*R v Barry*, 2025 NWTSC 48

Date: 2025-06-27
Docket: S-1-CR-2022-000 004

**IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES**

**BETWEEN:**

HIS MAJESTY THE KING

-and-

NEIL ALEXANDER BARRY

Application by the Crown to Permit a Witness to Testify Remotely
Section 714.1 of the *Criminal Code*

Heard at Yellowknife: April 10, 2025

Written Reasons filed: June 27, 2025

# REASONS FOR DECISION ON PRE-TRIAL APPLICATION

**Restriction on Publication:** There is a ban on the publication, transmission or broadcast of any information that could identify the complainant, pursuant to section 486.4 of the *Criminal Code*

Counsel for Crown: A. Paquin and J. Kelly

Counsel for Defence: A. Lind

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## BACKGROUND AND OVERVIEW

[1] Neil Barry, ("the Accused") is charged with various sexual offences alleged to have taken place in Tulita, and Yellowknife, Northwest Territories between September 1, 2006, and July 1, 2011. His trial will proceed before a jury commencing April 22, 2025, in Yellowknife.

[2] This is an application by the Crown, pursuant to section 714.1 of the *Criminal Code*, seeking an order permitting one of the complainants, T.E., ("the Complainant") to testify at the upcoming trial by way of video link from the Court House in High Level, Alberta. The Defence opposes this request on several grounds more fully set out below. I heard this application on April 10, 2025. After oral

argument, I reserved my decision. Counsel were informed on April 14, 2025, that the application was granted with written reasons to follow. These are my reasons for decision.

**FACTS**

[3] In support of its application, the Crown filed the affidavits of Vivian Hansen, Crown Witness Coordinator, Public Prosecution Service of Canada, Yellowknife, NT, and Desiree Heaslip, paralegal, Public Prosecution Service of Canada, Yellowknife, NT. In her affidavit, Ms. Hansen deposes that T.E. is expected to be in High Level, Alberta during the scheduled trial dates of this matter. Ms. Hansen states that T.E. is one of the complainants in this matter and would have been between 16 and 18 years of age at the time of the alleged offences. She further states that she believes that T.E. was residing with the Accused and his wife during this timeframe and that they were his guardians.

[4] In her affidavit, Ms. Hansen deposes that she spoke with T.E., together with Crown Counsel, Jared Kelly, on February 21, 2025, regarding the possible use of remote testimony and testimonial aids. According to Ms. Hansen, T.E. asked to be permitted to testify from High Level. He stated that he did not want to be in the same courtroom as the Accused. He also advised that he works a schedule of 7 days on followed by 7 days off, and that he is currently scheduled to work from April 23-29, 2025. T.E. further stated that work is important to him. He also indicated that the house he shares with his wife and 7-year-old child burned down in February 2024, and that the family has been staying in a hotel ever since. Ms. Hansen goes on to state that she recently learned that the family moved into their new home in the past few weeks. Ms. Hansen reports that T.E. indicated that he will come to Yellowknife for the trial if required to do so.

[5] Ms. Hansen further deposes that, based on a review of the PPSC file, she learned that Ajay Puthenpura, Crown Witness Coordinator, and Angie Paquin, Crown Counsel, spoke to T.E. again on March 7, 2025, at which time he again requested to be permitted to testify from High Level. T.E. stated that he is more comfortable in High Level, than in Yellowknife, and that his entire support system is located in High Level.

[6] According to Ms. Hansen's affidavit, she spoke to T.E. again on April 2, 2025, at which time he advised that he could not speak in front of the Accused as this would trigger his past trauma and possibly lead to further trauma. He also indicated that he would not be comfortable testifying without a support person. Finally, he

advised Ms. Hansen that his parents do not have the financial means to travel to Yellowknife to provide support.

[7] On February 18, 2025, Ms. Hansen deposes that on February 18, 2025, she and Jared Kelly spoke to T.E.'s wife, C.K. C.K. confirmed that T.E. wished to testify remotely as he does not want to be in the same room as the Accused. She went on to state that she believes it would be detrimental for T.E. to have to testify in the same room as the Accused. She indicated that T.E. has been sober for a few years and doing well. She expressed concern that requiring T.E. to testify in the same room as the Accused might trigger T.E. and affect his sobriety. Ms. Hansen spoke to C.K. again on March 31, 2025, at which time C.K. advised that her parents are determining whether they have the financial means to travel to Yellowknife for the trial to support T.E. and herself during the trial. (C.K. is also scheduled to give evidence for the Crown at the upcoming trial.)

[8] Finally, Ms. Hansen deposes that she reviewed the Public Prosecution Service of Canada file and determined that Angie Paquin spoke to C.K. once again on March 12, 2025, during which conversation, C.K. advised that her family lives in High Level, and that T.E.'s family lives in Meander River, Alberta, approximately 40 minutes away from High Level. She advised Ms. Paquin that family members would be available to support T.E. if he were permitted to testify remotely from High Level.

[9] In her affidavit, Ms. Heaslip deposes that she has been in contact with Michael Stremick, the Video Conference Coordinator for Alberta Justice, regarding the availability of the video conferencing facilities at the courthouse in High Level, Alberta. Ms. Heaslip states that she was provided with the booking instructions to reserve the video conference facilities at this location and has submitted a completed application. During oral argument, Crown Counsel advised that a booking for Thursday, April 24, 2025, the date that the Crown intends to call T.E. as a witness, has been confirmed.

[10] Ms. Heaslip further deposes that she has been advised by Ruby Barbosa-Conde, Travel Coordinator for the Public Prosecution Service of Canada, Yellowknife, that the cost of T.E.'s in-person court attendance, including travel, accommodation, meals, and incidental expenses, would be $3,783.72. T.E.'s in-person attendance would require 5 days, including travel and court time.

[11] In her affidavit, Ms. Heaslip deposes that she has been advised by Angie Paquin that counsel will be able to show electronic documents to T.E. via ClickShare if he were permitted to testify remotely from High Level.

[12] Finally, Ms. Heaslip deposes that she participated in a test of the video conference system in Courtroom 201 at the Yellowknife Courthouse on April 1, 2025. Also in attendance were John Paul Mercado, Supreme Court Clerk, Megan Mindus, Manager, Technical Services, Government of the Northwest Territories, Department of Justice, and Angie Paquin, Crown Counsel. During this test, Ms. Hansen connected to the courtroom remotely and was shown a document that was not otherwise visible on the screens in the courtroom. She noted the document text was blurry in split screen mode but became clearer after adjustments by Megan Mindus. Ms. Mindus advised the group that her IT team would continue to work on improving the clarity of the document.

## The Law

[13] Section 714.1 provides as follows:

> 714.1 A court may order that a witness in Canada give evidence by audioconference or videoconference, if the court is of the opinion that it would be appropriate having regard to all of 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 in person;
> c) the nature of the witness' anticipated evidence;
> d) the suitability of the location from which the witness will give evidence;
> e) the accused's right to a fair and public hearing;
> f) the nature and seriousness of the offence;
> g) any potential prejudice to the parties caused by the fact that the witness could not be seen by them, if the court were to order the evidence be given by audioconference.
>
> 714.2(2) A party who wishes to call a witness to give evidence under subsection (1) shall give notice to the court before which the evidence is to be given and the other parties of their intention to do so not less than 10 days before the witness is scheduled to testify.
>
> 714.41 The court may, at any time, cease the use of the technological means referred to in subsection 714.1, 714.2 or 714.3 and take any measure that the court considers appropriate in the circumstances to have the witness give evidence.

## The Position of the Parties

### The Crown's Position

[14] The Crown says that this is a proper case for the Court to permit one of the complainants, T.E., to testify via video conference from a location close to his home in northern Alberta. The Crown maintains that T.E.'s reluctance to testify in the

same room as the Accused should be given significant weight, considering the relationship of trust and dependence that existed between them in the past. The Crown also contends that all T.E.'s personal support network, as well as his current employment, are in and around High Level, and that this support would not be readily available to him if he were required to travel to Yellowknife to give evidence in this trial. According to the Crown, permitting T.E. to testify remotely will not seriously impact the Accused's fair trial interests. Finally, the Crown relies on its prior testing of the video conference link to the courthouse in High Level as providing strong evidence of the quality and reliability of the proposed technology.

[15] In support of its position, the Crown relies on a series of decisions, including ***R v D.M.S***., 2025 MBCA 16, ***R v J.L.K.***, 2023 BCCA 87, ***R v Chocolate***, 2022 NWTSC 24, ***R v Mantla***, 2018 NWTSC 76, and ***R v K.M***., 2017 NWT SC 27.

[16] During the oral hearing of this application, counsel were also referred to, and made submissions relative to, the recent decision in ***R v G*** (***J.),*** 2024 NWTSC 46.

The Defence's Position

[17] In opposing this application, the Defence urges the Court to take into consideration the fact that T.E. is a key witness in this upcoming trial, one of four complainants alleging historic sexual offences by the Accused. The Defence rightly points out that credibility is the key issue to be determined at trial.

[18] While acknowledging the suitability of the courthouse in High Level, the Defence contends that technological advances have not altered the preference to have witnesses give evidence in person. The Defence also says that sharing documents over a split screen will reduce the jury's oversight of the witness as he responds to questioning related to these documents. The Defence maintains that it will be important for the jury to observe T.E.'s reaction to the documents as they are presented to him. Finally, the Defence points out that the testing of the video link undertaken by the Crown underscored the fact that difficulties remain with the resolution of shared documents. The Defence acknowledges that work is continuing to try and address this issue, but points out that presenting documents to T.E. will be an important part of the defence's cross-examination of this witness.

[19] The Defence also urges the Court to find that T.E. is currently 33 years of age and, as such, is not a young, vulnerable person, as was the case in ***G(J.)***. The Defence maintains that T.E. has not expressed fear relative to the Accused and, indeed, alleges that T.E. has initiated contact with the Accused over the years, including inviting him to his wedding. The Defence contends that such actions are

inconsistent with T.E.'s claim that he genuinely fears being in the same room as the Accused. Finally, the Defence says that this is really about comfort and convenience and that the Crown could easily reschedule its witnesses for the upcoming trial to accommodate T.E.'s work schedule. Alternatively, the Defence maintains that T.E. could make arrangements to adjust his work schedule to allow for his attendance. The Defence goes on to observe that there is nothing in the material before the Court indicating the impact on T.E.'s employment if required to miss a couple of days of work.

[20] The Defence relies on the decisions in ***R v Grimes***, 2023 NLSC 6, ***R v Cardinal***, 2006 CarswellYukon 76, ***R v Chapelle***, 2005 CarswellBC 618, ***R v N.S***., 2017 ONCJ 977, and ***R v. S.D.L.***, 2017 NSCA 58, in support of its opposition to the Crown's application to permit T.E. to testify remotely. The Defence would consent to the use of a screen in this instance, pursuant to s. 486.2, but does not agree to T.E. being permitted to testify outside of the courtroom.

## ANALYSIS

### The Statutory Factors

[21] Section 714.1 sets of the various factors that a court is required to consider when determining whether a witness can give evidence via audioconference or videoconference. As I held in ***G.(J.)***, at para 21, I agree with the British Columbia Court of Appeal in ***J.L.K***., (at para 52) that the list of factors set out in the section is not exhaustive and should not be read as a complete code. At para. 50 of ***J.L.K***., the Court explained:

> …s. 714.1 clearly authorizes the court to make an order for remote testimony in certain circumstances. Further, s. 714.1 identifies a number of factors for the court to consider that will inform the analysis of whether an order should be granted. Those factors on their face attempt to strike a balance between practical and logistical issues (such as the location and personal circumstances of the witness and the costs of having the witness attend in person), and any potential impact on the fairness of the trial and the ability of the accused to make full answer and defence.

[22] In ***J.L.K***., the Court of Appeal considered the interaction between s. 714.1 and ss. 486.2(2) and 486.2(1). At para. 30, the Court held:

> While there is some overlap in the two sections, in that both contemplate a witness providing testimony from outside the courtroom through the use of technology, the sections have different underlying rationales. Section 714.1 addresses logistical and pragmatic issues, for example witnesses who are located elsewhere and are unable to travel to the city in which the trial is being held. Section 486.2(2), and the similar

> s.486.2(1), permit accommodation of vulnerable witnesses who may experience mental or emotional distress if compelled to testify in open court and/or in the presence of the accused.

[23] The Defence concedes that the Court should consider both the factors set out in s. 714.1 as well as those in the related provision, s. 486.2. According to the Defence, the two sections are intertwined. I agree.

[24] While there is no application before the Court under s. 486.2(1) or s. 482.2(2), I am satisfied that the language of s. 714.1(a) is sufficiently broad to allow for the consideration of all of the witness's circumstances, including his concern that he will suffer mental or emotional distress if required to testify in open court in the presence of the Accused. Given T.E.'s age at the time of the alleged offences, the relationship of trust and dependency that existed with the Accused, the familial connection through the Accused's then-wife, and the concerns raised by T.E., I find that this is a reasonable response.

[25] In ***Chocolate***, Smallwood C.J. allowed the Crown's application to have a sexual assault complainant testify outside of the courtroom and with the presence of a support person. The Court noted that s. 486.2(2) was amended in 2015, and the threshold for making an order under this section was lowered from "necessary to obtain a full and candid account of the act complained of" to "would facilitate the giving of a full and candid account of the acts complained of" (at para 13).

[26] At the time of the application in ***Chocolate***, the complainant was 18 years of age and had been in a relationship with the Accused on an on-and-off basis for approximately six months in 2019, some three years before the trial of this matter. The allegation was that the accused had vaginal intercourse with the complainant without her consent on several occasions and that he confined her in her bedroom, covering her mouth and pinning her to the floor. In the affidavit filed in support of the application, it was stated that the complainant was not fearful of the accused, but would be "uncomfortable testifying in front of the accused in court and in front of family members if they were to attend the trial" (at para 8).

[27] At para. 25, Smallwood C.J. described the purpose of s. 486.2(2) as follows:

> The purpose of s. 486.2(2) is to accommodate witnesses and to permit them to participate in the criminal justice system in a more meaningful way in order to obtain a full and candid account of events. It is designed to encourage their participation and is not solely dependent on a witness being required to demonstrate that they have anxiety, phobias or experienced enough physical or mental trauma to qualify for an

> accommodation. The process itself is a difficult one, and section 486.2(2) is intended to facilitate the process, to make it easier for witnesses to testify.

[28] At para. 16, the Court explained the significance of the 2015 amendments to this provision in the following terms:

> The amendments to the *Criminal Code* in 2015 made it easier for victims and witnesses to provide their testimony in court proceedings while ensuring that the rights of the accused were protected. One of the main purposes of these provisions is to encourage the participation of victims and witnesses in criminal trials. Section 486.2(2) is intended to facilitate the testimony of adult witnesses who do not suffer from a mental or physical disability but who also require accommodation in order to facilitate their being able to give a full and candid account of the events.

[29] I agree with Chief Justice Smallwood's interpretation, as well as her observation, quoting from ***Mantla***, that there is "considerable interest" on the part of society in "ensuring that cases are decided on the fullest and best evidentiary record possible", and that "witnesses are given the best opportunity to testify." The Court in ***Mantla*** went on to find "[T]hat is consistent with trial fairness and with the truth-seeking function of the criminal justice system (at para 17). Smallwood C.J. also noted the high rate of violence and sexual violence in the Northwest Territories, and that "[I]t can be difficult and traumatizing for a victim of sexual assault to testify about what happened to them" (at para 18).

*The Location and Personal Circumstances of the Witness*

[30] The Complainant is a 33-year-old Indigenous man from Meander River, Alberta. He was between 16 and 18 years of age at the time of the alleged offence. At the time, he lived in Tulita with the Accused, as well as the Accused's then wife, Kathleen Barry, and their children. Kathleen Barry is T.E.'s biological aunt. The Accused and Kathleen Barry were acting as T.E.'s guardians while he was living and going to school in Tulita. The Accused was also T.E.'s basketball coach, teacher, and guidance counsellor.

[31] On the evidence before me, it is clear T.E. currently resides in High Level, Alberta, and works full-time. He would be required to be absent from High Level and his employment for 5 days if required to attend the upcoming trial in person. I am satisfied that this would create hardship for the Complainant in that he would have to be away from his home in Alberta and that his employment would be interrupted.

[32] I accept the evidence of Ms. Hansen that T.E. wishes to testify from his home, in part, on account of his anxiety in having to give evidence in the same room as the Accused. Specifically, he reports that he could not speak or answer questions if he is required to be in the same room as the Accused.

*The Costs that would be Incurred if the witness were to appear in person*

[33] The cost of having the Complainant attend in person would be approximately $3,800. I agree with the Defence that this is a neutral factor given the frequency of witness travel in this jurisdiction. The Crown does not suggest otherwise. While the amount is certainly not insignificant, I am satisfied that it is quite modest under the circumstances. I do, however, note that the Complainant would be required to be away from home and miss work for 5 days.

*The Nature of the Witness' Anticipated Evidence*

[34] T.E. is one of four complainants expected to give critical evidence at the upcoming trial of the Accused. His evidence will form a significant part of the Crown's case. Credibility will certainly be a central issue at trial. While I have carefully considered the Defence's concerns regarding the potential challenges of testing the credibility of witnesses who testify via video conference, I am satisfied that this technology affords more than an adequate basis to test credibility.

[35] In ***J.L.K***, the British Columbia Court of Appeal adopted the decision of Kenkel J in ***R v K.Z.***, 2021 ONCJ 321, in which the Court discussed the assessment of the credibility of witnesses who testify via videoconference. At para. 11, the Court held:

> Criminal trial courts have decades of experience in assessing the credibility of complainants and other witnesses who testify by way of video technology. Courts have gained experience during the COVID pandemic. No special test is required beyond the statutory criteria.
>
> During the pandemic in a province where lockdown stay-at-home orders are in place and courtrooms have added restrictions for public health and safety, the use of videoconference technology can provide a better opportunity to assess credibility than in-person testimony.
>
> Videoconference technology shows and records both the demeanor and the responses of a witness. When evaluating concerns about the ability to fully assess demeanour, it's important to remember the limited role demeanour plays in assessing credibility.

[36] While ***K.Z.***, was a decision relating to the very significant challenges presented to courts across the country by the COVID-19 pandemic, the underlying principles discussed therein are highly relevant to the consideration of the statutory factor set out in s. 714.1. As I observed is ***G.(S.)***, at para 30:

> We learned a great deal from the experience of COVID restrictions that were forced upon courts because of this worldwide pandemic. Amongst other things, we learned that our hesitation over the receipt of video evidence was, at least to some extent, unjustified. While I accept the Defence contention that in-person testimony is the preferred model, the extensive use of videoconference technology during the COVID pandemic demonstrated that videoconference evidence is a viable and acceptable alternative.

[37] In ***R v TLK***, 2024 ABCJ 89, the Court addressed technology concerns raised in that instance. At para 23, the Court held:

> Third, unlike the case before me, the ***S.D.L.*** decision from January of 2017 was plagued with technology issues. Today, the justice system has had seven more years of experience with technology in trial settings, including trials conducted by videoconference during a pandemic. Technology issues can be addressed, tested and managed before and during the trial. Should there be an issue with respect to a facility's ability to support videoconference testimony during trial then Defence can raise this issue.

[38] In ***R v Wilkes***, 2020 NWTTC 16, the Crown's application to have three RCMP officers testify via videoconference from Nova Scotia was granted. In that instance, the accused was charged with possession of cocaine for the purposes of trafficking. At para 16, Judge Malloy rejected the contention that the ability to effectively cross-examine the Crown witnesses was adversely impacted by the fact that they would not be physically present in the courtroom. He stated:

> As for the detriment associated with not being able to see a witness in person, I doubt if a judge's ability to discern between a confident cad and a tremendous teller of the truth is especially enhanced by being in the same room as the witness. Assessments of witness credibility are generally founded upon the preponderance of evidence, the presence or absence of inconsistencies in testimony and conformity of evidence with the circumstances that common sense reasonably anticipates to prevail at any given time. Placing too much emphasis on the appearance or demeanour of a witness is something all judges must guard against.

[39] The Defence relies on a series of cases, notably ***S.D.L***, a 2017 decision of the Nova Scotia Court of Appeal; ***R v Cardinal***, a 2006 decision of the Yukon Territorial Court; and ***R v Chapelle***, a 2005 decision of the British Columbia Supreme Court.

All of these decisions pre-date the 2019 amendments to s. 714.1 of the *Code* and are, as such, of limited assistance in applying the amended version of the provision.

[40] In ***S.D.L.***, the trial judge granted the Crown's application to permit the seven-year-old complainant and his mother to testify via video link in a trial involving allegations of sexual assault, sexual touching, and anal intercourse. The accused was subsequently convicted of the offences of sexual touching and anal intercourse. On appeal, the accused challenged the trial judge's decision to allow the use of a video link, as opposed to requiring the witnesses to testify in person in the courtroom.

[41] In allowing the appeal, the Court of Appeal found that the decision to allow the evidence through a video link denied the accused his right to make full answer and defence. The Court also found that there was no evidentiary basis for the decision given the absence of affidavit evidence. Of greater significance, the Court of Appeal referred to the "many technical problems as the two witnesses gave their testimony", and that "interruptions permeated the entire process": at para 43. The Court ordered a new trial, having determined that the combined effect of all of these issues denied the accused the right to make full answer and defence.

[42] In a lengthy decision, MacDonald CJNS outlined a series of guiding principles when dealing with applications of this nature. In particular, he suggested 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." He went on to suggest that "w*hen the credibility of the complainant is at stake, the requisite exceptional circumstances described in #2 must be even more compelling*" (at para 32) (emphasis in original). These guiding principles were largely rejected by the British Columbia Court of Appeal in 2023, in ***J.L.K.***

[43] In ***J.L.K***. the accused appealed his conviction for 17 offences, including sexual assault, most related to a former intimate partner. At trial, the Crown brought a s. 714.1 application to have the complainant testify remotely as she had been diagnosed with COVID-19 and the Crown was unaware of her actual whereabouts. It is clear from the decision that the complainant was initially uncooperative and did not want to testify. The trial judge allowed the application, and the complainant testified via video conference. During the testimony, there were many interruptions and other technical difficulties. At trial and on appeal, the Defence maintained that the credibility of the complainant was a central issue, and that the accused should have the right to confront her in the courtroom.

[44] After citing a number of other trial and appellate decisions, the Court of Appeal rejected the notion that "the courts should layer additional factors on top of the existing statutory criteria to consider or develop a different and stricter test when there are issues of credibility, or in particular cases like alleged sexual assaults": at para 51. As previously indicated, the Court of Appeal also adopted the decision of Kenkel J. in ***K.Z.***, in which the judge discussed the assessment of credibility of witnesses who testify via videoconference. In the result, the Court declined to follow the decision in ***S.D.L.*** on this point. Justice Mah of the Alberta Court of Justice reached a similar conclusion in ***TJK*** and followed the B.C. Court of Appeal's rejection of most of the impugned guiding principles set forth in ***S.D.L.***

[45] Having carefully considered all the decisions tendered by counsel, I accept the reasoning in ***J.L.K.***, I find that ***S.D.L.*** predates the 2019 amendments to the *Code* that expanded the reach of s. 714.1, and that there is nothing in the language of the section that restricts its availability to witnesses whose credibility will be an issue at trial. In my view, the decision of the Nova Scotia Court of Appeal would effectively deny complainants, or other non-police or non-expert witnesses, access to this provision. If Parliament had intended to make such distinctions, it could have easily included such exclusions in the 2019 amendments. Notwithstanding my conclusion in this regard, I agree that when the credibility of a witness who is the subject of a s. 714.1 application will be a significant issue at trial, this is one of many factors to be considered in the overall assessment of an application of this nature.

[46] The ***Chapelle*** and ***Cardinal*** decisions relied on by the Defence both involve findings that courts should be very reluctant to deny the trier of fact the opportunity to see the witness in person in the courtroom where credibility is a central issue. For the reasons previously stated, I respectfully decline to follow this line of authority.

[47] I agree with the reasoning in ***J.L.K.***, ***M.Z.***, ***TLK***, and ***Wilkes***, that the credibility of a witness can, when properly managed, be effectively assessed through the videoconference attendance of a witness.

*The Suitability of the location from which the Witness will give evidence*

[48] On the evidence before me, I am satisfied that the Courthouse in High Level, Alberta, is a suitable location for T.E. to give evidence at this trial. While I accept the notion that technology is not infallible, and that potential issues could conceivably arise, I find that reasonable steps were taken by the Crown to test the reliability of the audio and video components equipment. There is nothing unique

or, indeed, unusual about the use of technology to facilitate the attendance of accused persons, witnesses and even legal counsel in this post-COVID-19 environment.

[49] The Court in ***Chocolate*** observed that the courtroom where the trial of that matter was scheduled to take place is "one where the witness box is located in front of where the accused sits and is in close proximity to the accused, being a few feet away from the accused" (at para 9). I note that the same courtroom is to be used in the upcoming trial of the Accused. I would also observe that the jury box is located quite some distance away from the witness box in the courtroom in question. If T.E. were permitted to testify remotely, his image would be magnified and projected on a large screen located right next to the jury box. Arguably, the jury will have a better view of T.E. on the screen than if he were to testify in court from the witness box.

*The Accused's right to a fair and public hearing*

[50] An accused's person's right to a fair trial is part of the presumption of innocence enshrined in s.11(d) of the *Canadian Charter of Rights and Freedoms*. The section provides that: "[A]ny person charged with an offence has the right…(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal." Similarly, s. 7 provides "[E]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

[51] This same issue was fully addressed in my earlier decision in ***G.(J.)*** at paras 37-41 as follows:

> In ***R v Levogiannis***, [1993] 4 S.C.R. 475, the Supreme Court found that an accused's inability to confront their accuser in person in the courtroom does not undermine the right to make full answer and defence. In that instance, the accused challenged the constitutionality of s. 486(2.1) of the *Code*, a provision that permitted a court to allow a complainant under the age of 18 years to testify behind a screen if the judge believed the use of the screen was necessary to obtain a full and candid account of the alleged act. The accused alleged that s. 486(2.1) breached his rights under ss. 7 and 11(d) of the *Charter*. While the content of s. 476(2.1) was subsequently broadened by Parliament, I am satisfied that the principles set out in ***Levogiannis*** regarding the scope of an accused person's fair trial rights remain relevant and applicable.
>
> The provisions of s. 714.1 do not "render the trial procedure fundamentally unfair to the accused": ***Levogiannis*** at p 485. As in ***Levogiannis***, the video appearance of the Complainant during the trial of this matter will not in any way obstruct the Accused's view of this witness. Speaking for the Court in ***Levogiannis***, L'Heuruex-Dube J. quoted with approval the decision of Morden A.C.J.O. in the court below in which the

Ontario Court of Appeal discussed the "right" to face one's accuser. Specifically, at p. 490 of ***Levogiannis***, (pp. 366-67 (1990) 1 O.R. (3rd) 351 (C.A.), the Court of Appeal discussed the accepted tradition of court participants being in sight of each other:

> My conclusion, based on the foregoing, is that, since it is an accepted tradition of our legal system that judge, jury, witnesses, accused and counsel are all present in sight of each other, it can be said that normally an accused has the right to be in the sight of witnesses who testify against him or her. That this is probably so is confirmed by the need for a judge's order providing otherwise if the accused is not to be in the sight of the witness.
>
> Accepting that it is a right, of a kind, I do not think that it can be said to be an absolute right, in itself, which reflects a basic tenet of our legal system. It is a right which is subject to qualification in the interests of justice.
>
> I do not think that, by reason of the absence of face-to-face confrontation, any principle of fundamental justice has been infringed in such a trial. It may be that, if the order under s. 486(2.1) is not properly made, a legal right has been infringed, but that is not the present issue.

The decision in ***Levogiannis*** is also helpful in that it provides some insight into the natural evolution of rules of evidence and procedure in our legal system. At p. 487, the Court explained that "[O]ne must recall that rules of evidence are not cast in stone, nor are they enacted in a vacuum. They evolve with time". At p. 488, the Court continued "[A]s mentioned above and as discussed in the companion cases, rules of evidence and procedure have evolved through the years in an effort to accommodate the truth-seeking function of the courts, while at the same time ensuring the fairness of the trial. " The Supreme Court also cited with approval its' earlier decision in ***R v Lyons***, [1987] 2 S.C.R. 309 at p. 362, in which it found that the right to a fair trial does not entitle an accused to the most favourable procedures that could possibly be imagined.

While all of the aforementioned passages from ***Levogiannis*** relate to a constitutional challenge to s. 486(2.1) of the *Code*, not s. 714.1, they are, in my view, helpful to exploring the Accused's contention that an order permitting this witness to testify via videoconference from her home in British Columbia, will adversely impact his right to a fair trial. It bears repeating that the principles of fundamental justice guaranteed by s. 7 of the *Charter*:

…must reflect a variety of interests, including the rights of an accused, as well as the interests of society…While the objective of the judicial process is the attainment of truth, as this Court has reiterated in *L. (D.O.)*, *supra*, the principles of fundamental justice requires that the criminal process be a fair one. It must enable the trier of fact to "get at the truth and properly and fairly dispose of the case" while at the same time providing the accused with the opportunity to make a full defence (***R v Seaboyer***, supra, at p. 608): ***Levogiannis*** at p. 386.

> At para. 18 of ***TJK***, Mah J. noted that both s. 171.4 and 286.2(1) "contemplate a witness providing testimony outside the courtroom using technology". She continued: "[P]arliament recognizes that permitting witnesses to testify remotely does not sacrifice trial fairness, but rather enhances the truth-seeking function of the courts."

[52] Based on the various cases that have considered this issue, I am not persuaded that the Accused's right to a fair trial would be undermined in this instance by having T.E. testify remotely via videoconference. He will be clearly visible to the presiding judge, the members of the jury and counsel for the Defence. Other than the fact that the witness is not physically present in the courtroom, the trial will be conducted in the usual fashion, including full cross-examination by counsel for the Accused. Chief Justice Smallwood reached a similar conclusion in ***Chocolate***, at para. 27-28, a decision more fully discussed above. I would simply add that I agree with the decision of Malakoe TCJ in ***R v Drescher***, 2021 NWTTC 20, that an accused person does not have a right to confront his accusers in person.

*The nature and seriousness of the offence*

[53] The Accused is charged with several counts of sexual assault and two counts of sexual exploitation, both serious offences that carry a maximum punishment of 10 years and 14 years imprisonment, respectively. The offences related to T.E. include a major sexual assault and an allegation of sexual exploitation. The Accused faces a lengthy period of imprisonment if convicted of these offences. This is an important factor in attempting to strike a balance between practical and logistical concerns, the personal circumstances of the witness, and any potential impact on the fairness of the trial.

[54] While this is not an application under s. 486.2 to have the complainant testify in a different room or behind a screen, the existence of this companion provision reflects Parliament's general concern for the protection and privacy of witnesses in sexual assault cases. An order under s. 486.2 would have the same potential impact on this accused's ability to cross-examine the complainant. In both instances, T.E. would not be present in the courtroom and would be providing testimony via video conference. It would, accordingly, seem to make little difference whether the evidence is being broadcast to the courtroom from a different room in the courthouse or from a courthouse in a different province.

[55] The presence of a clerk or other court official in High Level will offer some degree of solemnity to the situation, as well as provide some degree of supervision of T.E. while testifying. The courthouse setting also conveys a sense of the seriousness of the process. The administration of an oath or affirmation will also

convey the solemnity of the proceedings, as will the formality of the court process that will be at play. This administration of an oath or affirmation is a standard procedure the court employs before permitting a witness to give evidence. This safeguard can easily be duplicated via video conference, as in the case of evidence offered from a different room pursuant to s. 486.2. Further, proper directions from the trial judge can underscore the gravity of the proceedings and convey to the witness the importance and significance of their participation in the trial process. Proper directions will also assure that the witness is alone and has no access to any form of testimonial aid. In addition, counsel are free to question the witness regarding any concerns that may arise relating to the circumstances of his giving evidence.

[56] The Defence suggests that T.E. is no longer a young or vulnerable person and that he has maintained contact with the Accused for many years after the alleged offences. According to the Defence, T.E. actions are inconsistent with someone claiming to be distressed at testifying in the same room as the Accused. In my view, T.E.'s past behaviour and current state of mind must be viewed in context. First, T.E. was an adolescent at the time of the alleged offences, between 16 and 18 years of age. Second, T.E. was in a relationship of trust and dependency with the Accused wherein the Accused exerted significant control over T.E. access to education and the pursuit of his strong interest in basketball. Third, the relationship between the Accused and T.E. was longstanding and complex, in part due to the family connection between T.E. and the then-wife of the Accused. I am also of the view that it is now well understood that victims of trauma, including sexual abuse, do not follow a single path in terms of the timing of disclosure or their actions after the fact. The relationship between T.E. and his uncle, the Accused, was complex and nuanced.

[57] For this application, what is significant is T.E.'s current state of mind and his current apprehension about testifying about these allegations of sexual assault in the presence of his alleged abuser. I also note that all of the alleged contact between T.E. and the Accused occurred prior to T.E.'s disclosure of this alleged offence. T.E.'s contact with the Accused following the alleged offences can be fully explored in cross-examination at the trial.

[58] The Defence relies on the decision in ***Grimes***, a 2023 decision of the Newfoundland and Labrador Supreme Court. To the extent that this decision stands for the proposition that some form of independent or expert evidence is required to quantify the impact on a witness of having to testify in open court in the presence of his or her alleged abuser, I respectfully decline to follow such authority. In my view, this sets the bar too high in applying a provision that is intended to accommodate

witnesses and victims and to facilitate their participation in the criminal justice system. I am satisfied that the evidence of T.E. and his wife, C.K., as relayed through the affidavit of Ms. Hansen, provides a sufficient evidential foundation.

[59] I am also not persuaded that the Crown should be required to rearrange its witness schedule to try and accommodate T.E.'s work schedule. This matter is scheduled to be heard by a jury and, as such, both the Crown and the Defence must be afforded considerable latitude in terms of the implementation of their respective trial strategies. Similarly, I do not accept the Defence suggestion that T.E. should be required to adjust his work schedule or provide evidence as to the impact on his employment of missing work to attend court. I am satisfied that the affidavit discloses adequate information regarding the hardship that would be occasioned to T.E. if required to be away from his home, his employment and his support system for a period of 5 days. In my view, that is the type of practical issue that s. 714.1 is intended to address. I am also satisfied that the Complainant's statements to Ms. Hansen provide adequate, reliable information regarding his anxiety at the prospect of having to face the Accused in person. I note his wife's concern that his current state of sobriety might be put at risk if he were required to relive this trauma in the direct presence of the Accused.

[60] Finally, the Defence relies on the decision in ***N.S.***, a case involving allegations of historic sexual assault that were alleged to have taken place when the complainant was between the ages of 15 and 17 years. The decision is principally concerned with whether evidence could satisfy the test for the use of a screen, but not the use of CCTV. In rejecting the Crown's application, the court relied on ***Levogiannis*** and ***R v N.S.***, [2012] 3 S.C.R. 726, the niqab case, as supporting the need to have a proper view of the demeanour of witnesses. In my view, this decision of the Ontario Court of Justice overstates the reach of ***N.S.***, where the Supreme Court was concerned with the potential obscuring of a witness's facial expressions as a result of the partial coverage of the witness's face by a niqab. I respectfully disagree with the suggestion that "[T]here must be a real and tenable connection to the proposed use of the testimonial aid and the expected quality of the evidence to be given by the witness. There must be a real prospect that the use of the aid will allow for the giving of a full and candid account when otherwise the evidence will be of lesser quality" (para 42). As with the decision in ***Grimes***, I am of the view that this sets the bar too high.

## CONCLUSION

**[61]** For the reasons set out above, the application is granted. I am satisfied that there is a proper and reliable basis on which to exercise my discretion under s. 714.1,

having regard to the objectives of the section, the factors set out in the section, and other relevant circumstances. The Complainant may testify via videoconference

M. David Gates
J.S.C.

Dated in Yellowknife, NT this
27th day of June, 2025,

Counsel for the Crown: A. Paquin and J. Kelly
Counsel for the Defence: A. Lind

S-1-CR-2022-000 004

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**IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES**

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BETWEEN:

HIS MAJESTY THE KING

-and-

NEIL ALEXANDER BARRY

**Restriction on Publication:** There is a ban on the publication, transmission or broadcast of any information that could identify the complainant, pursuant to section 486.4 of the *Criminal Code*

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REASONS FOR DECISION ON PRE-TRIAL APPLICATION OF
THE HONOURABLE JUSTICE M. DAVID GATES

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