

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Applicant

- and -

MICHAEL DRESCHER

Respondent

**REASONS FOR DECISION
of the
HONOURABLE JUDGE GARTH MALAKOE**

Restriction on Publication

Publication Ban: Evidence taken at the preliminary inquiry is prohibited from publication pursuant to s. 539(1) of the *Criminal Code*.

Note: This decision is intended to comply with the publication ban.

Heard at: Yellowknife, Northwest Territories

Date of Decision: October 26, 2021

Date of Hearing: October 22, 2021

Counsel for the Crown: Gary Magee, Trevor Johnson

Counsel for the Accused: Kim Arial

[Application under Sections 537(1)(a) and 714.1 of the *Criminal Code*]

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A. INTRODUCTION

A.1 Issue

[1] This application regards the conduct of the preliminary inquiry into the murder charge against the accused, Michael Drescher. In light of the most recent COVID-19 directive of the Territorial Court and in light of the joint request by counsel that the preliminary inquiry dates be maintained, the preliminary inquiry is currently scheduled to be heard in Inuvik from November 2 to 5, 2021 and in Yellowknife, from November 8 to 12, 2021.

[2] The Crown intends to call civilian and police witnesses. There had been agreement between counsel that some of the witnesses could appear by video-conference when the Court sat in Yellowknife. It was understood by counsel, however, that during the portion of the preliminary inquiry that was scheduled to take place in Inuvik, civilian witnesses who are resident in the Inuvik area (including a witness from Tuktoyaktuk) (the “Inuvik civilian witnesses”) and police witnesses from Inuvik and Fort McPherson (the “Inuvik police witnesses”) would appear in person at the Inuvik courthouse. Counsel for the accused would have the opportunity to cross-examine these witnesses (collectively, called the “Inuvik witnesses”) with the accused present in the courtroom.

[3] The Crown is now making an application which has two parts. First, it wishes to change the venue of the Inuvik portion of the preliminary inquiry to Yellowknife. Second, it seeks to examine the Inuvik witnesses by video-conference.

[4] In other words, if the Crown's application is granted, the entire preliminary inquiry would take place in a courtroom in Yellowknife. The judge, all counsel and the accused would be present, in person, in the Yellowknife courtroom. The Inuvik witnesses would be present, in person, in the Inuvik courthouse. When testifying, each would testify from either the courtroom or a witness room in the Inuvik courthouse. The participants in the preliminary inquiry who were located in Yellowknife would see and communicate with the Inuvik witnesses through videoconferencing technology.

[5] The Defence opposes the application. Mr. Drescher and his lawyer seek to be in the same room as the Inuvik witnesses when they testify. If the Court approves the application, Mr. Drescher seeks an adjournment of the preliminary inquiry.

A.2 Restriction on Publication

[6] I am making an Order pursuant to s. 539 directing that the evidence taken at the preliminary inquiry shall not be published in any document or broadcast or transmitted in any way before such time as, the accused is discharged; or if he is ordered to stand trial, the trial is ended. Later in this decision, I will be briefly referring to the anticipated evidence of certain of the witnesses. In my view, this Order prohibits the publishing of that anticipated evidence.

[7] In this decision, any reference to a section number in the absence of the name of the legislation is a reference to the *Criminal Code*, R.S.C. 1985, c.C-46, as amended.

B. THE COVID-19 BACKGROUND

[8] The application by the Crown is made in the context of and as a result of the COVID-19 pandemic. As of October 24, 2021, there are 14 active cases in Inuvik and 111 active cases in Yellowknife. The total number of active cases in the Northwest Territories is 265. There have been nine deaths in the Northwest Territories as a result of COVID-19.

[9] For the purposes of this application, I take notice of the following facts regarding COVID-19 which, in part, come from *R. v. Mills*, [2021] B.C.J. No. 591 (B.C. Prov.Ct.):

- (a) COVID-19 is spread by person-to-person contact either directly or via indirect transmission;
- (b) Individuals may be able to spread the virus while they are either pre-symptomatic or are asymptomatic;

- (c) The virus can be lethal;
- (d) The rates of mortality appear to be pronounced among the aged as well as among those who have certain underlying conditions such as respiratory ailments. The mortality rate among those who do not fall within these categories is not nearly as high;
- (e) Social distancing has been utilized to lessen the rate of infection in the population and, as such, the failure to adhere to social distancing will generally increase the rate of infection; and
- (f) Full vaccination with approved vaccines against COVID-19 creates a significant immunity against the virus for the vaccinated person. The likelihood of an unvaccinated or partially vaccinated person carrying or being infected by the virus is significantly greater than that of a vaccinated person.

[10] It is evident that travel by non-residents into a community is one way that the COVID-19 virus can be spread to that community.

[11] The most recent COVID-19 directive of the Territorial Court was issued on October 15, 2021. It cancelled all court sittings in communities outside of Yellowknife until 2022. It also cancelled all trials, preliminary inquiries and sentencings in Yellowknife until after November 22, 2021. These changes to the Court schedule were a result of an outbreak of COVID-19 in Yellowknife and an increase in the number of cases in the communities, including Inuvik.

[12] The Chief Public Health Officer (the CPHO) has made certain public health orders which restrict the occupancy in public buildings. The CPHO has also issued certain exceptions which allow the Territorial Court to continue to sit provided certain sanitary measures are implemented and followed. These exceptions are in the process of being renewed. In other words, the Territorial Court can continue to sit if it so chooses. Within the confines of its COVID-19 directive, the Territorial Court can decide to sit on individual preliminary inquiries, trials or sentencings even though there is a general adjournment of all of these proceedings.

[13] The Information alleging the murder charge under s. 235(1) against Michael Drescher was received on October 14, 2020 which is also the date on the Warrant of Committal. It has been over a year since Mr. Drescher has been facing this charge.

[14] In the absence of the Crown and Defence seeking to maintain the preliminary inquiry dates for Mr. Drescher, the preliminary inquiry would have been cancelled and automatically adjourned as a result of the COVID-19 directive. It is my

understanding that both Crown and Defence desire that the preliminary inquiry proceed; that all counsel are prepared to proceed; however, the Defence wishes only to proceed if Defence counsel can examine Inuvik civilian witnesses in person with Mr. Drescher present.

C. THE CROWN AND DEFENCE ARGUMENTS

C.1 The Crown Arguments

[15] The Crown makes the following arguments to support its request that the preliminary inquiry be held entirely in Yellowknife:

- (a) There is currently a global pandemic of the COVID-19 virus and a current outbreak of the virus in the Northwest Territories.
- (b) There is currently a directive by the Territorial Court that, because of COVID-19, circuits to all communities are cancelled until the New Year.
- (c) The accused is in custody at the North Slave Correctional Centre located in Yellowknife.
- (d) The presiding judge, both Crown counsel and the court staff involved in the preliminary inquiry reside in Yellowknife. The accused's lawyer resides in Edmonton.

[16] The Crown makes the following arguments to support its request that if the preliminary inquiry is held entirely in Yellowknife, the Inuvik witnesses should be allowed to appear by videoconference:

- (a) Travel between Yellowknife and Inuvik is not appropriate because of the possibility of the transmission of COVID-19.
- (b) There are six Inuvik civilian witnesses. One is fully vaccinated; one is partially vaccinated; two are not vaccinated. The vaccination status of two of the witnesses is not known. By November 1st, all RCMP will be required to be fully vaccinated.
- (c) At a preliminary inquiry, the presiding judge does not make findings of credibility with respect to the witnesses.
- (d) There is no right of the accused to confront his accuser in person.

- (e) The videoconference link between the courthouses in Yellowknife and Inuvik is reliable and tested.

C.2 The Defence Arguments

[17] Counsel for Mr. Drescher argues:

- (a) It is his right to have his accusers (i.e., the Inuvik civilian witnesses) testify in person before him and he is not prepared to waive that right.
- (b) Although credibility and reliability of the Inuvik civilian witnesses is not an issue for the preliminary inquiry judge in deciding on whether or not to commit the accused to stand trial, the credibility and reliability of the Inuvik civilian witnesses is an important trial issue.
- (c) An ancillary purpose of the preliminary inquiry is to allow the Defence to discover the Crown's case and in particular, to explore the credibility and reliability of the witnesses, including the opportunity to observe them in court and in the courthouse.
- (d) There is a presumption that the trial take place where the offence took place and it is important for the community of Inuvik to see justice being done.
- (e) There is an arrangement between Defence and Crown that, if there is time, other civilian witnesses located in Inuvik may testify during the preliminary inquiry.

[18] Let me deal first with the request for the change of venue.

D. THE VENUE OF PRELIMINARY INQUIRY

D.1 The Law Regarding the Venue of the Preliminary Inquiry

[19] Section 537 states:

537. (1) A justice acting under this Part may
- (a) adjourn an inquiry from time to time and change the place of hearing, where it appears to be desirable to do so by reason of the absence of a witness, the inability of a witness who is ill to attend at the place where the justice usually sits or for any other sufficient reason; (emphasis added)

[20] In my view, s. 537(1)(a) gives the presiding justice the ability to change the place of the preliminary inquiry for any “sufficient reason.” In this respect, I am in agreement with the comments of Judge Gouge in *R. v. Downer and Tompkins*, 2014 BCPC 200 who stated that, “. . . it was the intention of Parliament to identify two specific reasons for which a change of venue might be ordered, but not to preclude the possibility that other, unspecified reasons might also justify the order.”

[21] In the material filed by the Crown, there is reference to the application for a change of venue being governed by s. 599. Section 599 refers to the location of the trial, not of the preliminary inquiry. During submissions, both Crown and Defence agreed that s. 537(1)(a) was the governing provision. With respect to a preliminary inquiry, I agree with Judge Gouge that “the question is closely analogous to the question of balance of convenience which often arises when the issues of choice of forum arises in civil cases.” In balancing the relevant factors while determining the appropriate location, it is initially necessary to leave aside the question of remote appearances by the witnesses. In other words, while determining the appropriate location, I will assume that the witnesses, counsel and judge will be in the same location for the preliminary inquiry.

[22] The relevant factors are as follows:

- (a) The alleged offence took place in Inuvik and the eye witnesses reside in the Inuvik region;
- (b) The accused is currently on remand in Yellowknife and has been since he was arrested and charged on October 14, 2020;
- (c) The Crown, Judge and court staff are resident in Yellowknife;
- (d) The accused’s lawyer is resident in Edmonton, Alberta;
- (e) Many of the other witnesses are not resident in Inuvik;
- (f) As a result of the COVID-19 pandemic, the Territorial Court has cancelled all circuits to the communities for the remainder of 2021 and all trials and preliminary inquiries in Yellowknife until November 22, 2021, subject to exceptions allowed by the Court;
- (g) The only practical way of getting from Yellowknife to Inuvik is by airplane. The Court party normally travels to Inuvik on commercial flights operated by Canadian North. The flight stops in Norman Wells and takes about three hours in total to get to Inuvik.

[23] The main purpose of a preliminary inquiry is to determine whether there is sufficient evidence to commit the accused for trial. There is an ancillary purpose of giving the accused the opportunity to discover the Crown's case against him. As stated in *R. v. Hynes*, [2001] 3 S.C.R. 623:

31 Over time, the preliminary inquiry has assumed an ancillary role as a discovery mechanism, providing the accused with an early opportunity to discover the Crown's case against him or her: *Skogman, supra*, at pp. 105-6. Nonetheless, this discovery element remains incidental to the central mandate of the preliminary inquiry as clearly prescribed by the *Criminal Code*; that is, the determination of whether "there is sufficient evidence to put the accused on trial" (s. 548(1)(a)).

[24] The original arrangement to have the Court sit a week in Inuvik followed by a week in Yellowknife is clearly convenient for the Inuvik witnesses. In pre-COVID-19 days, that the Court party had to travel to Inuvik was considered a normal and necessary part of this Court's operations. There was a presumption that the Court would travel to the location of the alleged offence for the preliminary inquiry or trial.

[25] The current state of the pandemic clearly favours minimal travel between Yellowknife and Inuvik. This is due to the outbreaks of COVID-19 in each of the two communities.

[26] Although I have indicated that it was important to logically divide this application into two parts, i.e., the location of the preliminary inquiry and whether there will be remote testimony, it is apparent that the issues overlap. If the entire preliminary inquiry takes place in Yellowknife, the Inuvik witnesses would have to travel to Yellowknife in the absence of an order allowing them to testify remotely. Likewise, if the entire preliminary inquiry takes place in Inuvik, witnesses located in Yellowknife would have to testify in Inuvik. If the predominant consideration is to minimize travel during the pandemic, this would not be achieved without remote testimony.

[27] In my view, in the context of the current COVID-19 pandemic and situation in the Northwest Territories, and in the absence of any factors that would cause prejudice to the accused's right to a fair trial, the preliminary inquiry should be held in one location with travel for all participants kept to a minimum.

D.2 The Law Regarding Remote Appearances of Witnesses

[28] Section 714.1 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 teleconference.

[29] Normally, in an application for remote testimony of witnesses, the Court would review each of these factors in detail; however, for the purposes of this analysis, the real issues are the Defence assertions that the accused has the right to be present in the same room as his accusers when they testify and that cross-examination would be impaired with the use of videoconferencing. With respect to the other factors, I have already discussed the seriousness of the offence, where the witnesses are located and the travel required between Inuvik and Yellowknife. The nature of the anticipated evidence of the Inuvik civilian witnesses, as submitted by the Crown, is as follows:

[Note that the anticipated evidence is not included in this published decision in order to comply with the publication ban.]

[30] Counsel for Mr. Drescher asserts that at least one of the witnesses has given conflicting statements to the RCMP.

[31] For the purposes of my decision-making, I also note that the Telemerge videoconference system that is used for audio-visual transmission between the Yellowknife and Inuvik courthouses has been implemented, tested and is considered to be reliable. I contrast this to witnesses testifying remotely from their houses or offices or detachments, where the equipment or telecommunication link is unknown or has not been previously used in court proceedings. The reliability of remote testimony into the Yellowknife courtroom from other NWT courthouses has evolved to the point where, in the absence of issues with the telecommunication provider, the connections are similar in quality to closed circuit television where the witness is located in the same building.

[32] In its submissions, the Crown relied on the Saskatchewan Court of Queen's Bench case of *R. v. Burns*, 2020 SKQ 228, where the court allowed two witnesses to testify via videoconferencing technology in a murder and attempted murder trial.

[33] In *R v. Burns*, 2020 SKQB 228, the Court considered the effects of the COVID-19 pandemic and use of remote testimony:

11 However, in considering both of these gentlemen's personal circumstances, I must also weigh the inherent risks to them and their family and their workplace contacts of the COVID-19 pandemic. In *R v Cunningham*, 2020 ONSC 2724 at para 18, it was held that the Court could take judicial notice of the following factors with respect to COVID-19:

1. COVID-19 is spread by person-to-person contact either directly or via indirect transmission.
2. Individuals may be able to spread the virus while they are either pre-symptomatic or are asymptomatic.
3. The virus can be lethal.

...

12 In *R v Milliken*, 2020 ONCJ 356, Kwolek J. held at paragraph 70 that COVID-19 is an exceptional circumstance that justifies the greater use of remote testimony. I agree. Thus, considering both the stated personal circumstances of Mr. Meade and Mr. Crawford, in combination with the judicial notice that I can take of factors with respect to COVID-19, I conclude that the totality of the circumstances weigh in favour of the granting of the orders sought.

[34] The Defence in *Burns* argued, as does counsel for Mr. Drescher, that allowing the witnesses to appear remotely would affect the accused's right to a fair and public hearing by restricting the ability for the accused to be present and to cross-examine the witnesses. The Court responded:

23 This topic is at the core of defence counsel's objections to what the Crown seeks. Their position is that since these are very serious charges coupled with their sense that their cross-examination may potentially be less effective. They argue that to permit these witnesses, who may be significant or perhaps essential to the Crown's case, to testify by video link would constitute a denial of the right to a fair and public hearing and prejudice their defence. They advance the position that the loss of the ability to cross-examine these witnesses, present in the courtroom, risks limiting their opportunity for effective cross-examinations.

24 The fact that these are serious charges is without question. However, video testimony of complainants in cases of serious charges is quite common. Complainants in sexual assault cases frequently testify by video link. Testimony by video link in second-degree murder cases has occurred. See: *R v Husbands*, 2018 ONSC 6831. As the technology for video evidence has improved, concerns that there is perceived, but objectively unmeasurable, loss of ability to effectively cross-examine have decreased to the point that, in my opinion, the argument now lacks substance.

[35] I have also considered the Defence argument that Mr. Drescher has the right to confront, in person, his accusers. There was no case law presented by Defence in support of this argument. In this regard, the Crown has asked the Court to accept the decision of the Nunavut Court of Justice in *R. v. Hainnu*, [2011] Nu.J. No. 16, a

pre-COVID-19 case, which allowed young witnesses to testify remotely at a preliminary inquiry involving sex offences and which did not rely on the provisions of s. 486.2. After an extensive review of the history of what “confronting the accusers in court” means, Justice Kilpatrick stated:

47 There is no common law right to publicly confront a witness as defined by counsel in submissions. There is no jurisprudence supporting the existence of such a right outside that provided by the common law with respect to the right of cross-examination.

50 The “right” of face-to-face confrontation forms no part of the tenets of fundamental justice guaranteed by the *Charter*. It is the right to a fair trial and the right to make full answer and defence that is protected. It is only where the use of a testimonial aid infringes upon a protected right that *Charter* relief becomes available. Section 486.2 of the *Criminal Code* vests discretion in the Court to order a witness to testify without a testimonial aid in an appropriate case. This is as it should be.

[36] Mr. Drescher’s counsel submitted that the cross-examination of a witness, in person, has a context that is important to the cross-examination which is not present in remote testimony. This context consists not only of the lawyer cross-examining the witness but includes, for example, seeing the witness enter the courtroom, observing who he or she is speaking to or who he or she arrives with. Although I do not discount the intuition of experienced counsel, I have no evidence or case law that supports this submission. Counsel is able to do certain background research on the witnesses outside of the courtroom.

[37] Mr. Drescher’s counsel also asserted that a witness testifying remotely from the courtroom where the judge and counsel and accused are located is not subject to the same solemnity that would be present if he was in the same room. I understand this submission; however, I am also aware that this solemnity and the importance of the testimony can be reinforced to the witness by legal counsel and the judge.

[38] I accept the Defence submission that “discovery” is an ancillary purpose of the preliminary inquiry [see *R. v. Hynes*, [2001] 3 S.C.R. 623 at paragraph 31] and both Crown and Defence submissions that credibility is not assessed by the judge at a preliminary inquiry [see *R. v. Arcuri*, [2001] 2 S.C.R. 828 at paragraph 30].

[39] In the end, I agree with the following comments in *R. v. Hainnu*:

51 The proposed use of videoconferencing in the applications before the Court does not affect the Defendants’ rights to make full answer and defence. The Defendants, together with the trier of fact, will see and hear the witnesses testify. They will be able to assess the demeanour of the witnesses as they speak. The appearance of the witnesses by videoconferencing does not affect either the right or the ability of the Defendants to conduct comprehensive cross-examinations. There is no evidence before this Court to suggest otherwise. There is no empirical evidence before this Court to suggest that the truth telling function of a witness is impaired when they speak outside the courtroom through the use of this technology. There is no evidence to suggest that the proposed use

of videoconferencing will in any way affect the Defendants' rights to a fair trial as this right has been defined in the jurisprudence.

[40] I have considered the Defence argument that there is a public interest in holding a portion of the preliminary inquiry in Inuvik since the witnesses and location of the alleged offence are in Inuvik. In my view, this is a strong argument for the venue of a trial but its strength is diminished in the context determining the venue of a preliminary inquiry. Normally, there is a ban on the publication of evidence taken at a preliminary inquiry and there may be other steps taken by the Court to try and ensure that the potential jury pool in a smaller community is not affected by evidence given at the preliminary inquiry.

[41] I have also considered the Defence request that the order of witnesses be changed so that those witnesses who were going to testify in the second week in Yellowknife, either remotely or in person, now testify in the first week. This would allow the Court to travel to Inuvik during the second week if the situation involving COVID had improved. As indicated above, I have found that the use of videoconferencing should have little or no effect on the ability to cross-examine the Inuvik witnesses. In contrast, the disruption caused by a change in the scheduling of witnesses and the uncertainty of travel arrangements and accommodations caused by the suggested alternative is too great.

D.3 Mr. Drescher's application for an adjournment

[42] Mr. Drescher's counsel has indicated that she has allocated the time in her schedule and is prepared to conduct the preliminary inquiry. It has now been over a year since Mr. Drescher been facing this charge. Further delay may very well affect his right to a fair trial. I have found that there is no impairment to his right to a fair trial to have the Inuvik witnesses testify remotely. Accordingly his request for an adjournment is denied.

E. CONCLUSION

[43] The preliminary inquiry will be held in a courtroom in Yellowknife, NT commencing November 2, 2021. The following conditions will apply:

- (a) Counsel for the Crown will appear in person, unless leave is granted to appear remotely;
- (b) Counsel for the accused will appear in person, unless leave is granted to appear remotely;

- (c) The Inuvik civilian witnesses and the Inuvik police witnesses will appear by video-conferencing. They will be located in the courthouse in Inuvik;
- (d) The Inuvik civilian witnesses will disclose to the Inuvik court staff either through the Crown or directly, their COVID-19 vaccination status;
- (e) The Inuvik witnesses will be masked at all times while in the Inuvik courthouse, except when testifying;
- (f) The Crown will ensure that while testifying, the Inuvik witnesses have access to exhibits that they are required to refer to in their testimony;
- (g) Crown, in collaboration with Court Services staff, will test the video-conferencing equipment prior to the commencement of the preliminary inquiry;
- (h) All other witnesses shall appear in person in Yellowknife unless the Court orders that they can appear remotely. Applications for these orders should be made as soon as possible. If they are made with the consent of counsel for Mr. Drescher, they can be made to me by way of Memorandum, Affidavit and draft Order with endorsed consent. If the draft Order is not acceptable, I will schedule a hearing.

[44] My decision should not be seen as a deviation from this Court's ongoing commitment to bringing the Court and hence, the administration of justice, to the community where the alleged offence occurred. This decision is made in the context of the unique circumstances of this case against the background of the COVID-19 pandemic.

[45] Mr. Drescher's right to a fair trial is paramount. In my view, for the reasons indicated in this decision, the testimony of the Inuvik witnesses by videoconferencing does not affect that right. If, in the course of the preliminary inquiry, as a result of issues with the technology of videoconferencing, counsel feel that the remote testimony is affecting that right or in any other way prejudicing the accused, it should be brought to my attention in order that I can reconsider my decision.

Garth Malakoe

T.C.J.

Dated at Yellowknife, Northwest
Territories, this 26th day of
October, 2021.

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