THE PROVINCIAL COURT OF NOVA SCOTIA, SPRING EDUCATION CONFERENCE
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THE VIRTUAL COURT

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PROVINCIAL COURT OF NEWFOUNDLAND AND LABRADOR

INDEX

"Justice is not a place, it is a service."
(***R. v. Mischuk***, 2021 ONCJ 202, at paragraph 5)

Introduction:

At "the end of 2019 the World Health Organization was alerted to several cases of pneumonia in Wuhan, China, caused by an unknown virus. On 7 January 2020, China advised the world that a new coronavirus was the cause, later labelled SARS-CoV-2. It causes the disease known as COVID-19. In mid-January 2020, the Public Health Agency of Canada activated the Emergency Operation Centre in support of Canada's response to COVID-19. On 22 January 2020, Canada implemented COVID-19 screening requirements for travelers returning from China. On 25 January 2020, Canada confirmed its first case of COVID-19 related to travel from Wuhan, China. On 9 March 2020, Canada recorded its first death related to COVID-19" (see ***Taylor v. Newfoundland and Labrador***, 2020 NLSC 125, at paragraphs 29 to 31).

One of the impacts of COVID-19 was the closure of courthouses in Canada and throughout the world. It has been pointed out that "[i]n March 2020, in response to the rapid spread of a newly identified coronavirus, SARS-CoV-2, court buildings around the world began to close. Within a fortnight, there was a technological upheaval as the justice system moved from a world in which almost all court hearings were held in person to one in which where almost none were. To ensure ongoing access to justice, governments and judiciaries rapidly introduced various forms of 'remote court': audio hearings (largely by telephone), video hearings (for example, via Skype and Zoom), and paper hearings (decisions delivered on the basis of written submissions only)" [see Samuel Dahan and David Liang, *The Case for AI-Powered Legal Aid* (2021), 46 Queen's L.J. 415, at page 418].

Over time, however, matters began to be heard; many through remote appearances by video or audio conferencing. This often was done for safety reasons (see ***R. v. Theodore***, 2020 SKCA 107). In ***R. v. Thomas***, 2020 MBCA 84, it was indicated that "[d]ue process is possible in the digital world; courts should not assume that is not the case" (at paragraph 28). In ***Attorney General of the Turks and Caicos Islands v Misick & Ors*** [2020] UKPC 30, it was pointed out that the "Covid-19 pandemic has presented many challenges to justice systems around the world. Whilst it is essential to ensure that justice can continue to be both administered and accessed, means need to be found to enable this to be done safely and without endangering public health" (at paragraph 1).

In the Unites States "courts at every level have relied on remote technology to adapt the justice system to a once-a-century global pandemic, which shuttered courthouses doors beginning in March 2020 and has required limits on in-person proceedings for over a year" (see A. Bannon & D. Keith, *Remote Court: Principles for Virtual Proceedings During the COVID-19 Pandemic and Beyond* (2021), 115 NULR, Issue 6, 1875, at page 1877). It has also been noted that the pandemic "has forced state courts to figure out how to maintain access to justice while keeping court users, the public, and court employees safe" (see Danielle Elyce Hirsch & Lillian Wood, *Charting a Path Forward to Create Justice for All*, 57 Ct. Rev. 12 (2021), at page 105).

Dahan and Laing suggest that "the COVID-19 shutdown constitutes a huge unscheduled pilot--a great experiment in the use of a variety of technologies in our courts. It is clear that 'dropping our current court system into Zoom' does not constitute a transformation, let alone a paradigm shift. While these recent developments should be applauded, we are at the foothills of the transformation. The COVID-19 virus intervened and generated the sense of urgency that triggered superficial innovation under constraints. We quickly moved from a world in which almost all court hearings took place in person to one in which almost all hearings took place online, thus creating an opportunity--whether welcome or not-- to embrace technology (at pages 419 to 420).

Most Canadian courtrooms are now open, though some have been closed as a result of local increases in positive COVID testing. In either instance, virtual appearances can occur. The pandemic "has forced unprecedented agility and creativity, including the embrace of remote court in many contexts. Courts should not go backwards. But just as courts should resist the temptation to return to a broken *status quo*, they should also avoid embracing change without fully reckoning with the costs" (Bannon & Keith, at page 1920).

The present pandemic may eventually end and we will be back to our normal processes. This does not mean, however, that the type of technology that has allowed us to hear cases during the pandemic cannot still be utilized post-pandemic. The court processes utilized during the pandemic have illustrated that being present in court should not be equated with being present in-person. It has been suggested, for instance, that "[o]ne benefit [of the pandemic] is the ease with which [litigants] can participate in their case without coming to the courthouse. They can quickly and easily access the court from home or from work without having to take time off work; find someone to watch their kids; or pay for public transportation to, or parking at, the courthouse building. Remote services also help the elderly, disabled,

and others who have difficulty traveling with easier access to court services" (see *Pandemic Positives: Extending the Reach of Court and Legal Services*, 57 Ct. Rev. 12 (2021), at page 17).

This Paper:

This paper will seek to examine the manner in which the "virtual court" can operate in the criminal law context (when I use the words "virtual court", I am referring to the multitude of ways that the participants in a criminal matter, including the accused, witnesses, counsel and the judge, can appear or preside in whole or part without being present in-person in a courtroom).

The virtual court can be used for every element of the criminal trial process: bail hearings, pleas, applications, trials, sentence hearings and appeals (see ***R. v. JDW***, 2021 MBCA 49). It is not necessary for any of the participants in any of these matters to be present in-person for the process to work effectively and properly. However, does the law require in-person appearances, particularly in relation to the accused?

When the parties consent to the use of the virtual court, there is usually little difficulty. As an example, if both counsel and the accused wish to appear virtually at a sentence hearing, this should not cause any difficulty (see section 650(2) of the *Criminal Code*). In such a situation, the judge might also preside in the same fashion (see section 715.26 of the *Criminal Code*). The *Criminal Code of Canada*, R.S.C. 1985, contains provisions which allow for all of the parties, including the judge, to appear or preside from outside a courtroom in various situations.

Difficulties arise, however, when one of the parties objects and insists on an in-person attendance or hearing. For instance, what if the judge wants to preside virtually, but one of the parties wants the judge to preside in-person? What if the accused wants to appear in-person, but cannot do so because of financial concerns or because of pandemic restrictions? What if the accused seeks an adjournment so that he can appear in-person because he objects to a virtual appearance?

All three of these situations have occurred:

> -in ***R. v. Patriquin***, 2021 ONSC 359, the sentencing judge ruled that he could appear virtually, despite the accused's objections;
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> -in ***R. v. Berent***, 2020 MBCA 53, the trial judge rejected an application by the accused to appear virtually from their home in California, despite the expense involved and travel restrictions in place; and

> -in ***R. v. Singh***, [2020] N.J. No. 177 (P.C.), the accused sought an adjournment of his trial. He was living in British Columbia and argued that he could not travel to Newfoundland and Labrador because of financial considerations and because of the pandemic. The accused objected to appearing virtually, arguing that he had a right to appear in-person. In dismissing the application, the trial judge concluded that "when an accused person appears by video conference, she or he is 'present in court'" (at paragraph 46).

In ***R. v. Jeffries***, 2021 ONCJ 98, however, it was held that a judge cannot order an accused person to appear virtually, without their consent.

What I intend to primarily concentrate on in this paper are the situations in which the consent of one of the parties to utilizing the virtual court is missing. What authority, if any, do we have to order the Crown or the accused to appear virtually? Do we always need consent? Can we issue an order for virtual appearance on our own motion?

A consideration of these questions requires an analysis of, in particular:

> (1) whether a virtual appearance by the accused complies with the requirement in section 650(1) of the *Criminal Code* that the accused "shall" be "present in court" during her or his trial; and
>
> (2) whether section 715.23 of the *Criminal Code* allows a judge to order that the accused or the Crown appear virtually when both or either objects to doing so.

I will approach this analysis by considering section 650(1), the exceptions contained within other parts of that provision, and then the effect, if any, of sections 715.21 to 715.23 of the *Criminal Code* on these questions.

Finally, though the pandemic appears to be lessening in certain areas of the country, its impact on travelling and attending court in-person remains. This can occur for out-of-province travel, but it can also restrict in-province travel as well. In addition, for some individuals, attending court in-person is very difficult, regardless of the pandemic.[1] As a result, at the end of the paper, I will review sections 714.1 and 714.2 of the *Criminal Code*. These provisions allow a judge to order that a witness testify by virtual means.

Many of these issues will obviously require a factual foundation. Thus, I intend to start with judicial notice. I will then consider how virtual appearances comply, or do

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[1] See Helene Love, *Seniors on the Stand: Accommodating Older Witnesses in Adversarial Trials* (2019), 97 Can Bar Rev 242.

not comply, with the statutory presence requirements found in sections 650 and 715.21 of the *Criminal Code*. A consideration of these statutory provisions is crucial because the Provincial Court is a court of statutory jurisdiction.

In ***R. v. Jassem***, 2021 ONCJ 83, it was suggested that an order for a virtual appearance could be issued in the absence of statutory authority as "part of a court's general power to regulate their proceedings" and to "take reasonable steps to comply with public health directions and regulations and to protect the health of all participants" (at paragraph 13). However, in ***Woods (Re)***, 2021 ONCA 190, it was pointed out that "[t]he COVID-19 pandemic cannot justify a clear departure from the terms of the *Criminal Code*. The [Ontario Review Board] is a creature of statute and its powers are strictly circumscribed by the *Criminal Code*. The Board cannot expand its jurisdiction based on a sense of perceived urgency to act outside its statutory authority" (at paragraph 35).

Judicial Notice:

It seems well settled that a judge can take judicial notice of the pandemic and its impact on the ability of individuals to travel or appear in-person at a courthouse (see ***Bowes v. Bowes***, 2021 NLCA 10, ***R. v. Lariviere***, 2020 ONCA 324, ***R. v. Morgan***, 2020 ONCA 279, and ***R. v. J.M.***, 2021 ONCA 150). In ***R. v. SCC***, 2021 MBCA 1, the Manitoba Court of Appeal indicated that it was willing to take judicial notice of "the fact of the COVID-19 pandemic, its impact on Canadians generally, and the current state of medical knowledge of the virus, including its mode of transmission and recommended methods to avoid its transmission" (at paragraph 8).

I would suggest that we can also take judicial notice of the manner in which modern technology operates and how it allows for the virtual court to operate in the same manner as the in-person court (see ***R. v. Murrin***, [2021] N.J. No. 68 (P.C.), at paragraph 13). It has been pointed out that "[w]ith the dramatic improvements to videoconferencing technology in recent years, it is entirely possible that the traditional emphasis on in-person hearings will wane. In fact, recent *Criminal Code* amendments have expanded the circumstances in which trials and other criminal proceedings may be conducted by videoconference" (see ***Woods v. Ontario***, 2020 ONSC 6899, at paragraph 44).

The Effect of Refusing to Embrace Modern Technology:

If we embrace modern technology, the process of trials and hearings can continue, despite the present pandemic, or what follows it, and we can enhance access to justice both in and out of a pandemic. If we do not embrace modern technology in

the conducting of trials and hearings, then matters will be adjourned. This has repeatedly happened in Newfoundland and Labrador despite the Provincial Court having shown a great willingness to conduct virtual hearings (see ***R. v. Gillingham***, [2020] N.J. No. 107 (P.C.), at paragraphs 6 and 7). Perhaps all courts have a responsibility to take a more proactive approach and to demand virtual appearances even when resisted by the Crown or the accused. Judges may have to consider hearing any matter scheduled, by some means, unless satisfied by one of the parties that it would be unsafe or unfair to do so.

In ***R. v. K.N.***, 2021 BCPC 126, in granting an application pursuant to section 714.2 of the *Criminal Code*, allowing for a witness to testify remotely from New Zealand, Judge Giardini noted that "adjourning this matter until the Covid-19 situation improves is not appropriate having regard to all of the circumstances. First, none of us has a crystal ball that will tell us when Covid-19 will be sufficiently under control. Second, as the old judicial adage goes – justice delayed is justice denied" (at paragraph 123).

In ***KC (Re)***, 2021 ABPC 156, in the context of a child-welfare application, the presiding judge seemed pleased that the matter had "been heard by the fifth month and approximately one week after apprehension". It was suggested that "in the COVID climate, that is rapid light speed" (at paragraph 1). However, it is not apparent to me why we should accept that the pandemic as a reason, in and by itself, to delay matters or deny anyone access to justice.

Finally, in ***United States v. Meng***, 2021 BCSC 935, though an application for an adjournment was granted, the application judge indicated that she gave "no weight to the suggestion that the COVID-19 pandemic offers a context that favours the proposed adjournment" (at paragraph 43).

I would suggest that applications for virtual appearances must be considered in the context of the difficulty of hearing matters during a pandemic, including the difficulties and potential dangers which travelling can cause for witnesses. I would recommend an expansive judicial view of the use of modern technology. Having said this, the use of the virtual court requires access to proper technology. Not every court location nor every participant has such access. As an example, in a recent application filed in the Provincial Court of Newfoundland and Labrador, counsel for the accused sought an adjournment of the accused's trial based upon a member of counsel's family having potential contact with COVID-19. This meant that counsel had to quarantine at home. In her application, she addressed the use of the virtual court as a substitute for an in-person appearance by noting that she lives in an area

of the province "in which internet service is often unreliable, making a video appearance challenging, and I feel this would negatively impact my ability to properly represent my client in his defense against these very serious allegations".

In addition, some individuals are uncomfortable with virtual appearances and their discomfort will have to be considered.[2] Some judges are uncomfortable with the technology and fear that they will not be able to assess the case properly.[3] However, the commencement of a virtual hearing does not result in the judge losing the ability to stop the hearing if the technology proves unsuitable. The *Criminal Code* contains provisions allowing a judge who has commenced a virtual hearing to cease the presentation of evidence and take any measure that the judge considers "appropriate in the circumstances" (see sections 714.41 and 715.23(3) of the *Criminal Code*).

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[2]In ***David Trevor Brand vs High Park Farms***, 2021 ONNFPPB 7, an application was made pursuant to section 5 of the *Farming and Food Production Protection Act*, 1998, for an "in-person hearing of the application in this matter instead of a virtual hearing". The basis of the application was that two elderly witnesses were "not familiar with the virtual meeting methods and would prefer the hearing be held in-person as opposed to Zoom or otherwise" One witness did "not own a computer and [had] never used virtual technology". He indicated that he had "limited experience with virtual platforms and find the process intimidating, anxiety inducing, causes nervousness and cumbersome. I am not familiar with the available features used in virtual forums and I fear that I could make mistakes that could affect the outcome of the hearing. I am not a tech savvy individual and only engage the bare necessities of today's technology." The other witness indicated that she was "very hearing impaired and technologically challenged and feels that taking part in a video meeting would put her through more stress both mentally and physically" (at paragraphs 7 to 10).

In rejecting the application for an in-person hearing, the Board indicated that "[t]hose persons who profess to be nervous about appearing at a virtual hearing should be no more or less stressed than appearing before a panel in an in-person hearing in a formal setting. Those with hearing difficulties will not be hampered anymore than in an in-person hearing" (at paragraph 17).

[3] In the arbitration context, it has been suggested that "[a]rbitrators fear that they may not be able to accurately assess witness testimony or gauge reactions; counsel fear that they will be unable to cross-examine adverse witnesses effectively, especially if lags or connection problems affect the pace and thrust of the cross-examination, or that advocacy will fall flat when conducted through a screen; and witnesses may fear testifying about emotionally charged or personal matters in such an impersonal manner. Everyone working from home fears that proceedings will be interrupted by children, pets, neighbours' lawnmowers, or the like" (see Joshua Karton, *The (Astonishingly) Rapid Turn to Remote Hearings in Commercial Arbitration* (2021), 46 Queen's L.J. 399, at pages 405 to 406).

Dahan and Laing point out that "[i]n March 2020, the COVID-19 crisis paralyzed many institutions around the world, including most courts. Given those circumstances, legal professionals should be applauded for successfully transitioning to a model of remote justice. Not long ago this approach would have been considered unacceptable" (at page 429).

Does the Virtual Court Work in Practice?

Can criminal matters be heard by the virtual court fairly and appropriately?

In ***R. v. Marshall***, 2021 ONCA 344, at the end of an appeal judgment, Justice Doherty indicated that the transcripts of the sentencing proceedings under appeal, "show how difficult the conduct of even a simple proceeding had become in the criminal courts in the early summer of 2020 because of COVID-19. It is difficult to see how the system could have accommodated a lengthy trial" (at paragraph 59).

It is not clear why Justice Doherty decided to make this remark, but it is not consistent with what trial judges have been saying. In ***R. v. Y.A.***, 2021 ONCJ 295, for instance, it was pointed out that "[d]uring the course of the current pandemic, justice participants have gained experience conducting all manner of virtual proceedings" (at paragraph 10).

Similarly, in ***R. v. MacKinnon***, 2021 ONSC 2749, Justice Copeland stated that based on the "experience of the courts pre-pandemic, and during the pandemic, as well as my own experience with trials and evidence by videoconference during the pandemic, and CCTV before the pandemic, that witness evidence by videoconference is a reasonable alternative that can accommodate both the public health concern to limit spread of the COVID-19 virus, and the defendant's fair trial right... Pre-pandemic caselaw recognizes that modern videoconferencing technology is of sufficiently high quality that essentially nothing is lost of the ability to observe witness demeanour in testimony by videoconference" (at paragraphs 80 and 83).

The Provincial Court of Newfoundland and Labrador has attempted to embrace the use of technology so as to allow for the court process to continue when a party cannot be physically present or even when the courthouse has been closed. In ***R. v. Mitchell***, [2020] N.J. No. 95 (P.C.), for instance, an entire trial in which no one was in a courtroom, was conducted. It was noted that the "sound and picture quality was excellent. As a result, this trial was conducted in the same fashion as it would have been if the parties were personally present in a courtroom" (at paragraph 6). Similarly, in a case in which the complainant (Ms. MA) testified remotely from another province, it was noted that "Ms. MA testified by video link from her home in New Brunswick, pursuant to section 714.1 of the *Criminal Code*. The audio and

video quality was excellent and allowed for Ms. MA to testify in a manner that mirrored an in-person appearance" (see ***R. v. Rowe***, 2021 N.J. No. 126 (P.C.), at footnote 1).[4]

In Newfoundland and Labrador such matters as trials, sentence hearings (see ***R. v. D.(E.)***, 2020 CanLII 42688 (NL PC)), and bail hearings (see ***R. v. Jeon***, [2020] N.J. No. 75 (P.C.)), have been held in the virtual court. The willingness to have matters heard in the virtual court has been considered a mitigating factor in sentencing (see ***R. v. Gillingham***, [2020] N.J. No. 107 (P.C), at paragraph 58).

Recently, in ***Nova Scotia (Attorney General) v. Freedom Nova Scotia***, 2021 NSSC 170, Justice Norton heard an application for an injunction by what he described as "oral submissions" made "virtually" (at paragraph 6). It does not appear that any *viva voce* evidence was presented, but this case illustrates that many of the type of matters we hear can be heard without anyone being in a courtroom, including the presiding judge.

A Contrary View:

Not all judges agree. In ***R. v. Berent***, 2020 MBPC 53, for instance, some reluctance to the conducting of "virtual trials" was expressed, though the Provincial Court of Newfoundland Labrador was complimented for its approach (at paragraph 14):

> The Court in Newfoundland seems to have more experience and perhaps more sophistication with the technology which offers some assurance of its effectiveness. The Provincial Court of Manitoba is not in the same position at this time. We are certainly adept and familiar with video appearances for

[4] In ***R. v. Lawrence***, 2021 NLSC 7, Justice Burrage made the following comments concerning how the virtual court worked in that matter (at paragraphs 7 and 8):

> The technology proposed is the video platform provided through Memorial University of Newfoundland (MUN) Conferencing. It is the platform adopted by this Court in response to the COVID-19 pandemic and, indeed, was the means employed for the hearing of the within application. In particular, counsel appeared by video from a courtroom in Corner Brook, NL, the complainant appeared and was cross-examined while at the Provincial Court in Dartmouth, NS and I appeared from my chambers. After an initial delay on the Corner Brook end, the application proceeded seamlessly. Both the sound and video quality was excellent.
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> Given the Court's positive experience with MUN Conferencing, as confirmed on the hearing of this application, I am satisfied that the appearance of the complainant by videoconference will not impact negatively on the ability to see, hear, and comprehend his evidence.

> bail hearings and sentencings, and the occasional witness, usually an expert witness, appearing by video link. However, the added complexity required for virtual trials is one which requires a great deal of attention to the details of how the trial evidence will be presented from start to finish, including how the evidence will be viewed by all. Counsel have not provided any of these details in the application that was made before me.

There are specific provisions in the *Criminal Code* which allow for witnesses to appear and provide evidence by audio or video conferencing (see sections 714.1 and 714.2). In addition, there are provisions for remote appearances in bail hearings (see section 502.1)[5] and at preliminary inquiries (see sections 537(j) to (k)). Section 502.1(5) allows the justice conducting a bail hearing to "preside by audioconference or videoconference, if the justice considers it necessary in the circumstances". Finally, section 537(i) allows the justice conducting a preliminary inquiry to "regulate the course of the inquiry in any way that appears to the justice to be desirable, including to promote a fair and expeditious inquiry, that is consistent with this Act".

Does the Accused Have to Appear In-Person?

Perhaps the most contentious issue in the virtual court involves the question of whether the accused must appear in-person at her or his trial and what, if any, authority does a trial judge have to proceed with a trial in the virtual court over the objection of the accused?

A consideration of these issues starts with a consideration of section 650 of the *Criminal Code*. In interpreting section 650 and other related provisions in the *Criminal Code*, it is well accepted that the correct approach to statutory interpretation requires that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (see ***Bell ExpressVu Ltd. Partnership v. Rex***, [2002] 2 S.C.R. 559, at paragraph 26).

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[5] Section 502.1(1) of the *Criminal Code* states:

> *Except as otherwise provided in this Part, an accused who is required to appear in a proceeding under this Part shall appear personally but may appear by audioconference or videoconference, if arrangements are made with the court in advance and those arrangements are satisfactory to the justice.*

The Right to Be Present:

It has been held that the "right to be present is a fundamental right of the accused" (see ***R. v. Barrow***, [1987] 2 S.C.R. 694, at paragraph 38). It has been pointed out that the accused "must be able to see and hear the entire process by which it is sought to deprive him of his liberty…nothing less is sufficient" (see ***R. v. Fecteau*** (1989), 49 C.C.C. (3d) 534 (Ont. S.C.), at paragraph 19 and ***R. v. Tran***, [1994] 2 S.C.R. 951).

Few would take exception to these remarks. These principles are designed 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 and to appear to be unfair. However, the questions becomes: when the virtual court is utilized, is the accused absent? What does it mean to be "present in court"?

This latter question and section 650(1) of the *Criminal Code*, were considered by the Newfoundland and Labrador Court of Appeal in ***R. v. Gibbs***, 2018 NLCA 26. In ***Gibbs***, Justice Green noted that "the purpose of 'presence' is to ensure that the accused has the opportunity to have first-hand knowledge of proceedings which affect his or her vital interests, such as facing his or her accuser, hearing the case against him or her, consulting with counsel, cross-examining witnesses, participating in the trial through motions and objections, having proper observations made of the demeanour of witnesses and, in the words of subsection (3) of section 650, 'to make full answer and defence' after the close of the case for the prosecution". However, Justice Green also noted that "[n]one of these objectives is necessarily compromised if the judge is not present in the courtroom where everybody else is assembled, provided the objectives can be fulfilled by other means" (at paragraph 56).

Section 650 of the Criminal Code:

The general principle that the accused must be "present in court" for his or her trial finds statutory expression in section 650(1) of the *Criminal Code*. That section states as follows:

> *(1) Subject to subsections (1.1) to (2) and section 650.01, an accused, other than an organization, shall be present in court during the whole of his or her trial.*[6]

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[6] In ***R. v. Sinclair***, 2013 ONCA 64, it was held that in the context of section 650(1), the word "trial" carries "a broad meaning, although generally the trial proper does not commence until after a plea is entered…In determining whether something which occurred at trial falls within the

This type of provision was included in the original 1892 *Criminal Code*. At that time, it was section 660, but the wording was very similar: "Every accused person shall be entitled to be present in court during the whole of his trial unless he misconducts himself by so interrupting the proceedings as to render their continuance in his presence impracticable" (My emphasis. For a fuller review of the history of this provision, see ***R. v. Twoyoungmen***, 2021 ABPC 88, at paragraphs 23 and 24).

In ***Gibbs***, Justice Green pointed out that "[p]reviously, a court, of necessity, had to be conducted where every relevant player was assembled. The notion of hearing relevant arguments and evidence in order to be able effectively to respond thereto or for the judge to adjudicate thereon required contemporaneous physical presence in one place. If the judge was not there, the court could not be properly constituted; and if the accused was not there, his or her right to respond to the case against him or her would be compromised" (at paragraph 50). Justice Green also noted that "[w]hen Blackstone defined a court as 'a place wherein justice is judicially administered'…he, of necessity, had to conceive of its operating all in one place. His description, however, is institutional rather than locational. It begs the question, whether, if technology could allow for the achievement of the fundamental objectives of the court process by other means, court nevertheless must be defined as a single location in which all participants must be present" (at paragraph 51).

In ***Woods (Re)***, the accused had been found not criminally responsible on account of mental disorder in relation to a charge of uttering a threat. Because of the pandemic, the Review Board decided to conduct virtual hearings. Ms. Woods objected to appearing virtually and submitted, based upon section 672.9 of the *Criminal Code*, that she had a right to appear in-person at her hearing. Section 672.9 is worded in a similar fashion as is section 650(1). Section 672.9 states as follows:

> Subject to subsection (10), the accused has the right to be present during the whole of the hearing.

Section 672.10(a) allows the chairperson of the Review Board to "permit the accused to be absent during the whole or any part of the hearing on such conditions as the court or chairperson considers proper". The Ontario Court of Appeal indicated that

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meaning of 'trial' pursuant to s. 650(1), the court must ask whether what transpired involved the accused's 'vital interests'" (at paragraph 15). As a result of section 795 of the *Criminal Code*, section 650 and Part XX apply to summary conviction proceedings. Section 800(2) of the *Criminal Code* indicates that a "defendant may appear personally or by counsel or agent, but the summary conviction court may require the defendant to appear personally".

the "word 'permit' in s. 672.5(10)(a) implies that the Board may grant the accused permission to be absent. Stated otherwise, it is premised on an accused waiving her right to an in-person hearing" (at paragraph 47).

The Ontario Court of Appeal pointed out in ***Woods (Re)*** that the "right to be present could simply mean a right to attend the hearing. In contemporary times, someone could attend a hearing either physically or virtually. This would be consistent with the approach of courts to consider advances in technology that did not exist when Parliament enacted the provision" (at paragraph 44). However, after referring to section 672.5(13) [*If the accused so agrees, the court or the chairperson of the Review Board may permit the accused to appear by closed-circuit television or videoconference for any part of the hearing*.] the Court of Appeal held that "Parliament was careful to stipulate that the NCRMD accused must agree to appear by videoconference. This provision would have no meaning if s. 672.5(9) did not entitle the NCRMD accused to be physically present at a hearing" (at paragraph 45).

Section 650(1) clearly requires that the accused be present for his or her trial. It could be argued that this suggests an in-person presence is mandatory. However, this provision is not the only one in the *Criminal Code* that must be considered.

Section 650(1.1) of the Criminal Code:

Section 650(1.1) provides an exception to the presence requirement by allowing the accused to appear by videoconference, but only if the accused and the Crown consent. It states as follows:

> *(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.*

Because this provision requires the accused and the Crown to consent, and because it does not allow for a virtual appearance by the accused while evidence is being taken from a witness, it appears to have a very limited application.[7] In addition, it could be argued that since section 650(1.1) specifically requires the accused to consent to appearing by videoconferencing, we do not have the authority to order the accused to appear in this fashion, at any time, unless the accused consents.

[7] Similarly, though section 650.01 allows for a "designated counsel" to appear for the accused without the accused being present, it does not allow counsel to do so during a part of the proceeding in which the "oral evidence of a witness is taken" (see section 650.01(3)(a)(i)).

Finally, it could also be argued that if the accused wishes to appear by videoconferencing, we cannot allow him or her to do so, unless the Crown consents.[8]

Section 650(1.2) of the Criminal Code:

Section 650(1.2) applies to appearances by an accused persons who are in prison. It states as follows:

> *(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.*

This section does not refer to the necessity of any consent being obtained.

Justice Green indicated in ***Gibbs*** that he preferred "to regard subsections (1.1) and (1.2) not as authorizing provisions for the use of electronic court processes but as provisions regulating such processes to ensure that the fundamentals of a trial (facing one's accuser, hearing the case, participating in the trial and making full answer and defence, etc.) are not compromised. Viewed in this way, provisions regulating the presence of the accused in relation to the trial process would not preclude the use of electronic means in conducting the trial in other circumstances (specifically, involving the presence of the judge) provided the fundamental objectives of a trial – and the right of the accused to a fair trial – are respected" (at paragraph 62).

[8] Interestingly, sections 650(1) and 650(1.2), refer to the evidence of a witness being "taken". Section 650.01(3)(a)(ii), refers to the "oral evidence of a witness" being "taken".

Section 650(2)-A Broad Exception?

Section 650(2) provides exceptions to section 650's general rule requiring the presence of the accused. In particular, subsection 650(2)(b) is drafted in very broad terms[9]. It states as follows:

> *(2) The court may*
>
> > *(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.*

The word "permit" in section 650(2)(b) suggests that the accused has requested permission to be out of the courtroom or has waived the requirement to be present, implying that her or his consent is necessary for such an order to be issued (see ***In Re: Court File No. 19/578***, 2020 ONSC 3870, at paragraph 25 and ***Woods (Re)***, at paragraph 48). Thus, if the accused requests to appear virtually at her or his trial, this subsection appears to provide us with the authority to permit this to occur, despite subsection 650(1), though we can decline to issue such an order. This would include allowing the accused to appear virtually while evidence of a witness is being taken and it does not require the Crown's consent.

If the word "present" in subsection 650(1) is limited to "in-person" presence, then section 650 appears to prohibit us from ordering that an accused person, who wishes to be present in-person, appear in some other manner.

In ***R. v. Daley***, 2020 ONCJ 201, it was suggested that section 650(2)(b) of the *Criminal Code* "permits the court to allow the accused to be completely out of the courtroom with no connection by video or audio <u>even</u> when evidence is being taken from a witness" (at paragraph 13. My emphasis).

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[9] Sections 650(2)(a) and (c) deal with removal of the accused for misconduct and unfitness to stand trial. They state as follows:

> *(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; [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.*

In ***R. v. Pazder***, 2015 ABQB 493, however, a very restrictive approach to section 650(2)(b) was adopted (at paragraphs 249 and 250):

> …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 fair trial rights of the accused and other trial participants.
>
> The court should never make a s 650(2)(b) order, no matter its potential benefits, if that absence affects in a negative way the ability of the accused to have, and to see that he or she is having a fair, open, and impartial trial. There is much about a trial that is not recorded in the transcript of electronic recording. This includes body language, the response of witnesses to questions, the level of emotion or apprehension on the part of the witnesses, the interaction between judge, counsel, and witnesses. Thus the *status quo* remains that a s 650(2)(b) absence is the exception rather than the norm.

These comments ignore the reality of modern technology and as will be seen, they have been overtaken by subsequent amendments to the *Criminal Code*. However, in ***Gibbs***, Justice Harrington pointed out that "[t]hese sections [section 650(1) and 650(2)(b)] indicate strongly that the fundamental assumption made by the *Code* is that all the participants in a criminal trial – the parties, the witnesses, counsel, the jury and the judge – will generally be physically present in the courtroom in sight of one another" (at paragraph 25).

Presence of Counsel:

Defence counsel can be "designated" by an accused person pursuant to section 650.01 of the *Criminal Code*. Section 650.01(3)(a)(i) indicates that one of the effects of such a designation is that the accused does not have to be "present for any part of the proceedings, other than…a part during which oral evidence of a witness is taken". In addition, a plea of guilty can be entered and sentence imposed without the accused being "present", if "the court orders otherwise" (see section 650.01(3)(c)). What if a witness testifies at a sentence hearing? Does the accused have to be present for that part of the sentence hearing?

Interestingly, section 650.01 uses the word "proceedings", a hearing perhaps broader in scope than the use of the word "trial" in section 650.

As a result of section 650.02 of the *Criminal Code*, the Crown or the counsel designated "may appear before the court by audioconference or videoconference, if the technological means is satisfactory to the court".

In ***R. v. Waddell***, [2008] N.J. No. 388 (P.C.), Judge Trahey held that a "combined reading of sections 650.01 and 650.02 of the *Code* also permits a defendant to appear before the court without being present by way of designated counsel using 'any technological means satisfactory to the court that permits the court and all counsel to communicate simultaneously', for any part of the proceedings, other than, *inter alia*, a part during which oral evidence of a witness is taken. However, Part XX of the *Code* contains no provision for the defendant or for designated counsel to conduct an entire trial remotely" (at paragraph 30).

Judge Trahey concluded that she would allow the accused to appear virtually if counsel for the accused was present in the courtroom.

What Does it Mean to be Present in Court?

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).

Thus, it could be argued that having the accused appear by video conferencing, constitutes the accused being present for her or his trial and constitutes compliance with section 650(1) of the *Criminal Code* regardless of the accused's consent (see ***R. v. Singh***, [2020] N.J. No. 177 (P.C.) and ***R. v. D.G.***, [2021] N.J. No. 74 (P.C.)). The difficulty, however, is that subsection 650(1.1) specifically refers to the accused appearing by videoconferencing and it appear to be limited to the Court permitting this to occur upon the accused's request.

This was the conclusion reached in ***R. v. Jeffries***, 2021 ONCJ 98. In that case, Judge McKay concluded that "Parliament has chosen to differentiate those portions of a trial where evidence is not heard, and to permit the court to order an accused to appear by audio or video conference for those portions of the trial. However, Parliament has chosen to maintain the requirement that an accused be present in person in the courtroom for those portions of the trial where the evidence of a witness is taken. Section 650(2)(b) would allow the court to permit the accused to be out-of-court during the whole or any part of his trial…I am persuaded that by using the words "permit the accused' the provision requires the consent of an accused to make an order under that subsection. Absent consent, I do not have the jurisdiction to make that order" (at paragraph 35).

Sentence Hearings by Telephone:

In ***R. v. Chizanga***, 2020 ONSC 3090, Justice Harris held that to conduct a sentence hearing in the virtual court, the accused person must "waive their right to be

physically present for the sentencing to be done remotely" (at paragraph 5). He concluded that "while any accused can enter a plea of guilty by video or through counsel, a self-represented accused can only do so in person or by video. The *Code* does not permit it to be done by telephone" (at paragraph 6).

In ***R. v. Twoyoungmen***, 2021 ABPC 88, a different conclusion was reached. In that case, the accused was scheduled to appear for a sentence hearing. Because of a positive test for Covid 19, the accused was only able to appear by telephone from the penitentiary. An issue arose as to whether the sentencing judge had the "authority or jurisdiction to hear the plea and proceed to sentencing with the accused participating by telephone".

Judge Hawkes relying on sections 715.22 and 23, concluded that he did. He held that "the Parliamentary intent of the 2001 amendments, and the most recent addition of ss. 715.22 and .23 are consistent with, and indeed compel a broad discretion to impose conditions facilitating remote appearance where the physical presence of the accused cannot be safely facilitated pursuant to s. 650(2)(b)…I agree that the discretion should be exercised carefully and only in circumstances that clearly justify departure from normal practice" (at paragraph 41).[10]

R. v. Gibbs:

In ***Gibbs***, the accused applied to have evidence excluded pursuant to section 24(2) of the *Charter*. A date for the hearing of a *voir dire* was set. Judge Porter, who was presiding at a different courthouse, indicated that he was going to appear by videoconferencing. The accused and the Crown sought to have him appear in-person. Judge Porter declined to do so, and as a result, the *voir dire* was conducted with him being at one courthouse and the other participants (counsel, the witness and the accused) being in another courthouse. The Crown sought *certiorari*, prohibition and *mandamus* to quash his decision. The application was dismissed. The Crown appealed to the Court of Appeal.

A majority of the Court of Appeal dismissed the appeal. In doing so, the Court of Appeal considered section 650 of the *Criminal Code*.

Justice Green noted in ***Gibbs*** that the "important purposes of presence by the accused in court" can "be satisfied by other means, if no sense of injustice could reasonably

[10] In ***R. v. Robert***, 2021 BCSC 571, it was also held that section 650(2)(b) provided a judge with authority to allow an accused person to appear by telephone for the purpose of a sentence hearing.

result, and if the judge can hear, manage and decide the case in a fair and effective manner, the purposes served by s. 650 will not be subverted" (at paragraph 59).

It has been suggested that "the objective to modernize and ameliorate the use of court resources is a source of tension with the orthodoxy that mandates the attendance of an accused person throughout the entirety of the trial. Nonetheless, the discretion conferred on the court to permit the absence of the accused where it sees fit, save for statutorily mandated appearances, appears to be informed by the desire to ensure the effective delivery of the administration of justice" (see Brian Manarin and Reem Zaiaat, *The Queen v. Demetrius Walker: A Cautionary Tale about Guilty Pleas and Sentencing in Absentia* (2015), 19 Can. Crim. L. Rev. 253, at page 267).

In a dissenting judgment, Justice Hoegg opined that because the judge was not present in-person in the same courtroom as the accused, the application was not heard in a court that conformed "to the requirements of section 650 of the *Cod*e". Thus, she held that "the PCJ did not have jurisdiction to conduct Mr. Gibbs' trial virtually" (at paragraphs 90 and 96).

Justice Hoegg concluded as follows (at paragraph 107):

> I regard the law referenced above as showing that the three constituent parts of the Court must be in the physical presence of each other during a proceeding unless the law permits otherwise. This is for the express purpose of vindicating an accused's right to make full answer and defence and the open court principle. In this case, the trial Judge exceeded his jurisdiction by not applying and following the law and the SCAC Judge erred in upholding his decision.

The ability to be present at one's trial has evolved as a result of changes in technology. Section 650(1) does not use the words "physically present" and though this provision must be interpreted in accordance with its purpose, I would suggest that 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).

Justice Harrington suggested that a trial judge "should always be mindful that the decision to appear by video should not be made lightly and should only be made in exceptional circumstances…The judge's physical presence also adds to the

solemnity of the proceeding and is important for preserving the perception of a fair and impartial judiciary" (at paragraph 40).

A Summary of Section 650 and its Impact on the Virtual Court:

We must start with acknowledging that the right of the accused to be present in court during any proceeding relating to them is a fundamental right and one specifically enshrined and protected by section 650(1) of the *Criminal Code*. The importance of this principle has not lost any of its importance since it was first enacted in the 1892 *Criminal Code*. However, I would suggest that we must also acknowledge that what being present meant in 1892, is much different than what it means now. This is not intended to dilute the right of the accused to be present, but it might mean that we should be open to the idea that the words "present in court" can be defined and interpreted in a manner not anticipated a over a century ago.

This means two things. Firstly, if section 650(1) is interpreted as protecting a right to be present in-person, then section 650 will not provide any authority to order an accused person to appear virtually, unless they consent. Secondly, if section 650 is interpreted so that the presence requirement can be met by virtual appearances, then the ambit of the virtual court will be significantly expanded.

Section 650(1.1) would appear to provide a further limitation on the scope of the virtual court. It requires the consent of the Crown and the accused for the accused to appear virtually. Even with the consent of both parties, a judge cannot order or allow an accused person to appear virtually during any part of the trial in which the evidence of a witness is taken. This suggests a very limited scope of jurisdiction for the virtual court. Finally, this section appears to prohibit a judge from allowing an accused person, who wishes to appear virtually, from doing so if the Crown withholds its consent.

In contrast, the manner in which section 650(2) is drafted suggests a very broad power to allow the accused to appear virtually, regardless of the Crown's consent. Whether the consent of the accused is required, depends on how the word "permit" in section 650(1) is interpreted. If it is interpreted as requiring the accused's consent, then a limited judicial authority is prescribed.

In ***R. v. Jeffries***, 2021 ONSC 1983, it was concluded that "Parliament has chosen to differentiate those portions of a trial where evidence is not heard, and to permit the court to order an accused to appear by audio or video conference for those portions of the trial. However, Parliament has chosen to maintain the requirement that an

accused be present in person in the courtroom for those portions of the trial where the evidence of a witness is taken. Section 650(2)(b) would allow the court to permit the accused to be out-of-court during the whole or any part of his trial. However, I find the rationale of Monahan, J. in *Daley* compelling. I am persuaded that by using the words 'permit the accused' the provision requires the consent of an accused to make an order under that subsection. Absent consent, I do not have the jurisdiction to make that order" (at paragraph 35).

In summary, a persuasive argument can be made that the combination of these provisions has the effect of only allowing a judge to proceed with a virtual hearing with, at the very least, the consent of the accused. This is the position taken by both Justices Hoegg and Harrington in ***Gibbs***. However, the Court of Appeal did not consider section 715.23 of the *Criminal Code* in ***Gibbs*** (section 715.23(1) allows a trial judge to "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"). Let us do so now.

Part XXII.01 of the Criminal Code:

The heading to PART XXII.01 of the *Criminal Code* is entitled: "Remote Attendance by Certain Persons"[11]. Included in this Part, is section 715.22. It sets out the "purpose" of this Part of the *Criminal Code* by indicating that it is designed for the purpose of serving "the proper administration of justice, including by ensuring fair and efficient proceedings and enhancing access to justice" through the use of audio and videoconference appearances. Section 715.22 states 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.*

This provision was considered in ***R. v. Jassem***, 2021 ONCJ 83. In that case, Justice Kenkel suggested that the purpose of this section of the *Criminal Code* is "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

[11] In ***R. v. Lohnes***, [1992] 1 S.C.R. 167, it was held that "headings and preambles may be used as intrinsic aids in interpreting ambiguous statutes" (at paragraph 23).

administration of justice in criminal proceedings during this period" (at paragraph 9).

Section 715.21 of the Criminal Code:

Though section 715.22 sets out a general statement of purpose for Part XXII.01, this Part commences with a provision similar in wording to section 650(1). This is found in section 715.21, which states:

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

In ***Woods (Re)***, the Ontario Court of Appeal referred to section 715.21 as a "default rule" (at paragraph 57). The Court of Appeal pointed out that in the new Part XXII.01, "Parliament provided a judge or justice the authority to preside over proceedings via remote means, and in certain circumstances, to require the accused to appear by videoconference" (at paragraph 59).

Section 721.21 contains a broad general statement with an exception: personal appearance is required, except as "otherwise provided". Interestingly, section 715.21 refers to any person who appears or presides, suggesting that judges cannot appear virtually.

Section 715.23 of the Criminal Code:

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.*

The wording of this provision in combination with section 650(1) and 715.21, suggests that the accused can be required to appear virtually (see ***Woods v. Ontario***, 2020 ONSC 6899, at paragraph 35(ii)). Justice Monahan concluded in ***Woods*** that the reference in section 715.23 "to a court's authority to 'order an accused to appear by audio conference or videoconference' makes it clear that the court may make such an order whether or not the accused has consented" (at paragraph 35(v)).

Thus, section 715.23 allows for a judge to order that the accused appear by audio or videoconference.[12] It does not suggest that the accused person's consent is required for such an order to be issued. In contrast to section 650(2)(b), it does not use the word "permit". However, it does not provide any authority to order the Crown to appear virtually. Finally, it sets out a very broad test:

> *[I]t would be appropriate having regard to all the circumstances.*

The Statutory Circumstances to be Considered:

Section 715.23 sets out a non-exhaustive list of factors to be considered. The section does give preference to any one circumstance and the factors listed do not affect the test to be applied. That test is whether it would be appropriate.[13]

In this way, section 715.23(1) is very similar to section 714.1, which allows for an order to be issued allowing a witness to testify by audio or videoconferencing "if it would be appropriate having regard to all of the circumstances". Section 714.1 also sets out a non-exhaustive list of factors to be considered, including those set out in section 715.23(a) to (e).[14]

An application for a section 715.23(1) order can be made by the Crown or the accused. It also appears that the Court can make such an order on its own motion (see ***R. v. Jefferies***, 2021 ONSC 1983). However, the exception to appearing personally does not extend to the person "presiding", as will be seen, we have our own section.

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[12] If the accused is in prison, section 715.24 applies. Its states as follows:

> *Despite anything in this Act, if an accused who is in prison does not have access to legal advice during the proceedings, the court shall, before permitting the accused to appear by videoconference, be satisfied that the accused will be able to understand the proceedings and that any decisions made by the accused during the proceedings will be voluntary.*

[13] If such an order is not made, the Court "must include in the record a statement of the reasons for not doing so" (see section 715.23(2)). However, these reasons do not have to be in writing.

[14] Section 714.1 contains two conditions not included in section 715.23: "(c) the nature of the witness' anticipated evidence" 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".

Audioconference and Videoconference Defined:

Section 715.23 refers to the accused being ordered to appear by "audioconference" or "videoconference". These phrases are defined in section 2 of the *Criminal Code* in the following manner:

> *audioconference means any means of telecommunication that allows the judge or justice and any individual to communicate orally in a proceeding; (audioconférence).*
>
> *videoconference means any means of telecommunication that allows the judge, justice or chairperson of a Review Board, as defined in subsection 672.1(1), and any individual to engage in simultaneous visual and oral communication in a proceeding; (vidéoconférence).*

What Does Simultaneous Communication Mean?

The word "simultaneous" has been defined to mean: "happening or being done at exactly the same time" (see https://dictionary.cambridge.org/). Thus, it appears that in the context of section 715.23 of the *Criminal Code*, the simultaneous requirement for evidence by videoconference requires that the technology utilized will allow the witness to be seen, heard, and communicated with at the same time.

The Factors Listed:

Though the factors listed must be considered, none of these factors has precedence and a lack of evidence in relation to one or more of them will not necessarily be fatal (see ***R. v. Mehl***, 2019 BCCA 438, at paragraph 15).

(a) the location and personal circumstances of the accused:

In certain case, it will be difficult for an accused person to appear in court in-person. This could be as result of employment, child care, etc. In the context of the difficulties and potential dangers in travelling as a result of the pandemic, including those situations in which such travel may be prohibited, it is important that judges interpret this provision in a manner that allows for fair and safe trials to be conducted. Section 715.23 and the judicial embracing of modern technology can allow for both of these things to occur.

(b) the costs that would be incurred if the accused were to appear personally:

It can be very expensive for an accused person to travel so as to be able to appear in-person. In addition, depending on the health policies in place in which the trial is to

be conducted, the accused may have to quarantine at their expense for a period before the trial commences (two weeks in most provinces, including in Newfoundland and Labrador).

The Difficulties of Appearing In-Person:

An example of some of the difficulties which can arise when an accused person is ordered to appear in-person, but is unable to do so, can be found in ***Berent***.

In ***Berent***, the accused, who were living in California, applied to appear by videoconference at their trial. They indicated that they did "not have the means to quarantine for two weeks upon their return to Manitoba, as required by public health directives due to the Covid-19 pandemic. They say to stay for a lengthy period in Manitoba would impose a great hardship on them" (see paragraph 1).

The accused were represented by local counsel who would be appearing in the courtroom. The Crown objected to the accused appearing virtually, on a number of grounds. This included the nature of the technology that was going to be used (Zoom), the complexity of the trial, the number of exhibits and that identification was in issue. None of these objections appears insurmountable.

The application judge concluded that "sections 715.21-715.23 could be relied on to allow for an accused to appear by video-conferencing at a trial" (at paragraph 12), but rejected the application. The application judge was concerned that the accused would not appear for sentencing, if convicted (see paragraph 24), and that the overall case was too complicated to be heard in the virtual court (at paragraphs 21 to 23):

> The Crown points out the case is complex. They intend to call 20 witnesses, rely on surveillance video evidence, tender still photographs, have witnesses comment on these pieces of evidence and point out things in this evidence. They intend to play 911 calls. There is no evidence before me to explain how the Berents would be able to see this evidence. Zoom video technology generally captures a headshot of the speakers. Most people now have a familiarity with Zoom technology. The more participants on the call, the smaller the image becomes of each camera shot. While I am aware of presentation features, where the screen is filled with only the presentation by a presenter, this would not work in a criminal trial where the participants need to be visible to each other at all times. There is a real concern the Berents would not be able to effectively see and appreciate the evidence that was being led against them.
>
> The Crown points out the added complexity of the need for an interpreter. He argued there is often a need for an interpreter to be present in person with the

> person they are interpreting for, to ensure the evidence is being communicated and understood. In my view, this challenge could have been overcome with a functioning video link.
>
> The Crown says identification will be an issue in this case. While "in-dock" identification can be frail evidence, he points out there is added difficulty and complexity for the Crown if the Berents are appearing on video. Further the Crown intends to rely on statements made by the Berents. The voluntariness of the accuseds' statements is at issue. It is expected the Berents will testify. This is an added complexity because the plan proposed is the Berents will sit together in the same room in the Chabad. The Crown says there is opportunity for the appearance of mischief or mischief itself because there could be signalling or communication with each other during such testimony that would not be captured on camera. I accept this as a valid concern. While judges are instructed not to rely too heavily on demeanor evidence, I also accept that a headshot alone, particularly when an image of witness becomes smaller the more people are on the platform, could compromise trial fairness in this case. Significant communication can take place through body language. I am not satisfied, based on a lack of evidence of a plan to address these concerns, that the proposal for a Zoom or video-conferencing platform virtual trial is appropriate.

This may appear to be harsh, considering the circumstances of the accused. No doubt there can be difficulties encountered in the virtual court, as there can be in the in-person court. However, if the accused cannot afford to appear in person, then the trial will not proceed and declining to allow the accused to appear virtually will have to result in the issuing of a warrant of arrest.

The decision in ***Berent*** does not make any reference to section 715.23(3) of the *Criminal Code*. Section 715.23(3) allows the trial judge to "cease the use of the technological means" utilized if problems arise. It is a form of "fail-safe". It states as follows:

> *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.*

(c) the suitability of the location from where the accused will appear:

The "suitability of the location" from which the accused will appear is a statutory factor that must be considered in determining if the accused will be ordered or allowed to appear by videoconference. However, section 715.23(1) does not require that the accused appear from another courthouse. It does not specify or give

preference to any specific location, but it does specifically list the location from where the witness will be testifying as a factor to be considered by the application judge. Testifying from a courthouse can be preferable, but section 715.23(1) does not require that any particular location be utilized. Testifying from home or work can be in accordance with section 715.23(1) of the *Criminal Code*.

The location from which the accused will appear is always an important factor because the location will often be outside of the control of the trial judge. A remote appearance from another courtroom, for instance, may not always be possible. As a result, there should be evidence upon which the application judge can conclude that the integrity of the trial process will be protected when the accused is allowed to testify from outside of the courtroom in which the judge is located. Though modern technology must be judicially embraced, it must be done so in the context of the nature and purpose of criminal trials.

(d.1) the accused's right to a fair and public hearing:

One of the primary objections raised to the conduct of trials in the virtual court has been the suggestion that the accused's ability to fully participate in the trial process and to make full answer and defence will be compromised. A sub-objection involves the suggestion that the ability of the judge to assess the credibility of a witness who testifies virtually is affected.

It has been held that the accused's right to a fair trial is not automatically offended by the use of the virtual court. In ***R. v. Lucas-Johnson***, 2018 ONSC 2370, for instance, it was pointed out that "[c]urrent video link technology is sufficiently sophisticated to capture a variety of non-verbal cues and expressions perhaps in more detail when the camera is focused on the witness' full face" (at paragraph 10). In addition, assessing the truthfulness or accuracy of a witness or the accused through a consideration of their demeanor while they are testifying can be a dangerous method of assessing credibility (see ***R. v. Rhayel***, 2015 ONCA 377, and Anna Wong, *Looks Can Be Deceiving: The Irrelevance of Demeanour in Witness Assessments* (2020), 68 C.L.Q. 346).

It is crucial to ensure that the use of the virtual court does not constitute a "significant and unwarranted constraint" upon the accused person's ability to make full answer and defence (see ***R. v. Lyttle***, [2004] 1 S.C.R. 193, at paragraph 2). However, having a witness or the accused appear virtually does not, in and by itself, impair an accused person's right to a fair and public hearing. When a witness or the accused testifies by videoconferencing, the judge and the other parties are able to see and hear the witness. The witness' face will be visible. In contrast, a witness testifying in person

will likely be wearing a mask. Thus, it could be argued that having a witness appear by videoconferencing enhances the trial process.[15]

In addition, a fair trial does not require that an accused person be able to confront a witness in person (see ***R. v. Levogiannis***, [1993] 4 S.C.R. 475). In ***R. v. S.D.L.***, 2017 NSCA 58, the Nova Scotia Court of Appeal indicated that "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" (at paragraph 19).

In ***R. v. Stevens***, 2019 NSSC 208, the accused was charged with the offence of sexual assault. The Crown sought to have the witness testify by videoconference from Japan. The accused objected, arguing that the use of "videolink testimony would be contrary to the principles of fundamental justice. They say: the witness at issue is the complainant; credibility is a central issue; evidence is unavoidably complicated by the need for a Japanese/English translator; and this is a sexual assault allegation where the primary issue for trial is expected to be consent or mistaken belief in consent" (at paragraph 8).

Justice Jamieson indicated that the "mere fact that credibility is in issue does not mean videolink evidence is contrary to the principles of fundamental justice - even when the witness is the complainant" (at paragraph 27). She noted that "[i]n today's world of technology, taking evidence by videolink is becoming increasingly common in both the criminal and civil contexts. It seems to me that Section 714.2 assumes technology is such that testimony by videolink can be easily accomplished. The Section came into force in 1999. Advancements in technology since then serve only to reinforce this assumption. We should also not lose sight of the access to justice considerations such provisions promote" (at paragraph 20).

Justice Jamieson allowed the application, subject to a "test run" being conducted before the trial (at paragraph 42):

> The application of the Crown is granted, subject to a test run demonstrating that the proposed technology will permit the witness to testify in the virtual

[15] It has been pointed out that "[a] decision of the Austrian federal Supreme Court of Justice, issued in July 2020, received particular attention as the first decision of an apex court reviewing a tribunal's decision to hold a remote hearing despite one party's objections. The court held that the ordering of a remote hearing is not in itself sufficient to trigger due process concerns; however, it observed that careful planning is required to ensure that the remote hearing is fair. Similar decisions followed from courts in the United States, Egypt, and elsewhere" (see *The (Astonishingly) Rapid Turn to Remote Hearings in Commercial Arbitration* (2021), 46 Queen's L.J. 399, at pages 404 to 405).

> presence of the parties and the Court. The test run will also address how exhibits and documents will be presented to the witness. The Court, counsel and accused must all be able to see the witness on a screen and hear and see the witness testify in real time, and the witness must be able to hear and see counsel questioning her, the court clerk who administers the oath, and the Court. The test run will be scheduled for a pretrial well in advance of the trial dates. In advance of the pretrial, the Crown will provide its detailed plan to address logistics and procedural safeguards as noted above. Counsel are encouraged to work together to reach agreement on the plan.

In ***Y.A.***, in the context of a preliminary inquiry, the presiding judge noted that she was "unable to understand how [the accused] would be prejudiced at a preliminary inquiry by having [the complainant] testify by way of videoconference. Credibility is not in issue at the preliminary inquiry. If this witness testified in person at the present time, she would be masked and Y.A. would be observing her through layers of plexiglass. I fail to understand how he would be prejudiced by seeing and hearing her testify by videoconference where she would be unmasked. The reasons for the Crown's request to have her testify remotely are legitimate and rooted in public health concerns" (at paragraph 5).

Finally, if the technology utilized does not provide for simultaneous visual and oral communication when utilized at the trial, the presiding judge has the authority to cease the presentation of the evidence and take any measure that she or he considers "appropriate in the circumstances to have the witness give evidence" (see section 714.41 of the *Criminal Code*). As pointed out in ***MacKinnon***, though there "is a need to ensure" that the place from which the witness testifies "is suitable, and safeguards are in place to prevent the witness being improperly influenced…this is something the courts are capable of addressing and monitoring" (at paragraph 83).

(d.2) attendance of the Public:

Having the public attend, should not be impaired by the use of videoconferencing. If the courthouse is open, the public can attend. If it is closed to the public, the press can be linked so that they can be "present" in the virtual court (see ***R. v. Mitchell***, [2020] N.J. No. 99 (P.C.), at paragraph 3).

(e) the nature and seriousness of the offence:

This is a consideration, but the seriousness or nature of the offence would not have an effect on whether having the accused appear virtually would be appropriate. The technology utilized does not change depending on the seriousness of the charge.

Including this factor, might be seen as a reluctance to accept the use of virtual court for all criminal matters. However, seriousness or the nature of a charge could be significant in encouraging a judge to conduct a virtual trial. For instance, a judge may wish to expedite the hearing of a trial depending on the nature of the charge and the nature of the complainant.

A Summary:

As we have seen, PART XXII.01 of the *Criminal Code* is entitled: "Remote Attendance by Certain Persons" and section 715.22 sets out the "purpose" of this Part of the *Criminal Code*, by indicating that it is designed for the purpose of serving "the proper administration of justice, including by ensuring fair and efficient proceedings and enhancing access to justice" through the use of audio and videoconference appearances. However, section 715.21 specifically 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".

Curiously, in combination these two provisions encourage and limit the use of the virtual court. Which provision should dominate depends on how the words "otherwise provided" are interpreted.

Does section 715.23 of the *Criminal Code* provide a judge with the authority to require that the accused appear virtually? Section 715.23 is certainly drafted in very broad terms: it 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 the list set out in subsection (a) to (e).

In summary, section 650(1) appears to limit the authority of a judge to require the accused to appear virtually. Section 715.23 appears to have enlarged that authority. Can these two provisions be reconciled?

Can Sections 650(1) and 715.23 be Reconciled?

As we have seen, section 715.23 allows for an accused person to appear by audio or video conferencing. However, 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", and section 650(1) indicates that the accused "shall be present in court".

Can these provisions be reconciled? Does section 715.21 limit the application of section 715.23 because sections 650(1) and (1.1) state that the accused "shall be

present in court during the whole of his or her trial" and that videoconferencing can only be used by consent?

In ***Jassem***, it was concluded that "the provisions do not conflict". Justice Kenkel concluded that "Parliament intends each provision to have meaning and does not intend to produce absurd consequences. I find the legacy provisions and the new Part XXII.01 are not contradictory, they simply provide different paths by which a party may seek an order regarding attendance by videoconference. If the applicant relies on s 537(j) for a routine appearance where evidence is not being heard, the court may grant that order under that section without considering any of the criteria set out in ss 715.23 to 715.26. This application engages s 715.23 and the criteria under that section must be applied. The restrictions in 537(j) don't apply because the order is not being made under the authority of that section" (at paragraph 12).

In ***Berent***, Judge Krahn held that the "starting point in section 650 is an accused should be personally, physically present in court", but that "sections 715.21-715.23 "could be relied on to allow for an accused to appear by video-conferencing at a trial" (at paragraphs 8 and 12). In denying the application, Judge Krahan indicated that "while I am satisfied provisions of the *Criminal Code* would permit the accused to appear by video for a trial in some cases, this is not such a case. I find this trial, as set for three non-consecutive weeks, is complicated and lengthy. In addition, for all the reasons stated above regarding the technological challenges this is not a matter which can proceed by video. I am not satisfied a fair trial, for both the Berents and the public, could be held with the Berents appearing by video. I dismissed their motion" (at paragraph 28).

If the accused is ordered to appear by videoconferencing, the presiding judge must ensure that the location from which the accused will appear is suitable. This can be anywhere. Though it does not have to be another courtroom, the location chosen has to be one which allows for the trial to be conducted in a manner which is similar to how it would be conducted if the accused was present in person.

What if the Accused Objects to Appearing Virtually?

What if the accused wants to be present in-person but cannot be present in-person because the courthouse is closed or they reside elsewhere? This problem can arise outside of pandemic conditions. It can arise, for instance, in cases where the accused cannot afford to travel to the location in which the trial is to be conducted. In those situations, can we order the accused to appear virtually?

This issue was recently considered in ***R. v. Y.A.***, 2021 ONCJ 295, in which the presiding judge, over the accused's objection, ordered the accused to appear by videoconferencing.

In ***Y.A.***, the accused was charged with the offence of sexual assault. He elected to be tried in the Superior Court and his preliminary inquiry was scheduled to commence on May 21, 2021. However, on April 26, 2021, "on the advice of public health authorities in response to the increased spread of the Covid-19 virus, the Ontario Court of Justice announced the temporary suspension of in-person proceedings. This suspension remains in effect for Y.A.'s preliminary inquiry" (at paragraph 2).

The presiding judge indicated that the Crown "brought an application for an order that PC DeBoer, the officer in charge of the investigation, be permitted to testify remotely at Y.A.'s preliminary inquiry, and an application for an order that Y.A. attend the inquiry by way of videoconference, which would allow the entire proceeding to be conducted remotely on the Zoom platform. Y.A. contests both orders. He argues that the order for remote testimony of PC DeBoer would impact the fairness of the proceedings, and he also argues that this Court does not have jurisdiction to order that he attend the preliminary inquiry remotely by way of videoconference without his consent. Even if I find that I do have jurisdiction to order his remote attendance without his consent, Y.A. argues that doing so would be unfair" (at paragraph 3).

Justice Konyer held that he had jurisdiction to order the accused to appear by videoconferencing and did so, relying upon the wording of section 715.23 of the *Criminal Code* (at paragraph 9):

> …s.715.23 provides for an alternate route for attendance by videoconference at "a proceeding", a term which includes preliminary inquiries. The section permits a court to "order" an accused to attend a proceeding by videoconference where the criteria in that section are met. There is no necessity to obtain the consent of the accused. This section is contained within Part XXII.01 of the *Criminal Code*, which provides for the remote attendance of various participants, including counsel, witnesses, the accused and the Judge. Section 715.23, which deals with accused persons specifically, would be meaningless if s. 537(j) were the only means by which an accused could appear by way of videoconference. This is not a result that Parliament could have intended. Parliament's intent is clearly spelled out in s.715.22 – to permit attendance by videoconference in order to "serve the proper administration of justice".

Justice Konyer indicated that he was satisfied that if he made "the order sought, Y.A. will be a full participant in the proceeding in the same way he would as if the

proceeding were conducted in a physical courtroom. I conclude that Part XXII.01 of the *Criminal Code* provides me with the authority to order that the proceeding be conducted in this manner, and that s.715.23 specifically provides me with the authority to order that Y.A. attend those proceedings virtually. His consent is not required" (at paragraph 10).

The opposite conclusion was reached in ***R. v. Jeffries***, 2021 ONCJ 98. In that case, Judge McKay concluded that "Parliament has chosen to differentiate those portions of a trial where evidence is not heard, and to permit the court to order an accused to appear by audio or video conference for those portions of the trial. However, Parliament has chosen to maintain the requirement that an accused be present in person in the courtroom for those portions of the trial where the evidence of a witness is taken. Section 650(2)(b) would allow the court to permit the accused to be out-of-court during the whole or any part of his trial. However, I find the rationale of Monahan, J. in *Daley* compelling. I am persuaded that by using the words "permit the accused' the provision requires the consent of an accused to make an order under that subsection. Absent consent, I do not have the jurisdiction to make that order" (at paragraph 35).

The Answer to the Question Posed:

The answer to the question whether we can require an accused person to appear virtually without their consent, depends on how sections 650(1), 715.21 and 715.23 are interpreted, when considered together.

If these provisions are interpreted as requiring an in-person presence by the accused or as providing the accused with an absolute right to appear in-person, then section 715.23 becomes an exception that requires the accused's consent for an order to be issued permitting the accused to appear virtually.

If section 715.23 is interpreted as a provision designed to allow judges to determine whether the circumstances require a virtual appearance by the accused, then the accused's consent is not required.

A Summary:

In summary, the appearance of the accused in-person is the traditional and present standard. Virtual appearances can occur with the accused's consent and with the Crown's consent if evidence of a witness is not being taken. However, section 650(2) of the *Criminal Code* may be broad enough in scope to allow for the accused, with

the accused's consent, to appear virtually, even when the Crown does not consent and even if the evidence of a witness is being taken. Though broadly drafted, section 650(2) does not appear to provide a judge with the authority to order that the Crown appear or present its case virtually. Having said this, if a court orders that the accused appear virtually for their trial, the Crown will be expected to be ready and able to proceed, regardless of their consent to do so. If the Crown is not able or is not willing to participate in the virtual court, then the presiding judge will have to determine if the charge should be dismissed for want of prosecution.

Section 650.01 and the designation of counsel also broadens a judge's authority to utilize virtual appearances. Section 650(3)(c) may allow for a sentence hearing to be conducted with the accused appearing virtually regardless of whether evidence is taken or either party consents.

In addition, 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 the list set out in subsection (a) to (e).

This latter provision appears to provide a broad scope for the court to issue an order requiring the accused to appear virtually. However, once again, it does not appear to provide such authority in relation to the Crown.

Assuming that a judge has the authority to require an accused person to appear virtually, when should the judge do so?

When Should a Judge Require the Accused to Appear Virtually?

In ***Y.A.***, after holding that he could order the accused to appear by video conferencing, Juge Konyer indicated that "the question becomes whether it is appropriate to do so in the circumstances of his case". He held that the "exercise of my discretion is guided by s.715.22, which provides that '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 the court, is to serve the proper administration of justice, including by ensuring fair and efficient proceedings and enhancing access to justice'" (at paragraph 12).

In ruling that a remote appearance was appropriate, Judge Konyer pointed out that such an appearance was no different than appearing in-person (at paragraphs 13 and 17):

> By appearing at his preliminary inquiry remotely, Y.A. will be attending the functional equivalent of a courtroom. He will be able to see and hear the Crown, the witnesses, his lawyer and the Judge. He will be able to speak to his lawyer in private using the breakout room function at any time. He can make himself heard just as he would if he were before me in a physical courtroom. His counsel will be able to cross examine both witnesses fully and to make complete submissions as to whether the Crown has met the test for committal…In every way that matters, Y.A. will be present at his preliminary inquiry if I order that he attend by videoconference in a virtual court. Justice can be served fully through a preliminary inquiry conducted in this manner.
>
> There is nothing that could be accomplished if the proceedings were conducted in a physical courtroom that cannot be accomplished by conducting the proceedings remotely. Y.A. will not be deprived of his right to be meaningfully present at his preliminary inquiry, nor will he be compromised in his ability to challenge the Crown's case. I find that he would suffer no prejudice if I were to order that the entire preliminary inquiry be conducted remotely by videoconference.

In ***Berent***, it was suggested that before a virtual trial is held "[t]here should be evidence before the Court the technological infrastructure is in place or can be put in place to support the video or audio proceeding counsel are requesting" Judge indicated "at minimum the Court and trial process will have to ensure" (at paragraph 27):

> 1.) All participants are able to see and hear each other;
>
> 2.) And require, in most cases, an informed, clear and unequivocal waiver from the accused to proceed with a video appearance for trial, see *R. v. Ali, Boparai, Khan, Malonga-Massamba*, 2020 BCSC 996, (Canlii), at para.18; *Re: Court File No. 19/578*, 2020 ONSC 3870, at paragraph 7 and 21;
>
> 3.) The Accused is able to see and hear the evidence that is being presented at the trial;
>
> 4.) The Accused is able to communicate in private with his counsel throughout the trial; and

5.) The rights of all trial participants are respected.

Appearance of Judge by Videoconference:

Section 715.26 states as follows:

> *715.26 (1) Except as otherwise provided in this Act, the judge or justice may preside at the proceeding by audioconference or videoconference, if the judge or justice considers it necessary having regard to all the circumstances, including*
>
> *(a) the accused's right to a fair and public hearing;*
>
> *(b) the nature of the witness' anticipated evidence;*
>
> *(c) the nature and seriousness of the offence; and*
>
> *(d) the suitability of the location from where the judge or justice will preside.*[16]

This provision was considered in ***R. v. Patriquin***, 2021 ONSC 359. In that case, Justice Rady decided to proceed with as sentence hearing with all participants appearing by videoconference. The accused objected, indicating that they wanted the judge "to be present in the courtroom during the hearing".

In rejecting this submission, Justice Rady indicated that having "considered the public health concerns respecting COVID and the factors enumerated at s. 715.23(1)(a) through (e)…The hearing will be fair and public just as it would be if all participants were physically in the courtroom. The offences are obviously serious but do not otherwise change the analysis…The same holds true with respect to s. 715.26(1)(a) and (c). As to (b), as already noted, no *viva voce* evidence will be tendered. Finally, there should be no concern about the suitability of the location from where I will preside. It is local, private and equipped for a remote proceeding" (at paragraphs 14 to 16).

Section 715.26 allows us to preside by videoconferencing and it does not require the Crown or the accused person's consent. However, we must conclude that it is

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[16] A similar, but stream-lined provision applies to preliminary inquiries. Section 502.1(5) states:

> *The justice who is to preside at a proceeding under this Part shall preside personally but may preside by audioconference or videoconference, if the justice considers it necessary in the circumstances.*

"necessary having regard to all the circumstances" including the ones specifically listed in this provision

Other Participants:

Section 715.25(2) allows the court to order that a "participant" appear by audio or video conferencing. "Participant" is defined as meaning "any person, other than an accused, a witness, a juror, a judge or a justice, who may participate in a proceeding" (see section 715.21).

The test in section 715.25(2) is the same as in section 715.21: it must be appropriate. Section 715.25(2) states:

> *(2) Except as otherwise provided in this Act, the court may order a participant to participate in a proceeding 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 participant;*
> >
> > *(b) the costs that would be incurred if the participant were to participate personally;*
> >
> > *(c) the nature of the participation;*
> >
> > *(d) the suitability of the location from where the participant will participate;*
> >
> > *(e) the accused's right to a fair and public hearing; and*
> >
> > *(f) the nature and seriousness of the offence.*

Who would a "participant" be? It could include a court clerk, a victim service worker or a probation officer.

Remote Appearances by Witnesses:

Section 714.1 of the *Criminal Code* allows us to 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". Should the words "appropriate" and the inclusion of "all of the circumstances" 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?

Section 714.1 is discretionary in nature. It has been suggested that section 714.1 provides a judge with "a wide discretion to allow witnesses to testify via videoconference" (see ***R. v. J.T.H.***, 2021 BCPC 76, at paragraph 7).

Prior to September 19, 2019, section 714.1 of the *Criminal Code* indicated that a court could allow a witness to testify by means of technology from "elsewhere in Canada" if the technology utilized caused the witness to be "in the virtual presence of the parties and the court". On September 19, 2019, section 714.1 was repealed and reenacted (see *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, S.C. 2019). In its present form, section 714.1 no longer requires that the technology utilized cause the witness to be in the virtual presence of the parties and the court. In addition, it no longer refers to the witness being "elsewhere in Canada".

The present section states:

> *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*
>
> *(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 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.*

Section 714.1 of the *Criminal Code* creates a clear and simple test: is it "appropriate" to allow the witness to testify by means of "audioconference or videoconference",

considering all of the circumstances, including the factors listed. Though the factors listed must be considered, none of these factors has precedence and a lack of evidence in relation to one or more of them will not necessarily be fatal (see ***R. v. Mehl***, 2019 BCCA 438, at paragraph 15).

These factors were considered earlier in the context of section 715.23 of the *Criminal Code*.

Section 714.1 only applies to witnesses in Canada. Section 714.2 allows for a witness who is outside of Canada to testify by "videoconference". In contrast to the discretion provided by section 741.1, section 714.2 is mandatory in nature. Section 714.2(1) indicates that the application judge "shall receive evidence given by a witness outside Canada by videoconference, unless one of the parties satisfies the court that the reception of such testimony would be contrary to the principles of fundamental justice".

In ***R. v. Le***, 2021 BCPC 104, it was suggested that the "best practice for the party seeking a s. 714.1 order allowing a witness to testify by videoconference is to file a detailed affidavit addressing each of the factors enumerated in s. 714.1" (at paragraph 3). In ***R. v. Chow***, 2021 NSPC 16, Judge van der Hoek indicated that this type of application requires "a supporting foundation of the kind guided by the section and our Court of Appeal decision in *SDL*" (at paragraph 42). In ***R. v. Rice***, 2016 NLTD(G) 107, in which an application was made pursuant to the former section 714.1, it was pointed out that the "onus is on the applicant to establish why such an order is appropriate in the specific circumstances of the case. The order is not to be granted without a proper evidentiary foundation" (at paragraph 15).

In summary, section 714.1 indicates that the application judge "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". In addition, it requires the application judge to consider "all of the circumstances", including the specific factors referred in subsections (a) to (g). Subsection (d) refers to the "suitability of the location". Though section 714.1 lists "any potential prejudice" as a factor, this is only a factor if it is proposed to have the witness testify by audioconference (see subsection (g)).

When Will it be Appropriate?

Section 714.1 does not define when it will be appropriate, other than including a non-exhaustive list of factors that should be considered. I would suggest that the word "appropriate" must be interpreted in a manner that facilitates the use of modern

technology. It must also be interpreted in a manner that reflects the changes made by Parliament to this section, including the repeal of the virtual presence requirement and the factors specifically listed in the provision.

Thus, in the context of section 714.1 of the *Criminal Code*, I would suggest that the word "appropriate" means "suitable or proper" in the circumstances of a criminal trial being held in which the witness is not present in the courtroom in which the trial is being conducted. As a result, allowing a witness to testify by videoconferencing will be appropriate when it facilitates the presence of the witness, without infringing the other parties' right to a fair trial.

I suggest that section 714.1 should be interpreted and applied in the context of the difficulties and potential dangers in travelling as a result of the pandemic. It is important that judges interpret this provision in a manner that allows for fair and safe trials to be conducted. Section 714.1 and the judicial embracing of modern technology can allow for both of these things to occur.

Prejudice to the Accused:

Interestingly, section 714.1 does not, as does section 714.3 of the *Criminal Code* (evidence of a witness by audio link), specifically require the Court to consider "any potential prejudice to either of the parties caused by the fact that the witness would not be seen by them". This is a recognition of the significant difference between virtual testimony and audio testimony. Having said this, prejudice to an accused person's ability to make full answer and defence must always be considered. However, it will take more than the mere virtual presence of a witness to establish that an accused person's ability to make full answer and defence has been negatively impacted.

In ***R. v. SDL***, 2017 NSCA 58, the Court of Appeal of Nova Scotia indicated that "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…When the credibility of the complainant is at stake, the requisite exceptional circumstances described [above] must be even more compelling" (at paragraph 32).

However, the suggestion that compellingly exceptional circumstances must be present in order to issue a section 714.1 order when the witness is a complainant whose credibility is in issue, would render this provision of very limited application. Nothing in the wording of section 714.1 supports the Court of Appeal's interpretation.

The nature of the witness' evidence is a factor to be considered, but the test for complainants does not differ from other witnesses. The comments in ***S.D.L.*** are too broad. Such an absolute approach is inconsistent with the statutory language utilized and ignores the reality that "[a]ccess to justice requires the courts to rely more and more on various technologies, including video link and even, depending on the circumstances, the telephone" (see ***R. v. Rice***, 2016 NLTD(G) 107, at paragraph 21). Having said this, if the witness is a complainant, this is a factor to be considered because the nature of the witness' evidence is a factor. Thus, in some cases this will be significant, while in others less so. The key is to avoid the creation of categories of witnesses to whom section 714.1 is to have a different application.

A Summary:

I would summarize the principles that apply to a section 714.1 *Criminal Code* application in the following manner:

> 1. the section provides the court with the discretion to allow a witness to testify from outside the courtroom and from anywhere in Canada by "audioconferencing or videoconferencing", upon application by the Crown or the accused;
>
> 2. the applicant must establish that such an order is "appropriate" in the specific circumstances of the case;
>
> 3. this requires that a proper evidentiary foundation be presented, including evidence relating to each of the factors specifically listed in the provision;
>
> 4. in the Provincial Court, the application must be presented in compliance with the Court's *Rules*;
>
> 5. the section does not create any presumptions or exceptions based upon the characterization of the witness, such as being a complainant or an expert (see Judge Porter's comments in ***R. v. W.S.***, 2017 CanLII 41828 (NL PC), at paragraph 5, and Justice Burrage's comments in ***R. v. Lawrence***, 2021 NLSC 7, at paragraph 19). However, in Nova Scotia, if the credibility of the witness is an issue, or if the witness is the complainant, "exceptional circumstances" must exist for a section 714.1 order to be issued (see ***S.D.L.***, at paragraph 32);
>
> 6. the section requires that the technology used allows the witness to communicate orally in the proceeding (audioconference) or to engage in

simultaneous visual and oral communication in the proceeding (videoconference). The application should indicate whether the technology to be utilized complies with the applicable provision;

7. simultaneous visual and oral communication means that the technology utilized allows the witness to be seen, heard, and communicated with while testifying;

8. in order to issue a section 714.1 order, the court must conclude that such an order "would be appropriate having regard to all of the circumstances" including:

(i) the location and personal circumstances of the witness;

(ii) the costs that would be incurred if the witness had to be physically present;

(iii) the nature of the witness' anticipated evidence;

(iv) the suitability of the location from where the witness will give evidence;

(v) the accused's right to a fair and public hearing;

(vi) the nature and seriousness of the offence; and

(vii) 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;

9. in assessing the suitability of the location from which the witness will be testifying, the application judge must consider whether the witness will face the same level of solemnity offered by a courtroom and whether he or she will be as free from outside influences while testifying as she or he would be if they were to testify in person before the trial judge (see Harrington J.A.'s comments in ***Gibbs***, at paragraphs 39 and 40);

10. none of these factors has precedence and a lack of evidence in relation to one or more of them will not necessarily be fatal, though any application

presented should refer to evidence in support of each factor and explain how the integrity of the trial process can be assured;

11. potential prejudice to the opposing party is relevant when the Crown or the accused seeks to have a witness testify by videoconferencing. The onus of establishing prejudice rests with the party asserting it;

12. a judge must consider all of the circumstances in determining whether to grant the application, including such factors as the following (in addition to the statutory factors), none of which are more important than any of the others:

> i. the distance between the court house in which the trial is being conducted and the location of the witness;
>
> ii. the hardship, if any, that might be caused to the witness if he or she has to be present in person, including any potential impact on the witness' health or family (see ***R. v. McLean***, [2002] Y.J. No. 88 (T.C.), at paragraph 18);
>
> iii. any other relevant personal circumstances of the witness, such as her or his age, employment or child-caring responsibilities;
>
> iv. whether the presence of the witness in the courtroom will result in an attempt to intimidate the witness (see ***R. v. T.P.S.***, [2003] Y.J. No. 113 (S.C.));
>
> v. whether the witness' evidence is significant or of a minor nature in the context of the specific case;
>
> vi. whether the presentation of the evidence in the manner allowed by section 714.1 will negatively impact or enhance the accused's ability to make full answer or defence or the Crown's ability to present its case; and
>
> vii. the importance of conducting hearings during a pandemic in a manner which is safe for all participants, including witnesses.

Witnesses Outside of Canada:

Section 714.2(1) of the *Criminal Code* allows for an order to be issued allowing for a witness to testify from outside of Canada by videoconference. It states as follows:

> *A court shall receive evidence given by a witness outside Canada by videoconference, unless one of the parties satisfies the court that the reception of such testimony would be contrary to the principles of fundamental justice.*

Section 714.2 does not, as does section 714.1, set out a list of factors to be considered and unlike section 714.3 (appearing from outside of Canada by audio conference), it does not specifically adopt the list of factors set out in section 714.1(a) to (g). Finally, section 714.41 (the "court may, at any time, cease the use of the technological means...and take any measure that the court considers appropriate in the circumstances to have the witness give evidence") is applicable to an application made under either section 714.2 or 714.3.

In ***Stevens***, Justice Jamieson held that section 714.2(1) "is presumptive and mandatory in its use of the words 'a court shall.'…Section 714.2 does not differentiate between classes of witnesses. A complainant is not treated under the Section as a different class of witness. When Parliament enacted the Section, it could have differentiated between classes of witnesses, but it did not. The presumption in Section 714.2 applies regardless of whether the witness is the complainant" (at paragraphs 12 and 13).

In ***R. v. K. N.***, 2021 BCPC 126, the Crown applied to have a witness testify from New Zealand. Prior to the application being heard, a test-run was conducted. It used "MS Teams":

> On February 1, 2021, the affiant also participated in a test using MS Teams, which is the authorized platform being used by the B.C. Court Services Branch to facilitate video and audio court appearances. The test was run from a courtroom at the Vancouver Provincial Court. The affiant was shown how a witness and an exhibit appear on a large monitor as a split screen. The images were very clear. The affiant also tested the connection, camera, speakers, and microphone with Ms. B. On March 14, 2021, the affiant had, approximately, a 10-minute conversation with Ms. B. on MS Teams. She and the complainant had no difficulties using the equipment.

Judge Giardini noted that the "onus in the two sections is very different" (at paragraph 55):

> Under s. 714.1 (which is a discretionary provision) the onus is on the party proposing to call the witness to satisfy the court that the proposed means of giving evidence "would be appropriate having regard to all the circumstances". However, in contrast, s. 714.2(1) (which is mandatory) reads, "A court shall receive evidence given by a witness given outside Canada by videoconference …" Moreover, the onus is on the party opposing the admission of such evidence to do so on the basis that it would be "contrary to the principles of fundamental justice".

Judge Giardini indicated that "the defence has not satisfied [her] that Mr. N. will be denied his ability to make full answer and defence by not being able to challenge the complainant's evidence in person. In assessing credibility, demeanour is simply one factor to consider. However, even when it is considered, a trial judge must proceed cautiously. Moreover, a trial judge's ability to assess the quality of a witness's evidence and to apply the factors outlined in the case law for the assessment of credibility is unlikely to be negatively affected by the fact a complainant is testifying by videoconference" (at paragraph 111).

Conclusion:

In conclusion, the provisions in the *Criminal Code* that I have referred to provide the potential for an expansive use of the virtual court. Experience has shown us that the virtual court can operate in an identical manner as the in-person court.

Whether the virtual court will expand, or remain a limited process for the hearing of criminal matters, depends on the interpretation given to the various provisions referred to and the willingness of counsel to participate and embrace the advantages offered by the virtual court. It also depends on whether the judiciary is willing to adapt the words "present in court" to meet present day attendance issues and modern technology.

APPENDIX "A"

Three Hypotheticals and More than Three Answers:

Q 1. *The accused wishes to appear at her or his trial virtually. The Crown objects. Can the Judge allow the accused to appear virtually?*

A 1. Yes.

Section 650(1) of the *Criminal Code* requires that the accused be present in court during his or her trial. However, section 650(1.1) allows the judge to order that the accused appear by videoconference and the Crown's consent is not required. But, the order would not apply to those portions of the trial in which the evidence of a witness is being taken.

Section 650(2)(b) permits a judge to allow the accused to appear virtually. It does not require the Crown's consent and it is not limited to any portions of the trial.

Section 725.23 allows the judge to order that an accused appear virtually if the court is of the opinion that it would be appropriate having regard to all the circumstances. The lack of Crown consent is irrelevant.

Q 2. *The accused wishes to appear virtually at his or her sentencing hearing. The Crown objects. Can the Judge allow the accused to appear virtually?*

A 2. Yes.

Section 650(1.1) allows the judge to order that the accused appear by videoconference and the Crown's consent is not required. However, the order would only apply to those portions of the sentence hearing in which the evidence of a witness is not being taken. Section 650(2)(b) permits a judge to allow the accused to appear virtually. It does not require the Crown's consent and it is not limited to any portions of the sentence hearing.

If the accused has designated counsel, section 650.01 allows for the sentence hearing to be conducted with the accused appearing virtually, whether evidence is or is not taken. The Crown's consent is not necessary.

Section 715.23(1) allows the judge to order that an accused appear virtually, for any portion of a proceeding if the court is of the opinion that it would be appropriate having regard to all the circumstances. The lack of Crown consent is irrelevant.

Q 3. *The accused is charged with a criminal offence. He lives outside the province in which the trial is to be held. He applies for an adjournment of the trial, arguing that he cannot travel because of COVID-19 travel restrictions. The Crown objects to the adjournment, arguing that the Court should require the accused to appear virtually. The accused indicates that he has access to the internet at his home and could appear virtually, but wants to appear in-person.*

Can the court require the accused to appear virtually?

A 3(a). No.

The Crown's lack of consent is irrelevant.

Section 650(1) of the *Criminal Code* indicates that the accused "shall" be present in court during her or his trial. This means in-person.

Section 650(2)(b) permits a judge to allow the accused to appear virtually, but only if she or he consents.

Section 715.23(1) allows the judge to order that the accused appear virtually, if the court is of the opinion that it would be appropriate having regard to all the circumstances, but this section is subject to the "except as otherwise provided" provision. Sections 650(1) and (2)(b) provide the otherwise as provided, denying the judge the authority to order that an accused person appear virtually without their consent.

A 3(b). Yes.

The Crown's lack of consent is irrelevant.

Section 650(1) of the *Criminal Code* indicates that the accused "shall" be present in court during her or his trial. This does not mean in-person. An accused person can be present by a multitude of means.

Section 715.23(1) allows a judge to order that the accused appear by audioconference or videoconference, if the judge concludes that it would be appropriate to do so. If such an order is issued, the accused is present in court.