

CANADA / JUDGMENT

R. v. Knight

2022 BCSC 749

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 749 R. v. Knight

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Knight,

2022 BCSC 749

Date: 20220505

Docket: 179326

Registry: Victoria

Regina

v.

Kyle Michael William Knight

Corrected Judgment: The front page was corrected on May 27, 2022.

Before: The Honourable Justice Lamb

Reasons for Judgment re: Admissibility of Evidence in accordance with s. 715(1) of the Criminal Code of Canada

Counsel for the Crown:

S. Bakken

Counsel for the Accused:

R. Drury

Place and Dates of Hearing:

Victoria, B.C.

April 29, 2022

Place and Date of Judgment:

Victoria, B.C.

May 5, 2022

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Introduction

- [1] This is an application by the Crown to have the evidence of the complainant from the preliminary inquiry admitted into evidence pursuant to s. 715(1) of the Criminal Code, R.S.C., 1985, c. C-46 [Code]. E.M., the complainant, is apparently not willing to return to court to continue testifying, and the Crown submits that this constitutes a refusal to give evidence for the purposes of s. 715(1).
- [2] The defence says that E.M.'s unwillingness to attend court does not meet the refusal standard. The defence says evidence should only be admitted pursuant to s. 715(1) when there is no other way to get the witness' evidence before the court, which does not apply in the case at bar. Further, if the evidence is otherwise admissible pursuant to s. 715(1), the defence says that I should exercise my discretion to exclude E.M.'s preliminary inquiry evidence to avoid an unfair trial.

- [3] The Crown acknowledges that this s. 751(1) application based on a refusal to testify is unusual if not novel, and I was not provided with any legal authorities from British Columbia in which an application was made in similar circumstances.

Background Facts

- [4] As a result of events alleged to have occurred on October 20, 2019, Kyle Knight is charged with sexually assaulting E.M. contrary to s. 271 of the Code and touching her, directly or indirectly, for a sexual purpose when she was under the age of 16 years contrary to s. 151 of the Code. He has pleaded not guilty to both charges.
- [5] On September 22, 2021, E.M. testified at the preliminary inquiry in this matter by attending in person without testimonial accommodation. Mr. Knight was not physically present in the courtroom but instead attended the preliminary inquiry by closed circuit television. E.M. testified under affirmation on a voir dire pursuant to s. 715.1(1) to have the video recording and transcript of the police statement she gave on October 23, 2019 admitted into evidence at the preliminary inquiry as part of her direct evidence. She was cross-examined on the voir dire and further cross-examined once the videotaped police statement was ruled admissible.
- [6] The trial started on Monday, April 25, 2022. E.M. attended court under subpoena on the afternoon of Tuesday, April 26, 2022, to testify on a s. 715.1(1) voir dire to have the video recording and transcript of her police statement admitted into evidence at trial. A pre-trial order pursuant to s. 486(2) of the Code allowed her to testify from behind a screen with a support person and a support dog. E.M. affirmed that she would tell the truth. She answered a few preliminary questions, including confirming that her date of birth was November 3, 2003. She testified that she was nervous, that she had thrown up twice earlier in the day, and that she had not slept well the night before.
- [7] E.M. was then shown the initial moments of the video recording of her police statement, and she confirmed that it showed her speaking to the police officer. She confirmed that she was telling the truth when she spoke to the police officer. E.M. was shown the balance of the video recording. She did not adopt the contents of the video recording before court was adjourned for the afternoon recess. When court resumed after the break, E.M. failed to return to court to continue her direct examination. The Crown reported that she was "too overwhelmed" to continue testifying that afternoon. The Crown requested and was granted an adjournment until the following morning.
- [8] Early on Wednesday, April 27, 2022, the Crown filed an application pursuant to s. 486.2(2) of the Code to allow E.M. to testify from another room using closed circuit television.
- [9] When the trial resumed on Wednesday, April 27, 2022, the Crown advised that E.M. was not willing to attend court to continue her testimony. The Crown advised that it intended to bring an application pursuant to s. 715(1) of the Code to have E.M.'s evidence from the preliminary inquiry admitted into evidence. Counsel for the accused urged the Court to

issue a warrant to compel E.M. to attend court to ensure she was properly informed regarding her obligation to testify while under subpoena, to explain the consequences of not testifying, and to specifically to warn her of the risk of contempt proceedings. The Crown strenuously opposed the issuance of a warrant, noting that s. 715(1) on its face did not require that step to be taken as a prerequisite to an application under that section. I declined to issue a warrant, and the trial was adjourned to Friday, April 29, 2022 to allow the Crown to give notice of the evidence and submissions upon which it intended to rely for this application.

[10] In support of its s. 715(1) application, the Crown tendered an affidavit made by Kim Gramlich, the Coordinator of Delta Police Victim Services and handler of Accredited Facility Dog, Puma. Ms. Gramlich had attended the trial with Puma on Tuesday, April 26, 2022 to support E.M. during her testimony. Ms. Gramlich made an affidavit documenting her observations of E.M. and various statements made by E.M. before and after testifying on Tuesday, April 26, 2022 and on the morning of Wednesday, April 27, 2022. I will address the defence's objections to the admissibility of the hearsay statements included in the affidavit later in these reasons. The Crown says the fact of E.M.'s non-attendance is further evidence of her refusal to testify.

Relevant Legislative Provision - s. 715(1) of the Code

[11] Section 715(1) of the Code allows evidence at a preliminary inquiry to be admitted at trial in certain circumstances:

715 (1) Where, at the trial of an accused, a person whose evidence was given at a previous trial on the same charge, or whose evidence was taken in the investigation of the charge against the accused or on the preliminary inquiry into the charge, refuses to be sworn or to give evidence, or if facts are proved on oath from which it can be inferred reasonably that the person

- (a) is dead,
- (b) has since become and is insane,
- (c) is so ill that he is unable to travel or testify, or
- (d) is absent from Canada,

and where it is proved that the evidence was taken in the presence of the accused, it may be admitted as evidence in the proceedings without further proof, unless the accused proves that the accused did not have full opportunity to cross-examine the witness.

[Emphasis added].

[12] As the language of this section is permissive rather than mandatory, the trial judge retains a residual discretion to exclude the evidence, even if the s. 715(1) requirements are met: *R. v. Saleh*, 2013 ONCA 742 [Saleh] at paras. 73-74; see also *R. v. Potvin* (1989), [1989] 1 S.C.R. 525, 1989 CanLII 130 (S.C.C.) [Potvin] at 550.

Issue

[13] The issues I must decide are the following:

- a) did E.M. refuse to give evidence for the purposes of s. 715(1) of the Code; and
- b) if so, should I exercise my residual discretion to exclude her preliminary inquiry evidence from the trial?

Position of the Parties

Crown position

- [14] The Crown argues that the requisites of s. 715(1) are met and there is no reason to exercise my residual discretion to exclude E.M.'s preliminary inquiry evidence.
- [15] The Crown emphasizes that a provision similar to s. 715(1) has been part of the Code for more than a century. Since 1892, the Code has included a provision to allow evidence given on a preliminary inquiry to be admitted into evidence at trial in circumstances where the witness is dead, so ill as not to be able to travel or is absent from Canada. The section, then as now, required that the accused had full opportunity to cross-examine the witness. In 1913, the phrase "or if such person refuses to be sworn or to give evidence" was added.
- [16] The Crown says that the evidence proves on a balance of probabilities E.M.'s refusal to give evidence. The Crown says that once the requisites of s. 715 have been met, the Court's discretion to exclude the evidence should only be exercised when the evidence was obtained unfairly or where the probative value of the evidence is outweighed by the prejudicial effect, neither of which applies in this case.
- [17] The Crown relies on *Potvin*, in which the Supreme Court of Canada found that s. 643(1) (now s. 715) of the Criminal Code does not violate s. 7 or 11(d) of the Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), c. 11 [Charter]. In *Potvin*, the accused and two others were accused of murder. One of Mr. Potvin's co-accuseds testified at the preliminary inquiry but refused to testify at trial. The trial judge admitted the transcript of the co-accused's evidence from the preliminary inquiry at Mr. Potvin's trial pursuant to then s. 643(1). After the initial appeal was dismissed, the Supreme Court of Canada granted Mr. Potvin's appeal and ordered a new trial on the basis that the trial judge failed to recognize his residual discretion to exclude the evidence and some errors in the jury charge related to the co-accused's evidence.
- [18] In the case at bar, the Crown relies on Justice Devlin's summary of *Potvin* at paras. 15 to 17 of *R. v. Oler*, 2019 BCSC 586 [Oler]:
- [15] In *R. v. Potvin*, [1989] 1 S.C.R. 525, 47 C.C.C. (3d) 289 [Potvin], the Supreme Court of Canada discussed this section, which at the time was s. 643(1) of the Code. In finding that this section granted trial judges discretion not to allow previous testimony to be admitted in circumstances where it would be unfair to the accused, such circumstances would be

relatively rare (at 547). Further, discretion is not a "blanket authority to undermine the object of [now s. 715(1)] by excluding evidence of previous testimony as a matter of course" (at 548). Further, the Court held that the admission of the previously obtained evidence did not deprive an accused his right to a fair trial as long as it is established that the accused had a full opportunity to cross-examine, regardless of whether he chose to exercise that opportunity.

[16] In *Potvin*, the Court identified two main types of mischief which may engage a Court's discretion not to allow the evidence in at trial even if the requirements of the section had been met. Firstly, discretion can cure situations where there has been unfairness in the manner in which the evidence was obtained (at 551). An example of this is where a witness was temporarily absent from Canada but the Crown could have obtained the attendance of the witness with a minimal degree of effort. Secondly, discretion may be designed for situations where the admission of the evidence would impact on the fairness of the trial itself, such as when the probative value of the evidence is outweighed by its prejudicial effect (at 552). Under this second scenario, the manner in which the evidence as obtained may be irrelevant.

[17] Governing the decision to exercise discretion under s. 715(1) is the need to balance "two competing and frequently conflicting concerns" of fair treatment of the accused and society's interest in the admission of probative evidence in order to get at the truth of the matter." (at 553, 554).

[Emphasis added.]

[19] Oler was a retrial. A witness who had testified on a voir dire at the first trial into the admissibility of certain records declined to testify at the second trial. The witness resided in the United States. He advised one of the investigating police officers that he would not comply with a subpoena and that he would rely on his Fifth Amendment rights not to answer if compelled to testify by video from the United States.

[20] Citing para. 26 of *R. v. Ellard*, 2004 BCSC 777, Justice Devlin at para. 19 of *Oler* noted that the standard of proof on a s. 715 application is the balance of probabilities and that the Crown could rely upon secondary evidence and hearsay to establish that the witness was absent from Canada.

[21] The Crown adopts the analysis deployed by Justice Devlin in *Oler*, modified to respond to the circumstances of this case:

(i) Is the evidence that of a person whose evidence was given at a previous trial on the same charge?

(ii) Is there evidence from which it can be reasonably inferred that the witness refuses to give evidence?

(iii) Was the evidence taken in the presence of the accused?

- [22] Affirmative responses to (i) and (iii) of this analysis are non-controversial in the case at bar.
- [23] The Crown argues that the affidavit of Ms. Gramlich, and E.M.'s failure to attend court as required on the morning of April 27, 2022, establish her refusal to give evidence. The Crown relies on *R. v. Druken* (1995), 1995 CanLII 10542, 135 Nfld & P.E.I.R. 338 (N.L.S.C.) [Druken] for the propositions that a refusal can be constructive and the court is not required to assess the legitimacy of the reasons given for the witness' actions. In *Druken*, the complainant's preliminary inquiry evidence was admitted.
- [24] With respect to the exercise of my discretion, the Crown argues that the two types of unfairness identified in *Potvin* do not arise in this case. First, the evidence was not secured in a manner that was unfair to the accused: There was no indication at or before the preliminary inquiry that E.M. might not testify at trial and that the Crown would then apply to have her evidence from the preliminary inquiry admitted at trial pursuant to s. 715(1). Second, it cannot be said that the prejudicial effect of the evidence outweighs its probative value: E.M.'s evidence is highly probative as it directly addresses the circumstances giving rise to the charges against the accused.
- [25] In terms of other factors that affect the exercise of my discretion, the Crown notes that the evidence already tendered and anticipated corroborates E.M.'s evidence in some measure. Further, according to the Crown, E.M. was cross-examined at length at the preliminary inquiry. Finally, I had an opportunity to observe E.M. testifying under affirmation when she gave evidence on the trial voir dire, though the Crown concedes this opportunity was quite limited and did not include cross-examination.
- [26] In *Druken*, the court did not exclude the complainant's preliminary inquiry evidence even though the trial judge would be deprived of the opportunity to assess credibility based on the witness' demeanour. In *Druken* at para. 36, the court identified two principal concerns with s. 715: First, since the guilt or innocence of the accused in that case depended on whether the trier of fact believed the evidence given at the preliminary inquiry, the result was a "paper trial" without viva voce evidence (para. 35). Second, there was a risk that s. 715 could be used improperly to relieve witnesses from testifying in "stressful or embarrassing cases" (para. 36). The court in *Druken* was satisfied in the circumstances of that case that those concerns did not justify exclusion of the evidence. With respect to the first concern, the court emphasized that s. 715 did not distinguish between types of witnesses or the significance of the evidence sought to be admitted. In other words, "the fact that the evidence sought to be admitted is substantially the whole of the case for the Crown should not in itself be ground for exercising the discretion of exclusion" (*Druken* at para. 38; see also *Potvin* at 553). With respect to the second concern, the court was satisfied that the procedure was not being used improperly to "convict the accused on paper evidence" (para. 39), nor was the witness' refusal the result of an ulterior motive; rather, the witness was genuinely fearful and her refusal to testify was sincere.

- [27] The Crown also brought *R. v. Dalley*, 2018 NLSC 124 [Dalley] to my attention. I will review it in detail below, as it was relied upon by the defence.

Defence position

- [28] The defence says that, at this stage, E.M. has not refused to testify. This is not a case where the witness is beyond the reach of the court: A material witness warrant could be issued but the Crown opposed that step.
- [29] The defence distinguishes *Druken* by noting that the complainant in that case maintained her refusal to testify while in the witness stand after a review of her obligation to testify and the risk of contempt proceedings. This led the court to accept she was refusing to testify and to admit her preliminary inquiry testimony at trial. The defence says that a s. 715(1) refusal to testify must include more than a witness opting out and deciding not to attend court.
- [30] The defence relies heavily on the analysis in *Dalley*. In that case, the accused was charged with sexual assault. Over the two days scheduled for the trial, the Crown completed its direct examination and the defence started its cross-examination of the 19-year-old complainant, who testified via closed-circuit television pursuant to a s. 486.2(2) order. Near the end of the second day, while still under cross-examination, the complainant became upset. It was evident that the trial would not complete during the scheduled two days, and the complainant expressed her reluctance to return because she wanted to move on with her life. When the trial resumed five weeks later, the Crown advised the court that the complainant did not want any more to do with the trial, and the Crown was not seeking an order to compel her to attend. The court received submissions on what should happen as a result of the complainant's failure to attend for continuation of the trial, with the defence arguing for a judicial stay or exclusion of the complainant's evidence and the Crown asking the court to deem cross-examination to have been completed. Before a decision was rendered, the Crown brought an application to have the complainant's preliminary inquiry evidence admitted at trial pursuant to s. 715(1) of the Code.
- [31] In considering what to do about the interrupted cross-examination, Justice Murphy in *Dalley* referred to the analysis undertaken by Cromwell J.A. (as he then was) in *R. v. Hart*, 1999 NSCA 45 (leave to appeal ref'd: [2000] S.C.C.A. No. 109) [Hart], a case involving a child witness who was unresponsive on cross-examination. In *Hart*, Cromwell J.A. set out three factors that a trial judge should consider when determining whether the witness' unresponsiveness has limited the accused's right to make full answer and defence or rendered the trial unfair: (1) the reason for the witness' unresponsiveness, (2) the impact of the unresponsiveness, and (3) the possibilities of ameliorative action to remedy or mitigate the limitation on cross-examination.
- [32] Considering the first of these factors, in *Dalley*, Murphy J. noted that it would be an error to reach any conclusion about why the complainant had become upset in a case where she testified about an incident of sexual assault where the defence advanced the position that

the incident did not occur: To conclude her upset was attributable to the sexual assault would presuppose the verdict. Similarly, the defence in the case at bar says it would be an error to draw any conclusions about why E.M. has failed to return: It may be that she is uncomfortable with the prospect of telling untruths, for example. When reviewing whether the complainant's unresponsiveness could have been avoided by reasonable action, Murphy J. noted that the Crown could have pursued other steps to require the complainant to complete her cross-examination.

- [33] It was in the context of reviewing the third factor - potential ameliorative action - that Murphy J. in *Dalley* considered the Crown's s. 715(1) application and addressed the same issues I must decide in the case at bar. In assessing whether there was a refusal, Murphy J. relied on Potvin to say that s. 715(1) ought to be interpreted narrowly as opposed to broadly (para. 47). Murphy J. suggested that Potvin's "finding of constitutionality was at least in part based on the fact that there were limited circumstances in which the procedure could be used" (para. 46). Murphy J. also said that the circumstances covered by subsections (a) through (d), all specific examples of exceptional circumstances where there would be no other way to get the evidence before the court, assist in the interpretation of "refuses to be sworn or to give evidence". Murphy J. found that the phrase "refuses to be sworn or to give evidence" should be interpreted so that it is restricted to situations where "there would be no way to get the evidence before the court without the benefit of section 715(1)": *Dalley*, para. 50.
- [34] In *Dalley*, Murphy J. ultimately concluded that the complainant was not beyond the reach of the court and it could not be said that there was no way to get her evidence before the Court without resort to s. 715(1). As a result, the Court found that the factual circumstances did not equate to the complainant's refusing to give evidence; thus, s. 715(1) did not apply.
- [35] The defence in the case at bar argues that I should follow this analysis and conclude that E.M.'s voluntarily opting out from the trial process does not amount to a refusal to testify. The defence says that resort to s. 715(1) without first compelling E.M. to attend court and to risk contempt charges by refusing to testify would be a subversion of the Court's power to control its own process and contempt power.
- [36] The defence says that even if I find a refusal, then Potvin confirms that I have a residual discretion to exclude the evidence. They submit that I ought to do so in this case, again relying on *Dalley*.
- [37] In *Dalley*, Murphy J. noted that even if he had found the requirements of s. 715(1) were satisfied, he would have exercised his discretion to exclude the evidence because allowing the admission of the preliminary inquiry evidence would have violated the accused's right to make full answer and defence and his right to a fair trial. Murphy J. noted that credibility was critical in that case because the accused's position was that the incident alleged by the complainant had not occurred. He concluded that the assessment of the complainant's credibility would be extremely difficult without the opportunity to observe her demeanour

under full cross-examination; the absence of the opportunity to observe the complainant's full cross-examination outweighed the importance of obtaining the probative evidence from the preliminary inquiry. Thus, he would have exercised his discretion not to admit the evidence pursuant to s. 715(1).

- [38] The defence argues that admitting the preliminary inquiry evidence in this case would significantly affect trial fairness. Although there was a full opportunity to cross-examine at the preliminary inquiry, the defence says this cross-examination was used to gather information rather than to challenge E.M.'s credibility. There will be prejudice to the accused, as the accused will lose the opportunity to demonstrate through cross-examination before the trier of fact that E.M. is untruthful and unreliable. In this case, there will be additional prejudice in that the court will be asked to assess E.M.'s credibility in circumstances where the video recording of her police interview was admitted pursuant to s. 715.1 as part of her direct evidence at the preliminary inquiry, but there is only audio recording and a transcript of the limited cross-examination that occurred.
- [39] The defence says that this case rests on credibility, as the issues are expected to be consent and mistaken belief in communicated consent. Although not mentioned in submissions, given the charges, I assume that the defence will also be asserting mistaken belief in age. The defence says that none of the corroborative evidence addresses these key issues. As the accused is expected to testify, his evidence and the evidence of other defence witnesses will be challenged through the rigours of cross-examination in the courtroom. It would be unfair, says the defence, if the complainant's credibility is assessed without being tested in a similar manner.
- [40] The defence says the prejudice is compounded in this case because it might have been avoided if a warrant had been issued to compel E.M.'s attendance or if she was given the opportunity to testify from another room using closed circuit television.

Crown reply

- [41] With respect to Dalley, the Crown says respectfully that s. 715(1) does not include the necessity component read in by the trial judge; in other words, there is no requirement in s. 715(1) that there be no other way to have the evidence available. In particular, the Crown says there is no requirement that a witness be found in contempt in order to qualify as a refusal to testify, pointing to Druken as an example where evidence was admitted without contempt proceedings against the complainant.
- [42] The Crown emphasizes that s. 715(1) uses the conjunction "or" to separate the refusal to testify from the prescribed grounds in subsections (a) through (d), which suggests reading the phrase in context is less important.
- [43] Although Murphy J. in Dalley suggested that s. 715(1) be read narrowly, the Crown argues he did not consider Wilson J.'s recognition in Potvin that the failure to testify may be voluntary.

[44] The Crown seeks to distinguish Dalley further on the basis that the Crown relied on counsel's submission that the complainant was not willing to testify, whereas the Crown in this case has tendered an affidavit from the support worker, in effect better evidence on which to establish a refusal. The Crown also notes that s. 715(1) refers to the need to have facts from which it can be reasonably inferred that subsections (a) through (d) are proved, but there is no such requirement with respect to the refusal to give evidence, implying a lower threshold for its application.

Analysis

[45] I will consider whether E.M. "refused" to testify for purposes of s. 715(1) of the Code. However, in my view, whether to admit her preliminary inquiry evidence really comes down to an issue of trial fairness. In the circumstances of this case, I am inclined to exercise my discretion to exclude the evidence even if the requirements of s. 715(1) are otherwise met.

Admissibility of Ms. Gramlich's affidavit

[46] As noted above, in support of the application, the Crown tendered Ms. Gramlich's affidavit, which included her observations of E.M. and comments made by E.M. The defence did not formally object to the admissibility of the affidavit but took the position that E.M.'s hearsay statements could not be relied upon nor given any weight. By hearsay, I understood that the defence was referring to any statement made by E.M. that was quoted in the affidavit.

[47] Ms. Gramlich's affidavit includes various statements made by E.M. For example, according to Ms. Gramlich, during the Tuesday afternoon break, E.M. said, "I don't think I can do this" and recounted how her "vision went black" twice while in court. According to the affidavit, E.M. said the following on Wednesday morning:

- (a) "I don't think I can do it";
- (b) her mental health had declined since the preliminary inquiry;
- (c) she did not think she would be more comfortable testifying by closed circuit television;
- (d) "I don't think I can", and when asked to clarify, "I think that's just the way I talk, I know I can't do it";
- (e) she would feel traumatized if made to testify; and
- (f) when asked if she was refusing to testify, E.M. confirmed that she was.

[48] Ms. Gramlich recounted that on Wednesday morning, Ms. Bakken told E.M. that she had the ability to seek a warrant to compel E.M. to testify, but that she did not intend to do so.

[49] Although the defence submitted that the statements made by E.M. in Ms. Gramlich's affidavit were hearsay, I am not convinced that is the case. The statements attributed to E.M. are not relied upon for their truth, but rather to demonstrate her state of mind and her intention not to testify. E.M.'s statements are admissible for that limited purpose.

Did E.M. refuse to testify?

[50] Most of the cases to which I was referred do not focus on the nature of the witness' refusal, nor what constitutes a refusal for the purposes of s. 715(1).

[51] The defence argued that the reasoning in Dalley should be applied in the case at bar, noting that the Crown in Dalley - and in the case at bar - declined to seek a warrant to compel the complainant to attend court to complete her testimony. In finding that there was no refusal in such circumstances, Murphy J. relied on comments in Potvin and Druken to conclude that s. 715(1) should be interpreted strictly and narrowly, and confined to situations where there is no other way to bring the evidence before the court (see Dalley, paras. 45-50, 54).

[52] As part of his reasoning, Murphy J. referenced the Ontario Court of Appeal's interpretation of the phrase "refuses to be sworn or give evidence" in R. v. Hawkins (1995), [1995] O.J. No. 523, 1995 CanLII 1859 (O.N.C.A.). However, the Supreme Court of Canada rejected the Ontario Court of Appeal's finding that the witness' marriage to the accused represented a refusal to testify: R. v. Hawkins (1996), [1996] 3 S.C.R. 1043, 1996 CanLII 154 (S.C.C.) at paras. 54, 147.

[53] On balance, I am not convinced that it is appropriate to read in a necessity component when interpreting the phrase "refuses to be sworn or to give evidence" in s. 715(1). In my view, whether it is necessary to admit the unavailable witness' preliminary inquiry evidence is an issue of trial fairness to be considered as part of my exercise of discretion. In support of this view, I note that courts have found a refusal to testify for the purposes of s. 715(1) in circumstances that fall short of the standard set in Dalley:

- a) where a witness failed to attend trial while under subpoena: R. v. Atkinson et al, 2018 MBCA 136 at para. 41;
- b) where a witness evaded service of a subpoena: R. v. Brown (1997), [1997] O.J. No. 380, 33 W.C.B. (2d) 448 (O.N.C.A.); and
- c) where a witness could not be located after being served with a subpoena: R. v. Williams and Khamis, 2015 ONSC 6884.

[54] In this case, E.M. stated her intention to refuse to testify and acted upon it by failing to attend court while under subpoena. I recognize that her refusal was made in the context of advice that the Crown would not seek a warrant to compel her to attend. I am nevertheless satisfied that E.M. has refused to testify, and the conditions for admissibility of her preliminary inquiry evidence set out in s. 715(1) are satisfied, subject to my residual discretion.

Should I exercise my discretion to exclude E.M.'s evidence from the preliminary inquiry?

[55] For the reasons that follow, I have decided to exercise my discretion to exclude the complainant's preliminary inquiry evidence on the basis that it may lead to an unfair trial if it was admitted.

[56] As noted, the Supreme Court of Canada in *Potvin* specifically recognized that the trial judge retains a residual discretion to exclude a witness' preliminary inquiry testimony in circumstances where the conditions for admission pursuant to then s. 643(1) (now 715(1)) were otherwise satisfied. After concluding that s. 643(1) did not violate the accused's Charter rights, Justice Wilson proceeded to provide guidance on the nature and purpose of the discretion conferred by s. 643(1), identifying two main types of mischief at which the discretion might be aimed: (1) unfairness in the manner in which the evidence was obtained, and (2) the effect of admitting the evidence on the fairness of the trial itself.

[57] There is no suggestion in the case at bar that the way in which the evidence was obtained was unfair to the accused.

[58] As for the effect on the fairness of the trial itself, Justice Wilson in *Potvin* noted the concern flowed from the principle of the law of evidence that "evidence may be excluded if it is highly prejudicial to the accused and of only modest probative value", though she specifically stated that "s. 643(1) of the Code should be construed as conferring a discretion on the trial judge broader than [that] traditional evidentiary principle": *Potvin* at 552 (emphasis added).

[59] Justice Wilson provided further guidance on how the trial judge's discretion ought to be exercised (at 553):

the discretion should only be exercised after weighing what I have referred to as the "two competing and frequently conflicting concerns" of fair treatment of the accused and society's interest in the admission of probative evidence in order to get at the truth of the matter in issue: see *Clarkson v. The Queen*, [1986] 1 S.C.R. 383, at pp. 392-93.

[60] Justice Wilson went on to say (at 553):

The protection of the accused from unfairness rather than the admission of probative evidence "without too much regard for the fairness of the adjudicative process" (see *Clarkson*, at p. 393) should be the focus of the trial judge's concern.

[61] Returning to the necessity component that Murphy J. read in to the interpretation of "refusal", the Ontario Court of Appeal has recognized that the principled approach to the admissibility of hearsay, which considers necessity and reliability, may have some role in interpreting and applying s. 715(1): *R. v. Li*, 2012 ONCA 291 [Li] at para. 50; *Saleh* at para. 76. The necessity of admitting a witness' prior evidence may be more relevant than necessity on an application under s. 715(1) - in particular, the court's discretionary consideration of whether sufficient efforts were made to procure the witness for testimony may overlap with

the necessity analysis of the principled approach: Li, at paras. 56 and 60. However, the Ontario Court of Appeal declined to decide whether it was necessary to show that s. 715(1) was the only means of putting the evidence before the court: Li, para. 53.

- [62] In *R. v. Christurajah*, 2017 BCSC 991, the defence relied on Li to argue that the Crown needed to prove necessity on a balance of probabilities in order to rely on s. 715(1)(d) in a case where witnesses in Thailand had testified on the initial trial but there was no evidence that they would not do so on the re-trial. After reviewing Li, Justice Wedge said the following:
- [46] What I take from the Li decision is the following: Even if a witness is absent from Canada, the Crown must make its best efforts to get the live evidence of the witness before the jury, such that the jury can see and hear the witness's evidence in chief and cross. If there is no attempt to get the best evidence before the jury, then the Crown may not have made out necessity.
- [63] As the defence emphasized in submissions in this case, not all available procedures have been pursued to compel E.M. to testify. There is no evidence that anyone explained to E.M. her obligation to testify or the risk of a contempt finding, nor that she received independent legal advice about either of these issues before or after she refused to testify. As noted, E.M. was specifically told that the Crown would not seek a warrant to require her to attend court to continue testifying. The Crown has failed to establish at this stage that it has made its best efforts to get E.M. before the court.
- [64] The loss of the opportunity to assess credibility through live examination and cross-examination is a factor that affects trial fairness. In *Potvin*, after acknowledging that deciding whether or not to exercise the statutory discretion would not have been easy in that case, Wilson J. noted that a factor against admission included the fact that a critical credibility assessment would have to be done without the jury's having an opportunity to observe witness' demeanour (*Potvin*, at 554). At para. 77 of *Saleh*, the Ontario Court of Appeal confirmed that the "crucial nature of the credibility of the witness whose evidence is tendered for admission" is among the relevant factors a trial judge might consider in deciding whether to exclude preliminary inquiry evidence that would otherwise be admissible under s. 715(1).
- [65] In this case, while there is some corroborative evidence relating to the circumstances of the offence, it is anticipated that an assessment of the credibility of both the complainant and the accused will be critical to the outcome at trial. Although the defence had an opportunity to cross-examine E.M. at the preliminary inquiry, I accept the defence submission that the cross-examination did not seek to undermine E.M.'s credibility.

- [66] In considering whether to exercise my residual discretion to exclude the evidence, I am mindful of the comments of Justice Wilson in Potvin, which confirmed that the purpose of former s. 643 was to ensure "that evidence, even important and highly probative evidence, is not lost because of the unavailability of a witness at trial": Potvin, at 553.
- [67] Returning to the basic framework of weighing "fair treatment of the accused and society's interest in the admission of probative evidence in order to get at the truth of the matter in issue" (Potvin, at 553), for the reasons set out above, I am satisfied that the risk of an unfair trial in the circumstances of this case outweighs society's interest in the admission of probative evidence. I am exercising my discretion to exclude E.M.'s preliminary inquiry evidence.

Conclusion

[68] Returning to the two issues I have identified, I find as follows:

- a) E.M. refused to give evidence for the purposes of s. 715(1) of the Code; and
- b) I am exercising my residual discretion to exclude her preliminary inquiry evidence from the trial.

"Lamb J."

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