

27178
Vancouver Registry

In the Supreme Court of British Columbia
(BEFORE THE HONOURABLE MADAM JUSTICE DUNCAN)

Vancouver, B.C.
March 29, 2017

REGINA

v.

PATRICK HENRY FOX

PROCEEDINGS IN CHAMBERS
(Pretrial Conference)

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Crown Counsel:

M. Myhre

Appearing on his own behalf:

P. Fox

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1
2 Vancouver, B.C.
3 March 29, 2017
4 MR. MYHRE: Good morning, My Lady, Mark Myhre for the
5 Crown.
6 THE COURT: Mr. Myhre.
7 THE CLERK: Calling Her Majesty the Queen and Fox.
8 THE COURT: Mr. Myhre, is there a copy of the
9 indictment that the Crown is proceeding on? I
10 received something from scheduling this morning
11 but I understood that it was perhaps a work in
12 progress.
13 MR. MYHRE: The Crown is proceeding on the dash 2
14 indictment.
15 THE COURT: Thank you.
16 MR. MYHRE: So as long as that's in the file.
17 THE COURT: Good morning. Are you Mr. Fox?
18 THE ACCUSED: Yes, I am.
19 THE COURT: You can have a seat, Mr. Fox. This morning
20 -- I'm not sure what your understanding is of the
21 process, but this is a pretrial conference.
22 You've got a jury trial coming up in a couple of
23 months and it's customary in Supreme Court to hold
24 pretrial conferences to hopefully iron out some
25 procedural issues before the matter goes to trial.
26 So I can advise that I reviewed the Crown
27 synopsis which gives a general overview of the
28 case. And I think before I ask Mr. Myhre any
29 questions, Mr. Fox, what I'm going to ask you is,
30 have you done a jury trial by yourself before?
31 THE ACCUSED: Not representing myself.
32 THE COURT: Right.
33 THE ACCUSED: That case was dismissed in court.
34 THE COURT: All right. So you have not been involved
35 either with or without counsel on a jury trial, is
36 that fair to say?
37 THE ACCUSED: I have been involved in a jury trial with
38 counsel.
39 THE COURT: All right. So my next question is, do you
40 have any intention to have counsel assist you with
41 this matter?
42 THE ACCUSED: No, I do not.
43 THE COURT: All right, so you're going to act for
44 yourself. So what I'm going to start off with
45 then is I am going to hand out to you and Mr.
46 Myhre and also mark for the court file, a very,
47 very general overview of the trial process,

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1 because judge alone trials are one thing, but
2 judge and jury trials are quite another, and they
3 are procedurally quite complex, especially things
4 like jury selection.

5 So I am going to hand you out what looks to
6 be a rather long and daunting document but in it
7 you will see sections devoted to jury selection as
8 well as the trial process itself. And I'm not
9 going to expect you to read it while I'm talking,
10 it's something you will have to take away and look
11 at prior to your next court appearance.

12 So I've got a copy for the court file, it
13 could just be dated stamped, Madam Registrar,
14 that's sufficient, it's not an exhibit. I have a
15 copy for Mr. Myhre and I've got a copy for Mr.
16 Fox. And Deputy Sheriff, the staple in it is
17 protruding so it may well be --

18 MR. MYHRE: Thank you.

19 THE COURT: -- best to remove it so no one cuts
20 themselves. And perhaps we can arrange for a clip
21 or something before Mr. Fox goes back into
22 custody.

23 THE ACCUSED: May I interrupt for one moment?

24 THE COURT: You may.

25 THE ACCUSED: May I borrow a pen from someone, please?
26 I'm not permitted to bring one from the jail.

27 THE COURT: No, and the deputies will furnish you with
28 one from court. Very good, all right.

29 So and I've asked that it be given both to
30 the Crown and put on the court file just to make
31 sure everyone is on the same page at the trial,
32 what information you've been given in advance of
33 the trial.

34 All right. So currently we've got jury
35 selection set for May 30th and I guess my question
36 for Mr. Myhre is -- we'll get to the pretrial
37 applications in a moment, but my question, Mr.
38 Myhre, is since there's a gap of about three weeks
39 between jury selection trial, is it the Crown's
40 view that 14 jurors should be chosen?

41 MR. MYHRE: That sounds like a prudent idea, My Lady.

42 THE COURT: All right. So, Mr. Fox, usually when a
43 jury is chosen Crown and defence look for 12
44 people. Sometimes when there's a gap between when
45 the jury is picked and when the trial starts they
46 pick an extra two just in case people become ill
47 or unavailable between when they are picked and

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1 when the trial starts. So what I've suggested,
2 and Mr. Myhre agrees, is that when you go to jury
3 selection you be prepared to choose 14 jurors.
4 The last two chosen will be sent home on the day
5 of trial if the original 12 are still available.
6 So that's just a procedural thing. That's covered
7 in the document I gave you about jury selection.
8 THE ACCUSED: Yes.
9 THE COURT: So we are not going to go any further on
10 jury selection at this point. But I do encourage
11 you to study the ins and outs of jury selection.
12 THE ACCUSED: I will.
13 THE COURT: With a view to choosing 14 rather than the
14 usual 12.
15 All right, so Mr. Myhre, I understand that
16 there's a number of applications set for April
17 18th, is that correct?
18 MR. MYHRE: Yes, although that's going to have to
19 change, I understand, My Lady.
20 THE COURT: All right. So maybe you could outline to
21 me, and as I say, I've read the synopsis and I
22 understand the Crown's applications are for a
23 variety of measures concerning what I'll call the
24 main Crown witness in terms of a support person
25 and a lawyer to cross-examine that person; is that
26 correct?
27 MR. MYHRE: That is correct.
28 THE COURT: All right. So that would have taken place
29 on April 18th but that's now not going to happen?
30 MR. MYHRE: Yes, Mr. Fox informed me via letter in
31 February or maybe -- he sent me three letters
32 since our last appearance here in court. In one
33 of those letters he pointed out that the 18th is
34 the last day of Shevat and he cannot attend on
35 that day.
36 THE COURT: All right, so --
37 MR. MYHRE: So that will have to be rescheduled.
38 THE COURT: All right. So have you had an opportunity,
39 Mr. Myhre, to look at subsequent dates?
40 MR. MYHRE: I have not canvassed subsequent dates. I
41 wanted to canvass what applications need to be
42 made so that we can determine the right time
43 estimate today.
44 THE COURT: All right. So, Mr. Fox, we will regard
45 April 18th as a day that's not available for the
46 Crown's applications because of Shevat.
47 THE ACCUSED: Just one minor correction.

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1 THE COURT: Yes?

2 THE ACCUSED: It's actually the last day of Passover.

3 THE COURT: It's Passover?

4 MR. MYHRE: Passover, sorry.

5 THE COURT: It's a bit of a difference but it remains
6 the same, so it's the last day of Passover. Thank
7 you.

8 So, Mr. Myhre, can you outline for me the
9 applications the Crown does intend to make prior
10 to trial?

11 MR. MYHRE: Yes, so there are -- there's an application
12 to have counsel appointed to cross-examine Ms.
13 Capuano. And my understanding from -- I should
14 say last day we were in this court Mr. Fox and I
15 had fairly extensive discussions, facilitated by
16 Judge Silverman, and so some conclusions were
17 reached at the end of that. I understand that Mr.
18 Fox is not opposed to that application and in fact
19 if he continues in that position I would ask Your
20 Ladyship to make that order today so that I can
21 get the ball rolling with counsel.

22 The next application the Crown intends to
23 make is to have Ms. Capuano, who will be here in
24 person, testify from behind a screen. I'm not
25 sure if Mr. Fox is opposed to that application.
26 The Crown will also be applying to have a support
27 worker sit next to her. She is -- the support
28 worker proposed by the Crown is a victim service
29 worker with the Burnaby RCMP. And so I'm not sure
30 -- I know Mr. Fox was opposed to Ms. Capuano
31 testifying via video but I'm not sure if he's
32 opposed to the screen or the support person.

33 THE COURT: All right. So first of all, Mr. Fox, in
34 matters of this nature the Crown can apply under
35 the *Criminal Code* to have a lawyer appointed for
36 the limited purpose of cross-examining what I'll
37 loosely call a vulnerable witness. I think you
38 have an understanding of that, do you?

39 THE ACCUSED: Yes, the four issues.

40 THE COURT: Yes, thank you. So what is your position
41 concerning the Crown's application that he has
42 articulated, and I think you've heard of four, to
43 have a lawyer appointed to cross-examine the
44 complainant in this case?

45 THE ACCUSED: First, is it appropriate that I stand
46 when I address the court, or --

47 THE COURT: Usually, but if you've got -- if you're

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1 trying to make notes and talk at the same time I'm
2 not going to insist that you stand up.
3 THE ACCUSED: Right. With respect to the 486.3, I
4 oppose that.
5 THE COURT: Okay.
6 THE ACCUSED: And I don't think that that is something
7 that is a decision to be made on today at this
8 point.
9 THE COURT: No, not if you're opposed.
10 THE ACCUSED: The 486.2 and the 486.1 I have no
11 opposition to.
12 THE COURT: All right. Maybe, Mr. Myhre, you can help
13 me because my *Criminal Code* did not make it to the
14 courtroom with me. So I just want to be clear
15 that Mr. Fox is not opposed to orders under 486.1
16 or 486.2 of the *Criminal Code*. So if you --
17 MR. MYHRE: 486.1 is the application for a support
18 person.
19 THE COURT: Yes.
20 MR. MYHRE: 486.2 is the testimony from behind a
21 screen. So given Mr. Fox's position, can I hand
22 up to Your Ladyship a draft order for those two
23 subsections?
24 THE COURT: All right. So, Mr. Fox, you are not
25 opposed to an order that the complainant testify
26 with a support person nearby and that she testify
27 from behind a screen; that you will be able to see
28 her, she will not be able to see you. Do you
29 understand that?
30 THE ACCUSED: Yes, I do, and that's fine.
31 THE COURT: And you consent to those orders today; is
32 that correct?
33 THE ACCUSED: I do.
34 THE COURT: All right. Thank you, Mr. Myhre, you can
35 hand those up and we will dispense with Mr. -- the
36 necessity of Mr. Fox's signature on those orders
37 given that we've done it on the record with his
38 consent.
39 MR. MYHRE: Thank you, My Lady, and I've got two copies
40 here, one that could be kept in the court file,
41 and if I could keep one myself and I can get Mr.
42 Fox a copy.
43 THE COURT: Thank you.
44 MR. MYHRE: So you can see, My Lady, it's a standard
45 form where I've just checked off --
46 THE COURT: Yes.
47 MR. MYHRE: -- support person.

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- 1 THE COURT: 486.1, and what I'm going to do, just for
2 the completeness of the record, is I'm going to
3 cross out the ones that are not checked just so
4 the document doesn't look -- it will look
5 cluttered but it won't be confusing. No, it's too
6 late for that.
- 7 So I am going to give Madam Registrar the one
8 that I originally signed. And on the other one
9 I'm just going to write "copy" at the top.
- 10 MR. MYHRE: Actually I believe this one should stay in
11 the court file.
- 12 THE COURT: The originally signed one, I think you need
13 to file that in -- with scheduling.
- 14 MR. MYHRE: Okay.
- 15 THE COURT: Yes, and the copy remains on the court file
16 so the record will reflect that I have granted
17 those two orders. So then that significantly
18 decreases -- perhaps significantly decreases the
19 amount of time that's going to be required for the
20 Crown's application for a lawyer to conduct the
21 cross-examination. Is that fair to say, Mr.
22 Myhre?
- 23 MR. MYHRE: Yes, and My Lady, I would anticipate a
24 morning for the Crown's application under s. 486.3
25 for the counsel to cross-examine.
- 26 So the next potential application: My Lady,
27 last day in front of Judge Silverman, Judge
28 Silverman canvassed the voluntariness of a
29 statement the Crown intends to lead, a statement
30 Mr. Fox made to Constable Potts of the Burnaby
31 RCMP. And after a fair bit of back and forth with
32 -- with Judge Silverman confirming with Mr. Fox
33 that he understood what voluntariness meant, Mr.
34 Fox agreed on the record that he admitted that
35 that statement was voluntary.
- 36 In a letter to the Crown, one of the three
37 letters I referenced that he's sent me since that
38 day, he has indicated that he wants to cross-
39 examine a police officer in relation to the
40 lawfulness of his arrest.
- 41 THE COURT: All right. So Mr. Fox --
- 42 MR. MYHRE: By the Burnaby RCMP after he was handed
43 over by U.S. Authorities, essentially.
- 44 THE COURT: Mm-hmm.
- 45 MR. MYHRE: Do I have that right, Mr. Fox?
- 46 THE ACCUSED: No, no.
- 47 THE COURT: Okay.

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- 1 THE ACCUSED: I don't think that there's any question
2 about the lawfulness of the arrest once I was
3 returned to Canada. The questions that I have,
4 though, relate to under what authority I was
5 returned to Canada, like for -- for what reason.
6 The RCMP was not requesting that Homeland Security
7 return me here. I'm not sure that those
8 questions, though, directly relate to this matter.
- 9 THE COURT: What is your citizenship, Mr. Fox?
- 10 THE ACCUSED: I am a U.S. citizen. I was born in the
11 U.S. but the Canadian government insists that I am
12 a Canadian citizen.
- 13 THE COURT: What passport do you hold?
- 14 THE ACCUSED: I don't any.
- 15 THE COURT: Have any. Okay. And your birth
16 certificate is from the United States?
- 17 THE ACCUSED: Yes. I have a U.S. birth certificate but
18 the U.S. government some years ago accused me of
19 being an illegal alien from Canada and they
20 accused me of being a person from Ontario. They
21 then told the Canadian government that I am that
22 person, so the Canadian government insisted I'm
23 that person and that's how I end up here.
- 24 THE COURT: All right. So, Mr. Myhre, it seems that
25 Mr. Fox is not challenging the lawfulness of his
26 custodial status in Canada and I think matters
27 extraneous to this court's jurisdiction, such as
28 United States, might be outside the jurisdiction
29 of this court for the purposes of indictment. But
30 I don't know why he was returned to Canada.
31 So is there a particular officer from a
32 Canadian police force that you want to cross-
33 examine?
- 34 THE ACCUSED: I would need to check my notes.
- 35 THE COURT: All right, go ahead and check your notes.
- 36 THE ACCUSED: I don't remember exactly.
- 37 MR. MYHRE: Mr. Fox, I might suggest that it was
38 Constable Denise Cam [phonetic] who, according to
39 the Report to Crown Counsel, said that she formed
40 the grounds to have you arrested and arranged for
41 that to happen at the border.
- 42 THE ACCUSED: Yes, I believe you're correct, but the
43 reason that I wanted to cross-examine Constable
44 Cam was because of some of these statements that
45 she had put one of her affidavits, particularly
46 for the seizure of the firearms.
- 47 MR. MYHRE: So Mr. Fox in the letter also raised issues

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1 with the police search of his house. Now, well,
2 before Mr. Fox was brought back to Canada by U.S.
3 authorities, U.S. authorities had some
4 communication with Canadian authorities, who then
5 got a search warrant and searched his house,
6 looking for firearms. They didn't find anything,
7 there's nothing from that search that the Crown
8 would be reading or any circumstances related to
9 it that the Crown would be leading at trial.

10 So I think Mr. Fox would maybe have some
11 questions for those officers but it doesn't seem
12 to me that that -- those questions would relate to
13 any potential evidence or issue at the trial.

14 THE COURT: Mm-hm. So, Mr. Fox, just to decode what
15 Mr. Myhre is saying, you are best not to wander
16 off the four corners of the indictment and start
17 taking issue with criminal suspicions or
18 investigations that are not before the court in
19 relation to the harassment or the other count
20 before the court, and the reason for that is
21 juries are repeatedly told to listen to the
22 evidence, disregard bad character evidence. And
23 if you start asking officers about things that
24 aren't really related to the indictment the jury
25 is going to wonder a little bit about things that
26 they probably shouldn't be wondering about, that
27 being, to put it bluntly, whether or -- whether or
28 not you are of bad character.

29 THE ACCUSED: With all due respect, I think Mr. Myhre's
30 -- is that how you pronounce it, Myhre? Mr. Myhre
31 may have been misinterpreting some of what I was
32 stating in the letter.

33 THE COURT: All right.

34 THE ACCUSED: Because -- yes.

35 THE COURT: Okay.

36 THE ACCUSED: Sorry, nothing more to say on that.

37 THE COURT: No, so here's what I'm going to suggest is
38 we are going to have to concern ourselves with
39 setting a date for the application the Crown is
40 going to make under 486.3 for the appointment of a
41 lawyer. That's going to be some time not too long
42 after the 18th of April. And I'm going to suggest
43 between now and that date you think carefully
44 about what is on the indictment and what the jury
45 will hear about the indictment and the matter that
46 you raised in the letter to Mr. Myhre.

47 Because juries are brought from the

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1 community, they are regular working people and
2 when we choose a jury we tell them, "Look, this
3 trial is scheduled to last for 10 days." We
4 always tell them sometimes things go shorter,
5 generally they'll go longer. And you have to
6 concern yourself with obviously putting the best
7 defence forward, making sure the Crown proves its
8 case, but at the same time it will be the role of
9 the trial judge to minimize the times that the
10 jury has to be sent out of the courtroom to deal
11 with issues that shouldn't or may not be properly
12 before them and that might include what you've got
13 some concerns about in terms of the -- the other
14 firearms suspicions.

15 So we've got 12 normal people, we take them
16 away from their jobs and we tell them this trial
17 will last 10 days. But if it becomes prolonged
18 then it can cause difficulties with people --
19 people tell their employers they'll be back in 10
20 days and then if they're not they are perhaps
21 under some pressure to get back to work or get
22 back to their families and so on.

23 So if the goal is to have this trial done
24 fully and fairly in 10 days, I think you really
25 need to consider how much beyond the indictment
26 you need to go to properly defend yourself.

27 So you're certainly free to put matters to
28 witnesses, police witnesses included, that may
29 impact on their credibility. But if the Crown is
30 not going to be relying on that particular
31 constable's affidavit you might want to wonder,
32 well, is that going to be something that's going
33 to help my case in front of a jury or hurt it. So
34 I'm not telling you not to make the application,
35 I'm just telling you to look at the big picture,
36 focus on the indictment and what the Crown has to
37 prove and what you -- what you need to do to
38 defend yourself. Okay?

39 THE ACCUSED: Thank you, I understand. I do now for
40 the record wish to express some concern about the
41 amount of time set aside for the trial and we
42 discussed this somewhat at the previous hearing.

43 THE COURT: Okay.

44 THE ACCUSED: I do intend to cross-examine some of the
45 witnesses such as Ms. Capuano quite extensively.

46 THE COURT: Okay.

47 THE ACCUSED: And personally I don't think that the

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1 trial is going to be able to be completed within
2 the two weeks that's currently allotted.

3 THE COURT: All right. So that's a -- that's a good
4 concern to put on the table at this point. Mr.
5 Myhre, sort of generally, I mean Crown usually
6 makes the estimate in consultation with defence
7 counsel. There's no counsel in this case. Just
8 roughly how did you arrive at the 10 days and was
9 that something Mr. Justice Silverman queried you
10 about?

11 MR. MYHRE: Wat happened last day, My Lady, is that we
12 stood down and I had a discussion with Mr. Fox and
13 we went through each witness estimating how much
14 time each would take, and basically we've set
15 aside an entire week for Ms. Capuano.

16 THE COURT: Okay. Direct and cross-examination?

17 MR. MYHRE: Yes.

18 THE COURT: All right.

19 MR. MYHRE: I think I'll be one day with her in direct.
20 Mr. Fox could potentially be two or three days
21 with her in cross.

22 THE COURT: Okay.

23 MR. MYHRE: And then the rest of the witnesses, the
24 potential for Mr. Fox to call evidence.

25 THE COURT: All right. Mr. Fox, you don't have to tell
26 me if you're calling evidence, but if you are, is
27 that one of the concerns that you think puts this
28 beyond a 10-day trial?

29 THE ACCUSED: Yes. Yes, I do intend to call some
30 witnesses that I haven't disclosed and probably
31 won't --

32 THE COURT: Okay.

33 THE ACCUSED: -- prior to that. I've also, though,
34 since decided that I'm going to testify myself as
35 well and that will probably take two or three days
36 at least.

37 MR. MYHRE: And, My Lady, there are a couple of other
38 applications we should discuss, but since we're on
39 the topic of time estimates, in his letters Mr.
40 Fox asked the Crown to arrange for a number of
41 witnesses to be present at the trial.

42 So I've reflected on the list of witnesses
43 that he's asked for and I can advise the court and
44 Mr. Fox that I am willing to call James Pendleton
45 to the stand. My understand -- Mr. Pendleton is
46 Ms. Capuano's partner, they both live in the
47 United States. My understanding is that he is

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1 travelling to Canada and so my intention will be
2 to serve him with a subpoena when he arrives in
3 Canada. I will call him as part of the Crown
4 case; I have very few questions for him but I
5 understand Mr. Fox would have some questions for
6 him.

7 THE COURT: Okay.

8 MR. MYHRE: Now, Mr. Fox has also asked for a police
9 officer who declined to revoke his possession and
10 acquisition licence. He has asked for the lead
11 investigator to testify. He has asked for two
12 reporters from CBC to testify. These reporters
13 took statements or did interviews of Mr. Fox and
14 Ms. Capuano and he, as I understand it, would like
15 to tender both of those statements and ask them
16 about their respective demeanours and their
17 opinion as to the truth-telling of the people they
18 interviewed.

19 Certainly I won't be subpoenaing the CBC
20 reporters. Similarly this police officer --
21 THE COURT: Well, just -- we'll stop there. I don't
22 know if this is something that was discussed
23 before Mr. Justice Silverman, Mr. Fox, but the
24 court will not hear from witnesses who have
25 opinions about the truthfulness or otherwise of
26 any witness or of you. The ultimate arbiter of
27 credibility and truthfulness is going to be the
28 jury and it will add nothing to the trial process
29 for you to call witnesses who say what they think
30 about your truthfulness or otherwise.

31 You can call good character witnesses who --
32 who can testify as to your reputation in the
33 community, but calling witnesses who are going to
34 testify favourably about your credibility or
35 otherwise is not a permissible use of court time,
36 it's not a permissible route to take on the basis
37 of the *Rules of Evidence*. So I encourage you to
38 have a look through the document I gave you today,
39 it's going to give you some -- some idea about
40 some of the rules of evidence about challenging
41 credibility. But this is not going to turn into a
42 trial of you calling witnesses who will comment on
43 the credibility or truthfulness of you or the
44 complainant.

45 THE ACCUSED: Thank you. I understand that. My
46 intention with the journalists was partially to
47 authenticate the video and also to possibly answer

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1 some questions about decisions with respect to
2 having her coaching Ms. Capuano for the interview
3 etc. and why they may have decided not to include
4 certain statements by her. Not so much to give
5 their opinion on her character.

6 THE COURT: Well, if you -- if you seek to call those
7 witnesses as part of your case and you are
8 successful with the trial judge allowing you to
9 call them for those limited purposes, the Crown
10 may well be entitled to recall the complainant to
11 testify about the coaching or other -- otherwise,
12 as you allege.

13 There's a rule of evidence, lawyers call it
14 the rule in *Browne v. Dunn* and if you don't
15 confront a witness on cross-examination with a
16 contrary version of events or a contradictory
17 version of events, and then you tender evidence
18 that contradicts them on those points, the
19 prosecution is entitled to recall parts of its
20 case to essentially in fairness to the witness to
21 demonstrate why that might not be so.

22 So you can't simply cross-examine the
23 complainant on a -- on a few areas and then, you
24 know, it's like sandbagging in poker, if you're
25 familiar with that term, you can't keep your chips
26 in your pocket when you're cross-examining, you've
27 got to put your chips on the table and if you
28 don't do that then the Crown can fill in the
29 patches in re-examination and recalling witnesses.

30 So just bear that in mind as you're calling
31 your case and as you are cross-examining,
32 particularly if there's something you want to put
33 to witnesses on cross-examination, do it, because
34 if you don't you may run into difficulties in your
35 case; you think you've called evidence to
36 contradict them and then the Crown can make an
37 application to come back and bring the witnesses
38 back to what we call rehabilitate them, and that
39 is to have them address a matter that they weren't
40 confronted with in the first place.

41 It's a little convoluted. The rule in *Browne*
42 *v. Dunn* is referred to in the materials I gave to
43 you. I encourage you to study that very carefully
44 when you consider both your cross-examination and
45 -- and any witnesses that you might call and the
46 subject matter of their evidence. All right?

47 THE ACCUSED: Yes.

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- 1 THE COURT: Okay.
- 2 MR. MYHRE: So that brings us to another potential
3 application, My Lady. So Mr. Fox clearly would
4 like Ms. Capuano's interview that she did with the
5 Canadian Broadcasting Corporation. Now, the Crown
6 is actually trying to get Mr. Fox's interview, and
7 that's the subject of an ongoing dispute between
8 the RCMP and CBC, they've been fighting over it.
- 9 THE COURT: Mm-hmm.
- 10 MR. MYHRE: And I don't know if it will be settled by
11 the time of trial or not. Because that is already
12 underway I did -- when I got Mr. Fox's letter it
13 seemed to me that he was -- would clearly like to
14 be in possession of Ms. Capuano's interview with
15 CBC and so I asked the RCMP if they could add that
16 to the production order, but things are already
17 underway and my understanding is that they are not
18 willing to do that, and that's their prerogative
19 as the investigative agency.
- 20 THE COURT: Right.
- 21 MR. MYHRE: Which means that if Mr. Fox really does
22 want that interview he's going to have to make an
23 application for it that would involve the CBC.
- 24 THE COURT: Yes. So, Mr. Fox, just so you understand,
25 the police are trying to get by way of a
26 production order which is kind of like a mini
27 search warrant in the *Criminal Code* documents that
28 they want -- or the interview that you want, it's
29 too late, in the vernacular, piggyback that on the
30 application. So you're going to be on your own
31 with that, with that kind of an application.
- 32 THE ACCUSED: I already actually have both of those
33 interviews, the full interview footage.
- 34 THE COURT: Okay.
- 35 THE ACCUSED: So I don't require it through the court.
- 36 THE COURT: So you don't require a court order, okay.
37 All right. And in terms of the use of Ms.
38 Capuano's interview, again that is or may be fair
39 game to cross-examine her on.
- 40 THE ACCUSED: Quite.
- 41 THE COURT: Okay, you understand that?
- 42 THE ACCUSED: Yes.
- 43 MR. MYHRE: The next potential application relates to
44 the Crown's application to have two ATF agents
45 testify from California, and I understand my
46 friend -- I should say Mr. Fox is, is opposed to
47 that.

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1 THE ACCUSED: No, I don't oppose that.
2 MR. MYHRE: You are not opposed to them testifying from
3 California. Then at the next date I will formally
4 make that application and seek an order under s.
5 714.2 allow them to do that.
6 THE COURT: Good.
7 MR. MYHRE: The -- Mr. Fox has requested -- he
8 requested disclosure of a number of investigative
9 files that related to him and Ms. Capuano from
10 2015 in a -- in a letter to me in -- at the end of
11 February, and I sent him some disclosure just very
12 recently, maybe -- did you get it already?
13 THE ACCUSED: I did receive it.
14 MR. MYHRE: I noticed that there are some appendices
15 missing, so I've asked the police to follow up and
16 get me those things. But one of the things that
17 was disclosed in there was another statement that
18 Mr. Fox made in 2015 and so I want to advise Mr.
19 Fox that I also intend to lead that statement at
20 the trial. That's your statement to Constable
21 Huggins. And so there's a potential Crown
22 application to prove the voluntariness of that
23 statement.
24 THE ACCUSED: I believe that statement was already
25 provided in previous disclosure.
26 MR. MYHRE: In any event, it was only recently that I
27 decided that I would like to lead that at the
28 trial.
29 THE COURT: All right. So there's -- there's one
30 statement that Mr. Myhre has discussed with you,
31 Mr. Fox.
32 THE ACCUSED: Yes.
33 THE COURT: And it appears that you have agreed that
34 it's voluntary. You have to put your same thought
35 processes on the 2015 statement, which I
36 understand is a different one from the one that
37 the Crown originally asked you to consider the
38 voluntariness issue. So that should go on the
39 list of things for you to -- to consider whether
40 or not you want to admit voluntariness or if you
41 want the Crown to -- to prove it on a voir dire.
42 THE ACCUSED: Okay.
43 MR. MYHRE: At the last appearance Mr. Fox indicated
44 that he was willing to admit that the handguns
45 that he registered and that the Crown says that he
46 shipped to California were restricted firearms as
47 that term is defined in the Code and used in s.

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1 93, the section under which he's charged. And I
2 sent Mr. Fox a draft admission about a month ago.
3 I wonder if Mr. Fox had a chance to consider it.
4 THE ACCUSED: Yes, I reviewed it and everything seems
5 fine to me.
6 MR. MYHRE: Okay, that being the case, I do have a copy
7 that could be signed and filed with the court
8 today.
9 THE COURT: All right, just let Mr. Fox have a look at
10 it. I'm sure it's exactly the same as the one you
11 sent him, but we just want to make sure, since
12 we're doing it on the record, that it is indeed
13 the one that he has reviewed. And if it is the
14 one that's consented to, then that admission can
15 be signed and the Crown can deal with it as an
16 exhibit or read in in the usual course.
17 THE ACCUSED: Shall I sign?
18 MR. MYHRE: If you are content to admit that.
19 THE ACCUSED: Nos obviously I haven't memorized all the
20 serious numbers of the pistols but I assume they
21 are correct.
22 THE COURT: All right, thank you, Mr. Fox.
23 MR. MYHRE: The last admission, as I reflected on the
24 case, that the Crown would be seeking from Mr.
25 Fox --
26 THE COURT: Stop there, Mr. Myhre. I am not required
27 to sign an admission of fact, so Mr. Fox has
28 signed it and you have signed it, and what I'm
29 going to suggest is that it be -- well, it's
30 theoretically part of the Crown's case.
31 MR. MYHRE: Yes.
32 THE COURT: So I would suggest you hang onto it and
33 tender the original as an exhibit at the outset of
34 the trial and have copies made for yourself and
35 Mr. Fox to have, but that admission has been made,
36 so you can hang onto that, Mr. Myhre.
37 MR. MYHRE: Very well, thank you.
38 THE COURT: All right.
39 MR. MYHRE: I will be asking Mr. Fox to admit his
40 United States criminal record, but I -- if you
41 know today that you're not willing to admit that
42 you could say so. If you are, I can draft
43 something.
44 THE COURT: Just before you answer, Mr. Fox. Mr.
45 Myhre, where in the Crown's case is Mr. Fox's
46 criminal record relevant?
47 MR. MYHRE: That would be put to Mr. Fox if he

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1 testifies.

2 THE COURT: If he testifies. All right, so Mr. Fox,
3 the rule is the Crown leads its case focused on
4 the counts in the indictment. They don't lead
5 evidence of a criminal record or bad character
6 except for very limited purposes. So the only
7 reason Mr. Myhre wants to know if you admit your
8 U.S. criminal record, which I assume he has
9 furnished you with, is that when you testify it's
10 fair for the Crown to put to you prior convictions
11 that are admitted. So it won't form part of the
12 Crown's case, but if you testify then you need to
13 know that that can be put to you.

14 There's one concern I have, and that is, Mr.
15 Myhre, with respect to two cases, *Underwood* and
16 *Madrusan*, and that is concerning the subject
17 matter and the extent of the accused's criminal
18 record when it's a jury trial.

19 So just shorthand, Mr. Fox, we're saying the
20 jury can hear that you've got a criminal record
21 but if it's a massively long criminal record with
22 lots and lots of really bad things on it, you can
23 make an application to have it -- sanitized is the
24 wrong word, but there can be an application to
25 have it summarized for the jury so that they know
26 you've got a record for particular things but they
27 don't need to see a great long list of a rap
28 sheet, essentially.

29 THE ACCUSED: Right.

30 THE COURT: All right, so that's something that -- that
31 ball is in your court if you want to make that
32 application before you testify to know precisely
33 what criminal record the Crown is going to be
34 putting to you and what the jury will know about.

35 So, Mr. Myhre --

36 MR. MYHRE: I can advise just for Mr. Fox's benefit
37 that if Mr. Fox testifies the conviction that the
38 Crown is interested in putting in front of the
39 jury is the conviction for perjury.

40 THE COURT: All right.

41 MR. MYHRE: One conviction for perjury.

42 THE COURT: All right. So just for your edification,
43 Mr. Fox, a conviction for perjury, fraud, theft,
44 those kinds of offences, those are generally very
45 relevant for a jury to consider when assessing the
46 credibility of a witness. So you are free to
47 apply to have your criminal record sanitized, but

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1 I would have to say that a perjury conviction is
2 extremely relevant in the eyes of somebody
3 assessing your testimony.

4 THE ACCUSED: Mm-hmm.

5 THE COURT: So not -- I am not the trial judge, not
6 making a ruling, I'm just giving you a heads up in
7 that regard.

8 THE ACCUSED: If the perjury conviction were to be
9 brought up, would I be able to provide explanation
10 or background on that conviction, for example
11 [indiscernible/overlapping speakers].

12 THE COURT: Don't tell me anything about the background
13 or anything.

14 THE ACCUSED: You see, I would think it would serve my
15 purposes, my interests very well if a perjury
16 conviction and false claim of U.S. citizenship
17 conviction were brought up at the trial, as long
18 as I would then be able to provide some
19 explanation about those convictions. Of course
20 I'm sure -- I'm sure you see where I'm going with
21 that.

22 THE COURT: Well, to a certain extent an explanation is
23 permitted. If you -- if the explanation is by way
24 of a denial there is case law from the Supreme
25 Court of Canada that a conviction is a conviction
26 unless it's challenged or set aside, so the fact
27 of the conviction is fair for the jury to hear.
28 Your explanation may, in the trial judge's ruling,
29 the trial judge may wish to ensure that your
30 explanation is brief and succinct, i.e. that it
31 doesn't go on for several days because sometimes
32 what happens is you get into a trial of a side
33 issue and again you will have 12 people who won't
34 be able to hear a lot of that stuff if the trial
35 judge has to rule on it.

36 So, but Mr. Myhre is on notice that if the
37 record is put to you in its current form you will
38 be seeking to furnish an explanation. So we'll
39 just leave it at that.

40 MR. MYHRE: And again for Mr. Fox's benefit, I'm not
41 asking for an answer today, just something for you
42 to consider ahead of the next date.

43 THE ACCUSED: I can give you an answer today. I have
44 no opposition to the perjury and false claim of
45 U.S. citizenship convictions being brought up at
46 the trial.

47 THE COURT: So to put it in technical terms, you admit

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1 you've been convicted of perjury and what was the
2 second offence?

3 THE ACCUSED: False claim of U.S. citizenship.

4 THE COURT: False claim of U.S. citizenship. So are
5 there other matters on the record that you might
6 seek to put to Mr. Fox, Mr. Myhre?

7 MR. MYHRE: No, Your Honour -- My Lady.

8 THE COURT: All right, so -- all right, so I think the
9 Crown then can treat the perjury and false claim
10 of U.S. citizenship convictions as admitted and
11 Mr. Fox has put the Crown on notice that he will
12 want to furnish an explanation for them. So that
13 is something that the trial judge will have to
14 balance in the mix and decide how much, if
15 anything, the jury will hear of the explanation.
16 And again, Mr. Fox, I am not making rulings, I'm
17 just giving you a heads up of what will happen at
18 trial, or what will likely happen at trial. All
19 right?

20 Is that sort of the end of what we can deal
21 with today, Mr. Myhre? Before I get to you, Mr.
22 Fox, don't worry.

23 MR. MYHRE: Yes, from my perspective the only thing
24 would be to reschedule the application date.

25 THE COURT: All right. Mr. Fox.

26 THE ACCUSED: My biggest issue at this point is with
27 the jail making it impossible for me to prepare
28 any kind of defence whatsoever. I've been dealing
29 with this issue with them for the past few months
30 and I have documentation to support it all, but
31 essentially they're prohibiting me from receiving
32 any DVDs or CDs in the mail which would contain
33 video which would be evidence to support my case.
34 And for that reason if I can't obtain those
35 videos I can't present them to the court or to the
36 jury. I'm not sure how we can proceed on that,
37 there doesn't seem to be a lot of case law in
38 Canada.

39 THE COURT: Not so much, no.

40 THE ACCUSED: It goes with self-represented parties in
41 custody.

42 THE COURT: Mm-hmm.

43 THE ACCUSED: There was *R. v. Ryan* that I read,
44 addresses some of the issues.

45 THE COURT: Okay. I think I'll have a suggestion about
46 how to deal with that. So, Mr. Myhre, the April
47 18th application has to be reset. So what I'm

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1 going to suggest is that on that date it's treated
2 both as an application by the Crown to appoint
3 counsel to cross-examine the complainant and it
4 will be open to Mr. Fox to make application on
5 that day for some sort of change or exception to
6 the conditions of his custodial status.

7 So, Mr. Fox, you're right, with self-
8 represented individuals it's difficult to receive
9 things. There's -- there's reasons for that, the
10 warden has reasons, there's security and so on and
11 so forth.

12 THE ACCUSED: Right.

13 THE COURT: But there may well be a way to manage that.
14 It's not a way I can do today, but it's something
15 that should be considered on the next date. There
16 may well be simply an order that between certain
17 hours of the day Mr. Fox has access to a computer
18 or something to play a video, so I throw that out
19 there.

20 THE ACCUSED: Well, you see, I do have a computer to
21 use for E-disclosure.

22 THE COURT: You're just not getting the things in the
23 mail?

24 THE ACCUSED: Right, they say I can receive those in
25 the mail if they come from an attorney.

26 THE COURT: Okay.

27 THE ACCUSED: But not from any of my witnesses.

28 THE COURT: Right.

29 THE ACCUSED: And I have proposed to them some
30 solutions because I had a similar situation when I
31 was in Arizona in custody on another case, but
32 they were more equipped to handle that, I guess.

33 THE COURT: All right. So what -- what I'll say is
34 that's an application that you should bring to the
35 court's attention on the occasion when the Crown's
36 application is next set. All right.

37 THE ACCUSED: Another significant issue that I have is
38 the term psychological harm and psychological
39 safety. Found lots of references to them in a lot
40 of case law but no real definition. And I know
41 that the -- or I believe that the prosecutor's
42 case depends heavily on this concept of
43 psychological harm, because obviously there is no
44 physical harm or threats between Desiree and I,
45 and I think that that's something that certainly
46 would be helpful to me and I'm sure the jury would
47 benefit from having some clear definition of what

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1 exactly that means.

2 THE COURT: Well, Mr. Myhre is on notice of that, but I
3 can tell you that the very nature of harassment
4 itself is psychological fear, harm, fear of harm,
5 fear of going out and about on your daily business
6 without being subjected to, you know, seeing
7 someone that you perceive to be a threat or a harm
8 to you. So the Crown is not required to call a
9 psychologist to say this is psychological harm.
10 Psychological harm is kind of inherent in -- in
11 one of the way that harassment can be
12 accomplished. So I can't recall the name of the
13 leading authority for Supreme Court of Canada, I
14 think *R. v. McCraw* perhaps.

15 THE ACCUSED: In *McCraw* they just make reference to,
16 they say that psychological harm is considered the
17 equivalent or just as relevant as physical harm.

18 THE COURT: Right. That's in the context of uttering
19 threats though.

20 THE ACCUSED: Right, right.

21 THE COURT: So I don't mean to cut you off, Mr. Fox,
22 but my difficulty is this pretrial conference was
23 set for 15 minutes and we've gone for --

24 THE ACCUSED: Oh, I'm sorry.

25 THE COURT: No, it's not -- it's -- it's not anyone's
26 fault, it's just that things are more complex when
27 a person is acting for themselves, particularly
28 with a jury trial.

29 THE ACCUSED: I understand.

30 THE COURT: So what I'm going to do is Mr. Myhre is on
31 notice that you're a bit at sea on that concept
32 and perhaps he can send you a -- a letter with the
33 name of a couple of authorities that he might be
34 relying on, or even there's a criminal jury
35 instruction manual that has a standard instruction
36 concerning a variety of criminal offences
37 including harassment and I'm not requiring Mr.
38 Myhre to send you the criminal jury instruction in
39 that regard but if he has the ability to send you
40 a couple of pages from the electronic version of
41 *CRIMJI* explaining criminal harassment it might
42 help you understand what the jury will have to
43 grapple with at the end of the day. So we'll just
44 leave it there for now.

45 Was there anything else pressing that you
46 needed to address today?

47 THE ACCUSED: Just one more clarification.

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1 THE COURT: Okay.

2 THE ACCUSED: Perhaps you might be able to take care of
3 this. Proper administration of justice in the
4 context of 486.3, no real definition of that term.

5 THE COURT: 486.3 is a highly discretionary section of
6 the *Criminal Code* and the judge hearing the
7 application has to balance the interests of
8 justice, including your interests, in a full and
9 fair cross-examination of the complainant with how
10 it might look to the jury to see you cross-
11 examining her, how she might feel being cross-
12 examined by you.

13 So it's a complex mixture of factors and I
14 don't think there's any one case that comes out
15 with a definition. But certainly in advance of
16 the Crown's application, I think Mr. Myhre will
17 probably file a couple of cases for the
18 edification of the trial judge and hopefully serve
19 those on you in advance, or at the very least have
20 them available to you the morning of the
21 application when you come to Vancouver Law Courts
22 so you can have a look through them.

23 I think Mr. Myhre is on notice that you're --
24 you need a little bit of guidance about the scope
25 of that concept within the application.

26 MR. MYHRE: I will get cases to Mr. Fox ahead of the
27 application.

28 THE COURT: All right. Thank you very much, Mr. Myhre.

29 Well, I think for today's purposes we have
30 accomplished a few things. We've got a signed
31 admission and we have orders concerning the
32 support person and the one-way screen.

33 Mr. Myhre, I'm going to leave it to you to
34 set the -- the date for the subsequent Crown
35 application. I'm just going to say that jury
36 selection is set for Tuesday, May 30th, and that
37 might seem like a long time away. It's actually
38 not that far away and I'm wondering if another
39 pretrial conference either before someone who is
40 appointed to hear the trial or before another
41 judge of this court might be helpful to make sure
42 that when this goes to the jury the issues between
43 the Crown and the defence are sufficiently
44 narrowed that it's going to be manageable.

45 MR. MYHRE: I agree, My Lady, and so when I set the
46 date for the Crown's application I will also set
47 another pretrial date.

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1 THE COURT: All right.

2 MR. MYHRE: And space them out so that they're at least
3 a few weeks before that jury selection date.

4 THE COURT: All right. And I guess my final question
5 is, Mr. Fox has articulated some realistic
6 concerns about the 10-day time estimate and I'm --
7 I'm wondering if we should just bite the bullet
8 and bump it up to 15 days at this point, or if we
9 should leave that to the next pretrial conference.
10 Just for your information, Mr. Fox, juries
11 are told -- the jury pool is notified about two
12 weeks in advance of jury selection and they really
13 need to know how long they're going to be
14 required, realistically, so if this is not a 10-
15 day trial, it's a 15-day trial, they need to know
16 that early and often.
17 So I think I'll leave that to the two of you
18 to think about. I'll indicate in my pretrial
19 report that this trial is quite possibly going to
20 take longer than 10 days and scheduling may be in
21 contact with you, Mr. Myhre, to -- sort of for
22 some further information on that. But I am going
23 to let them know that likely 10 days is not
24 enough.
25 Yes, Madam Registrar?

26 THE CLERK: So would you like me -- would you like me
27 just to put the returnable date May 30th and then
28 Mr. Myhre makes another --

29 THE COURT: Yes. So the April 18th appearance for
30 which Mr. Fox would be required is cancelled as a
31 result of the Passover period. Mr. Myhre will
32 arrange subsequently for another date for the
33 Crown's application, and on that same day Mr.
34 Fox's application for access to video, and also
35 Mr. Myhre will arrange for Mr. Fox's appearance
36 through the registry at a subsequent pretrial
37 conference.
38 So technically, Mr. Fox, your next appearance
39 before this court is for jury selection on May
40 30th. You will be back before then.

41 THE ACCUSED: Right.

42 THE COURT: All right?

43 THE ACCUSED: Do you have a minute? It occurs to me
44 the -- if I submit the application about problems
45 with the jail on the same day as the 486.3 that
46 creates a bit of a problem because some of the
47 evidence that I want to use at that 486.3 hearing

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1 is audio and video of Desiree. But if I can get
2 those before that hearing --

3 THE COURT: Mm-hmm.

4 THE ACCUSED: Unless he sends them to you. And you can
5 send them to me.

6 THE COURT: Mr. Fox, I'm going to have to -- I have a
7 family case conference that I've got to hear and
8 I'm sorry to cut you off, just the fact is there
9 is some progress today, but if not a lot more
10 progress is made at the next appearance I think
11 there's got to be some decisions made about jury
12 selection, length of trial, and so on.

13 Thank you very much for your cooperation and
14 thank you, Mr. Myhre, for your cooperation, and we
15 will adjourn to a date to be determined.

16 MR. MYHRE: Thank you, My Lady.

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18 (PROCEEDINGS ADJOURNED)

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22 Transcriber: G. Agema

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I hereby certify the foregoing to be a true and accurate transcript of the evidence recorded on a sound recording apparatus, transcribed to the best of my skill and ability.



G. Agema
Court Transcriber