



**IN THE COURT OF APPEAL  
OF NEWFOUNDLAND AND LABRADOR**

**Citation:** *R. v. Gibbs*, 2018 NLCA 26

**Date:** May 8, 2018

**Docket:** 201401H0098

**IN THE MATTER OF** an appeal by Her Majesty the Queen in Right of Newfoundland and Labrador from the dismissal by the Supreme Court of Newfoundland and Labrador, sitting at Grand Bank, of an application for *certiorari*, *mandamus* and *prohibition* directed to a judge of the Provincial Court of Newfoundland and Labrador, Docket Numbers 0614A0062 and 0614A0063

**BETWEEN:**

HER MAJESTY THE QUEEN IN RIGHT OF  
NEWFOUNDLAND AND LABRADOR

APPELLANT

**AND:**

EUGENE GIBBS

FIRST RESPONDENT\*

**AND:**

HER MAJESTY THE QUEEN IN  
RIGHT OF CANADA

SECOND RESPONDENT

**Coram:** Green C.J.N.L.\*\*, Harrington and Hoegg JJ.A.

\* In accordance with this Court's decision in *R. v. Penunsi*, 2016 NLCA 50, the style of cause has been amended to remove any reference to the Provincial Court Judge as a party.

\*\* Since the hearing of this appeal, Chief Justice Green has relinquished the office of Chief Justice and continues to sit as a supernumerary Judge.

**Court Appealed From:** Supreme Court of Newfoundland and Labrador  
Trial Division, Grand Bank 201406G0121  
(2014 NLTD(G) 140)

**Date of Hearing:** May 14, 2015

**Judgment Rendered:** May 8, 2018

**Reasons for Judgment by:** Harrington J.A.

**Concurring Reasons by:** Green J.A.

**Dissenting Reasons by:** Hoegg J.A.

**Counsel for the Appellant:** Frances Knickle Q.C.

**Counsel for the First Respondent:** Gregory French

**Counsel for the Second Respondent:** No appearance

### **Harrington J.A.:**

[1] This appeal involves the issue of whether a provincial court judge and an accused are required to be physically present in the same courtroom during the conduct of a summary conviction criminal proceeding when witness testimony is heard. The use of video-conferencing has facilitated the administration of justice throughout Canada for many years. Provincial courts operate in various designated areas of the province. In this proceeding, the alleged offence took place in a district where the position of provincial court judge was vacant due to a retirement. On the date when the summary conviction proceeding was scheduled to be heard, the judge providing coverage for two courts, ordered the witnesses, the accused, and counsel to appear in Clarenville and he would hear evidence and argument by video-conference from his home courtroom at Grand Bank.

### **BACKGROUND**

[2] The accused was charged with offences related to the operation of a motor vehicle while under the influence of drugs at Clarenville, Newfoundland and Labrador. He made an application to exclude evidence due to a violation of his *Charter* rights. Counsel for the federal and provincial Crown and the accused requested that the Provincial Court judge temporarily assigned to conduct proceedings at Clarenville in the absence of a sitting judge, preside at trial in person. However, the judge ordered that all

of the participants would attend at the court in Clarenville for the *Charter* application. He advised that he would conduct the hearing by video-conference in his courtroom at Grand Bank, thereby eliminating a four-hour return drive enabling him to cover both courts effectively.

[3] Crown and defence counsel objected to the process proposed for the conduct of the *voir dire* with respect to the admissibility of the testimony of the arresting officer. The judge rejected the objection and ultimately denied the accused's *Charter* application based on the testimony of the investigating police officer heard by the judge via video-conference. Crown counsel and defence counsel for the first respondent appealed. They submitted that the Provincial Court judge exceeded his jurisdiction when he did not attend in person at Clarenville to hear the *Charter* application as to whether the police officer had grounds to detain and subsequently arrest the first respondent.

[4] Counsel, the accused, the arresting officer, and court clerk were present in the courtroom in Clarenville. Counsel for the accused and counsel for the Federal Crown agreed with the position taken by the provincial Crown. The arresting officer was the sole witness who testified at the hearing. While giving his reasons for ordering the hearing by video-conference the presiding judge raised concern about the work load he had with regard to trials at two Provincial Court locations, the four-hour drive he would have to make to attend court in Clarenville, and the fact that the case involved a summary conviction offence. The Provincial Court judge dismissed the Crown's application and subsequently provided written reasons (see *R. v. Gibbs*, 2014 NLPC 0614A0062). Relevant portions of the reasons are set out in paragraphs. 35-43 as follows:

[35] We are not breaking new ground here. On the contrary, we are following the practice of the superior courts. The Supreme Court of Canada set the precedent for the appearance by counsel electronically over 20 years ago. The *Criminal Proceedings Rules of the Supreme Court of Newfoundland and Labrador*, rule 12.13(5), provides that "an application may be heard by video conference by a judge in another judicial centre".

[36] A recent case where videoconferencing was used by our Court of Appeal is in *R. v. Hart*, [2009 NLCA 10]. Paragraph 6 in that decision clearly confirms that the Appellant in the matter appeared before the Court of Appeal by videoconference from the penal institution at Renous, New Brunswick, where Mr. Hart was incarcerated.

[37] The *Rules of the Provincial Court of Newfoundland and Labrador in Criminal Proceedings*, SI/2004-134, include rule 6.10, which provides as follows:

6.10 Unless otherwise ordered, an application shall be heard and determined by a judge sitting in the court centre in which the proceeding is being or is to be held.

[38] Presumably, the preface to that rule is not meant to be meaningless. Since video appearances are used in the Supreme Court of Canada and the Supreme Court of Newfoundland and Labrador, it would be passing strange indeed if it were not used in the Provincial Court. It is in this court, after all, where all persons accused of having committed an offence must appear. And it is this court which hears and concludes the vast majority of criminal and regulatory offence matters.

[39] At the risk of stating the obvious, it is clear that

- 1) there is a judicial vacancy in Clarenville;
- 2) only the Applicant can fill that vacancy;
- 3) nobody, not even a judge, can be in two different places at the same time;
- 4) the court rooms in Grand Bank and Clarenville are more than 200 km apart;
- 5) the Applicant has elected to proceed by summary conviction in this matter;
- 6) a defendant in a summary conviction matter is not usually required to be present in court for his trial;
- 7) counsel routinely appear on summary matters, including summary conviction trials, by video or by telephone; and
- 8) when Crown counsel has found it convenient, pre-trial applications made in indictable matters have also been dealt with by video appearance.

[40] Now, in that context, let us consider some jurisprudence.

[41] In *R. v. Denham*, 2010 ABPC 82 ... , B.D. Rosborough Prov. Ct. J. had occasion to consider an application to have a witness appear by video. He said, (if I might be so bold as to summarize his remarks) in paragraphs 16 to 18, that there is no constitutional right in Canada of the accused to confront witnesses in person.

[42] At paragraphs 34 to 36, Judge Rosborough said as follows:

34 It is helpful at the outset to comment on observations of a witness' 'demeanor' when making credibility assessments. In *Turner*, the court stated in that regard: "As to the assessment of credibility, sometimes members of the public, lawyers and perhaps even judges make the mistake of concluding that the assessment of credibility depends on observations of physical demeanor during the course of the witness testifying. In my experience, those observations are rarely determinative of credibility, as a judge who relies solely on physical observations of demeanor is likely to err." These comments are amply supported in our jurisprudence. See, for example, *R. v. Dehaan*, [2002] O.J. No. 430 (C.A.).

35 There is some support for the proposition that video evidence actually enhances the ability of the parties to cross-examine or otherwise assess credibility. In *Heynen*, for instance, the court stated (at para.325): "Witness reaction and demeanor may already be more effectively scrutinized by the use of technology than by the steely eye of a judge sitting apart and usually at an angle to a witness. Enlarging the picture, viewing the picture of the witness from different angles and replaying the picture of a witness enhance the court's ability to assess credibility and determine 'truth'. And further (at para.315): "I found no significant difficulty in evaluating testimony, but rather noted several advantages. Camera angles and close-up views, in many respects, enhance the ability to evaluate demeanor. Although not required in this case, the opportunity for a video replay affords many advantages over audio replays."

36 I have had the benefit of both watching and participating in the use of CCTV in judicial proceedings throughout central Alberta. There have been few, if any, technical glitches. Moreover, the opportunity to observe and listen to prisoners during the course of bail hearings, sentence hearings and other interim appearances has so closely replicated in-person appearance as to make the distinction between the two almost negligible. I share Stuart C.J.'s belief that video evidence, " ... will soon become essential to the conduct of court business."

[43] The learned judge held in that case that he was satisfied that it would be appropriate in all the circumstances to permit the witness to testify by video in the virtual presence of the parties. I share his view. It is an error of law to make decisions about credibility based on the appearance and demeanour of the witnesses. Further, in this day and age, the use of technology to bridge the geography of this great Country ought to be encouraged.

## REASONS OF THE SUPREME COURT JUDGE

[5] As a statutory court, justification for the process followed by the presiding judge must be found in the *Criminal Code* and the *Provincial Court Act, 1991*, SNL 1991, c. 15. The Crown brought an application by way of *certiorari*, *prohibition* and *mandamus*, to the Supreme Court at Grand Bank seeking to quash the decision of the Provincial Court judge. Justice Handrigan summarized the Crown's position in his written reasons at paragraph 25:

The Crown's position put another way:

- The Provincial Court of Newfoundland and Labrador is a statutory tribunal.
- It derives its authority from the *Provincial Court Act, 1991* and the *Criminal Code of Canada*, and *Rules* made under both acts.
- Its authority is limited to the jurisdiction that its enabling statutes confer on it and it has no inherent jurisdiction.
- In particular, the *Provincial Court Act, 1991*, the *Criminal Code of Canada* and the *Rules* made pursuant to either do not allow a Provincial Court judge to attend trials or application hearings by video-conferencing so he must attend personally.
- The trial judge in this case exceeded his jurisdiction when he heard Mr. Gibbs' application by video-conferencing.
- Prerogative relief is available to quash the proceedings as a nullity and to order the trial judge to appear in person to hear Mr. Gibbs' application.

[6] Handrigan J. dismissed the Crown's application to quash the proceeding. He held that section 4 of the *Provincial Court Act, 1991* provided authority for conduct of the hearing remotely as follows:

[29] Section 4(1) of the *Provincial Court Act, 1991* says that the "...the court and every judge have jurisdiction throughout the province..."; and, for greater certainty, section 4(2) says that a "...judge may preside over the court at any place in the province for the orderly dispatch of the business of the court" (underlining mine). It is well accepted that any judge of the Provincial Court of Newfoundland and Labrador can hear any matter that is properly before the court at any place where the court sits in the province.

[7] The Supreme Court judge addressed two fundamental issues 1) the courts' ability to proceed with a *Charter* hearing by video-conferencing and 2) the deficiencies alleged by counsel for the Crown and the accused.

[8] He acknowledged that technical problems can arise with video-conferencing particularly when evidence is being given and received remotely. Nevertheless the reviewing judge affirmed the decision of the Provincial Court judge to proceed.

[9] Handrigan J. gave the following reasons for his decision:

[31] If, as they do, Provincial Court judges have jurisdiction throughout the province and can preside over any court in the province, there is nothing inherently wrong with a judge of that court sitting in one location and "attending" proceedings in another location by video-conferencing. The trial judge has jurisdiction in each of the locations connected by the technology and he does not exceed that jurisdiction by being simultaneously in both places through the medium of video-conferencing.

[32] There is nothing in the *Act* or the *Regulations* that requires the trial judge to be physically present at either place to preside over court there. The trial judge's choice of how he or she appears is simply trial management and is well within his or her discretion to decide. That is not to say that trial judges may arbitrarily decide to appear in person or by video. As always, a trial judge must ensure that he or she participates as fully in the proceedings as circumstances permit.

[33] But a trial judge's discretion of how to appear must not be fettered by antiquated notions that he or she must always appear in person regardless of the circumstances. As Kilpatrick, J. said in *R. v. Hainnu*, [2011 NUCJ 14], when discussing the accused's right to confront his accuser in person: "This spatial relationship, the proximity of the accused to the accuser in a courtroom, was dictated by the limitations of the technology available to the courts during the early development of the right of cross-examination".

[34] We are no longer limited by technology. All court centres in this province have video-conferencing facilities, as do many other courts throughout Canada, including the Supreme Court of Canada. Many courts hear matters regularly by video-conferencing and the technology that serves those courts is easy to use, gratifyingly intuitive and facilitates sensitive and fulsome participation in the proceedings.

[35] The public knows the benefits of video-conferencing well and it willingly embraces its uses. Real-time, internet-based video platforms like Skype® and FaceTime® are notoriously ubiquitous and operate on the same principle as the video-conferencing formats we employ in our courts. Video-conferencing is

neither novel nor intimidating; and it does not impede or impair the truth-seeking function of the court.

[36] Trial judges must know the limitations of the technology they use and ensure that everyone involved in the process, including members of the public who are simply present to observe the proceedings, see and hear fully what happens and, if appropriate, can participate to the fullest extent. Mr. Gibbs says that the technology interfered with his *Charter* hearing. He goes as far to say that the trial judge made a serious error of fact because he appeared virtually that he might not have made if he had heard his application in person.

[37] Mr. Gibbs' observations invite these comments:

- Using technology effectively in court always presents trial judges with trial management issues; whether it is video-conferencing or sound recording equipment, white boards or blackboards, easels, flipcharts or overhead projectors, laser pointers or pointing sticks, and laptops or hard copy notebooks.
- Judges sometimes err on the facts, whether they hear matters in person or remotely.
- Court proceedings are often interrupted *ex tempore*, whether by equipment malfunctions, emotional outbursts, or a simple need for temporary respite.
- Trial judges (and juries) often have difficulty hearing witnesses who may speak softly or are drowned out by loud ambient noises, the droning of air conditioners or other equipment and a plethora of other interferences.

[38] In this case the trial judge was using voice-activated split-screen technology that defaulted to the location where microphones picked up background sounds, such as banging doors, coughing or voices. The trial judge may have been trying to do too much at once: He attended to Mr. Miller at Her Majesty's Penitentiary in St. John's while pressing ahead with Mr. Gibbs' application. He would not have experienced any third-party interference if he had simply maintained a one-to-one connection between Grand Bank and Clarenville.

[10] The Supreme Court judge concluded as follows:

[42] Overall, I find that the trial judge did not exceed his jurisdiction by hearing Mr. Gibbs' *Charter* application by video-conferencing from Grand Bank. At worst, he may not have managed the hearing as well as he might have. If he erred in fact, as Mr. Gibbs' claims, Mr. Gibbs might appeal the trial judge's ruling and seek redress by the conventional route.

[43] In the result, I dismiss the Crown's application for prerogative relief. I go back to what McLachlin, C.J.C. said about certiorari in *R. v. Russell*: Certiorari permits review only where it is alleged that the tribunal has acted in excess of its assigned statutory jurisdiction. The trial judge did not exceed his jurisdiction by electing to hear Mr. Gibbs' application by video-conferencing; so I will not review his choice.

[44] For greater certainty, let me answer the questions I posed at the beginning of these reasons when I stated the issues I had to consider:

1. Do Provincial Court judges have jurisdiction to hear matters remotely? Yes, they do.
2. If not, are the extraordinary remedies the Crown wants available against the trial judge in this matter? No, they are not.
3. If not, are the proceedings from July 11, 2014 a nullity and should they be quashed? No, they are not.

[11] The Supreme Court judge issued the following order:

[47] In the result,

1. I dismiss the Crown's application for prerogative relief.
2. I find that the proceedings that took place on July 11, 2014 in the Provincial Court at Clarendville when the Provincial Court judge appeared by video-conferencing are not a nullity.
3. I find that the Provincial Court judge's virtual appearance at those proceedings was within the jurisdiction of the court.

## ISSUES

[12] Two main issues arise in the circumstances of this appeal:

- (i) was the procedure adopted by the Provincial Court judge consistent with the provisions of the *Criminal Code*, in particular sections 650, 714.1 or 802(1); and
- (ii) was the procedure adopted by the Provincial Court judge adequately protective of the accused's right to a fair trial.

## ANALYSIS

### Jurisdiction to Entertain the Application

[13] *Certiorari* is a judicial remedy only available in limited circumstances when there is no right of appeal and the Provincial Court has acted outside of its jurisdiction or in a manner which constitutes a denial of natural justice (*R. v. Forsythe*, [1980] 2 S.C.R. 268, *Dubois v. The Queen*, [1986] 1 S.C.R. 366). The rules of natural justice may be violated when the provincial court fails to observe a mandatory provision of the *Code* or when there is a “complete denial to the accused of a right to call witnesses or of a right to cross-examine prosecution witnesses” (*Forsythe* at 272). If the judge has failed to comply with sections 650 or 802(1) of the *Code*, which codify the right to be apprised of proceedings affecting vital interests and to make full answer and defence, or has otherwise denied the accused that right to a sufficient degree, *certiorari* may be available.

[14] I am mindful of the decision of this Court in *R. v. Ramalheira*, 2009 NLCA 4, 282 Nfld. & P.E.I.R. 29 (Barry J.A. dissenting), which held that whether or not a summary conviction trial can proceed in the absence of the accused contrary to section 650 of the *Code* may sometimes be a question of law not jurisdiction and should be dealt with on appeal, not by way of an application for *certiorari*. I consider that *Ramalheira* is distinguishable from this case. The accused in that case sought to create an interlocutory appeal in a regulatory offence proceeding, where the matter could have been dealt with by way of appeal. This case raises a genuine question of procedure and jurisdiction under the *Code*. In this instance, section 650 is imperative and its contravention vitiates a proceeding without the need to show prejudice (*R. v. Meunier* (1966), 48 C.R. 14 (Que. CA), *aff’d* [1966] S.C.R. 399).

### Legal Authority for the Conduct of Criminal Proceedings by Video

[15] Neither the Provincial Court judge nor the Supreme Court judge cited any statutory authority which definitively permits a judge to appear by video in a criminal proceeding while the parties are physically present in a courtroom in another location. Both referenced section 4 of the *Provincial Court Act, 1991* which states:

## Jurisdiction

4. (1) The court and every judge have jurisdiction throughout the province and every judge
  - (a) shall exercise the powers and perform the duties conferred or imposed upon a judge under an Act of the Legislature or the Parliament of Canada;
  - (b) has the power and authority vested under an Act of the Legislature in a judge, two justices of the peace sitting together or a youth court or judge of a youth court, subject to the *Young Persons Offences Act* ;
  - (c) may exercise the powers and perform the duties conferred or imposed upon a judge or one or more justices of the peace under an Act of the Parliament of Canada; and
  - (d) is, by virtue of the office, a justice of the peace.
- (2) A judge may preside over the court at any place in the province for the orderly dispatch of the business of the court.

[16] While this section clarifies that a Provincial Court judge has the jurisdiction to preside over the court at any place in the province, it does not expressly authorize conducting the proceeding by video technology. The Supreme Court judge decided that this section confers a discretion upon the Provincial Court judge to administer justice in person or by video as long as it is done in a way which permits the judge to participate in the proceedings “as fully...as circumstances permit” (paragraph 32).

[17] What is absent from the decisions of the courts below is an analysis of whether the Provincial Court judge’s discretion as to procedure is circumscribed by the *Code* which also sets out procedures to follow in criminal cases and, more generally, whether a policy promoting court efficiency by participating by video “as fully as circumstances permit” is compatible with the principles of criminal law which jealously protect the right of an accused to a fair trial.

[18] The provincial court judge made reference to sections 800(2) and 714.1 of the *Code* which apply to summary conviction proceedings. He found that there was nothing in those sections that required the judge, the accused and the witnesses to be physically present in the same room and therefore those sections did not prevent the judge from appearing by video. He did not reference section 650 of the *Code* which provides for the right of

the accused to be present at a trial for an indictable offence. It also applies to summary conviction proceedings by virtue of section 795 (see *Ramalheira*). The Supreme Court judge made passing reference to the *Code* but did not discuss its procedural sections in detail.

[19] Section 650 of the *Code* reads:

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

(1.1) Where the court so orders, and where the prosecutor and the accused so agree, the accused may appear by counsel or by closed-circuit television or any other means that allow the court and the accused to engage in simultaneous visual and oral communication, for any part of the trial other than a part in which the evidence of a witness is taken.

(1.2) Where the court so orders, an accused who is confined in prison may appear by closed-circuit television or any other means that allow the court and the accused to engage in simultaneous visual and oral communication, for any part of the trial other than a part in which the evidence of a witness is taken, if the accused is given the opportunity to communicate privately with counsel, in a case in which the accused is represented by counsel.

(2) The court may

(a) cause the accused to be removed and to be kept out of court, where he misconducts himself by interrupting the proceedings so that to continue the proceedings in his presence would not be feasible;

(b) permit the accused to be out of court during the whole or any part of his trial on such conditions as the court considers proper; or

(c) cause the accused to be removed and to be kept out of court during the trial of an issue as to whether the accused is unfit to stand trial, where it is satisfied that failure to do so might have an adverse effect on the mental condition of the accused.

(3) An accused is entitled, after the close of the case for the prosecution, to make full answer and defence personally or by counsel.

[20] Section 650 provides that the accused has the right to be “present in court” throughout the trial and may only appear by video when the restricted requirements of section 650(1.1) are met. Contrary to the statements of the lower courts and subject to the exceptions in the *Code*, there may therefore be a legislated requirement that the judge and the parties in a criminal matter be physically present in the same courtroom depending on whether or not an

accused can be said to be “present in court” if the judge appears by video during the “trial”. Thus the issue in this case is the interpretation of that phrase in the context of a *Charter* hearing in a summary conviction trial where the sole Crown witness gave evidence in a courtroom remote from the court room where the trial judge, who was hearing the evidence by video-conference, was. The appellant, the Crown and the respondent accused, Mr. Gibbs, both argue that the procedure adopted by the Provincial Court judge in this case violated section 650.

### **The Meaning of Section 650**

[21] This appeal raises a novel issue for the Court. While the meaning of “trial” in section 650 of the *Code* has been settled by case law, the question of whether “presence in court” requires the physical presence of the accused, the judge and the witnesses in the same courtroom has not been directly addressed.

[22] The meaning of “during the whole of his or her trial” was summarized recently in *R. v. Sinclair*, 2013 ONCA 64, 114 O.R. (3d) 284 where Rouleau J.A. wrote at paragraph 15 for the Court:

Section 650(1) of the *Criminal Code* provides that an accused must be "present in court during the whole of his ... trial". In the context of s. 650(1), "trial" carries a broad meaning, although generally the trial proper does not commence until after a plea is entered. Martin J.A. explained the broad interpretation of "trial" for s. 650(1) purposes at para. 50 of *R. v. Hertrich* (1982), 67 C.C.C. (2d) 510 (Ont. C.A.):

..."trial" for the purpose of the principle that an accused is entitled to be present at his trial clearly includes proceedings which are part of the normal trial process for determining the guilt or innocence of the accused such as arraignment and plea, the empanelling of the jury, the reception of evidence (including voir dire proceedings with respect to the admissibility of evidence), rulings on evidence, arguments of counsel, addresses of counsel to the jury, the judge's charge, including requests by the jury for further instructions, the reception of the verdict and imposition of sentence if the accused is found guilty. [Emphasis added.]

In determining whether something which occurred at trial falls within the meaning of "trial" pursuant to s. 650(1), the court must ask whether what transpired involved the accused's "vital interests" (*Hertrich*, at para. 82).

[23] Since the *voir dire* on the *Charter* issue is part of the trial, an accused has a right to be “present in court” for it. The question is then whether or

not the accused is “present in court” if the judge appears by video. In order to determine this, the Court must interpret section 650 by following the well-established guidance of the Supreme Court of Canada quoting *Driedger’s* approach that “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament” (*Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559 at para. 26).

[24] The *Code* does not provide an obvious answer as to whether the judge may appear by video. It does provide for circumstances when the accused or a witness may do so. Section 650(1.1) stipulates that a judge may order an accused to appear by video-conference if the prosecution and defence agree and in circumstances when no evidence is taken from a witness. This is stated as an exception to section 650(1) which provides that an accused must be “present”. The jurisprudence also treats section 650(1.1) as an exception to section 650(1) (see *R. v. F.E.E.*, 2011 ONCA 783, 108 O.R. (3d) 337 at para. 1, note 1) and refers to video-presence of the accused as “absence” (see *R. v. Waddell*, 2008 NLPC 1707A00868 at para. 53). Similarly, witnesses may be permitted to appear by video in accordance with section 714.1. Witness video-testimony is termed “virtual presence”.

[25] These sections indicate strongly that the fundamental assumption made by the *Code* is that all the participants in a criminal trial – the parties, the witnesses, counsel, the jury and the judge – will generally be physically present in the courtroom in sight of one another. This notion of “the court” reflects the tradition of our legal system, explained by the Supreme Court of Canada in *R. v. Levogiannis*, [1993] 4 S.C.R. 475 at 491, affirming the judgment of Morden A.C.J.O of the Ontario Court of Appeal:

...it is an accepted tradition of our legal system that judge, jury, witnesses, accused and counsel are all present in sight of each other...

[26] However, by permitting video appearances for the accused and witnesses in some circumstances the *Code* also recognizes that courts have evolved and technology has progressed with time and the need for physical presence in the courtroom is not as great as it was at the time the traditions of our legal system were established (see for example *Endean v. British Columbia*, 2016 SCC 42, [2016] 2 S.C.R. 162). That is, while physical presence by all trial participants in the courtroom remains the norm and a time-tested best practice for ensuring a fair trial, as long as the purposes of

section 650(1) are respected, the accused's "presence in court" may, in exceptional circumstances, be secured even if there is an interference with the direct line of sight between the judge, the accused and the witnesses, for example if there is video appearance. (See also *Levogiannis*, which concerned the use of a screen to shield the complainant and *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, which concerned the right of a complainant to testify while wearing a niqab).

[27] Because the *Code* sets out specific circumstances when the accused and witnesses may appear by video (which it is agreed were not met in this case), but does not set out when a judge may do so, it is necessary to ask whether the purposes of section 650 can ever be fulfilled when a judge appears remotely and whether there is any meaningful difference between a situation where the accused appears by video and when a judge does so, or whether, in substance, that is the same situation and therefore section 650(1.1) must be complied with.

[28] The purposes of section 650 were explained in *R. v. Tran*, [1994] 2 S.C.R. 951, where, citing with approval the judgment of Martin J.A. of the Ontario Court of Appeal in *R. v. Hertrich* (1982), 137 D.L.R. (3d) 400 (Ont. C.A.), leave to appeal refused, [1982] 2 S.C.R., the Supreme Court identified two rationales for the accused's right to be physically present in court in section 650: (i) informing the accused of proceedings which affect his or her vital interests; and (ii) giving effect to the accused's right to make full answer and defence. At pages 973-974 the Court in *Tran* wrote:

The case of *Hertrich* is important because it makes it clear that an accused need not demonstrate any actual prejudice flowing from his or her exclusion from the trial -- i.e., that he or she was in fact impeded in his or her ability to make full answer and defence. Prejudice is a sufficient but not a necessary condition for a violation of the right to be present under s. 650 of the *Code*. For a violation of the right to be present under s. 650 to be made out, it is enough that an accused was excluded from a part of the trial which affected his or her vital interests. Importantly, the two rationales provided in *Hertrich* for the right of an accused to be present at his or her trial -- i.e., full answer and defence, and first-hand knowledge of proceedings which affect vital interests -- need not necessarily overlap. For instance, as was the case in *Hertrich*, there will be situations where an accused's right to full answer and defence is not prejudiced, but his or her right to first-hand knowledge of proceedings affecting his or her vital interests is negatively affected.

(Emphasis added.)

(See also *R. v. Barrow*, [1987] 2 S.C.R. 694.)

[29] Some of the aspects of the right to make full answer and defence which are affected by the accused's presence in court include the accused's right to consult with counsel, cross-examine witnesses and have the trier-of-fact observe their demeanour in order to evaluate their credibility. In *N.S.* the Supreme Court of Canada re-affirmed that face-to-face confrontation and observation remains strongly connected to a fair trial:

[21] This much, however, can be said. The common law, supported by provisions of the *Criminal Code*, R.S.C. 1985, c. C-46, and judicial pronouncements, proceeds on the basis that the ability to see a witness's face is an important feature of a fair trial. While not conclusive, in the absence of negating evidence this common law assumption cannot be disregarded lightly.

[22] As a general rule, witnesses in common law criminal courts are required to testify in open court, with their faces visible to counsel, the judge and the jury. Face-to-face confrontation is the norm, although not an independent constitutional right: *R. v. Levogiannis* (1990), 1 O.R. (3d) 351 (C.A.), at pp. 366-67, aff'd [1993] 4 S.C.R. 475. To be sure, long-standing assumptions of the common law can be displaced, if shown to be erroneous or based on groundless prejudice — thus the reforms to eliminate the many myths that once skewed the law of sexual assault. But the record before us has not shown the long-standing assumptions of the common law regarding the importance of a witness's facial expressions to cross-examination and credibility assessment to be unfounded or erroneous.

[23] In recent years, Parliament and this Court have confirmed the common law assumption that the accused, the judge and the jury should be able to see the witness as she testifies. To protect child witnesses from trauma, Parliament has passed legislation permitting children to testify via closed-circuit television or from behind a screen so that they cannot see the accused: *Criminal Code*, s. 486.2(1). This Court has upheld these testimonial aids, relying on the fact that they do not prevent the accused from seeing the witness: *R. v. J.Z.S.*, 2010 SCC 1, [2010] 1 S.C.R. 3, aff'g 2008 BCCA 401, 261 B.C.A.C. 52. Before a witness is permitted to testify by audio link, the *Criminal Code* expressly requires that the judge consider “any potential prejudice to either of the parties caused by the fact that the witness would not be seen by them”: ss. 714.3 (d) and 714.4 (b). This, too, suggests that not seeing a witness's face during testimony may limit the fairness of a trial.

...

[25] Covering a witness's face may also impede credibility assessment by the trier of fact, be it judge or jury. It is a settled axiom of appellate review that deference should be shown to the trier of fact on issues of credibility because trial

judges (and juries) have the “overwhelming advantage” of seeing and hearing the witness — an advantage that a written transcript cannot replicate: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 24; see also *White v. The King*, [1947] S.C.R. 268, at p. 272; *R. v. W. (R.)*, [1992] 2 S.C.R. 122, at p. 131. This advantage is described as stemming from the ability to assess the demeanour of the witness, that is, to see how the witness gives her evidence and responds to cross-examination.

...

[27] On the record before us, I conclude that there is a strong connection between the ability to see the face of a witness and a fair trial. Being able to see the face of a witness is not the only — or indeed perhaps the most important — factor in cross-examination or accurate credibility assessment. But its importance is too deeply rooted in our criminal justice system to be set aside absent compelling evidence.

(Emphasis added.)

[30] However, the right to have the judge observe the witness face-to-face is not unqualified. As summarized succinctly by the Ontario Court of Justice in *R. v. Allen*, 2007 ONCJ 209 at para. 27:

The main objection is that the entire truth seeking process suffers by permitting the witness to “mail it in” – to give evidence at a distance without his being brought into the presence of those he is accusing and the solemn and majestic atmosphere of the court house. It is said there is a right to confrontation that is infringed or at least diluted by the video-link process. However such right of confrontation as it exists in Canada is a qualified right and can be subject to exceptions designed to achieve some valid purpose in the administration of justice: *R. v. Levogiannis* (1990), 62 C.C.C. (3d) 59 (Ont. C.A.). ... The Court in *Levogiannis* cited with approval the case of *R v. R. (M.E.)* (1989), 49 CCC (3d) 475 (N.S. C.A.) where the Nova Scotia Court of Appeal held that an order permitting a child’s evidence to be received by video-link did not offend the accused’s right to face his accuser. ...

[31] Extrapolating from *N.S.*, while a procedure whereby the judge appears by video-conferencing departs from the traditional model of face-to-face confrontation and observation and dilutes the right to make full answer and defence, it does not automatically impair that right to such an extent that the trial becomes unfair. The accused’s right is to a fair trial, not a perfect one (*R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863, at para. 28).

[32] Clearly, where there are significant problems with the video-conferencing which undermine the ability of the judge to observe the

witnesses and interact with the accused, section 650 will be violated. This is illustrated, for example, by the decision in *R. v. Gates*, 2002 BCCA 128, 163 C.C.C. (3d) 274 leave to appeal to SCC refused, [2002] S.C.C.A. No. 200. The British Columbia Court of Appeal dealt with an appeal by the accused from his convictions and sentences on numerous counts of aggravated assault. Following trial, the judge and counsel could not find dates whereby all parties could attend in person to hear the reasons for judgment and conduct a sentencing hearing. The parties agreed that the trial judge could sit in Vancouver to read the reasons for judgment and sentence the convicted accused through video-conferencing while the accused was in a courtroom in Prince George and both defence and Crown counsel attended a courtroom in Smithers. The video equipment did not allow for simultaneous visual and audio communication. The evidence indicated that the judge and the accused could not see each other when they were speaking. The Court held that the circumstances constituted a breach of section 650 of the *Code* which was held to affect the fairness of the proceeding. More specifically, Ryan J.A. speaking for the Court set out certain criteria at paragraph 17 of the reasons as follows:

If the accused does not appear in person but is permitted to appear by closed-circuit television or some other means, s. 650 (1.1) requires that “the other means” allow the court and the accused to engage in simultaneous visual and oral communication. That provision was not complied with in this case.

[33] The Court was of the view that in spite of this error, it should dismiss the conviction appeal pursuant to the curative provision in section 686(1)(b)(iv) of the *Code*. One factor noted by the Court was that the procedure followed was not imposed on an unwilling accused. Counsel for the appellant agreed on his behalf to the delivery of reasons for judgment by telephone. The Court went on to say that there was no suggestion that Mr. Gates did not hear the reasons as they were read or that he did not understand that the trial judge was addressing his culpability (at paragraph 18).

[34] However, with respect to the sentencing hearing, the Court agreed with counsel that “Mr. Gates had become a by-stander while the court and the lawyers struggled with the logistical and technical problems this case presented” (at paragraph 23). The Court concluded “the problems that occurred in the sentencing proceeding were not just harmless procedural errors but error[s] that affected the fairness of the proceedings” and that Mr. Gates, without his consent, was not fully present for his sentencing hearing

(at paragraph 24). The Court allowed the sentence appeal and re-sentenced the offender.

[35] Since the law does leave room for the trial judge in a criminal matter to exercise a discretion to appear by video in an exceptional case as long as the purposes of section 650 are met, the only remaining question is what factors the judge should consider before exercising that discretion.

### **Factors to Consider**

[36] In answering the question as to what circumstances must exist for the judge to be able to appear by video, the Court must first determine whether or not section 650(1.1) of the *Code* applies to the situation where it is the judge and not the accused who appears by video, thereby covering the field and prescribing the conditions necessary for a video appearance, or whether there is a distinction between the accused appearing by video and the judge doing so, such that the Section 650(1.1) does not apply.

[37] Having regard to the purposes of section 650 outlined above, I conclude that a situation where the judge is physically present in the courtroom and the accused appears by video is not the mirror image of a situation where the accused is physically present and the judge appears by video. To be clear, both the presence of the judge and the presence of the accused are required in order for the accused to be “present in court” pursuant to section 650(1). However, only the video presence of the accused is further regulated by section 650(1.1). This is because the physical presence of the judge and judge’s ability to observe witnesses is only one part of the right to make full answer and defence that is protected by the right of the accused to be present in the courtroom. Other aspects of the right to make full answer and defence include the right to cross-examine and observe witnesses, the right to speak to counsel and to have access to the courthouse to file documents or sort out procedural or case management issues.

[38] This conclusion is supported by the fact that the test for permitting witnesses to appear by video set out in section 714.1 of the *Code* is also not the same as that for permitting or ordering the accused to do so. However, the presence of witnesses is also required for the accused to be “present in court”.

[39] Therefore, the *Code* does not prescribe the factors which the judge must consider before appearing by video. The provisions for analyzing witness appearances do, nonetheless, provide some helpful guidance as to the kinds of factors which may be considered. The principles which permit video-appearance by witnesses were reviewed by Gorman PCJ in *R. v. Osmond*, 86 W.C.B. (2d) 561 (N.L. Prov. Ct.) at paras, 18-19:

[18] In *R. v. Chapple* [2005 BCSC 383], it was held that section 714.1 of the *Criminal Code* “does not replace the established procedure of calling witnesses to the witness stand in criminal cases or of allowing the accused to face his or her accuser” and thus, “the presumption, or starting point, must be that, unless the circumstances warrant dispensing with the usual practice, the witness should be called to the witness stand to testify.” In *R. v. R.(M.E.)* (1989), 49 C.C.C. (3d) 475 (N.S.C.A.), however, it was held that the “right to face one's accusers is not in this day and age to be taken in the literal sense...it is simply the right of an accused to be present in court, to hear the case against him and to make answer and defence to it.”

#### A Summary of the Applicable Principles

[19] Based upon the wording of section 714.1 of the *Criminal Code* and the authorities referred to, I would summarize the applicable principles as follows:

1. the 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 a proper evidentiary foundation for it having been presented;
2. 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 what the words “virtual presence” means. I conclude that this element of the provision will be satisfied if the parties and the court are able to see; hear; and question the witness (see *R. v. Morin*, [2005] A.J. No. 54 (Q.B.), at footnote eight); and
3. in considering a section 714.1 application, the court must consider all of the circumstances including (i) the location and personal circumstances of the witness; (ii) the costs that would be incurred if the witness had to be physically present; and (iii) the nature of the witness’ anticipated evidence. An analysis of these circumstances requires a consideration of such factors as:
  - i. the distance between the court house and the location of the witness, though the requirement for a witness to travel, standing

alone, is not likely to be sufficient for a section 714.1 order to be issued (see *R. v. Fleury*, [2004] S.J. No. 242 (P.C.));

ii. the hardship, if any, which might be caused to the witness if he or she had to be present in person, including any potential impact on the witness' health (see *R. v. McLean*, [2002] Y.J. No. 88 (T.C.));

iii. any other relevant personal circumstances of the witness, such as her or his age and employment;

iv. whether the presence of the witness in the courtroom will result in an attempt to intimidate the witness (see *R. v. T.P.S.*, [2003] Y.J. No. 113 (S.C.). ...

v. the financial costs involved in having the witness personally present, particularly if those costs are to be incurred by the witness; the accused; or by the Crown for a witness of minor importance in the case;

vi. whether the witness's evidence is significant or of a minor nature in the context of the specific case;

vii. whether the presentation of the evidence in the manner allowed by section 714.1 will negatively impact or enhance the accused's ability to make full answer or defence; and

viii. the location of where the video link will be situated. The Court must, in considering the location from which the evidence will be presented, consider whether the witness will face the same level of solemnity offered by a courtroom and whether he or she will be as free from outside influences while testifying as she or he would be if they were to testify in person before the trial judge.

[Emphasis added.]

[40] While the same factors will not be relevant in every case where the judge may be trying to decide whether to appear by video, they will provide guidance when considering whether an entire proceeding could be conducted remotely. The judge should always be mindful that the decision to appear by video should not be made lightly and should only be made in exceptional circumstances. While the focus of the application to permit a witness to testify by video is trial fairness as well as evidence of hardship to witnesses, the focus of the analysis in a case where the judge wishes to appear by video must be trial fairness and access to justice, not mere convenience. Access to

justice means not only trial efficiency and cost savings, but meaningful access to the decision-maker, court space and adequate court time and attention to resolve the live issues in the dispute. The judge's physical presence also adds to the solemnity of the proceeding and is important for preserving the perception of a fair and impartial judiciary.

## CONCLUSION

[41] The potential structures of particular video-teleconference arrangements for the conduct of a criminal proceedings are numerous and varied. In the proceeding under appeal where the judge conducted a *voir dire* hearing while sitting at his home court room while all other participants were present in the Clarendville court room, all counsel along with the accused were present in court. In such circumstances, it could be said that any "right of confrontation" recognized under Canadian law was not impaired to the extent that the accused was able to physically face the arresting officer in person. Further, the only evidence given at the hearing in Clarendville was that of the police officer who conducted surveillance of the manner of the accused while driving his vehicle under suspicion by the officer that he was under the influence of drugs or alcohol leading to the arrest.

[42] Where evidence is received at trial from a witness attending in court by way of a "virtual presence" gives rise to a debate as to whether the presiding judge can assess the witnesses' testimony including credibility via video-conference technology. Given the nature of the hearing in this matter and the evidence having been offered by the officer in the physical presence of the accused and counsel, it would not appear that there was any impairment of the evidence receiving process such that the judge was unable to make a full and proper evaluation of the evidence. There was also no impairment of the defence's ability to cross-examine.

[43] The judge considered a number of irrelevant factors in determining whether to appear by video. However, in the exceptional circumstances of there being a judicial vacancy in Clarendville and the long travel time between Grand Bank and Clarendville which was causing matters to be cancelled in both courts, the Supreme Court judge did not err in upholding the decision by the Provincial Court judge to conduct the *voir dire* hearing through his virtual presence at his court room. The procedure did not render Mr. Gibbs' *Charter* application hearing unfair.

[44] Therefore, I would dismiss the appeal and deny the application for *certiorari*, *prohibition* and *mandamus*. This does not take away the right of the accused to appeal the merits of the *Charter* application once the trial is completed.

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M.F. Harrington J.A.

**Green J.A.:**

[45] I agree with my colleague, Harrington J.A. that this appeal should be dismissed. I desire, however, to add some additional reasons for the conclusion that has been reached.

[46] I begin by posing the question, “What is a Court?” Is it a place (a building designated as a courthouse, or any place where a judge performs judicial functions)? Or is it a person (a judge or, additionally, a conglomeration of persons including lawyers, witnesses, parties and court officials)? Or is it, conceptually, something more abstract than that?

[47] The answer to these questions goes some way to answering the question at issue in this case: can a Provincial Court judge, instead of physically appearing in a designated courthouse where a summary conviction offence would normally be tried and where all counsel, witnesses and court officials are assembled, “appear” from a remote location in the province by videolink and conduct the trial or a part thereof (in this case a *voir dire*) in that manner?

[48] Of course, the issue cannot be completely resolved by theoretical reasoning alone. The Provincial Court of Newfoundland and Labrador is a statutory court. A judge derives his or her jurisdiction from the legislation conferring that jurisdiction. In this case, the relevant statutes are the *Criminal Code* and the *Provincial Court Act, 1991*, SNL 1991, c. 15.

[49] The *Criminal Code* has numerous provisions which purport to authorize a judge to permit various activities normally performed in a courtroom, such as a witness testifying and counsel making submissions, to

be conducted by electronic aids such as videolinks. Most of these provisions appear to proceed on the temporal assumption that a court is synonymous with a courthouse, i.e. a physical place.

[50] Of interest is that there is no provision which expressly addresses the possibility of a remote appearance by a judge in that physical place. In one sense that is perfectly understandable, given the fact that the possibility of remote appearances by anybody in the court process has only been technologically possible in recent times. Previously, a court, of necessity, had to be conducted where every relevant player was assembled. The notion of hearing relevant arguments and evidence in order to be able effectively to respond thereto or for the judge to adjudicate thereon required contemporaneous physical presence in one place. If the judge was not there, the court could not be properly constituted; and if the accused was not there, his or her right to respond to the case against him or her would be compromised.

[51] When Blackstone defined a court as “a place wherein justice is judicially administered” and observed that it had at least three constituent parts (“the *actor*... who complains of an injury done; the *reus*... who is called upon to make satisfaction for it; and the *judex*... which is to examine the truth..., to determine the law... and to ascertain... the remedy”) (*Commentaries on The Laws of England* Book III, (Oxford: Clarendon Press, 1768), at 23 and 25) he, of necessity, had to conceive of its operating all in one place. His description, however, is institutional rather than locational. It begs the question, whether, if technology could allow for the achievement of the fundamental objectives of the court process by other means, court nevertheless must be defined as a single location in which all participants must be present.

[52] Does the fact that the *Code* addresses remote appearances in some cases but not others, including whether the judge can still constitute the court if not physically present, mean that the judge has no jurisdiction to conduct a trial remotely? If the court is equivalent to a location, i.e. a purpose-built courthouse, and if one must seek authorization for use of videolinks in the *Code*, then perhaps the answer is yes. *Expressio unius, exclusio alterius*.

[53] But, a Provincial Court judge has jurisdiction throughout the province and may sit and hold court in different locations that are not designated courthouses. See, *Provincial Court Act*, 1991, section 4. This suggests that a court is not just a place; court functions wherever the judge is. But is the

presence of the judge not only a necessary but also a sufficient condition for holding court? If so, then others can appear remotely (if the judge, in the exercise of his or her discretion to control court processes, permits) without the necessity of authorizing provisions in the *Code*. If on the other hand, court is not properly constituted unless others such as the accused, counsel and witnesses are also present, then remote appearances could only be permitted within the strictures set out in the *Code*.

[54] But are we limited in our conceptions of a court to the traditional notions of physical place or person? What is the essence of a court? Is it not an institutional adjudicative *process* whereby legal rights are fairly adjudicated according to law in a manner that allows the accused to make full answer and defence on the basis of reliable and properly permitted evidence and argument in a forum (physical or virtual) that is capable of being accessed and observed and participated in by the vital participants and the public? If that process can be effectively conducted without all persons being present in one location, is there any reason in principle to insist that the process must nevertheless be hidebound by outdated notions – no longer needed in light of modern technology - that everyone must be present in one place for the court to function validly?

[55] In my respectful view, there is no reason in principle why a judge may not hold court remotely, provided the essence of a court is maintained, and that there is no relevant statutory provision that precludes this.

[56] Section 650(1) of the *Code* provides that, subject to certain exceptions, an accused “shall be present in court during the whole of his or her trial.” The purpose of “presence” is to ensure that the accused has the opportunity to have first-hand knowledge of proceedings which affect his or her vital interests, such as facing his or her accuser, hearing the case against him or her, consulting with counsel, cross-examining witnesses, participating in the trial through motions and objections, having proper observations made of the demeanour of witnesses and, in the words of subsection (3) of section 650, “to make full answer and defence” after the close of the case for the prosecution. See *R. v. Tran*, [1994] 2 S.C.R. 951; *R. v. Hertrich* (1982), 137 D.L.R. (3d) 400 (Ont. C.A.), leave to appeal to SCC refused, [1982] 2 S.C.R. x, and *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726. None of these objectives is *necessarily* compromised if the judge is not present in the courtroom where everybody else is assembled, provided the objectives can be fulfilled by other means.

[57] It is idle to assert that the protection of an accused's right to be present at his or her trial necessarily precludes virtual judicial participation, because the notion of "present in court" begs the question of what presence means.

[58] The question for consideration is whether the phrase "present in court" in s. 650 is limited to the concept of presence in a physical courtroom and, if so, whether the judge has to be physically present with the accused. (This case does not raise questions about who, other than the judge, must also be present.) It is far better to inquire as to the purposes underlying the presence requirements and assess whether those underpinnings can still exist where there is a virtual appearance by the judge.

[59] The cases cited in argument (*Hertrich*; *Tran*; *R. v. Barrow*, [1987] 2 S.C.R. 694; *R. v. Walker*, 2010 SKCA 84, 362 Sask. R. 168 and *R. v. Gates*, 2002 BCCA 128 (leave to appeal to SCC refused [2002] S.C.C.A. No. 200), simply reiterate the important purposes of presence by the accused in court. If those purposes can be satisfied by other means, if no sense of injustice could reasonably result, and if the judge can hear, manage and decide the case in a fair and effective manner, the purposes served by s. 650 will not be subverted.

[60] The fact that subsections (1.1) and (1.2) of section 650 specifically address circumstances where the *accused* may "appear" by electronic means may suggest that, by exclusion, no other circumstances are permitted to deviate from the traditional necessity of all actors, including the judge, being in the same location. Those subsections, however, address a different circumstance: they ensure that the use of electronic appearances does not frustrate or dilute the fundamental participatory objectives of a trial insofar as the *accused's* right to a fair trial is concerned. They restrict the use of electronic means to defined circumstances (in the case of subsection (1.1), where the accused may continue to "engage in simultaneous visual and oral communication" with the court and other than where the evidence of a witness is taken and, additionally, in subsection (1.2), where the accused has the opportunity to communicate privately with counsel). Those circumstances generally relate to the interaction between the accused and complainants, witnesses, lawyers and other officials, but not judges.

[61] It is to be noted, however, that the operation of subsections (1.1) and (1.2) is limited to circumstances where the evidence of witnesses is not taken. The ability to observe the demeanour of a witness while testifying appears to be regarded as important enough to restrict electronic

participation by a witness to circumstances where observation of the evidence-presentation portions of the trial is not involved unless the accused and Crown otherwise consent. This aspect of electronic participation is, of course, relevant to the participation of the judge as well, since it is he or she who may have to make findings of credibility. But, face-to-face confrontation between an accused and a witness is not an independent constitutional right: *R. v. Levogiannis* (1990), 1 O.R. (3d) 351 (C.A.) at pp. 366-367, *aff'd* [1993] 4 S.C.R. 475 and *N.S.* at paragraph 22. Furthermore, it is recognized that making credibility assessments is not based solely, or even primarily, on observations of demeanour. There are many circumstances where, depending on the nature of the witness and the type of evidence being given, credibility assessments by judges, especially those based on demeanour, play a small, or even no, role. In principle, the need for demeanour-based credibility assessments is not engaged in every criminal trial in respect of every witness, and even where it is, it cannot be said categorically that observation of a witness cannot be effectively achieved in all cases.

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

[63] There is an additional reason for reaching this conclusion. It is derived from the division of powers in the Constitution. Section 91(27) of the *Constitution Act, 1867* assigns the Parliament of Canada exclusive jurisdiction over:

The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

[64] By contrast, section 92(14) accords provincial legislatures exclusive jurisdiction over:

The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

[65] Thus, Parliament has legislative jurisdiction over “procedure in criminal matters” but not the “constitution” and “organization” of courts in the province. The creation and organization of a court is therefore within the bailiwick of the provincial legislature. It is only once the court is constituted and organized that Parliament has legislative authority to regulate the procedure to be employed within the court so constituted.

[66] The phrase “procedure in criminal matters” is not defined. *Halsbury’s Laws of Canada: Criminal Procedure* (2016 Reissue), 1st ed. (Toronto: Lexis Nexis, 2016) at para. HC2-1 describes “criminal procedure” as providing “the *framework* for administering the substantive law and ... primarily concerns itself with the procedural rules that support the implementation and enforcement of the substantive criminal law” (emphasis added). Insofar as the use of electronic means to conduct a trial is a framework for conducting the trial, it would fall within the notion of procedure and be subject to regulation by the *Criminal Code*.

[67] In *Di Iorio v. Montreal Jail*, [1978] 1 S.C.R. 152 at 209, Dickson J. observed that the phrase “criminal procedure” did not lend itself to precise definition and that although narrower definitions could be found, “in one sense, it is concerned with proceedings in the criminal courts and such matters as conduct within the courtroom, the competency of witnesses, oaths and affirmations, and the presentation of evidence.” In *Reference re Young Offenders Act (Can.)* (1988), 54 D.L.R. (4th) 430 (N.B.C.A.), Stratton C.J.N.B., in drawing a distinction between criminal procedure and jurisdiction, noted that procedure is “ancillary to jurisdiction.” He also drew a distinction between the constitution of a court (a provincial power) and the determination of the procedure to be followed in the court once constituted (a federal power): “The criminal court, once having been validly established by the province, will follow the procedure set by Parliament” (paragraph 46).

[68] This leads to the conclusion that the regulation of the manner in which witnesses and the accused participate in a trial with respect to the giving of evidence and the performance of other functions is a matter of criminal *procedure* which can be regulated by Parliament under the *Code*. It is not *jurisdiction*—conferring.

[69] This conclusion is buttressed by the notion of the “constitution, maintenance, and organization” of courts which is assigned to the provincial legislature by section 92(14) of the *Constitution Act, 1867*. The creation of a provincial court encompasses its operational and organizational functions. For example, it appears that legislation defining the territorial jurisdiction of judges is a matter for the province. In *Re County Courts of British Columbia* (1892), 21 S.C.R. 446, Strong J. stated:

... the constitution, maintenance and organization of provincial courts plainly includes the power to define the jurisdiction of such courts territorially as well as in other respects. This seems to me too plain to require demonstration.

[70] Further, in *R. v. Cook* (1914), 19 D.L.R. 318 (N.S.C.A.). Ritchie J., in refusing to grant leave to appeal to the Privy Council, appeared to be firmly of the view that the fixing of dates when the court shall sit was not a matter of criminal procedure but fell within the court-organizational authority of the province under section 92(14).

[71] It is not an unreasonable extension to say that the province has, as a matter of the constitution and organization of the courts, in determining the territorial jurisdiction (location) and sitting dates, the power to constitute a court in a manner whereby the judge could exercise his or her jurisdiction in a place remote from other participants and at a time when he or she is not in their presence, even though all other participants are in the same place.

[72] In principle, the province could create a completely virtual court that operated solely online, subject, of course, to ensuring that the minimum requirements for a fair and impartial tribunal and public observance of the process are met. The constitution and organization of a court that could operate through electronic means in appropriate circumstances is therefore a matter over which the *province* has legislative authority. On the other hand, the role of *Parliament* when dealing with appearances by electronic means would not encompass *authorizing* the use of such means, as that would be part of the constitution and organization of the court; instead it would involve the procedural *regulation* of such electronic usages pursuant to its power to regulate criminal procedure in a court that is already constituted and which does not prohibit such operation.

[73] This does not mean that *Parliament*, through the *Code*, could not require a court which may be provincially *authorized* to operate virtually, in whole or in part, to function, in relation to criminal trials and related matters,

in a non-virtual manner in some or all respects. In fact, the opposite is true. Requiring a judge to be in the presence of an accused and other participants in the process is certainly something that *Parliament* may do as a matter of regulating criminal procedure. However, unlike its regulation of appearances by accused and witnesses, it has not seen fit to regulate judicial appearances directly.

[74] It is not sufficient to say that because s. 650 contemplates presence of an accused in court without use of videolink in certain circumstances, it necessarily means that the judge has to be in the same place also. That begs the very question in issue. The rationale for accused presence (allowing visual and oral examination of witnesses giving evidence and communicating with counsel, etc.) does not preclude judicial remote appearance because, at least in some cases, visual and oral communication can be achieved by other electronic means with respect to judicial participation without compromising the essence of a fair trial.

[75] This, then, is a further reason for concluding that the provisions of the *Criminal Code*, especially sections 650(1.1) and (1.2) and others, do not constitute authorization provisions for the use of remote appearances. It follows that it is inappropriate to reason, on the basis of the maxim *expressio unius, exclusio alterius*, that because there is no reference in the *Code* to remote appearances by judges in contradistinction to appearances by other participants, such appearances are unauthorized. The *authorization* must come from provincial jurisdiction. The *Code's* role engages to regulate such matters procedurally to ensure trial fairness, in the sense of ensuring the right to make full answer and defence and proper participation of participants, especially the accused, in the trial process.

[76] In this case, Parliament has chosen not to regulate the manner in which the judge conducts the trial, from the point of view of electronic appearances by the judge. That means that the judge may do so provided he or she is not precluded by provincial legislation and provided other procedural requirements in the *Code* are complied with and the essence of a trial is maintained.

[77] The legislation constituting the Provincial Court of Newfoundland and Labrador does not define the manner of sitting, except to say that a provincial court judge has jurisdiction throughout the province and we know, of course, that such judges sometimes exercise their jurisdiction in locations far from designated courthouses. Until recently, that has meant, for

practical purposes, that all other participants had to be present in the same location as well. The legislation says nothing about conducting trials using electronic aids. It certainly does not preclude them. There is no reason, in principle, in these circumstances, to refuse to recognize the evolving nature of the delivery of justice services, provided, of course, the fundamentals of a criminal trial are always observed. If they can be accommodated using other technological means, then I see no reason why they should not be used. Such usage can be accommodated within the current legislation constituting the Provincial Court. The legislation constitutes a court and leaves it to the institution itself to determine how, in a given case, its functions should be carried out, subject, of course, to procedural regulatory restrictions imposed by *Parliament* in the context of the criminal law.

[78] It is recognized in twenty-first century Canadian society that we must do better in the delivery of justice services, to facilitate access to justice and to reduce unnecessary delay, amongst other things. This of necessity involves modifying processes and accommodating new methods of doing things to ensure that the court can function efficiently in the new environment. One only has to reflect on the modification of court processes on the civil side of the court towards summary trials instead of “full” traditional trials to realize the approach to delivery of justice services can be accommodated without compromising fundamental values. Taking advantage of modern technology is another way of achieving this.

[79] It is true of course that the full impact of a court proceeding (the so-called “majesty of the law”) may not be as fully felt if the judge is not physically present. But the importance of that will vary according to the nature of the proceeding, the type of witnesses and the perceived need to maintain order in the proceedings. To concede that it would be better *in some circumstances* to have a judge physically present is not a sufficient argument in favour of *never* allowing a remote appearance.

[80] As well, it must not be forgotten that, as was pointed out in *Gates*, there is a “human element” in justice which may be lost where certain judicial functions, such as sentencing an accused, are carried out via a video screen, through a “disembodied television image” rather than having to “look the accused in the eye”. Again the appropriateness of physical presence for some matters such as sentencing does not provide a justification for not allowing virtual presence in other circumstances. It is not a jurisdictional matter.

[81] This is not a question of whether the traditional ways may be better, only whether new ways can be adopted which still fundamentally preserve the basic values, principles and rights involved in the notion of a fair trial and hence the operation of the essence of the court process. As has been noted on other occasions, an accused is entitled to a fair trial, not a perfect one.

[82] It follows that, as a matter of principle, a Provincial Court judge is not precluded from conducting a trial from a location remote from the place where all other participants are located, provided the essence of a trial, as we understand it, can be maintained, so that the accused will be able to make full answer and defence and will be able to have knowledge of the proceedings and to participate effectively in representing his or her vital interests. The right of the public to access the court and to know about court proceedings will not necessarily be compromised either. In the current case, we are only concerned with whether a judge may appear remotely by visual electronic means in a place where all other participants are assembled. The public will still have access to that place and can observe the full proceedings, including the judge's participation, by observing the video screen and hearing what is said, along with the others present.

[83] This does not mean, of course, that a judge may, at his or her whim or for his or her own personal convenience, decide to appear remotely as a matter of course. A decision must be made judicially on a case-by-case basis on the basis of what is in the interest of the administration of justice, by considering a number of factors, including:

- (i) The presence of external factors, such as weather or other impediments, that would otherwise delay or otherwise affect the conduct of the trial, if the judge were required to travel to the court location (the default position always being that physical presence should be the preferred position);
- (ii) The nature of the trial proceeding, including whether evidence, as opposed to argument, will be involved and, considering the type of witness (expert, lay, complainant, etc.), the importance of the judge seeing and observing the witness first hand as opposed to viewing the witness on a video screen;

- (iii) Whether, given the nature of the technology involved, viewing on a screen would be an *adequate* (not necessarily a perfect) substitute for physical presence;
- (iv) The reliability of the technology involved, it being noted that perfection is not required (sometimes technology fails, just as it does now with respect to digital recording equipment). The mere fact that there is a *possibility* of technological glitches is no reason not to use generally reliable equipment;
- (v) Whether other rights of the accused, in relation to other participants, such as the right to cross-examine witnesses, the right to face one's accuser, the right to make motions and objections, the right to consult counsel and to hear the case against him or her might be inappropriately compromised if the judge were not physically present to ensure those rights were properly enforced;
- (vi) Whether the accused is represented by counsel and whether there is any additional obligation, considering the nature of the case, for the judge to take steps to ensure there is proper understanding of, and participation on the part of an unrepresented accused in, the trial process that might require the physical presence of the judge in the courtroom;
- (vii) Whether the interests of other participants in the trial process, such as protection of vulnerable witnesses, can be adequately protected if the judge is not physically present;
- (viii) Whether the open court principle would be unacceptably compromised in a given case;
- (ix) Whether, given the nature of the case and the issues at stake, the physical presence of a judge in the courtroom would be appropriate to maintain the dignity and decorum of the proceedings and to ensure that the open court principle is preserved;

- (x) Whether it is important, in particular circumstances, to provide physical judicial presence in remote or rural areas to ensure that the appearance of rural justice is not compromised.

[84] This is not an exhaustive list. The overriding criterion must always be whether, considering all the circumstances, the accused can, by virtue of the electronic technology involved, effectively participate in the trial process to protect his or her vital interests and to make full answer and defence and whether the public will still have a means of seeing and hearing what is happening in the court. Provided these matters are not materially compromised and there are other justifications for doing so, the judge may exercise his or her discretion to appear remotely for all or a part of the trial or hearing.

[85] Regardless of whether one subscribes to the broad view of how a court should be conceived (as a fair institutional *process* not tied to location), for the purposes of this case it is sufficient to regard the courthouse in Clarendville, the intended hearing venue, as the court in which the judge appeared remotely. On that analysis, sections 650(1.1) and (1.2) are not engaged because the accused and all other participants were physically present in the courthouse. And there is nothing that requires the judge in this circumstance, as one of the constituent parts of the court, to be physically present.

[86] Like my colleague, Harrington J.A., I am satisfied that the Provincial Court judge had jurisdiction to conduct the *voir dire* hearing in Clarendville remotely from his base courthouse in Grand Bank. The fact that there were certain technological problems encountered during the process does not necessarily deprive the judge of jurisdiction, although, depending on the nature of the problems and their effect on the accused's interests, a new trial may ultimately be indicated. However, this appeal was argued on the issue of the jurisdiction of the judge to appear remotely. Thus, whether the respondent might be entitled to a new hearing either because of the occurrence of technical problems with the videolink or on the basis that the judge in this case exercised his discretion inappropriately must be left for another day.

## **Dissenting Reasons by Hoegg J.A.:**

### **INTRODUCTION**

[87] I am unable to agree with my colleagues on the disposition of this appeal. My reasons for disagreement are set forth below.

[88] I begin by stating that I agree with my colleague Green C.J.N.L. that the province has constitutional jurisdiction over the establishment and constitution of courts in the province. This province has been holding courts in church basements, community halls, and the like for many years, and there is nothing in the provisions of the *Provincial Court Act, 1991, (Act)* to prevent it from doing so. Likewise, there is nothing in the *Act* that would prevent a Provincial Court from operating virtually within the geographical jurisdiction of the province. Accordingly, I agree with my colleague that in principle the province can or even does permit virtual court proceedings.

[89] I also agree with my colleague, Green C.J.N.L. that a court is not just a place. Rather, as he states, it is a place where an adjudicative process fairly determines the legal rights of parties which in a criminal prosecution is a process that allows an accused to make full answer and defence on the basis of reliable and properly admitted evidence and argument in a forum that is capable of being accessed and observed and participated in by the vital participants and the public. The place where the adjudicative process takes place is a court, within the meaning of section 650 of the *Criminal Code*, which comprises a judge, the Crown, and an accused, or as Sir Blackstone stated many years ago, the actor, the *reus* or defendant, and the *judex* or judicial power (W. Blackstone, *Commentaries on the Laws of England*, Book III (Oxford: Clarendon, 1768) at 23 and 25).

[90] Where I diverge from my colleagues is that the adjudicative forum in which the trial Judge decided Mr. Gibbs's section 9 *Charter* application was not a court capable of being accessed and observed and participated in by the vital participants and the public. It was not such a court because it did not conform to the requirements of section 650 of the *Code*, which regulates the procedure and composition of a court for the purpose of the rights of an accused person facing a criminal trial.

### **BACKGROUND**

[91] In this case the Provincial Court Judge (PCJ or the trial Judge) gave the parties advance notice that he intended to appear virtually at Mr. Gibbs'

trial which had been scheduled to take place in Clarenville, Newfoundland and Labrador. The Crown and the defence objected to him doing so, and the Crown applied for him to be present in the Clarenville court with them. The PCJ denied the Crown's application saying he had the jurisdiction to appear virtually and went on to do so, hearing evidence and then dismissing Mr. Gibbs's *Charter* application. The Crown appealed, and Mr. Gibbs supported the Crown's appeal.

[92] On appeal to the Summary Conviction Appeal Court (SCAC), the SCAC Judge held that section 4 of the *Act* specifically authorizes a PCJ to administer justice in person or virtually, and because the PCJ in Mr. Gibbs' case appeared virtually in a way that permitted the PCJ to participate in the proceedings as fully as circumstances permitted, his decision to do so was lawful trial management within the exercise of his jurisdiction and therefore his decision to dismiss Mr. Gibbs' *Charter* application stood.

[93] The SCAC Judge did not mention Mr. Gibbs' right to fully participate in his trial, nor did he advert to any right the Crown may have had respecting the matter. Neither did he discuss section 650 of the *Code*, although in fairness, it appears as though that section of the *Code* may not have been argued before him. Instead, he focused on the practicality and expediency that technological advances could bring to the justice system, and ultimately concluded that "the trial judge's decision to hear the *Charter* application by video-conferencing was within his authority to manage the trial and [that he] did not exceed the jurisdiction available to him in that behalf" (2014 NLTD(G) 140 at para. 46).

## ANALYSIS

[94] Section 4 of the *Act* provides:

4. (1) The court and every judge have jurisdiction throughout the province and every judge
  - (a) shall exercise the powers and perform the duties conferred or imposed upon a judge under an Act of the Legislature or the Parliament of Canada;
  - (b) has the power and authority vested under an Act of the Legislature in a judge, two justices of the peace sitting together or a youth court or judge of a youth court, subject to the *Young Persons Offences Act*;

(c) may exercise the powers and perform the duties conferred or imposed upon a judge or one or more justices of the peace under an Act of the Parliament of Canada; and

(d) is, by virtue of the office, a justice of the peace.

(2) A judge may preside over the court at any place in the province for the orderly dispatch of the business of the court.

[95] The Provincial Court of Newfoundland and Labrador is a statutory court. The jurisdiction of its judges is set out in section 4 of the *Act*. In my view, sections 4(1)(a) and (c) clearly confine a PCJ to applying the law of the land as prescribed in the *Code* and interpreted in the jurisprudence. If he or she does not do so, that PCJ will be exceeding his or her jurisdiction.

[96] I am of the view that the PCJ in this case exceeded the jurisdiction vested in him by the *Act* by conducting Mr. Gibbs' trial virtually – that is from a location remote from Mr. Gibbs and the Crown. His decision to do so stands in conflict with well-established Canadian law respecting matters of criminal trial process and procedure which is the domain of the federal government per section 91 of the *Constitution Act, 1867*. Accordingly, I cannot agree with the SCAC Judge's decision upholding the trial Judge's actions on the basis that he had jurisdiction to do what he did. Section 4 of the *Act* permits PCJs who are appointed to courts in certain geographical districts to sit in other districts within the province. A PCJ may have jurisdiction to appear virtually in some circumstances, but the PCJ did not have jurisdiction to conduct Mr. Gibbs' trial virtually in the circumstances of this case. While I understand that my colleagues' respective opinions do not precisely accept the SCAC Judge's reasoning, their dismissal of the Crown's appeal effectively upholds the trial Judge's actions, which, in my view, is contrary to law. I cannot accept my colleagues' effective endorsement of the PCJ's management of Mr. Gibbs' trial by dismissing the appeal.

[97] The legal principle which is in conflict with the decisions of my colleagues is that an accused person has the right to be present in court during criminal proceedings involving him or her. The principle is enshrined in section 650 of the *Code*:

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

(1.1) Where the court so orders, and where the prosecutor and the accused so agree, the accused may appear by counsel or by closed-circuit television or any other means that allow the court and the accused to engage in simultaneous visual and oral communication, for any part of the trial other than a part in which the evidence of a witness is taken.

(1.2) Where the court so orders, an accused who is confined in prison may appear by closed-circuit television or any other means that allow the court and the accused to engage in simultaneous visual and oral communication, for any part of the trial other than a part in which the evidence of a witness is taken, if the accused is given the opportunity to communicate privately with counsel, in a case in which the accused is represented by counsel.

[98] While there are recognized exceptions to this principle, none supports the proposition that an accused's right to be present in court during the taking of evidence is fulfilled by the judge adjudicating his or her case from a virtual location in the absence of his or her, and the Crown's, consent. Neither have I seen jurisprudential authority for the proposition that a trial, which includes a *Charter* application, can proceed where the accused is physically separated from the judge in circumstances where the Crown and the accused do not consent and where evidence is taken.

[99] Section 650 exists for the purpose of protecting an accused's right to be present at his or her trial. This was explained by Martin J.A. in *R. v. Hertrich* (1982), 137 D.L.R. (3d) 400 (Ont. C.A.), leave to appeal to SCC refused, [1982] 2 S.C.R. x at 426:

The essential reason the accused is entitled to be present at his trial is that he may hear the case made out against him and, having heard it, have the opportunity of answering it: *R. v. Lee Kun* (1915), 11 Cr. App. R. 293. The right of the accused to be present at his trial, however, also gives effect to another principle. Fairness and openness are fundamental values in our criminal justice system. The presence of the accused at all stages of his trial affords him the opportunity of acquiring first-hand knowledge of the proceedings leading to the eventual result of the trial. The denial of that opportunity to an accused may well leave him with a justifiable sense of injustice. Indeed, in my view, an examination of the Canadian decisions shows that the latter principle is, in fact, the implicit and overriding principle underlying those decisions. ...

[100] In *R. v. Barrow*, [1987] 2 S.C.R. 694, the Supreme Court of Canada quoted with approval Justice Martin's reasoning, saying at page 705:

In *R. v. Hertrich* (1982), 67 C.C.C. (2d) 510 (Ont. C.A.), leave to appeal refused, [1982] 2 S.C.R. x, one of the questions raised was whether a judge's examination

in chambers of two jurors concerning anonymous phone calls, with only counsel present, breached the right of the accused to be present and thus vitiated the trial. Martin J.A. delivered the judgment of the Court of Appeal and adverted to the "fundamental principle" of the criminal law that a person charged with an indictable offence is entitled, indeed required, by s. 577 to be personally present at his trial. For the purpose of this principle "trial" means the entire proceedings, including sentence. Martin J.A. continued, at p. 527:

Generally speaking, the trial of an accused does not commence until after plea: see *Giroux v. The King* (1917), 29 C.C.C. 258 at p. 268. However, "trial" for the purpose of the principle that an accused is entitled to be present at his trial clearly includes proceedings which are part of the normal trial process for determining the guilt or innocence of the accused such as arraignment and plea, the empanelling of the jury, the reception of evidence (including voir dire proceedings with respect to the admissibility of evidence), rulings on evidence, arguments of counsel, addresses of counsel to the jury, the judge's charge, including requests by the jury for further instructions, the reception of the verdict and the imposition of sentence if the accused is found guilty. [Emphasis added.]

Justice Martin went on to state at page 707 that the accused's ability to see "the entire process by which he or she is tried and is able to see that the correct procedure is followed and the trial fair" is of enormous importance to the perceived fairness of the Canadian justice system.

[101] The same court reiterated this reasoning in *R. v. Tran*, [1994] 2 S.C.R. 951 at 972 to 974.

[102] More recently Richards J.A. reiterated these principles in *R. v. Walker*, 2010 SKCA 84, 362 Sask R. 168 at para. 19:

Section 650(1) is certainly concerned with enabling an accused person to hear the case against him or her and respond to it. However, in addition, it is also very much aimed at the broader objective of ensuring accused persons perceive the trial process as being fair and just. Indeed, in his often-cited decision in *R. v. Hertrich* (1982), 67 C.C.C. (2d) 510 (Ont. C.A.) at p. 537, Martin J.A. said this latter purpose was the dominant feature of s. 650(1):

The essential reason the accused is entitled to be present at his trial is that he may hear the case made out against him and, having heard it, have the opportunity of answering it: *R. v. Lee Kun* (1915), 11 Cr. App. R. 293. The right of the accused to be present at his trial, however, also gives effect to another principle. Fairness and openness are fundamental values in our criminal justice system. The presence of the accused at all stages of his trial affords him the opportunity of acquiring first-hand knowledge of the proceedings leading to the eventual result of the trial. The denial of that opportunity to an accused may well leave him with a justifiable sense of

injustice. Indeed, in my view, an examination of the Canadian decisions shows that the latter principle is, in fact, the implicit and overriding principle underlying those decisions. ... [Emphasis added.]

[103] The denial of the opportunity for an accused to be present at his or her trial has even been held to apply to the sentencing aspect of a trial. In *R. v. Gates*, 2002 BCCA 128 leave to appeal to SCC refused, [2002] S.C.C.A. No. 200, Ryan J.A., quoting with approval from *R. v. Fecteau* (1989), 49 C.C.C. (3d) 534 (Ont. H.C.J.) said:

[21] Although the case of *R. v. Fecteau* (1989), 49 C.C.C. (3d) 534 (Ont. H.C.) was heard before s. 650(1.1) and (1.2) were enacted, the comments of Campbell J. are worth repeating. In that case the appellant pleaded guilty and was sentenced via closed-circuit television from a prison cell in the Don jail in Toronto. Of the importance of the presence in person of the accused, Campbell J. said this (at page 541):

There is another element involved here and that is the human element in the sentencing process. It is one thing for a judge to sentence to imprisonment a live human being who stands physically before the judge in open court. The judge before imposing a term of imprisonment at least has to look the accused in the eye. It may be quite another thing to sentence to imprisonment a disembodied television image that appears on a screen on the judge's dais. While the sentencing process has many faults one of its strengths is that it is at least a human process. It does not add to the human strength of the sentencing process to turn it into a disembodied electronic exercise.

[104] Section 650.01 specifically addresses circumstances in which it is acceptable for an accused to appear apart from the physical court hearing his or her case. Section 650.02 addresses circumstances in which Crown and defence counsel can appear by technological means, if satisfactory to the court, and if the court and all counsel are able to communicate simultaneously. There is no *Code* provision that addresses the specific circumstance of a judge appearing virtually, although several provisions in the *Code* permit video appearances of accuseds and witnesses in limited circumstances (487.053(2), 487.055(3.01), 515(2.2), 515(2.3), 537(k), 606(5), 714.1 – 714.4).

[105] The Judges below and my colleagues have characterized this case as concerning whether a judge can appear virtually. With respect, I see it from

a different perspective – that of Mr. Gibbs as an accused, and of the Crown – the actor – in the exercise of its duty to conduct criminal proceedings in accordance with the law.

[106] The point of sections 650, 650.01 and 650.02 is that if and when an accused person is separated from the other two constituent parts of the court, certain criteria must be met. The judge is one of the constituent parts and if an accused is physically separated from the judge, the consents of the Crown and the accused are required, and even when they do consent, no evidence can be taken. Moreover, when all of these criteria are met, the judge must still decide whether to proceed by considering all of the presenting circumstances. To say that because section 650 does not mention the judge appearing virtually the section is inapplicable to this case is a narrow and in my view artificial interpretation of section 650 which ignores its fundamental purpose and conflicts with the jurisprudence.

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

[108] It must also be stated that in this case the Judge's virtual appearance was on the Judge's own motion and for his own convenience. While I can understand the Judge's frustration at having to drive several hours for a relatively short evidentiary hearing by reason of there being no sitting judge in Clarendville, his frustration does not entitle him to carry out his judicial functions in violation of the law. Other scheduling options were available to him which would have complied with the law. As well, the records show that the virtual hearing did not proceed smoothly. Mr. Gibbs argues that technical difficulties which occurred during the hearing impacted his perception of the fairness of his hearing. The possibility of technical difficulties presenting in a hearing involving a virtual appearance is doubtless one reason why the criteria set out in section 650(1.1) must be met.

[109] The position of my colleagues reflects a desire to acknowledge and incorporate twenty-first century technology into criminal trials. In principle, I do not disagree. Neither, it appears, does Parliament. But Parliament, in

its constitutional role as regulator of criminal procedure through the provisions of the *Code* and other legislation, has set parameters around when this can occur, and the jurisprudence has interpreted the statutory provisions and explained Parliament's purposes in doing so. While the majority decision could be described as forward thinking and my analysis as stuck in time, I am of the view that Parliament and the Supreme Court of Canada have legislated and adjudicated on the issue of virtual appearances in criminal proceedings and the rights of accuseds at play in such cases, and that the decisions of the PCJ, the SCAC Judge and the majority conflict with it.

[110] Accordingly, I would allow the appeal, and order that the trial proceedings involving Mr. Gibbs are a nullity.

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L.R. Hoegg J.A.