encourage courts to adopt video technology in order to meet the purpose described in s. 715.22. However, sections 650(1.1) and 650(1.2) must be reconciled with provisions enacted in Bill C-75. The provisions of the Code must be read as a whole. That requires a purposive approach consistent with the rules of statutory interpretation that the legislature intends each provision to have meaning and does not intend to produce absurd consequences. A different approach would frustrate the legislative intent in enacting the provisions of Bill C-75. I also note the requirement in s. 715.23(2) for court to provide reasons for refusing to make an order under s. 715.23(1). That reveals a legislative intention in favor of remote appearances where the statutory criteria enumerated in the provision are met.

28. The court is entitled to control its own process in a matter that is consistent with its statutory framework. An accused is not entitled to a perfect trial or a trial conducted in the fashion that the accused believes is most favourable to the accused. An accused is entitled to a fair trial.

[16] I have also considered *R. v. Jassem*, 2021 ONCJ 83, where the court stated:

9. For indictable matters, the presumption is that the accused is to be present at the hearing – *Criminal Code* ss. 650(1), 715.21. In September of 2019, the Code was amended by Bill C-75 which added Part XXII.01 to permit remote attendance

by all parties via audioconference and video conference. The purpose of the new provisions was to serve the proper administration of justice by ensuring fair and efficient proceedings and enhancing access to justice through the use of audio and video technology – s. 715.22. Parliament could not have guessed that months after the provisions took effect, courts across Canada would be compelled by the COVID pandemic to move all proceedings online. The C-75 amendments were critical to continuing the administration of justice in criminal proceedings during the period.

[17] In the current case, the court has the waiver and informed consent of Mr. Colegrove and a request based on personal circumstances and humane grounds, in the face of an ongoing pandemic.

[18] In *R. v. Ali, Boparai, Khan & Malonga-Massamba*, 2020 BCSC 996, the court had a similar request in relation to *voir dire*s involving evidence. There the accused signed a waiver, and the Crown did not oppose the accused's request. I rely on the court's analysis of the case law as set forth below:

[22] In *R. v. Walker*, 2004 ONCJ 271, Dean J. held at para. 40:

While paragraph 650(2)(b) allows the court to excuse the accused "on such conditions as the court considers proper", this must be read in its full statutory context. Given the limits on the use of video links, it would not be appropriate to interpret the broad, general discretion in paragraph 650(2)(b) as allowing what subsections 650(1.1) and (1.2) exclude.

[23] That passage was quoted with approval by Downes J. in *R. v. Candelaria*, 2020 ONCJ 194. At para. 13 of that decision, Downes J wrote:

But seen in its statutory context and in light of the caselaw on point, s. 650(2)(b) is about *absence* not presence by alternative means. Using it in Mr. Candelaria's situation, where he *wants to be present* and have his matter heard, would in my view be an artifice of statutory interpretation.

[Emphasis in original]

[24] That interpretation was rejected, however, in *R. v. Daley*, 2020 ONCJ 201, where Monahan J. held that s. 650(1.1) does not limit the broad discretion conferred by s. 650(2)(b). He wrote at para. 14:

Justice Downes in *Candelaria* quotes with approval the comments of Justice Dean in *R. v. Walker*, 2014 ONCJ 271 (CanLII), [2014] O.J. No. 2567 (Ont. C.J.) to the effect that "it would not be appropriate to interpret the broad, general discretion in paragraph 650(2)(b) as allowing what subsections 650 (1.1) and (1.2) exclude". With respect, it is my view that subsections (1.1) and (1.2) "exclude" nothing. They only enable. They do not and could not narrow the broad scope of subsection 650(2)(b). As I have already said, subsection 650(2)(b) contemplates precisely that which is not

provided for in (1.1) and (1.2) namely that evidence can be taken from a witness even when the accused is completely absent from the trial.

[25] Justice Monahan acknowledged that in the reported cases, s. 650(2)(b) had been used almost exclusively to deal with circumstances where an accused requested to be completely absent from his or her trial, but he reasoned that it would be anomalous to conclude that a court could permit an accused to be completely absent under s. 650(2)(b) but could not permit that same accused to participate by telephone or videoconference. He wrote at para. 15 (in reference to *R. v. Drabinsky*):

Having said that, can there be any doubt that if the defendant Mr. Drabinsky asked that he be permitted to be absent from his trial for a day but he requested that he be permitted to listen to the trial by audio telephone, that subsection 650(2)(b) would have permitted the trial judge to allow such participation if she wished? The answer must surely be yes. Similarly, if Mr. Drabinsky or some other defendant in another case had indicated that for good reason (medical reasons for example) the defendant could not be present for the first day of trial but he nevertheless wished to have his trial go ahead in his absence, can there be any doubt that the trial judge could have permitted him to enter his plea of not guilty by audio telephone? In my view, the answer must be yes. In this regard, I note that subsection 650(2)(b) permits the trial judge to have the accused out of court during "the whole or any part of his trial" (which must include a plea) "on such conditions as the court considers proper" (which vests a broad discretion in the trial judge to impose or allow any conditions to ensure that justice is served and must permit the judge to have the accused participate by audio).

[Emphasis in original]

[26] Before me, defence counsel submits that although s. 650(1.2) cannot apply to a part of the trial where the evidence of a witness is taken, s. 650(1.2) does not constitute a limit on the court's broad discretion under s. 650(2)(b). According to counsel, this interpretation does not render s. 650(1.2) superfluous, because s. 650(2)(b) is limited to situations where the accused seeks the permission of the court, whereas s. 650(1.2) permits the court to order the appearance of an accused in custody by videoconference even if the accused would prefer to appear in person.

[27] I agree with that interpretation. As Monahan J. held in *R. v. Daley*, s. 650(1.1) does not limit the broad discretion conferred by s. 650(2)(b), which includes the discretion, in appropriate circumstances, to permit an accused to appear by videoconference, even for a portion of the trial where the evidence of a witness will be taken.

[19] In *R. v. Edwardson*, 2019 BCCA 259, the court said an accused person can waive procedural rights for their benefit, including those protected by s. 650 so long as the waiver is informed, clear and unequivocal. I am satisfied that the waiver in

this case meets these requirements. Mr. Colegrove has had the benefit of representation by experienced and capable counsel. He has had the benefit of their legal advice. He is fully informed of what he is waiving, and he waives it freely.

[20] In *Re: Court File No. 19/578*, 2020 ONSC 3870, Lemon, J. was faced with a request from both the Crown and defence to run a trial over the Zoom platform, which would involve the accused being physically absent from the courtroom during the taking of evidence. The accused would observe through the remote video conferencing software.

[21] The court reviewed the impact of s. 650 and ss. 715.21- 715.23. The latter provisions state:

715.21 Except as otherwise provided in this Act, a person who appears at, participates in or presides at a proceeding shall do so personally.

715.22 The purpose of the provisions of this Act that allow a person to appear at, participate in or preside at a proceeding by audioconference or videoconference, in accordance with the rules of court, is to serve the proper administration of justice, including by ensuring fair and efficient proceedings and enhancing access to justice.

715.23 (1) Except as otherwise provided in this Act, the court may order an accused to appear by audioconference or videoconference, if the court is of the opinion that it would be appropriate having regard to all the circumstances, including

- (a) the location and personal circumstances of the accused;
- (b) the costs that would be incurred if the accused were to appear personally;
- (c) the suitability of the location from where the accused will appear;
- (d) the accused's right to a fair and public hearing; and
- (e) the nature and seriousness of the offence.

(2) If the court does not make an order under subsection (1) it shall include in the record a statement of the reasons for not doing so.

(3) The court may, at any time, cease the use of the technological means referred to in subsection (1) and take any measure that the court considers appropriate in the circumstances to have the accused appear at the proceeding.

[22] After reviewing the competing decisions in *R. v. Candelaria*, 2020 ONCJ 194 and *R. v. Daley*, 2020 ONCJ 201, Lemon, J. wrote:

[22] Support for the parties' submission is found in *R. v. Daley*, 2020 ONCJ 201, at para 7. There, Monahan J. distinguished *Candelaria* by finding that an

accused who is represented by counsel can expressly waive his right to be physically present during a guilty plea and sentence.

[23] Moreover, Monahan J. interpreted s. 650 differently than Downes J. Whereas Downes J. found that the explicit inclusion of s. 650(1.1) and (1.2) in s. 606(5) precluded relying on s. 650(2), Monahan J. found the opposite. He wrote (at para. 13):

Subsections 650(1.1) and (1.2) permit the accused in certain circumstances to appear by video except where evidence is being given by a witness. However, subsection 650(2)(b) is even broader and permits the court to allow the accused to be completely out of the courtroom with no connection by video or audio even when evidence is being taken from a witness.

[23] The court went on to make the following statement, with which I agree:

I do not see *Candalaria* of any significance to my interpretation here. That case dealt with an unrepresented accused who wished to plead guilty by phone. Regardless of Downes J.'s analysis, this is an entirely different situation here. Similarly, in *Daley*, the issue was with respect to a guilty plea by phone but with counsel. I need not determine who is correct for my purposes.

[24] I also adopt the reasoning of the court as expressed in the following excerpt:

[32] Edited to its relevant wording, s. 650 allows that an accused shall be present in court during the whole of his or her trial. However, the court may permit the accused to be out of court during the whole or any part of his trial on such conditions as the court considers proper.

[33] Where the accused, his experienced counsel and the Crown all agree on the proper conditions of the videoconferencing for the purposes of the particular trial, a judge should be slow to hold up the trial. Here, however, I have an ample record to find that the factors enumerated in ss. 715.22-715.24 allow for such a trial.

[34] The charge is to be tried by judge alone. There are few witnesses, few documents and few issues. All parties are committed to the Zoom process and sufficiently experienced to make it work effectively. Despite the nature of the charge, it appears that the complainant agrees with the process.

[25] In *R. v. Singh*, 2020 NLPB 1320, the court reviewed the various Code sections and held that they permitted an accused to appear via videoconference. In fact, the court noted that nowhere in s. 650 do the words “physically present” appear. Where videoconferencing is used, an accused is not absent, but can see and hear the proceedings. The court in *R. v. Singh* stated as follows:

[38] Being present at one's trial has evolved, as has technology. Section 650(1) does not use the words "physically present" and though this provision must be interpreted in accordance with its purpose, it must be applied in the context of modern technology and in a manner that prevents the Pandemic from closing our courts. Anything else would be an abdication of our responsibility as judges to ensure that access to our courts continues. It has been pointed out that "by permitting video appearances for the accused and witnesses" the *Criminal Code* "recognizes that courts have evolved and technology has progressed with time and the need for physical presence in the courtroom is not as great as it was at the time the traditions of our legal system were established" (per Mr Justice Harrington in *Gibbs*, at paragraph 26).

[39] The purpose of section 650 is to ensure that the accused hears the evidence and is able to fully participate in the trial process. The absence of the accused at her or his trial has the potential of causing the trial to be unfair. However, when video conferencing is utilized, the accused is not absent.

[40] The word "present" has been defined as being "in view or at hand" (see www.merriam-webster.com); "being with one or others or in the specified or understood place" (see www.Dictionary.com); and "If someone is present at an event, they are there" (see www.collinsdictionary.com). Having the accused appear by video conferencing, if the accused's "right to a fair and public hearing" is maintained (see section 715.23(1) of the *Criminal Code*), constitutes the accused being present for her or his trial.

[41] An appearance by video conferencing is consistent with the purpose of section 650 of the *Criminal Code* and in my view constitutes a modern method of being "present in court", no different in substance from being physically present. Interestingly, the impact of modern technology has been recognized by Parliament in amendments made to the *Criminal Code*. PART XXII.01:

[42] Parliament added "PART XXII.01-Remote Attendance by Certain Persons" to the *Criminal Code*. This new Part is designed to increase the use of modern technology in the court process. Included in the amendments was the enactment of section 715.22, which indicates as follows:

The purpose of the provisions of this Act that allow a person to appear at, participate in or preside at a proceeding by audioconference or videoconference, in accordance with the rules of court, is to serve the proper administration of justice, including by ensuring fair and efficient proceedings and enhancing access to justice.

[43] Section 715.21 indicates that "[e]xcept as otherwise provided in this Act, a person who appears at, participates in or presides at a proceeding shall do so personally". However, section 715.23(1) indicates that a court "may order an accused to appear by audioconference or videoconference, if the court is of the opinion that it would be appropriate having regard to all the circumstances, including":

- (a) the location and personal circumstances of the accused;
- (b) the costs that would be incurred if the accused were to appear personally;
- (c) the suitability of the location from where the accused will appear;
- (d) the accused's right to a fair and public hearing; and,
- (e) the nature and seriousness of the offence.

[26] I have accepted the evidence and find that Mr. Colegrove is not vaccinated. In that regard, the following portion of *Jassem, supra* is relevant:

6. The travel and personal attendance by persons in custody creates some risk for them and everyone involved in their processing and transport. It also poses risk to the court officers, court clerk and court reporter who must stay in the courtroom with them during the trial. To address that risk the court has put in place protective equipment to ensure safety, all parties are masked throughout, and the court ordered at the outset that social distance rules must be obeyed.

...

8. I understand Mr. Counsell's preference, and I understand the context – that COVID measures to protect inmates in the jails have resulted in a number of inconveniences including more time in "lockdown". Everyone is experiencing restriction during COVID and of course the situation is worse for those in detention centres.

[27] Here, allowing Mr. Colegrove to appear by video ensures that he is not subjected to close confinement for extended periods of time. We know that if he were to be physically present in the courtroom for these *voir dire*s, he would be subjected to a lengthy period of close confinement with only one hour out of his cell. The courts have been clear about such confinement, it takes a terrible toll on those subjected to it. I refer to *Brazeau v. Canada (Attorney General)*, 2020 ONCA 184, *Corporation of the Canadian Civil Liberties Association v. Her Majesty the Queen*, 2019 ONCA 243; and *British Columbia Civil Liberties Association v. Canada (Attorney General)*, 2019 BCCA 228).

[28] This is a request by Mr. Colegrove on humane grounds. This should not be lost in the considerations. Further, the province is still in a state of emergency. As an unvaccinated individual in a correctional facility, Mr. Colegrove is vulnerable. This is also a factor to consider.

[29] We have used video links in all our case management conferences and in applications where no evidence was called. These have gone smoothly, and Mr.

Colegrove has not had any problem hearing or seeing those in the courtroom. He has also had every opportunity to speak to and consult his very experienced lawyers.

[30] The accused is directed to alert the court immediately if he cannot see or hear the evidence or if he wishes to consult with his counsel.

[31] I will grant an order like the one referred to in *Re: Court File, supra* at para 37:

At the outset of trial, I signed an order such that the accused was permitted to be “out of the court” for the whole of his trial, including the taking of evidence by witnesses, subject to the following conditions:

- a. For the entirety of the proceeding, the accused will participate in the trial using video conferencing software.
- b. The accused will immediately alert the court and/or his counsel if he is unable to see or hear the trial proceedings for any reason, including any technological issues.

Conclusion

[32] I grant the accused’s application to appear via video for the *Charter* motions he is advancing. I do so considering the location of the accused in the Springhill Institution and the fact that he has medical conditions and is not vaccinated against Covid-19. He has access to a video booth which has proven to be an effective means for him to participate in this matter. If I were to deny this application, I would be causing the accused to be subjected to extensive time in close confinement (although described as quarantine in these circumstances).

[33] With the benefit of legal advice from experienced counsel, the accused has waived his right to appear in person. Being fully informed, he has freely and voluntarily waived this right, and I will permit him to participate via video.

Brothers, J.