

1-1-2018

Back to the Future: Reviving the Use of Video Link Evidence in Canadian Criminal Courts

Helena Gluzman

Follow this and additional works at: <https://digitalcommons.schulichlaw.dal.ca/cjlt>

Recommended Citation

Helena Gluzman, "Back to the Future: Reviving the Use of Video Link Evidence in Canadian Criminal Courts" (2018) 16: 1 CJLT

This Article is brought to you for free and open access by the Journals at Schulich Law Scholars. It has been accepted for inclusion in Canadian Journal of Law and Technology by an authorized editor of Schulich Law Scholars. For more information, please contact hannah.steeves@dal.ca.

Back to the Future: Reviving the Use of Video Link Evidence in Canadian Criminal Courts

Helena Gluzman*

Abstract

*Section 714.1 of the Criminal Code of Canada allows for witnesses and victims to testify remotely via video link, within Canada. The legal test embedded within this provision — “appropriate in all the circumstances” — has led to inconsistent application across the country. Some jurists have embraced the flexibility provided by the video link process. Others have expressed reluctance, articulating the position that in-court testimony is to be preferred and permitting the use of video link evidence only in exceptional circumstances. *R. v. S.D.L.* is the first treatment of s. 714.1 by an appellate court. The Nova Scotia Court of Appeal has provided a set of clear guiding principles for trial judges. The court recognized that applications for testimony via video link “should be permitted” so long as they do not negatively impact upon trial fairness or the open court principle. More specifically, where reliability (rather than credibility) is the central issue with respect to evaluating a witness’ evidence, video link applications should routinely be granted. The use of technology in the courtroom can thus contribute to the truth seeking function of the trial process and provide support for vulnerable victims and witnesses who may otherwise face greater personal costs through the process of testimony.*

INTRODUCTION

Technology is developing rapidly and impacting every aspect of our social fabric. The criminal justice system should be no exception, particularly in the use of technology to allow for remote testimony. As Justice Duncan wrote in *R. v. Allen* over 10 years ago,

[W]here Parliament has authorized the use of new technology to address a problem, courts should not hesitate to embrace it, where appropriate. There should be no bias in favour of doing things the traditional way. . .¹

Rules of evidence “are not cast in stone.”² Section 714.1 of the *Criminal Code* of Canada seeks to enable witnesses within and outside of Canada to testify by

* Assistant Crown Attorney — Peel Crown Attorney’s Office. The views expressed are personal and not necessarily the views of the Attorney General of Ontario. The author would like to thank Jacob Sone for his helpful review of an earlier draft of this paper.

¹ *R. v. Allen*, 2007 ONCJ 209, 2007 CarswellOnt 3044 (C.J.) at para. 15 [*Allen*].

² *R. v. Levogiannis*, 1993 CarswellOnt 131, 1993 CarswellOnt 996, [1993] 4 S.C.R. 475, at para. 22 [*Levogiannis*]. While the focus of this decision was the constitutionality of permitting a child witness to testify behind a screen, many of the concerns raised in that

video link.³ For a witness testifying *within* Canada, the party calling that evidence has a burden to satisfy the court that the video link evidence is “appropriate in all the circumstances”. In the appropriate circumstances, the use of remote video link evidence presents a “genuine attempt to bring the relevant and probative evidence before the trier of fact in order to foster the search for truth.”⁴ However, the wording of this provision leaves much room for the exercise of judicial discretion. While some jurists embrace the flexibility provided by the use of technology to allow for remote witness testimony,⁵ others have expressed reluctance. Part of the reason for this inconsistency lies in the lack of a uniform approach to interpreting the discretionary standard laid out in s. 714.1 of “appropriate in all the circumstances.”

The Nova Scotia Court of Appeal in the recent case of *R. v. S.D.L.*⁶ has recognized the lacuna that existed in the legal interpretation surrounding the use of video link evidence. In what appears to be the first treatment of s. 714.1 by an appellate court in Canada, *R. v. S.D.L.* has provided guidance to trial judges which, if followed across the country, will provide clarity as to the use of video link technology to facilitate the testimony of vulnerable victims and witnesses.

Overview of s. 714.1 and the State of the Law Prior to *R. v. S.D.L.*

Section 714.1 provides that the court “may” receive the evidence of a witness located in Canada by video link where the trial judge is satisfied that doing so would be “*appropriate in all the circumstances*”, including:

- (a) the location and personal circumstances of the witness;
- (b) the costs that would be incurred if the witness had to be physically present;
- and
- (c) the nature of the witness’s anticipated evidence.

These factors must be considered in hearing an application under s. 714.1, but others might be relevant. The statutory language makes it clear that an order under this section is discretionary.

case (the right to face one’s accuser and impact upon cross-examination) are equally applicable to the context of remote video link testimony.

³ *Criminal Code*, R.S.C. 1985, c. C-46, s. 714.1.

⁴ *Levogiannis*, *supra* note 2 at para. 22.

⁵ See, for instance, *R. v. D.R.D.*, [2007] O.J. No. 1806 at paras. 9 — 10 (Ont. C.J./Youth J.C.):

These types of innovations are being used in medicine, where quite literally people are attending at clinics and receiving treatment at the hands of a general physician or even a nurse practitioner, based on the directions of some more experienced person in a large city centre.

It is clear to me that the times have changed and that it is not reasonable to insist that all persons giving evidence must be physically present in the courtroom.

⁶ 2017 NSCA 58, 2017 CarswellNS 453 (C.A.) [*S.D.L.*].

The personal circumstances of the witness include not only location and health, but age and employment, and the degree that travel might interfere with the witness's personal life. As Justice Topolniski wrote in *R. v. Ragan*,⁷ s. 714.1 may be properly invoked on the basis of "pressing personal" concerns:

As evidenced by the cases which have considered s. 714.1, this provision generally is applied when the witness lives at a distance from the locale of the trial and a cost-benefit analysis favours allowing their virtual presence. *In some cases, the section is used when the witness is subject to infirmity, risk to health or pressing personal or business concerns which preclude or raise a significant barrier to their testifying in person.* In my view, that is the intention of the provision.

While recognizing that witnesses volunteer their time to fulfill the critical role of providing testimony and forwarding the truth-seeking function of the courts, Justice Topolniski wrote that "[a]n appearance in court remains the preferred method for receiving testimony."⁸ A witness must have "a good reason" to overcome the preferred method of in-court testimony, which "can be constituted by *significant* inconvenience to a witness to appear."⁹

The "good reason" at hand in *R. v. Ragan* arose because the witness, Mr. Bissett, had been shot in the back of the head, while armed and wearing a bullet proof vest. His assailant was not identified and he continued to live in fear, suspecting that his shooting was somehow linked to Mr. Ragan. His testimony revolved around the fact that he alleged he had been hired by Mr. Ragan to carry out a hit. He suffered a significant brain injury as well as anxiety, which became amplified as the time drew closer to travel back to the vicinity of the shooting for the purpose of testimony at trial. Mr. Bissett's doctor provided an opinion on the video link application that "'minimizing contact with the perpetrators of his injury' would be in the best interests of Mr. Bissett's mental health."¹⁰ Mr. Bissett's evidence was characterized as "central"¹¹ to the case.

Mr. Bissett's credibility was to be assessed by a jury. Justice Topolniski was in "no way satisfied"¹² that Mr. Bissett's health presented a "significant barrier" to his ability to be present in court, in light of that credibility assessment. In dismissing the application for remote testimony, Justice Topolniski did come to the following conclusion:

. . . I am satisfied that the *technology would be adequate to permit a free-flowing cross-examination* and that the *right to face one's accuser can be met* by virtual presence. . .¹³

⁷ 2008 ABQB 658, 2008 CarswellAlta 2307 (Alta. Q.B.) at para. 32 (emphasis added) [*Ragan*].

⁸ *Ragan*, *ibid*, at para. 39.

⁹ *Ibid* (emphasis added).

¹⁰ *Ibid*, at para. 6.

¹¹ *Ibid*.

¹² *Ibid*, at para. 61.

¹³ *Ibid* (emphasis added).

Other jurists have also pointed out that video link evidence cannot capture demeanour as fulsomely as being in the direct, continuous and immediate presence of a witness. And while demeanour evidence on its own is not a reliable way to determine credibility, nonverbal responses of a witness still have a part to play in an overall assessment of credibility. While noting that the right to confront one's accuser is not absolute, Justice Ricchetti wrote in *R. v. Dessouza*:

There can be no doubt it is best when the evidence is given in court [because. . .] the ability of the trier of fact to observe the witness [is. . .] best achieved with live testimony by a witness.¹⁴

Mr. Dessouza's case had been before the courts for 16 years. The complainant alleged that she had been sexually assaulted at knife point. She had been diligent in attending the scheduled preliminary hearing dates in 1997, 2003 and 2009, as well as subsequent trial dates. She became increasingly reluctant to attend court and by the time the matter was to be heard by Justice Ricchetti, she refused to attend in person even in the face of a possible arrest warrant. Mr. Dessouza's actions (leaving the country and failing to attend) had caused nine years of the lengthy delay.

While ultimately granting the Crown's application for video link testimony, Justice Ricchetti wrote that such decisions should be confined to the "rarest of cases."¹⁵ His Honour deemed the circumstances before him to be "rare and exceptional".¹⁶ In allowing the primary witness in a sexual assault trial to testify remotely, His Honour concluded that there was "very little negative"¹⁷ impact upon defence counsel's ability to cross-examine the complainant and attempt to undermine her credibility before the jury, in part because she had been cross-examined previously at a preliminary inquiry. He also made the following observation:

[W]hile a cross examination over a video link may not be as compelling to a jury, neither will the examination in chief of the Crown's primary witness.¹⁸

By contrast, Justice Duncan found in the oft-cited decision of *R. v. Allen*,¹⁹ that in some respects evidence received via video link is *superior* to evidence

¹⁴ 2012 ONSC 145, 2012 CarswellOnt 982 (S.C.J.) at para. 24 [*Dessouza*]. Justice Richettie also expressed concern regarding the glitches that may be associated with reliance on technology and the practical realities of translating the trial process onto the screen, such as the use of exhibits.

¹⁵ *Dessouza, ibid.*, at para. 26.

¹⁶ *Ibid.*, at para. 28.

¹⁷ *Dessouza, ibid.*, at para. 36.

¹⁸ *Ibid.*

¹⁹ *Allen, supra* note 1, at para. 26. *Allen* was decided specifically in the context of permitting a witness or victim to testify remotely due to safety concerns, under a distinct provision of the *Criminal Code*. However, His Honour's commentary regarding the nuances of video

received in open court. Video link evidence equips the trier of fact with unique tools to assess a witness's demeanour as it permits the audience to see a full face-on video of the witness, as opposed to the profile view often seen by a judge or jury in open court. Because evidence tendered via video link can be taped, it can also be replayed by a trier of fact when considering their ultimate verdict. His Honour also noted that the video link evidence of children is "routinely" received through the closed circuit video provision of s. 715.1 and "credibility assessments are not hampered by the procedure".²⁰

Justice Duncan also emphasized that an accused has no constitutional right to an in-person face-to-face confrontation with a complainant. His Honour wrote:

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 courthouse. It is said that there is a right to confrontation that is infringed or at least diluted by the video-link process. However such right of confrontation as exists in Canada is a qualified right and can be subject to exceptions designed to achieve some valid purpose in the administration of justice²¹

These words hearken back to those of the Supreme Court of Canada in *R. v. L. (D.O.)*.²² In upholding the constitutionality of permitting child witnesses to provide their testimony through previously recorded video statements under s. 715.1, Justice L'Heureux-Dubé wrote:

Based on this Court's pronouncements that the principles of fundamental justice reflect a spectrum of interests from the rights of the accused to broader social concerns, a fair trial must encompass a recognition of society's interests. *Our Canadian society has a vested interest in the enforcement of criminal law in a manner that is both fair to*

link evidence have been adopted or referenced by numerous judgements across various provinces in applications pertaining to s. 714.1.

²⁰ *Ibid.* More recently, in the context of permitting testimony via closed circuit in a case involving gang intimidation, Justice Goldstein wrote at para. 25 of *R. v. Oppong*, 2017 ONSC 2978, 2017 CarswellOnt 7556 (S.C.J.): "I do not accept that CCTV will in any way impede cross-examination." Joanne Barrett provides this helpful commentary regarding any differences in assessing how testifying via closed circuit video may change a child's demeanour:

[T]o the extent that a child's reactions may be "altered" if the child does not have to look at the accused while testifying, research suggests that it is in a manner that *assists* the ultimate truth-seeking objective of criminal proceedings. Indeed, studies demonstrate that children who testify using CCTV or a screen are less anxious and therefore better able to communicate their evidence. This is not surprising given the research studies demonstrating the secondary victimization that may arise from participation in the criminal process. . . .

Joanne Barrett, "*R. v. S. (J.) — Facilitating Children's Testimony through the Presumptive Use of Screens and CCTV*" (2011) 57 Crim LQ 370 [Barrett, "Facilitating Children's Testimony"].
²¹ *Allen, supra*, note 1, at para. 27.

²² 1993 CarswellMan 24, 1993 CarswellMan348, [1993] 4 S.C.R. 419 [*L. (D.O.)*].

*the accused and sensitive to the needs of those who participate as witnesses . . .*²³

R. v. S.D.L. — A Fresh Direction for Video-link Evidence

In the recent case of *R. v. S.D.L.*, the Nova Scotia Court of Appeal recognized that s. 714.1 provides trial judges “a wide discretion” in its application. Nevertheless, Chief Justice MacDonald wrote that it would be

[P]rudent for appellate courts to establish appropriate parameters. Otherwise, inconsistency and uncertainty will prevail. Or worse, miscarriages of justice can ensue.²⁴

Chief Justice MacDonald summarized the wide variety of judicial opinions that had emerged at the level of trial courts across the country as follows:

To date, there has been little appellate authority dealing with this provision. At the trial level, we see the full spectrum; from judges who remain guarded about its use (*R. v. Ragan*, 2008 ABQB 658 at paras. 56-57 and *R. v. Munro*, 2009 YKTC 125 at para. 18) to those who demonstrate enthusiasm (*R. v. Oh*, 2013 ABPC 96 at para. 43 and *R. v. Gibbs* (2014), 1097 A.P.R. 149, 114 W.C.B. (2d) 579 (Nfld. Prov. Ct.) at paras. 32 and 43) and, not surprisingly, everything in between.²⁵

The court provided a detailed list of eight “guiding principles”²⁶ for trial judges considering an application for video link evidence under s. 714.1:

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

²³ *L.(D.O.)*, *ibid*, at para. 46 (emphasis added).

²⁴ *S.D.L.*, *supra* note 6, at para. 8.

²⁵ *Ibid*, at para. 23. Sossin and Yetnikoff describe this “judicial ambivalence” towards the use of video link for remote witnesses as follows:

The judicial ambivalence alluded . . . is not hard to find in a review of the relevant case law on videoconference hearings. Courts have expressed appreciation for the obvious advantages of videoconferencing, including reduced costs for transporting inmates to court from jail, and the reduced cost and increased convenience for those who live far away from urban centers. From a judge’s perspective, the advantages of videoconferencing include being able to see a witness face-on rather than from an angle, and being able to adjust the zoom level at which the judge may view the witness. However, the courts, public advocates and legal academics have also expressed a deep concern with both the perceived and actual fairness of videoconferencing. Where the videoconferencing technology is poor or credibility is at issue, the courts have resisted cost justifications for substituting a videoconference hearing for an in-person hearing. Lorne Sossin & Zimra Yetnikoff, “I Can See Clearly Now: Videoconference Hearings and the Legal Limit on How Tribunals Allocate Resources” (2007) 25 Windsor YB Access Just 247.

²⁶ *S.D.L.*, *supra* note 6, at para. 32.

2. That said, when credibility is an issue, the court should authorize testimony via s. 714.1 only in the face of exceptional circumstances that personally impact the proposed witness. Mere inconvenience should not suffice.
3. When the credibility of the complainant is at stake, the requisite exceptional circumstances described in (2) must be even more compelling.
4. The more significant or complex the proposed video link evidence, the more guarded the court should be.
5. When credibility will not be an issue, the test should be on a balance of convenience.
6. Barring unusual circumstances, there should be an evidentiary foundation supporting the request. This would typically be provided by affidavit. Should cross examination be required, that could be done by video link.
7. When authorized, the court should insist on advance testing and stringent quality control measures that should be monitored throughout the entire process. If unsatisfactory, the decision authorizing the video testimony should be revisited.
8. Finally, it is noteworthy that in the present matter, the judge authorized the witnesses to testify “in a courtroom . . . or at the offices of Victims’ Services . . .”. To preserve judicial independence and the appearance of impartiality, the video evidence, where feasible, should be taken from a local courtroom.

In providing the above guidelines, the court began from the following premise. While it remains a “fundamental aspect of most criminal trials,” there is no *Charter* right to face one’s accuser. Rather, the focus must be on whether the method of testimony presents any impairment to the accused’s ability to cross-examine a witness so as to undermine their credibility and/or reliability. In other words, the focus must lie on trial fairness, and the right to a fair trial “does not constitute a right to the most favourable procedures available”.²⁷ Citing the same case law relied upon by Justice Duncan in support of this proposition in *Allen*, Chief Justice MacDonald wrote:

Constitutionally, while the accused has a right to be present for his trial and to make a full answer and defence, it is not necessary that witnesses testify in the accused’s presence. For example, Macdonald, J.A. for this Court in *R. v. R. (M.E.)*, [1989] N.S.J. No. 248 at para. 28 explained:

*The right to face one’s accusers is not in this day and age to be taken in the literal sense. In my opinion, it is simply the right of an accused person to be present in court, to hear the case against him and to make answer and defence to it. . .*²⁸

²⁷ Barrett, “Facilitating Children’s Testimony”, *supra* note 20.

²⁸ *S.D.L.*, *supra* note 6, at para. 19. As Barrett points out (Barrett, “Facilitating Children’s Testimony”, *supra* note 20), it is for this very same reason that permitting children to testify via closed circuit video or behind a screen does not result in an unfair trial:

In considering the objectives and validity of s. 486.2 of the *Criminal Code*, it is important to distinguish cross-examination from face-to-face confrontation. While the former is a basic tenet of our legal system, the latter is not. In fact, the history of the common law demonstrates that the

In sum, to borrow the words of Justice L'Heureux-Dubé in *R. v. Levogiannis*, in the case of video link testimony for a remote witness, the “requisite ‘elements of confrontation’ remain”.²⁹

The fresh perspective taken by *R. v. S.D.L.* lies in the very first listed guideline. Specifically, the court recognized that applications for testimony via video-link “*should be permitted*”³⁰ so long as they do not negatively impact upon trial fairness or the open court principle. Rather, “in appropriate circumstances, [video-link testimony] can enhance access to justice.”³¹ The only significant qualification placed on this by the court is that where credibility, rather than reliability, is in issue, such applications should be granted “only in the face of exceptional circumstances that personally impact the proposed witness”. The clear corollary of the court’s qualification in *S.D.L.* regarding credibility is that where *reliability* is the central issue with respect to evaluating a witness’ evidence, video-link applications should routinely be granted.

With respect to the outcome of the appeal itself, the court overturned the decision on video link at the first instance. The appellant had been convicted of two counts of sexual touching and one count of sexual assault. Credibility was the central issue at trial. The trial judge had allowed the complainant as well as his mother to testify via video link from Lloydminster, Alberta. Their evidence formed the entirety of the Crown’s case (other than brief testimony from an officer for contextual purposes). Chief Justice MacDonald concluded that this decision resulted in a miscarriage of justice. The appellant had been denied his right to make full answer and defence, in large measure due to the technical or quality problems that had arisen with the video link during testimony. Specifically, the video link was interrupted numerous times during testimony. In ordering a new trial, Chief Justice MacDonald wrote:

[T]hese interruptions completely broke the flow of any meaningful examination or cross examination for witnesses that represented essentially the Crown’s entire case; a case where credibility was the only issue. Most of them came at inopportune times, and they occupy a significant portion of the transcript. In fact, as the attached summary . . . demonstrates, they were spread out and occupied 23 pages of an 81 page transcript.

Granted, I was not there and did not have the advantage of seeing how these interruptions played out. As well, I acknowledge that interruptions often occur even when witnesses testify in person. However, in my view, an objective reading

right of confrontation affords an accused with an opportunity to hear witnesses first hand and to cross-examine them on their evidence; it does not include the right to compel a witness to look upon the accused while testifying or *vice versa*. For almost a century, the common law has recognized that blocking a child’s view of an accused during the child’s testimony is permissible and does not result in an unfair trial.

²⁹ *Levogiannis*, *supra* note 2, at para. 31

³⁰ *S.D.L.*, *supra* note 6, at para. 32.

³¹ *Ibid.*

of the transcript leads to the inescapable conclusion that the appellant's right to make a full answer and defence was jeopardized.³²

While the technological impediments formed the court's "most significant"³³ reason for allowing the appeal, a number of concerns accumulated to reinforce the court's conclusion that the appellant had been denied his right to make full answer and defence. Chief Justice MacDonald commented unfavourably on the fact that the Crown had not laid any evidentiary foundation for its video link application at trial, relying solely on oral submissions. *R. v. S.D.L.* is unambiguous regarding the importance of filing as fulsome a record as feasible in future applications.

Approximately 13 months elapsed between the granting of the video link application and the eventual trial, due to unrelated reasons. Chief Justice MacDonald's comments in this respect suggest that an onus exists on the Crown to update the evidentiary record in such circumstances, to ensure that the underlying circumstance of the application have not changed:

[I]t should be noted that this authorization was granted in December of 2014 for a trial that was to have occurred the next month. However, for unrelated reasons, the trial ended up being postponed to February of 2016, some 13 months down the road. Yet the authorization was not revisited. For example, with the luxury of time, could the new trial dates not have been set to a time more convenient for the proposed witnesses to return to their native Cape Breton? Or maybe circumstances in Lloydminster changed by 2016 so as to make it less challenging.³⁴

In sum, an evidentiary foundation is an essential ingredient or "prerequisite"³⁵ to a successful video link application.

With respect to hardship, the Crown argued that if the complainant and his mother were forced to travel to the courthouse for in-person testimony, the complainant's father would be left alone to care for the family's two other children (including a four-year-old). Although a sympathetic circumstance, this type of familial strain caused by the mother's absence does not appear "exceptional". Nor does the submission that the complainant would miss several days of school. While there would be "personal [. . .] impact" on the complainant, this type of scholastic hardship is not uncommon in the reality of testifying during a complex criminal trial. Indeed, Chief Justice MacDonald commented as follows with respect to the Crown's position on hardship:

[I]n a case where credibility was the only issue and given the subject matter, it is hard to imagine more significant and sensitive testimony.

³² *S.D.L.*, *ibid*, at paras. 63, 64.

³³ *Ibid*, at para. 43.

³⁴ *S.D.L.*, *ibid*, at para. 42.

³⁵ *Ibid*, at para. 41.

Yet, *the Crown offered nothing compelling* to suggest that testifying in person would personally impact these witnesses. . .³⁶

In its oral submissions, the Crown adverted to the cost of transporting the two witnesses from Lloydminster as one factor to consider, pegging it as roughly \$3,500. While cost remains an enumerated consideration under s. 714.1, this argument is unlikely to carry the day under the guidelines of *R. v. S.D.L.* To reiterate the words of Chief Justice McDonald: “when credibility is an issue, the court should authorize testimony via s. 714.1 only in the face of exceptional circumstances that personally impact the proposed witness”.³⁷ The cost to be borne by the Crown to transport the witnesses is not an “exceptional circumstance” and does not “personally impact” the witness. Therefore, this consideration does not advance the position of the applicant seeking a video link where the Court repeatedly characterizes credibility as the “only”³⁸ issue at trial.

As of the date of writing, *R. v. Dapena-Huerta*³⁹ is the only reported treatment of *R. v. S.D.L.* The witness was unable to leave her home for the purpose of testimony due to a medical condition. In allowing her to testify before a jury via Skype, Justice Healey emphasized that the central concern with respect to the witness’s testimony was reliability, rather than credibility. Justice Healey found that the use of Skype in this manner would not undermine trial fairness, adding that a jury instruction could be given:

I do not see that the jury will be negatively affected. They have already seen one witness testify from outside of the courtroom by video link pursuant to s. 486.2(1) because of her age. The required mid-trial instruction was given. A similar *instruction can be given with this witness, indicating that the jury is to assess the witness’ evidence in the same manner as if it had been received from inside the courtroom, that the procedure used has nothing to do with the guilt or the innocence of the respondent* and that no such inferences are to be drawn from the use of the procedure.⁴⁰

CONCLUSION

The ability to hear a witness’s evidence in chief and have that witness cross-examined will not be seriously impacted if done via a reliable, continuous video link since the witness remains in the virtual presence of the parties and the court during her testimony. If reliability is the central issue with respect to evaluating a witness’s evidence, video-link applications should *routinely* be granted where there is no negative impact upon trial fairness or the open court principle. In this

³⁶ *S.D.L.*, *ibid*, at para. 40.

³⁷ *Ibid*, at para. 32.

³⁸ *Ibid*, at paras. 34, 40.

³⁹ 2017 ONSC 7530, 2017 CarswellOnt 20040 (Ont. S.C.J.) [*Dapena-Huerta*].

⁴⁰ *Dapena-Huerta*, *ibid*, at para. 13 (emphasis added).

way, the use of technology in the courtroom can contribute to the truth seeking function of the trial process and provide support for vulnerable victims and witnesses who may otherwise face greater personal costs through the process of testimony.