NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. S.D.L.*, 2017 NSCA 58

Date: 20170622
Docket: CAC 452387
Registry: Halifax

Between:

S.D.L.

Appellant

v.

Her Majesty The Queen

Respondent

Restriction on Publication: s. 486.4 of the *Criminal Code*

Judges:	MacDonald, C.J.N.S.; Beveridge and Van den Eynden, JJ.A.
Appeal Heard:	January 26, 2017, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of MacDonald, C.J.N.S.; Beveridge and Van den Eynden, JJ.A. concurring
Counsel:	M. Blair Kasouf, for the appellant James A. Gumpert, Q.C., for the respondent

Order restricting publication *B* sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 172.2, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with stepdaughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(i) to (iii).

Reasons for judgment:

OVERVIEW

[1] The appellant challenges the trial judge's decision to allow key Crown witnesses to testify against him by way of video link, as opposed to face to face in the courtroom.

[2] Judge Jean Whalen of the Nova Scotia Provincial Court convicted the appellant of two counts of sexual touching and one count of anal intercourse. The appellant's son J.H. was the complainant. He was approximately seven at the time of the alleged assaults and fifteen when he testified. The judge stayed an additional charge of sexual assault because it arose out of the same allegations. As well, the Crown concedes that the anal intercourse conviction must be set aside as being unconstitutional (see *R. v. T.C.F.*, 2006 NSCA 42).

[3] The appellant challenges the remaining convictions on several grounds, only one of which I need consider to dispose of this appeal. It involves the judge's decision to allow both the complainant and his mother to testify by video link.

[4] For the reasons that follow, I respectfully conclude that this decision denied the appellant his right to make a full answer and defence, which in turn led to a miscarriage of justice. It must be rectified by setting aside the convictions and ordering a new trial.

ANALYSIS

[5] In my following analysis, I will: (a) briefly review the provision authorizing testimony by way of video link and its legislative context; (b) consider an appeal court's role when this type of discretionary authority is challenged; (c) formulate guiding principles; and (d) apply those principles in the present case.

S. 714.1

[6] This provision, passed by Parliament in 1999, was part of a more comprehensive reform package, primarily targeting efficiencies in the extradition context:

> **714.1 Video links, etc. – witness in Canada**
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> A court may order that a witness in Canada give evidence by means of technology that permits the witness to testify elsewhere in Canada in the virtual presence of the parties and the court, if the court is of the opinion that it would be appropriate in all the circumstances, including
>
> (a) the location and personal circumstances of the witness;
>
> (b) the costs that would be incurred if the witness had to be physically present; and
>
> (c) the nature of the witness' anticipated evidence.
>
> **714.2 (1) Video links, etc. – witness outside Canada**
>
> A court shall receive evidence given by a witness outside Canada by means of technology that permits the witness to testify in the virtual presence of the parties and the court unless one of the parties satisfies the court that the reception of such testimony would be contrary to the principles of fundamental justice.

[7] Note we see a lower bar for its use internationally compared to domestically. For example, for proposed witnesses outside the Country, testimony by video link is presumed. Yet for witnesses within Canada, a video link is not presumed and the Court will so order only when the Court deems it appropriate in all the circumstances.

The Appeal Court's Role

[8] This provision offers trial judges a wide discretion which appeal court judges must respect. Nonetheless, it would be not only proper but, in my view, prudent for appellate courts to establish appropriate parameters. Otherwise, inconsistency and uncertainty will prevail. Or worse, miscarriages of justice can ensue.

[9] For example, in *Canadian Foundation for Children, Youth & the Law v. Canada (Attorney General)*, 2004 SCC 4, the Supreme Court considered the constitutionality of s. 43 of the *Criminal Code*. This provision serves to justify the use of force when parents, schoolteachers or guardians correct children. So the task of the trial judge is to determine the type of force that would be "reasonable under the circumstances":

> **43. Correction of child by force**
>
> Every schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be,

> who is under his care, *if the force does not exceed what is reasonable under the circumstances.*
>
> [Emphasis added]

[10] One of the issues for the Supreme Court was whether the concept of being *reasonable under the circumstances* was vague to the point of being unconstitutional. In upholding its constitutionality, the Court took solace from the fact that appellate courts could offer appropriate parameters. For example, Binnie J. (at para. 122) confirmed an appellate court's role to "rein in overly elastic interpretations", provided they stop short of judicial amendment. McLachlin, C.J. agreed:

> 43 My colleague, Arbour J., by contrast, takes the view that s. 43 is unconstitutionally vague, a point of view also expressed by Deschamps J. Arbour J. argues first that the foregoing analysis amounts to an impermissible reading down of s. 43. This contention is answered by the evidence in this case, which established a solid core of meaning for s. 43; to construe terms like "reasonable under the circumstances" by reference to evidence and argument is a common and accepted function of courts interpreting the criminal law. To interpret "reasonable" in light of the evidence is not judicial amendment, but judicial interpretation. It is a common practice, given the number of criminal offences conditioned by the term "reasonable". If "it is the function of the appellate courts to rein in overly elastic interpretations" (Binnie J., at para. 122), it is equally their function to define the scope of criminal defences."

[11] Similarly, Professor Stephen Waddams, in "Judicial Discretion" (2001) 1 O.U.C.L.J. 59 discusses the appellate court's role in providing guidance to trial judges on the application of discretionary legal rules, including in the criminal process (beginning at page 59):

> All legal rules, as has always been recognised, contain elements of uncertainty, because the circumstances in which the rules come to be applied cannot be precisely foreseen, nor can any rule, however detailed, describe in advance every possible future case. Many important and fundamental legal rules are necessarily very general, and are "open-textured" in nature, or allow for open-ended exceptions. It is sometimes said of rules of this kind that they are 'discretionary'.
>
> […]
>
> […] *However, the open-ended nature of a legal rule does not, in itself, present any particular reason to defer to a judge of first instance; on the contrary, the open-ended nature of a rule may be very good reason for the appellate court to give guidance and to settle uncertainties.* This is true whether or not there is theoretically a 'correct' legal answer. […]

[…]

[12] To illustrate his point, Professor Waddams describes recent debate over the concept of a constructive trust – a proprietary remedy which some believe, due to its perceived discretionary nature, is "open to the objection that it invites random and unprincipled creation of property rights" (at p. 62). Professor Waddams explains the role appellate courts have in minimizing such concern, writing on pp. 62-63:

> In practice, the appellate courts have usually exercised effective control over any such tendencies. The Supreme Court of Canada, for example, has stated in a domestic property case that,
>
> > for a constructive trust to arise, the plaintiff must establish a direct link to the property which is the subject of the trust ... the notion that one can dispense with a link between the services rendered and the property which is claimed to be subject to the trust is inconsistent with the proprietary nature of the notion of constructive trust.
>
> This is, I would suggest, a very proper use of the power of an appellate court, and it is important that it should not be endangered by the confusing proposition that the constructive trust is a 'discretionary' remedy. It is true that the operation of constructive trusts cannot be precisely defined and that they may be withheld for sufficient reason, but it does not follow that appellate courts should refrain from their important task of ensuring that the law is rational, coherent, and consistent.
>
> This proposition can be tested by supposing two cases on materially identical facts, each determined at first instance in opposite ways. Let us suppose the two cases are heard together by an appellate court. No court in such circumstances would consider it a satisfactory disposition of the cases to dismiss the appeals in both on the ground that deference was due in each case to the judge's (opposite) exercise of discretion. In some of the other classes of case considered below, this might be a proper and necessary result. If the interest in restricting appeals is very strong, inconsistent results will have to be tolerated for the sake of finality and expedition; if the judge of first instance is in an equal or better position than the appellate court to determine the question at issue, again the toleration of diverse results is a logical necessity. *But where 'discretionary' means that the rule in issue is flexible, or open-ended, there is no special reason to tolerate inconsistency, and very good reason not to do so where there is a difference of judicial opinion on the interpretation of an important legal rule that drastically affects the parties and many others.*
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> [Emphasis added]

[13] As well, consider this from Peter Sankoff in "The Search for a Better Understanding of Discretionary Power in Evidence Law" (2007) 32 Queen's L.J. 487, who (beginning at page 520) discusses:

> **III. The Limits of Discretion**
>
> We need to locate a balance that is appropriate for the interests at stake. A good place to begin is perhaps by rejecting once and for all the Diceyan notion of discretion as an arbitrary power. Discretion allows for some choice; it does not allow for just *any* choice. The existence of discretion hardly suggests that "each case is imagined to be scribbled on a clean slate and can be decided in, at least two incompatible ways." Judges remain constrained by the broader rules of the legal system and by basic standards of rationality. For example:
>
> To adopt standards that point to action *X* and then choose action *Y* is irrational, and therefore illegitimate. One could of course adopt different standards that lead to action *Y*, but that only shows that discretion pertains not just to final actions but also to standards of decision-making. If the minister has discretion to deport or not to deport *A*, he must first decide what are good reasons for deporting anyone, and then determine whether *A* falls within them.
>
> *It is hardly surprising that encouraging certainty is seen as an important role of the policy-maker or, where a common law rule is at stake, an important role of the appellate courts. Adopting explicit standards is a critical way of ensuring that discretion is not exercised haphazardly and it also provides trial courts with much-needed direction.* As Professor Paciocco has written:
>
> [E]ven if our appellate courts make deference their creed, they are still the masters of principle, responsible for ensuring that things are done properly. They are still teachers, explaining to the rest of us what the law is. Every time a case makes its way before appellate courts, appellate judges say something about it and about the application of the rule. When they do, they make law. They make "rules of thumb" if not full blown rules, and those rules then frame the principled approach …. This is a good thing.
>
> This is eminently sensible. *Providing clear guidance regarding the core principles that govern the use of discretion must be an essential function of the appellate courts. We would inevitably drift too far towards the flexibility end of the continuum if we permitted individual judges to apply their own vision and philosophy in choosing the factors that will guide the exercise of their discretion. There can be no doubt that discretion involves choice in judgment, factual appreciation and balancing of various elements, but it is difficult to accept that its proper application can tolerate theoretically opposing positions of the sort that seem to be in play in the section 12 jurisprudence. Over the long term, appellate courts cannot simply "defer" on these matters.*
>
> [Emphasis added]

[14] Perhaps the most useful comparison would be the appellate court function in establishing ranges of sentences to guide trial judges. Trial judges here too enjoy broad discretion, which we must respect. That discretion is well-established and nicely summarized by the Supreme Court in *R. v. Nasogaluak*, 2010 SCC 6:

> 43 The language in ss. 718 to 718.2 of the *Code* is sufficiently general to ensure that sentencing judges enjoy a broad discretion to craft a sentence that is tailored to the nature of the offence and the circumstances of the offender. The determination of a "fit" sentence is, subject to some specific statutory rules, an individualized process that requires the judge to weigh the objectives of sentencing in a manner that best reflects the circumstances of the case (*R. v. L. (T.P.)*, [1987] 2 S.C.R. 309 (S.C.C.); *M. (C.A.)*; *R. v. Hamilton* (2004), 72 O.R. (3d) 1 (Ont. C.A.)). No one sentencing objective trumps the others and it falls to the sentencing judge to determine which objective or objectives merit the greatest weight, given the particulars of the case. The relative importance of any mitigating or aggravating factors will then push the sentence up or down the scale of appropriate sentences for similar offences. The judge's discretion to decide on the particular blend of sentencing goals and the relevant aggravating or mitigating factors ensures that each case is decided on its facts, subject to the overarching guidelines and principles in the *Code* and in the case law.
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> [Emphasis added]

[15] Despite this discretion, provincial appellate judges have seen fit to suggest sentencing ranges for various offences. Furthermore, this practice has been recognized by the Supreme Court of Canada. For example, in *R. v. Stone*, [1999] S.C.J. No. 27, Bastarache, J. noted:

> 244 One function of appellate courts is to minimize disparity of sentences in cases involving similar offences and similar offenders; see *M. (C.A.), supra*, at para. 92, and *McDonnell, supra*, at para. 16, *per* Sopinka J. In carrying out this function, appellate courts may fix ranges for particular categories of offences as guidelines for lower courts. However, in attempting to achieve uniformity, appellate courts must not interfere with sentencing judges' duty to consider all relevant circumstances in sentencing; ...

[16] As well, consider this more recently from Wagner, J. in *R. v. Lacasse*, 2015 SCC 64:

> 1 Sentencing remains one of the most delicate stages of the criminal justice process in Canada. Although this task is governed by ss. 718 et seq. of the *Criminal Code*, R.S.C. 1985, c. C-46, and although the objectives set out in those sections guide the courts and are clearly defined, it nonetheless involves, by

> definition, the exercise of a broad discretion by the courts in balancing all the relevant factors in order to meet the objectives being pursued in sentencing.
>
> 2 For this purpose, the courts have developed tools over the years to ensure that similar sentences are imposed on similar offenders for similar offences committed in similar circumstances — the principle of parity of sentences — and that sentences are proportionate by guiding the exercise of that discretion, and to prevent any substantial and marked disparities in the sentences imposed on offenders for similar crimes committed in similar circumstances. For example, in Quebec and other provinces, the courts have adopted a system of sentencing ranges and categories designed to achieve these objectives.

[17] In summary, it is appropriate for appellate courts to provide parameters for trial judges when they exercise discretion and, for this appeal, it would be helpful to establish guiding principles surrounding the use of s. 714.1. That is where I now turn.

The Guiding Principles

[18] To assist in developing appropriate guiding principles, it would be helpful to first review the case law to date, beginning with some basic constitutional principles.

The Constitutional Context

[19] I begin with this premise. Constitutionally, 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. For example, Macdonald, J.A. for this Court in *R. v. R. (M.E.)*, [1989] N.S.J. No. 248 at para. 28 explained:

> The right to face one's accusers is not in this day and age to be taken in the literal sense. In my opinion, it is simply the right of an accused person to be present in court, to hear the case against him and to make answer and defence to it. In *R. v. Lee Kun* (1915), 11 Crim. App. R. 293 at p. 300, the Lord Chief Justice of England said:
>
> > "... The reason why the accused should be present at the trial is that he may hear the case made against him, and have the opportunity, having heard it, of answering it. The presence of the accused means not merely that he must be physically in attendance, but also that he must be capable of understanding the nature of the proceedings."

[20] In fact, even the right to cross examine your accuser is not absolute. See *R. v. Hart*, 1999 NSCA 45 at para. 19 (leave to appeal to SCC refused, [2000] S.C.C.A. No. 109).

[21] That said, an accused's right to face his or her accuser in the courtroom remains a fundamental aspect of most criminal trials.

[22] With that constitutional context, I will now consider how Canadian courts have applied s. 714.1 to date.

The Case Law

[23] To date, there has been little appellate authority dealing with this provision. At the trial level, we see the full spectrum; from judges who remain guarded about its use (*R. v. Ragan*, 2008 ABQB 658 at paras. 56-57 and *R. v. Munro*, 2009 YKTC 125 at para. 18) to those who demonstrate enthusiasm (*R. v. Oh*, 2013 ABPC 96 at para. 43 and *R. v. Gibbs* (2014), 1097 A.P.R. 149, 114 W.C.B. (2d) 579 (Nfld. Prov. Ct.) at paras. 32 and 43) and, not surprisingly, everything in between.

[24] There are also obvious trends. For example, its use is more popular in remote regions of Canada where accessing court facilities is particularly challenging. That is completely understandable. It is equally understandable that its use is inversely proportional to the importance of the proposed testimony. In other words, the closer the proffered testimony approaches the heart of the case, the less likely it will be tendered by video.

[25] It has also been noted that only in the "rarest of cases" would a complainant be authorized to testify by video. See *R. v. Dessouza*, 2012 ONSC 145 at para. 26.

[26] Along similar lines, it has been noted that, when facing "serious issues of credibility", courts should be "very reluctant" to engage this process and, in any event, the judge's role must involve more than simply a balance of convenience exercise. See *R. v. Chapple*, 2005 BCSC 383, [2005] 15 M.V.R. (5^{th}) 141 at paras. 50-55.

[27] Courts have also highlighted the need for a solid evidentiary foundation upon which to exercise their discretion. See *R. v. Rice*, 2016 NLTD(G) 107. This is particularly so when credibility is at issue, where "compelling evidence" would be demanded. See *R. v. Ragan*, *supra*, at para. 57.

[28] The only Nova Scotia decision to comprehensively consider this provision is *R. v. Chehil*, 2014 NSSC 421. There the Defence sought to have four witnesses testify by way of video link from Vancouver. They would support Mr. Chehil's duress defence. Justice Wood offered this helpful overview:

> [2] This section has been subject to considerable judicial interpretation although always in the context of an application by the Crown. In addition to the specific circumstances listed in the section judges have considered a broad range of factors in deciding whether to order testimony by video link (see for example *R. v. Ragan* 2008 ABQB 658 (CanLII)).
>
> [3] In cases where the witness' evidence does not raise issues of credibility and the cost of attendance is significant it is not unusual to have an order for them to testify by video link. An example of this is *R. v. Denham* 2010 ABPC 82 (CanLII). Where the witnesses' evidence is crucial to the case it is more likely that an order under s. 714.1 will not be granted although that is not always the case.
>
> [4] When the trier of fact will be a jury, as is the case here, special considerations arise. For example, in *R. v. Ragan, supra,* the Court noted as follows:
>
> > 57 I do not share the enthusiasm expressed by some other courts about allowing virtual presence testimony in cases where the nature of the evidence is contentious and credibility assessment is an important feature of the case. In those circumstances, courts should be reluctant to deprive the trier of fact of seeing the witness physically present in the courtroom. Compelling evidence would have to be presented to satisfy me otherwise.
> >
> > 58 The Crown in the present case has not produced compelling evidence for testimonial accommodation. Mr. Bissett is a critical witness. His evidence is controversial and credibility will be highly contested. Compounding the credibility assessment is that a jury, inexperienced in the fine points of making such assessments, will be undertaking the task. It is also a factor that, even with the best of cautions against prohibited reasoning, the jury might infer from Mr. Bissett testifying by video link that the accused was connected with his shooting.
>
> [5] Although demeanor is not viewed as a primary consideration in assessing credibility it is one aspect of the analysis that must be carried out by the trier of fact. I would echo the comments of the Ontario Superior Court of Justice in *R. v. Petit* 2013 ONSC 2901 (CanLII) at para. 7:
>
> > 7 But the accused, the Crown and the witness are not the only participants in the trial process. The ability of the court to fulfil its truth-finding function is also important. Unlike the situation at the preliminary inquiry, credibility will be a major issue at the trial. While demeanour, by itself, is an unreliable way to determine credibility, it is nonetheless one

> facet of the way in which the court in a case like this must do so. In my view, when it comes to demeanour, there is no substitute for being near the witness as she testifies. It is no accident that witness boxes are placed next to or near the judge and jury in almost every courtroom across the country.

[6] The position of the Crown on this motion is that where credibility is a factor effective cross-examination requires the presence of the witness. Mr. Covan argued that the inability to see gestures and movements by the witness, and delays between the transmission of questions and answers makes effective cross-examination difficult. In some respects these are issues related to the quality of the technology. In many cases involving motions under s. 714.1 the court has an opportunity to see the proposed video link in operation or makes an order conditional on a satisfactory test run. For example see the decisions in *R. v. Gibson* 2003 BCSC 524 (CanLII); *R. v. Jeanes* 2014 BCSC 994 (CanLII) and *R. v. Osmond* [2010] N. J. 54.

…

[12] I agree with Mr. MacDonald that the defence has no free standing obligation to disclose anything to the Crown concerning what evidence it may call at trial. In my view it is different when an application is made under s. 714.1. The applicant (whether Crown or defence) has the burden to provide the court with sufficient evidence to justify the order being requested. The legislation requires the court to consider the nature of the witnesses' anticipated evidence. In this case I am satisfied that Mr. MacDonald's representations concerning the events to which these witnesses will testify are sufficient for me to decide the motion.

[13] In his submissions Mr. MacDonald refers to the cost of having witnesses travel from British Columbia to testify. In addition to airfare they will likely need two or three nights hotel accommodation together with meals. I accept it can easily come to several thousand dollars per witness. I have no evidence the costs of witness travel would be an impediment to having them testify in person but I do accept, as a principle, that reducing overall costs is a legitimate objective.

[14] I believe the following factors are relevant considerations on this application and list these in point form:

- The cost of witness travel from British Columbia;
- Inconvenience to witnesses including disruption of their employment and family life;
- The existence of a jury as the trier of fact;
- The fact that all four of the witnesses will testify about the same incidents and these will also be addressed by Mr. Chehil should he testify in support of the duress defence;

- The video link would be with the courthouse in Vancouver with appropriate quality of video transmission;
- The five day jury trial will involve 14 to 16 witnesses including two experts; and
- The video link will only be available during the afternoon sitting of the court in Halifax.

[29] In the end, the defence motion was granted for two of the proposed witnesses, with the judge reasoning:

> [17] Mr. Kalvin Saran and Mr. Afroze Aiyub will both testify about events to be covered by other witnesses. Their personal circumstances are such that travel to Nova Scotia would be significantly inconvenient. Mr. Saran has the additional difficulty of trying to explain his absence to his employer. I am satisfied that both of these individuals can testify by video link. Mr. Brar will have difficulties taking paid vacation time, however, I believe he should testify in person and will refuse the defence request with respect to his testimony.
>
> [18] Mr. Jarnail Saran does not seem to have any particular personal or employment limitations on his ability to travel. Obviously coming to Nova Scotia to testify is inconvenient but no more so than for any other person. His proposed testimony is about background events which are presumably important to the duress defence. I believe he should testify in person and would dismiss the defence's motion with respect to his testimony.

[30] Perhaps the case most factually connected to ours is *R. v. Petit*, 2013 ONSC 2901. There the Court was asked to allow the complainant to testify via video link about sexual abuse she allegedly endured as a child at the hands of the accused. Otherwise, she would have had to travel from Brandon, Manitoba to North Bay, Ontario.

[31] In denying the Crown's request, the Court reasoned:

> [6] KVD resides in Brandon, Manitoba. The Crown relies on evidence that it will cost thousands of dollars to bring her here via airplane. It will also be necessary for her to travel a good distance by car and to spend most of the holiday weekend travelling by one mode or the other. It argues that these costs and this lost time need not be incurred when one considers the very minor effect, if any, that the use of the video link will have on the accused's right to assess the witness' demeanour while testifying.
>
> [7] *But the accused, the Crown and the witness are not the only participants in the trial process. The ability of the court to fulfill its truth-finding function is also important. Unlike the situation at the preliminary inquiry, credibility will be a*

> *major issue at the trial. While demeanour, by itself, is an unreliable way to determine credibility, it is nonetheless one facet of the way in which the court in a case like this must do so. In my view, when it comes to demeanour, there is no substitute for being near the witness as she testifies. It is no accident that witness boxes are placed next to or near the judge and jury in almost every courtroom across the country.*
>
> [8] *No doubt, there will be cases where the nature of the evidence to be given, the cost to the administration of justice, or the degree of inconvenience to the witness will be such as to make an order under s.714.1 appropriate. For example, where reliability - and not credibility - is in issue, as in the case of most expert evidence, an order under this section may make sense (see, for eg., R. v. Hinkley, 2011 ABQB 567).* The same may be true where the disruption to a particular witness will outweigh the value of that witness' testimony, as in the case of a busy small town emergency doctor who is called as a minor fact witness in a case, for example.
>
> [9] *But that is not this case. This witness is a complainant in this case. Her testimony is central to and her credibility is crucial in the matter. There is no evidence that requiring her to testify in North Bay will have any greater impact upon her or the Crown than it would with respect to any witness who lives in Brandon, Manitoba.*
>
> [10] *In my view, therefore, the negative affect of making an order under s.714.1 on the truth-seeking function of the trial court outweighs the benefits of doing so in this case.*
>
> [Emphasis added]

The Principles

[32] With this background, I would propose the following guiding principles for Nova Scotia trial judges, when considering s. 714.1 applications:

1. As long as it does not negatively impact trial fairness or the open courts principle, testimony by way of video link should be permitted. As the case law suggests, in appropriate circumstances, it can enhance access to justice.

2. That said, 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.

3. When the credibility of the complainant is at stake, the requisite exceptional circumstances described in #2 must be even more compelling.

4. The more significant or complex the proposed video link evidence, the more guarded the court should be.

5. When credibility will not be an issue, the test should be on a balance of convenience.

6. Barring unusual circumstances, there should be an evidentiary foundation supporting the request. This would typically be provided by affidavit. Should cross examination be required, that could be done by video link.

7. When authorized, the court should insist on advance testing and stringent quality control measures that should be monitored throughout the entire process. If unsatisfactory, the decision authorizing the video testimony should be revisited.

8. Finally, it is noteworthy that in the present matter, the judge authorized the witnesses to testify "in a courtroom…or at the offices of Victims' Services…". To preserve judicial independence and the appearance of impartiality, the video evidence, where feasible, should be taken from a local courtroom.

[33] Guided by these principles, I will now consider the decision under appeal.

Considering the Principles in this Appeal

[34] Aside from a police officer who provided context for laying the charges, the Crown's entire case rested on the video evidence of the complainant and his mother. In other words, the authorization essentially covered the Crown's entire case. Furthermore, the defence theory was a complete denial, thereby rendering credibility the only issue at trial.

[35] The Crown sought the s. 714.1 authorization by way of oral submissions, with no evidentiary foundation. Its motives primarily involved the challenges of having the witnesses travel from Lloydminster, Alberta. Crown counsel summarized:

> MR. MELNICK: …In order for her also to come here besides the cost factor and we're looking at her and her son travelling, the husband would be left home with the other two children, the 4 year old in particular. He would have to take time off of work in order to be able to look after those children while Mrs. [H] and [J] are out of province here testifying.

> In addition, [J] is going to be missing school. Again, I would suggest any where between, it would be a minimum of three days, probably more realistically, like five days.
>
> And the cost, Your Honour, the estimate on air fare for return flights for the both of them would be a minimum of $2,000. Then we're looking, as I say, for hotel costs, meals for two individuals for, as I say, between three and five days. That being probably close to $200 at least, probably more then that per day for meals and hotel for the individuals. So, the cost estimate, Your Honour, gets fairly significant when you add those factors.
>
> …
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> MR. MELNICK: As I was just saying, Your Honour, the cost estimate becomes very ah, adds up very quickly. So, when we're all said and done we're looking at probably a minimum of around $3,500 as a minimum cost factor for the Crown. Now, that's only one factor to consider.

[36] Defence counsel (not the eventual trial counsel) strongly opposed the request, maintaining a need for him to cross examine and for the Court to see the witnesses face to face. Highlighting the importance of credibility, he explained:

> MR. NICHOLSON: What's unusual in this case, Your Honour, I certainly can't get into the facts...
>
> …
>
> MR. NICHOLSON: ...but the complainant is not really the complainant. The complainant never complained. The complainant only complained after he attempted to sexually assault his brother and that was his excuse for having done this because he alleges that Mr. [S.D.L.] did that to him. This is years and years before. We're going back over a period of time here. We're covering two years and a very limited number of incidences that he's alleging. We have no forensic evidence. We have no physical evidence. We have absolutely nothing but his statement to his mother.
>
> …
>
> MR. NICHOLSON: And the mother is the ex-wife of the accused. Mr. Melnick talks about the, the difficulty this has caused for the family. Well, it's caused a lot of difficulty for Mr. [S.D.L.]'s family. He has a wife and children in Ontario and he's been down here on remand for five months. And I think where it's totally based on credibility here that it's essential that we have the accuser, who is the accuser by way of what the ex-wife says he says. With no physical evidence, it's extremely important that I have the opportunity to cross-examine him in person. And I don't think that can be replaced by video.

[37] The judge, after citing the relevant case law, authorized the proposed testimony by way of video link, and concluded:

> [54] After considering all of the circumstances including prejudice to the defendant to make full answer and defence. I am prepared to grant the Crown's application pursuant to s. 714.1 and order the witnesses to testify by video link from Lloydminster, Alberta.
>
> [55] Allowing them to do so will reduce any hardships upon the family and have no impact upon the defendant's ability to make full answer and defence.
>
> [56] The order is granted subject to the following:
>
> (1.) J.H. and R.H. shall testify by video link in a manner in which both can be seen and heard and questioned by all parties.
>
> (2.) Their evidence will be given in a courtroom in the Provincial Court in Lloydminster, Alberta, or at the office of Victims' Services in the same jurisdiction.
>
> (3.) To ensure their evidence is not influenced by any manner, during their testimony there shall be a police officer, deputy sheriff, court clerk or some other court officer acceptable to the court present.
>
> (4.) There will be a "test" of the video link at least 10 days prior to the trial to satisfy the court the technology is working appropriately.

[38] The complainant's mother is referred to as R.H. in the judge's decision. Before trial she remarried and became R.B. For consistency, I will refer to her as R.B. throughout.

[39] In my respectful view, this decision resulted in the appellant being denied his fundamental right to make a full answer and defence. I have reached this conclusion for several reasons.

[40] Firstly, in a case where credibility was the only issue and given the subject matter, it is hard to imagine more significant and sensitive testimony. Yet, the Crown offered nothing compelling to suggest that testifying in person would personally impact these witnesses. In fact, Crown counsel, in his submissions, referred to only "a bit" of hardship for R.B. and her family:

> MR. MELNICK: … And I'm suggesting, Your Honour, on the basis of what I have previously told you that it will cause a bit of a hardship towards Mrs. [H] and her family. Her husband is going to be missing work. There's going to be difficulty travelling during that period of time of the year. It's going to be for an extended period of time.

[41] Furthermore, there was no evidentiary basis whatsoever for the Crown's request. This was so despite Crown counsel's acknowledgement in his submissions (to the trial judge) that this should be a prerequisite:

> MR. MELNICK: … This section provides the court with the discretion to allow a witness to testify from outside the courtroom by technological means. Thus, the applicant must establish why such an order is appropriate in the specific circumstances of the case. The order is not to be granted without the proper evidentiary foundation for it having been presented. The section requires that the technology used results in the witness being in the virtual presence of the parties and the court. The section does not define those words.

[42] As well, it should be noted that this authorization was granted in December of 2014 for a trial that was to have occurred the next month. However, for unrelated reasons, the trial ended up being postponed to February of 2016, some 13 months down the road. Yet the authorization was not revisited. For example, with the luxury of time, could the new trial dates not have been set to a time more convenient for the proposed witnesses to return to their native Cape Breton? Or maybe circumstances in Lloydminster changed by 2016 so as to make it less challenging.

[43] Most significantly, the record reveals many technical problems as the two witnesses gave their testimony. As I will now summarize, interruptions permeated the entire process.

[44] Here is how the process began, with R.B. being the first to testify. Within seconds, there are technical difficulties leading to a delay in the process:

> Via Video Link
>
> [R.B.], sworn, testified:
>
> DIRECT EXAMINATION
>
> MR. MELNICK: Would you state your full name for the court record, please?
>
> A. My name is [R.B.].
>
> Q. Okay. And what was... Did you...
>
> THE COURT: Can you spell that name?
>
> A. [B- - - - --].
>
> THE COURT: Is that...it's froze.
>
> MR. KASOUF: It seems to me it's frozen.

THE COURT: Yeah.

A. I just got married a little over a year ago, a little over a year ago.

MR. MELNICK: Okay. We're just having a little bit of a problem. We can hear you fine but the video part is frozen. It's just a still picture, nobody is moving.

THE COURT: Except for you, Mr. Melnick, up in...

MR. MELNICK: Yeah.

THE COURT: You're, you're moving up in that corner, up in that...

THE CLERK: Yeah.

THE COURT: ...but it's not...yeah.

MR. MELNICK: Can you still see me fine?

A. I can see you perfect.

Q. And is it ah, a fluid picture? In other words, you can see me moving and speaking?

A. You're moving and...yes.

Q. Okay.

THE COURT: Okay, what if you... Can you redial or is that going to be a problem?

THE CLERK: ...(inaudible)...has to call back.

THE COURT: Okay. We're going to have to hang up and can you call us back from your end?

UNKNOWN VOICE: We'll get the court clerk to do it. She's the expert.

THE COURT: Okay. Is she there?

UNKNOWN VOICE: I will grab her.

THE COURT: Okay. Good. Thank you.

(11:39:47) Technical difficulties.

(11:49:50) Resumes

MR. MELNICK: There we go.

THE COURT: All right. There we are.

UNKNOWN VOICE Can you see us now?

MR. MELNICK: Yes.

UNKNOWN VOICE: Okay.

THE COURT: Mr. Melnick, there are two individuals in the room. One is, obviously, the witness, and who is the other?

MR. MELNICK: The second one is from Victim Services.

THE COURT: Okay. Great. Thank you very much. All right, Mr. Melnick, let's begin.

MR. MELNICK: Do you want to re-swear the witness again, or...

THE COURT: No, that was on the record the first time so that's good. Thank you.

MR. MELNICK: All right. I'm just going to have you identify yourselves for the court record if you don't mind.

A. My name is [R.B.].

Q. Okay. And who is sitting next to you, [R]?

A. Lillian Arneson, from Victim Services.

MS. ARNESON: Lillian, A-R-N-E-S-O-N.

MR. MELNICK: Thank you.

THE COURT: Thank you.

MS. ARNESON: You're welcome.

[45] As an aside, note the presence of Ms. Lillian Arneson from Victim Services in the room while the witnesses testified. The record before us provides no indication of the Crown applying to have a support person present (s. 486.1 of the *Criminal Code*). It remains unclear whether she was so designated or there solely to assist with the technology.

[46] The next interruption requires some context. These allegations came to light when the complainant J.H. was himself accused of sexual assault – against his younger brother M.H. When confronted, J.H. confessed and in the process alleged that he had been the victim of sexual assault at his father's hands. The Crown theory was that the allegations were credible. The defence theory was that J.H. was prone to lying and was doing so in this instance to mitigate the blame. There was also the dynamic of the allegations being reported through the appellant's estranged spouse.

[47] The Crown began by having R.B. describe her rocky relationship with the appellant, before turning to this important disclosure evidence. The record reveals an almost immediate interruption:

Q. Okay. And how long did you remain together?

A. Till 2007 with lots of breakups in between.

Q. Okay. Now, if you could tell me in your words um, how this came to your knowledge about what you said about some abuse involving your son and Mr. [SDL]?

A. Um...my son [M]...

Q. I'm just going to stop you right there for a moment, [R].

A. Okay.

THE COURT: We're frozen again.

MR. MELNICK: We're frozen again.

UNKNOWN VOICE: Oh, dear.

THE COURT: You'll have to get... You referred to the lady as Donna.

MR. MELNICK: I believe her name is Donna.

UNKNOWN VOICE: Yes.

THE COURT: You're going to have to call her back in and reconnect.

UNKNOWN VOICE: Excuse me, please.

THE COURT: Thank you.

MR. MELNICK: Just be patient, please, for a moment.

A. For sure.

(11:55:26) Technical difficulties.

MR. MELNICK: We're back.

THE COURT: Okay, there we are. You're moving now.

(11:59:06) Resumes.

[48] Then, when things appear to be working again, Crown counsel takes R.B. back to the history of her relationship with the appellant. Then after just a few questions, this happens:

A. We broke up just after I graduated in '07.

Q. So, he was with you on 59 [T] Road between 2005 and 2007?

A. Yes.

Q. And we're frozen again.

THE COURT: It's frozen again.

(12:02:24) Technically difficulties.

(12:08:31) Resumes.

THE COURT: All right. Mr. Melnick, just keep going until it freezes again.

MR. MELNICK: Okay. Sorry, Your Honour.

THE COURT: Mr. Melnick, it has frozen again, so I think...

MR. MELNICK: I think we should disconnect and try again maybe after lunch, Your Honour.

THE COURT: Okay.

MR. MELNICK: All right.

THE COURT: All right. You've frozen again, ladies, and so, we're going to have to take a break. It's ten after twelve here in Nova Scotia. Mr. Melnick, one o'clock?

MR. MELNICK: One o'clock would be fine.

THE COURT: All right. So, we're going to break until one o'clock, Nova Scotia time. That in 50 minutes. Mr. Melnick is going to see if he can't sort something out. Anyway, so we'll have you dial up again at one o'clock. Okay.

A. Okay.

THE COURT: All right. Thank you.

MR. MELNICK: Thank you.

A. Thank you.

COURT RECESSED (12:09:35)

COURT RECONVENED (13:03:33)

THE COURT: Okay. Mr. Melnick, the update on the...

MR. MELNICK: Yes. I spoke with the technician over the break we had, Your Honour. I understand they were going to try and call back at 1:00.

THE COURT: Umhum.

MR. MELNICK: He did show the lady from Victim Services, Lillian, I think is her first name, that they might be able to refresh it from their end.

THE COURT: Okay.

MR. MELNICK: We'll see how that goes.

THE COURT: Okay. (Call received. Reconnected.) All right. Mr. Melnick, to...

MR. MELNICK: Lillian, was there anything dealt with refreshing in case we lose the video again?

MS. ARNESON: Yes. If ah, if it freezes up on your end again, Rob suggested, there's a key here on my remote that I might try hitting twice. So, let me know if we freeze up and we'll try that.

MR. MELNICK: Okay. Thank you.

THE COURT: Thank you.

MR. MELNICK: I'll try to continue where we left off, [R], okay?

[49] Once again, Crown counsel returns to the history of the relationship and R.B. is able to explain young M's disclosure involving his older brother without interruption. However, when the Crown turned to J.H.'s accusations against his father, this happens:

Q. Now, did you get any details from [J] as to what actually occurred?

A. Not overly. Like, I got a little bit of...but not a whole lot. Children's Aid got everything. Like, he spoke with them and then he spoke with the cops.

Q. Okay. And did you have any conversations with [J] about this since this disclosure came to your attention?

A. Not overly. Like, just little, like just talking, you know, being there for him while ah... But I haven't really asked him a whole lot of questions.

Q. Okay. I think we are frozen up again, so let's just try and see if this works.

MS. ARNESON: Okay, let's...here we go. Did it work?

MR. MELNICK: Yes.

MS. ARNESON: Awesome.

MR. MELNICK: Keep your fingers crossed… So, after it went to Children's Aid, what happened after that?

[50] Crown counsel then delved into the appellant's potential opportunity to commit these crimes, by asking about the living arrangements at the family home at the time. Then this occurs:

Q. Okay. Can you tell me anything about 59 [T] Road and the layout of the apartment or the house? Who slept where and what the rooms were like?

A. It had...

Q. Let me stop you...

A. ...two big bedrooms.

Q. Let me stop you there for a moment. We're frozen again.

A. Okay.

MS. ARNESON: Good?

MR. MELNICK: No.

MS. ARNESON: We'll try it again. Did that work?

MR. MELNICK: No.

MR. ARNESON: Well... Okay, I'm going to try something more complicated so hopefully we're all still together when I'm done. Did that work?

MR. MELNICK: No. There's been a change.

MS. ARNESON: Boy! Well, I've tried the few things he's mentioned. I've done what I was asked to do then. No change?

MR. MELNICK: No, no change.

MS. ARNESON: Oh, dear.

MR. MELNICK: Can we try...

THE COURT: Why don't we hang up and have...we'll call from this end and see if that makes a difference.

MR. MELNICK: Okay.

THE COURT: All right. If you could hang up or disconnect at your end, please, and then the clerk here in Nova Scotia is going to dial into you to see if that makes any difference.

MS. ARNESON: Thank you.

THE COURT: Thank you.

(13:17:54) Technical difficulties.

(13:27:58) Resumes

MR. MELNICK: Now, [R], you had given a number of addresses that you had lived at in 2001...

[51] Crown counsel then asked R.B. to chronicle where the appellant lived in the years surrounding the allegations until this:

Q. Okay. All right. Now, before Mr. [S.D.L.]... I probably asked you this already but just, just, my notes are a little mixed up here from the confusion that we had. What do you, do you recall what year and Mr. [T], or Mr. [S.D.L.] lived together at the same residence?

A. In the same residence...

Q. Yes.

A. ...was 2005 to 2007.

Q. Okay. And we're frozen up again.

MS. ARNESON: Shall I try from my end?

MR. MELNICK: Yes, please.

MS. ARNESON: Did that work?

MR. MELNICK: Yes, it did.

[52] Those were the interruptions in R.B.'s direct evidence. They represented close to one-half the entire transcript, without including the many times the recording had to be stopped for various lengths of time.

[53] The problems persisted through R.B.'s cross examination. Defence counsel began by following up on R.B.'s testimony surrounding the couple's time together in Cape Breton. He then asked about their separation and this occurred:

Q. But by then you have two children with [S.D.L.] and we were spending lots of time back and forth?

A. Yes.

Q. Yeah. Now, you had indicated that you left Cape Breton in 2009?

A. Yes, August 2nd.

Q. You froze up, sorry.

THE COURT: It froze up again.

MR. KASOUF: Yeah, the screen is frozen. I'll stop.

MS. ARNESON: Okay, I will try here. Are we unfrozen?

MR. KASOUF: Yeah, you're back, back again. So, you left in 2009. Do you recall if it was early 2009, late 2009

MR. MELNICK: She said August.

A. It was August 2nd.

[54] After questioning R.B. about the years following their separation, defence counsel entered the crucial aspect of young M's disclosure involving his older brother and this transpires:

Q. Okay. Now, when you, when [M] mentioned the incident to you, did you take him to a doctor with away or a medical doctor?

A. When were at the medical... We went to his doctor the next day.

Q. Okay. You're...

A. But it was... And he spoke with [M] and... The incident took place months before it actually came out.

Q. Okay. You're frozen again.

MS. ARNESON: Okay. How is that?

MR. KASOUF: Wave your hand. Yeah, okay, you've moving. All right.

[55] Then, after asking R.B. about the measures she took to deal with the issue between the two young brothers following M's disclosure, we see this further interruption:

Q. Okay. And you mentioned that as a result of all this um, discussion, that there were no charges laid, to your knowledge, against [J]?

A. No.

Q. By the police, or...

A. No.

Q. And Children's Aid or Child Protection put in measures, that meaning they slept on different floors. That was in your house, I'm assuming.

A. Yes.

Q. And who, who actually was responsible for keeping boundaries?

A. Me.

Q. Yourself and perhaps your husband.

A. My husband.

Q. Did Children's Aid initiate any court hearing with you guys?

A. No.

Q. Nothing. No. Now, in regard to ah... You had mentioned that he didn't really have any discussion about this, these topics with [J] after he told you about them?

A. Yes.

Q. You're frozen again.

MS. ARNESON: Okay?

MR. KASOUF: Your picture is smaller but ah... I think you're still frozen perhaps. If somebody can move a limb. Yeah, you're frozen again.

THE COURT: Yeah, they're still frozen.

MS. ARNESON: I'll try once more.

MR. KASOUF: Okay.

MS. ARNESON: Now how is that?

MR. KASOUF: Your jumped a bit but ah, it still seems to be frozen.

MS. ARNESON: I'm going to try it one more time. Are we moving yet?

THE COURT: No.

MS. ARNESON: Okay, did that work?

THE COURT: No.

MR. KASOUF: No.

THE COURT: We're making...

MS. ARNESON: Sorry.

THE COURT: That's okay. We're making a call to the technician.

MS. ARNESON: That you.

MR. MELNICK: Do we stop? I guess...

(13:50:23) Technical difficulties.

[56] Unfortunately, the problems persisted throughout J.H.'s testimony. Crown counsel began by asking a few background questions and just as he got into the delicate aspect of the testimony, this happens:

Q. Okay. All right. Do you know who your real father is, your biological father?

A. Yes.

Q. Okay and who is that?

A. [S.D.L.].

Q. Okay. And when was the last time you might have seen [S.D.L.]?

A. Two weeks before I moved out here.

Q. It's frozen again.

MS. ARNESON: Okay, we'll try again. Did that resolve it?

MR. MELNICK: Not yet.

MR KASOUF: Yeah.

MR. MELNICK: Oh, it did.

MR. KASOUF: Yeah.

MR. MELNICK: It's good. Yeah, we're good. Now, [J], do you know why you're here today.

[57] Then in likely the most crucial aspect of his testimony – detailing one of the alleged incidents – this occurs:

Q. Right. Okay. And did you lay on your stomach then when he told you?

A. Yes.

Q. Okay. And then what, if anything, did he do at that point?

A. Pardon?

Q. What, if anything... We're frozen up again. If we can just ah...

MS. ARNESON: Okay. I'll try. Did it clear up?

MR. MELNICK: No, it just got smaller.

MS. ARNESON: Okay, we'll try it once more. How is it now?

MR. MELNICK: Yes, we're good.

[58] Then following a description of a second allegation, the record reveals:

Q. Okay. And how did this end?

A. I stopped and then he also threatens not to tell my mom.

Q. Umhum.

A. Or else he will hurt her.

Q. Okay. I'm just going to stop you there again. We're frozen up again.

MS. ARNESON: Okay. Is that better?

MR. MELNICK: Not yet, we're still small.

MS. ARNESON: I tried it again.

MR. MELNICK: Yeah, we're good.

[59] Then in describing how he sexually assaulted his younger brother, we have another interruption:

Q. Okay. And when did that happen?

A. 2011.

Q. And we're frozen.

MS. ARNESON: Sorry.

MR. MELNICK: Okay. You won't know because your end is not freezing, I assume.

MS. ARNESON: No.

MR. MELNICK: Okay. The picture...there we go, yeah, we're back.

MS. ARNESON: Okay.

[60] Crown counsel then turned to the ongoing counselling J.H. was receiving until this interruption:

MR. MELNICK: Yes. And did that counselling... How did that... Do you think that that helped you or not?

A. It helped me a lot.

THE COURT: It's frozen.

MR. MELNICK: We're frozen again.

A. It helped me understand right from wrong.

Q. Okay. Just let me stop for a moment because we're frozen again. Okay?

A. Yes.

Q. Lily, can you try your magic again?

MS. ARNESON: You bet.

MR. MELNICK: There we go.

MS. ARNESON: How is that?

MR. MELNICK: Perfect.

[61] There was a final interruption just as J.H. finished his direct examination but that appeared to be of little consequence.

[62] Fortunately, there were only two interruptions during J.H.'s cross examination. The first was during an exchange between defence counsel and the court. It had little impact. However, the second occurred during arguably the most important aspect. It involved the defence theory that J.H. made up the allegation against his father to divert attention away from his own sexual assault against his younger brother. Defence counsel got only one question out when this occurred:

Q. He's [the appellant] not important to you?

A. No.

Q. And [J] [stepfather] is your, [J] is your real father. He's a good guy.

A. Umhum.

Q. Now, is it possible, [J], that when your mother confronted you that you just came up with this to divert attention from yourself to someone else?

A. No.

THE COURT: Oh, it's frozen. Ms. Arneson, it's frozen again.

MS. ARNESON: Okay. Are we moving?

MR. MELNICK: Yes.

THE COURT: Yes.

MR. KASOUF: Sorry, your answer to that?

A. Pardon?

Q. If your answer was that...

MR. MELNICK: His answer was no.

MR. KASOUF: Your answer was, no?

[63] In my view, these interruptions completely broke the flow of any meaningful examination or cross examination for witnesses that represented essentially the Crown's entire case; a case where credibility was the only issue. Most of them came at inopportune times, and they occupy a significant portion of the transcript. In fact, as the attached summary (Appendix A) demonstrates, they were spread out and occupied 23 pages of an 81 page transcript.

[64] Granted, I was not there and did not have the advantage of seeing how these interruptions played out. As well, I acknowledge that interruptions often occur even when witnesses testify in person. However, in my view, an objective reading of the transcript leads to the inescapable conclusion that the appellant's right to make a full answer and defence was jeopardized.

[65] In reaching this decision, I realize that, as an adolescent, J.H. would be presumptively entitled to testify outside the courtroom and that the Crown sought this as alternative relief pursuant to s. 486.2 (1) of the *Criminal Code*:

> **486.2 (1) Testimony outside court room – witnesses under 18 or who have a disability**
>
> Despite section 650, in any proceedings against an accused, the judge or justice shall, on application of the prosecutor in respect of a witness who is under the age of 18 years or who is able to communicate evidence but may have difficulty doing so by reason of mental or physical disability, or on application of such a witness, order that the witness testify outside the court room or behind a screen or other device that would allow the witness not to see the accused, unless the judge or justice is of the opinion that the order would interfere with the proper administration of justice.

[66] However J.H.'s age did not factor into the judge's reasoning. Instead, she allowed the s. 714.1 request because "it will reduce any hardships upon the family and have no impact on the defendant's ability to make full answer and defence".

[67] As well, I remain equally concerned with the judge allowing the process to continue in the face of the constant interruptions.

[68] Furthermore, there was no such s. 486.2 relief sought for R.B. Yet, her evidence was very important to the Crown's case and, with the marital discord, her credibility was equally at stake.

[69] In summary, the cumulative effect of all the concerns I have identified causes me to conclude that the appellant has been denied an opportunity to make a full answer and defence. In my respectful view, this represents a miscarriage of justice which must be rectified.

DISPOSITION

[70] I would therefore allow the appeal, set aside all convictions, enter an acquittal on the anal intercourse conviction, and order a new trial on the remaining charges.

MacDonald, C.J.N.S.

Concurred in:

Beveridge, J.A.

Van den Eynden, J.A.

Appendix A

Testimony of R.B. (pp. 316-358 of AB, Vol II)

Type of Testimony	**Page Number**	**Incident**
Direct examination	316-318	The video is "frozen", which Crown counsel explains means that R.B.'s image is frozen, but the audio feed is fine. An unknown voice is said to be present in the room. S/he says the court clerk will fix the feed. A pause between 11:39:47 and 11:49:50 (approximately 10 minutes) is recorded on p. 318.
Direct examination	322	The Court and Crown counsel announce the video feed is "frozen again." They get a person named "Donna" to reconnect them. A pause of 11:55:26 to 11:59:06 (approximately 4 minutes) is recorded.
Direct examination	325-326	The video feed is frozen again. There is a pause recorded between 12:02:24 to 12:08:31 (approximately 6 minutes). When the record resumes, it appears the video feed freezes immediately. The Court announces it will take a 50-minute lunch break. A recess between 12:09:35-13:03:33 (approximately 55 minutes) is recorded.
Direct examination	330	Video feed is frozen. Appears to be immediately fixed by Ms. Arneson. No pause recorded in the record.
Direct examination	335-336	The feed is frozen again. A clerk from the Nova Scotia courtroom attempts to re-establish the feed. A pause is recorded between 13:17:54 and 13:27:58 (approximately 10 minutes).
Direct examination	339	The video feed is frozen. Ms. Arneson appears to have fixed it. No pause in the record.

Cross-examination	343-344	The screen is frozen. Ms. Arneson appears to have fixed it. No pause in the record.
Cross-examination	348	The video feed is frozen. Ms. Arneson appears to have fixed it. No pause in the record.
Cross-examination	353-354	The video feed is frozen. The Court calls a technician. A pause from 13:50:23 to 13:56:32 (approximately 6 minutes) is recorded.

Testimony of the Complainant (pp. 359-397 of AB, Vol II)

Type of Testimony	**Page Number**	**Incident**
Direct examination	363	The video feed is frozen. Ms. Arneson appears to have fixed it. No pause in the record.
Direct examination	367-368	The video feed is frozen. Ms. Arneson appears to have fixed it. No pause in the record.
Direct examination	372	The video feed is frozen. Ms. Arneson appears to have fixed it. No pause in the record.
Direct examination	377	The video feed is frozen. No pause in the record.
Direct examination	382	The video feed is frozen. Ms. Arneson appears to have fixed it. No pause in the record.
Direct examination	384	The video feed is frozen. Ms. Arneson appears to have fixed it. No pause in the record.
Cross-examination	391	The video feed is frozen. Ms. Arneson appears to have fixed it. No pause in the record.
Cross-examination	396	The video feed is frozen. Ms. Arneson appears to have fixed it. No pause in the record.

NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. S.D.L.*, 2017 NSCA 58

Date: 20170622
Docket: CAC 452387
Registry: Halifax

Between:

S.D.L.

Appellant

v.

Her Majesty The Queen

Respondent

Restriction on Publication: s. 486.4 of the *Criminal Code*

Revised Judgment:	The text of the original judgment has been corrected according to this erratum dated June 29, 2017
Judges:	MacDonald, C.J.N.S.; Beveridge and Van den Eynden, JJ.A.
Appeal Heard:	January 26, 2017, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of MacDonald, C.J.N.S.; Beveridge and Van den Eynden, JJ.A. concurring
Counsel:	M. Blair Kasouf, for the appellant James A. Gumpert, Q.C., for the respondent

Erratum:

[1] In ¶ 2, "Whelan" should be replaced with "Whalen".