

SUPREME COURT OF YUKON

Citation: *R v McLaughlin*,
2022 YKSC 17

Date: 20220413
S.C. No. 20-01512
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

APPLICANT

AND

STEVEN ALEXANDER MCLAUGHLIN

RESPONDENT

Publication of evidence taken at the preliminary inquiry is prohibited by court order pursuant to s. 539(1) of the *Criminal Code*. **This publication ban is no longer in effect.**

Pursuant to s. 648(1) of the *Criminal Code* no information regarding this portion of the trial shall be published before the jury retires to consider its verdict. **This publication ban has lapsed.**

Before Chief Justice S.M. Duncan

Counsel for the Crown

Lauren Whyte

Steven Alexander McLaughlin

Appearing on his own behalf

REASONS FOR DECISION

Introduction

[1] This is an application by the Crown under s. 714.1 of the *Criminal Code*, R.S.C., 1985, c. C-46 (the "*Criminal Code*"), for an order that two witnesses in the upcoming trial of this matter give evidence by videoconference.

[2] The respondent, Mr. McLaughlin, is charged with aggravated assault, unlawful confinement, uttering a threat to cause death, and assault. He was arrested on August 29, 2019. His trial is scheduled to commence on May 9, 2022, by judge and jury in Watson Lake, Yukon.

[3] The two witnesses the Crown seeks to have testify by videoconference are Dr. Neil Switzer, a radiologist located in Calgary, Alberta, and Ms. Janny Lau, a forensic identification specialist employed by the National Forensic Laboratory Services (“NFLS”) of the RCMP, located in Surrey, British Columbia.

[4] Mr. McLaughlin does not object to Dr. Switzer testifying by videoconference. He does object to Ms. Lau testifying by videoconference.

[5] After reviewing the Crown’s affidavit material on this matter, hearing oral submissions from the Crown and Mr. McLaughlin on April 6, 2022, and reviewing some relevant case law referred to below, I ordered that both witnesses be permitted to testify by videoconference at the trial. I stated I would issue reasons and they are as follows.

Facts

[6] The proposed evidence in chief of both these Crown witnesses is expected to be brief. Dr. Switzer has submitted a report about the victim’s injuries and will be called to explain the technical language he used in the report. As well he will be asked to identify the victim and the accused on the video from the Watson Lake Hospital.

[7] Ms. Lau is expected to testify that the swabs taken at the scene of the incident contained female blood. She will also provide background information on the forensic process to explain how this conclusion was reached.

[8] The respondent states that Ms. Lau is important to his case and he expects to spend a few hours cross-examining her. He says the “case is going to fall” on her evidence. He is concerned about alleged errors in her report and the fact that certain evidence was not provided to her.

[9] The respondent is also concerned about the quality of the video connection from Watson Lake as he says it was poor during previous applications when individuals from the RCMP testified.

Legal Test

[10] The *Criminal Code* begins with the premise that evidence at a proceeding shall be given in person (s. 715.21). Section 714.1 of the *Criminal Code* sets out the applicable legal test for a court order permitting a witness to testify by videoconference. The court must be of the opinion that it would be appropriate having regard to all the circumstances, including:

- 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 witness’ anticipated evidence;
 - d) the suitability of the location from where the witness will give evidence;
 - e) the accused’s right to a fair trial and public hearing;
 - f) the nature and seriousness of the offence; and
- ...

[11] None of the factors is determinative and all of the circumstances must be considered including the listed factors. The Alberta Provincial Court observed in *R v Denham*, 2010 ABPC 82 at paras. 12-13, that s. 714.1 has been characterized 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.

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.

[12] Numerous cases have considered this section. The decision of the Nova Scotia Court of Appeal in *R v SDL*, 2017 NSCA 58 ("*SDL*"), is still considered the leading case, although it has been the subject of much judicial discussion. In that sexual assault case, the complainant moved to Alberta and was permitted to testify remotely. The Court of Appeal concluded this was inappropriate for several reasons, including the fact that the credibility of the complainant was at issue. The Court of Appeal also found that the videoconferencing technology was poor, with many interruptions, resulting in breaks in the flow of examination and cross-examination of the main Crown witnesses, whose credibility was also at issue. The Court of Appeal set out guiding principles for Nova Scotia trial judges in their consideration of s. 714.1 applications. These included: where credibility is an issue, the court should allow remote testimony only in exceptional circumstances that personally impact the witness. If the witness is the complainant, the circumstances must be even more compelling. Where credibility is not an issue, the balance of convenience test applies.

[13] Some courts (*R v KZ*, 2021 ONCJ 321 ("*KZ*"), and *R v Musseau*, 2019 CanLII 83451 (NLProvCt); *R v Zamora*, 2020 BCSC 1259; *R v SLC* 2020 ABQB 515) have

declined to follow this decision for various reasons, including the fact that it was decided under the previous version of s. 714.1, which had only three criteria, not six, and it was decided before the C-75 amendments which expanded the ability of criminal courts to use virtual proceedings. None of the *Criminal Code* amendments in this area has invoked a special test where there are witness credibility concerns. Courts generally have accepted that credibility and reliability can be tested as effectively by video as in person. Other courts have distinguished *SDL* on the credibility issue, noting it was decided before the COVID-19 pandemic (*R v Young*, 2021 NSSC 214), and the pandemic constitutes exceptional circumstances (*R v McDougal*, [2021] OJ No 754 (ONSC)).

Analysis

[14] The *SDL* decision of the Nova Scotia Court of Appeal has persuasive value but is not binding on this Court. Like other courts, I am of view that its value particularly as it relates to assessment of credibility and reliability is limited given the subsequent amendments to the *Criminal Code* that did not include any special test or restriction for credibility and reliability assessments by video. As well, the extensive experience our Court has had with testimony by videoconference as a result of our remote location and the COVID-19 pandemic is a distinguishing factor.

[15] Having said this, credibility assessment is not a significant consideration for the professional witnesses in this case. If it were, I agree with the court in *KZ* at para. 21 that the addition of an exceptional circumstances test to cases involving credibility is unnecessary, given this Court's positive experiences in using videoconferencing technology to assess witness credibility.

[16] I will review and assess the evidence and submissions of the parties on the relevant factors in s. 714.1. I note that the Crown provided evidence by way of several affidavits prepared by a paralegal and a travel coordinator from their office.

[17] **The location and personal circumstances of the witnesses:** Dr. Switzer is in Calgary, Alberta. Although this was not in evidence, it is well understood in the Yukon that because of the territory's small population, specialist radiologists from outside the Yukon are regularly sent test results from Yukon patients to review. Dr. Switzer has no relevant personal circumstances other than the obvious fact that he is a professional whose primary role is patient care and not testifying in court.

[18] Ms. Lau is in Surrey, British Columbia. The Director of Operations of the NFLS, Ms. Lau's employer, provided a memorandum outlining the significant negative practical effects of in-person testimony for all their employees, including Ms. Lau in this case. The NFLS is a national public laboratory service with sites in Ottawa, Edmonton, and Surrey. Forensic service requests and subpoenas for staff to testify in court come from across Canada. There are significant reductions in productivity, service response times, and capacity if staff are required to travel to courts throughout Canada to provide in-person testimony.

[19] **The costs incurred for in-person appearances:** The cost for each witness's in-person appearance is estimated to be \$4,200. Crown counsel conceded in submissions this may be an over-estimate by approximately \$1,000 as it included the need for the witness to stay over the weekend, which is speculative. I will instead accept the more conservative estimate of \$3,200. By contrast, the cost of appearing by videoconference is nil.

[20] **The nature of witness's anticipated evidence:** Dr. Switzer's evidence in chief is expected to be 30-45 minutes. The Crown advised the purpose of his testimony is to explain his technical report to the jury. There was no evidence about the proposed cross-examination, but the respondent did not indicate it would be lengthy.

[21] Ms. Lau's evidence in chief is anticipated to be 60-90 minutes. The purpose of her evidence from the Crown's perspective is to provide the background for her conclusion that the swabs taken from the vehicle she analysed showed female blood. Cross-examination by the respondent is expected to be a "few hours". The respondent wishes to test alleged errors in her report and ask her questions about evidence and material she did not receive, among other things.

[22] There is no physical evidence for the witnesses to discuss – only their paper reports. There is no suggestion that videoconferencing makes it difficult to testify about paper reports.

[23] Although the evidence of these witnesses will be technical, it is not expected to be overly complex.

[24] **Suitability of location where witnesses will give evidence:** There was no evidence of the location from which Dr. Switzer will give testimony. The Crown expected it would be from his office or home by Zoom.

[25] Ms. Lau would be giving her evidence from the NFLS site in Surrey. The memorandum from the Director of Operations confirmed their system is located in a private and quiet environment and can accommodate internet-based technologies, such as Zoom.

[26] The Yukon courts use Zoom technology on a regular basis for remote testimony. There is no concern from the court technologist about the quality of the connection between Watson Lake and Surrey, and Watson Lake and Calgary. The locations suggested by the witnesses or Crown counsel (quiet office location or private office or home) are appropriate to the extent they will have minimal to no interference. Video testimony by witnesses, particularly professional witnesses, is regularly taken from their offices or homes without compromising impartiality or judicial independence.

[27] **The accused's right to a fair and public hearing:** These witnesses will be testifying in open court in a way that may be seen and heard by the jurors. They will be subject to cross-examination. There is no physical evidence for them to review or testify about other than the paper reports. From our significant experience in the Yukon with testimony by videoconference both before the COVID-19 pandemic and more frequently during the pandemic, there is no concern about the ability to test credibility and reliability of a witness by video. In fact, a video screen can enlarge the witness's features making expressions and reactions more obvious, especially as compared to an in-person witness who testifies while wearing a mask and/or behind plexiglass during the pandemic, to the extent demeanour is a consideration.

[28] **The nature and seriousness of offence:** The respondent's charges are serious. The Crown witnesses, as professionals testifying about technical matters such as the extent of victim injuries and the gender identification of the person bleeding at the site of the alleged offences, are necessary but peripheral witnesses. They are not significant witnesses whose evidence is likely to be determinative of the outcome of the case. It is not expected that their evidence will be contested. If the respondent is correct

that Ms. Lau made errors and did not receive evidence for analysis that she should have received, the respondent may have a building block towards an argument that the Crown has not met its burden of proof.

[29] In addition to the discussion about the factors set out in s. 714.1, previous problems with internet connectivity in Watson Lake affecting remote witness testimony were raised by the respondent. He is concerned that those connectivity issues will unfairly stall this case.

[30] As noted above, the court technologist in Whitehorse has advised the Crown that the internet connection between Watson Lake and the two provincial locations is good. The technologist always does advance testing and monitors the video during the witness's testimony.

[31] If the connection proves unreliable during the trial, s. 714.41 of the *Criminal Code* provides that the court may at any time cease the use of technological means such as videoconferencing and take any measure the court considers appropriate in the circumstances to have the witness give evidence. While this could cause some delay, it provides a necessary safeguard to the respondent to ensure all the evidence is properly given and his right to a fair trial is preserved.

Conclusion

[32] Considering all of the factors in s. 714.1, as well as the quality of connection issue raised by the respondent, and the circumstances of this matter, I am satisfied that the test under s. 714.1 has been met by the Crown. The effect of travelling to Whitehorse from British Columbia or Alberta is a serious imposition on the witnesses' time with a consequent negative effect on patient care to be provided by Dr. Switzer and

forensic lab services to be provided by Ms. Lau. The costs of approximately \$6,000 in total for in-person testimony are not justifiable especially in the context of the nature of their evidence, which is expected to be mostly uncontested, is peripheral to the main factual determinations required in this case and does not raise issues of credibility. The witnesses will be testifying from suitable locations with appropriate internet-based connection (Zoom). The respondent will be able to cross-examine them fairly in open court on their reports. Experience has shown that assessment of witnesses is not compromised through video-technology. The offences here are serious, and sensible accommodations should be provided for tangential witnesses. If connectivity issues arise, the Court may order alternative measures of taking the evidence.

DUNCAN C.J.