

27178-2
Vancouver Registry

In the Supreme Court of British Columbia
(BEFORE THE HONOURABLE MADAM JUSTICE HOLMES AND JURY)

Vancouver, B.C.
June 20, 2017

REGINA

v.

PATRICK HENRY FOX

PROCEEDINGS AT TRIAL

COPY

**BAN ON PUBLICATION - INHERENT
JURISDICTION**

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Crown Counsel:

M. Myhre

Appearing on his own behalf
by videoconference:

P. Fox

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1 Vancouver, B.C.
2 June 20, 2017
3

4 (JURY OUT)
5

6 (VIDEOCONFERENCE COMMENCES)
7 (THE ACCUSED IN REMOTE LOCATION)
8

9 THE CLERK: The Supreme Court of British Columbia, at
10 Vancouver, this 20th day of June, 2017, recalling
11 the matter of Her Majesty the Queen against
12 Patrick Henry Fox, My Lady.

13 THE COURT: Yes. Mr. Fox can you hear me?

14 THE ACCUSED: Yes, I can; thank you.

15 THE COURT: Thank you. Mr. Sheriff, I don't think we
16 need you unless you wish to be here, but --

17 THE SHERIFF: I'll [indiscernible/not at microphone].

18 THE COURT: -- it's up to you.

19 THE COURT: Thank you.

20 THE COURT: All right.

21 MR. MYHRE: My Lady, I believe the main purpose of
22 being here right now is to address the issue of
23 whether transport contemplates transportation by
24 third parties or whether it's just by the
25 individual licence holder.

26 THE COURT: Yes.

27 MR. MYHRE: And so I have submissions prepared on that.
28 Mr. Fox, did you receive my materials a few hours
29 ago?

30 THE ACCUSED: I did. Not a few hours ago, but I did
31 receive them. I've had a chance to skim through
32 them.
33

34 **SUBMISSIONS RE FIREARMS FOR CROWN BY MR. MYHRE:**
35

36 MR. MYHRE: So My Lady, I sent Mr. Fox everything I'll
37 -- I'll be referring Your Honour to and I told him
38 which paragraphs of the cases I would specifically
39 be referring to or relying on.

40 So my submission is essentially this: That
41 when you consider the purpose and the scheme of
42 the *Firearms Act*, it's quite clear that transport
43 refers to transport in the personal possession of
44 the licence holder.

45 So this begins with the basic principles of
46 statutory interpretation. The words of an Act are
47 to be read in their entire context, in their

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1 grammatical and ordinary sense, harmoniously with
2 the scheme of the Act, the object of the Act, and
3 the intention of Parliament.

4 I did look up the Oxford Dictionary
5 definition of transport. It doesn't really
6 assist, but it simply says, "take or carry from
7 one place to another". The purpose of the
8 *Firearms Act* was considered in -- of course, the
9 reference *Re: Firearms Act*, first case I've handed
10 up. And I've highlighted the two portions that I
11 say are particularly relevant here on paragraphs
12 -- page eight, paragraph 20.

13 So broadly the purpose the government had was
14 to promote public safety. And over the page at
15 paragraph 21, the court considers a number of the
16 problems the Act was meant to address. And the
17 first one they list, they list several. One is
18 the illegal trade in guns both within Canada and
19 across the border with the United States.

20 I've handed up the case *Cancade* because it
21 deals, generally, with the interpretations of
22 terms within the *Firearms Act* -- or sorry, related
23 to firearms charges. And so this -- *Cancade* was a
24 case in which somebody had been mailed some parts
25 that were, as they stood, illegal; but could be
26 modified, and they were intended to be modified by
27 the recipient to become legal. And the court --
28 that particular definition doesn't have
29 application here, but the general principles they
30 apply to the interpretation do.

31 So paragraph 18, the court sets out the
32 appellant and respondent positions and I've
33 highlighted the respondent's position because
34 that's what is adopted by the court later on. The
35 appropriate -- the respondent says:

36
37 ...the appropriate methodology in construing
38 this legislation is to take a purposive
39 approach, having regard to the circumstance
40 that this firearms legislation is to be
41 broadly construed because of the obvious
42 intent of Parliament to keep dangerous high
43 capacity weapons out of public circulation.

44
45 And so because of that, they didn't take a really
46 -- the most restrictive view possible of the term
47 that was being considered. And that I've

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1 highlighted one of relevant paragraphs from the
2 Supreme Court of Canada judgment relied on, and
3 then over at paragraph 22 where the court adopts
4 that line of reasoning.

5 So if I could take Your Ladyship to the
6 provisions of the Act --

7 THE COURT: All right.

8 MR. MYHRE: -- that I say show that what's meant is
9 individual personal possession, and I've just
10 provided the table of contents because it's
11 certainly not my intention to cherry pick
12 provisions here, but, of course, I did only print
13 out the provisions I thought had some bearing on
14 our inquiry.

15 But if I could take you to the first actual
16 bit of legislation on the fourth page; the s. 4 of
17 the purpose of the Act. So under s. (ii), the
18 purpose of the Act is to provide licences and
19 authorizations under which persons may possess
20 restricted weapons, et cetera, et cetera, in
21 circumstances that would otherwise constitute an
22 offence under ss. 93.

23 THE COURT: So in 4(a) --

24 MR. MYHRE: Two.

25 THE COURT: -- Roman Numeral ii; little Roman numeral
26 ii.

27 MR. MYHRE: Yeah; it deals with the exact circumstance
28 we're talking about here. And what you'll see
29 later on in the Act is the default position is the
30 holder of a licence is allowed to have it in their
31 home, and anything beyond that has to be
32 explicitly provided for.

33 THE COURT: All right.

34 MR. MYHRE: Over the page, s. 5; what's contemplated
35 is -- and this is so simple I -- but anyway. It's
36 a person who holds a licence.

37 THE COURT: Well, in the Federal statutory scheme, a
38 person doesn't mean "individual". Person includes
39 a corporation. It -- are make -- trying to make
40 the submission that that means an individual?

41 MR. MYHRE: It certainly seemed to me that that made
42 sense.

43 THE COURT: Well, I'm not sure that's -- I'd need to
44 hear more from you because the entire *Criminal*
45 *Code* is premised on the understanding of a person
46 as including an individual, a corporation, an
47 unincorporated association; think of the *United*

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- 1 *Nurses Association* case.
- 2 MR. MYHRE: So, My Lady, what -- the other things
3 you'll see in the *Firearms Act* is they contemplate
4 specific criteria for when a person can hold a
5 licence.
- 6 THE COURT: Well -- and look, s. 19, for example,
7 that's talking about an individual. So there --
8 even within the extracts you've given me from the
9 Act, there appears to be two different usages; one
10 of a person, one of individual. And presumably,
11 there is a reason for the difference.
- 12 MR. MYHRE: Well, if you look -- if you keep going in
13 sub -- in s. 5(2), in determining whether a person
14 is eligible, et cetera, et cetera; the firearms
15 -- Chief Firearms Officer should have regard to
16 whether a person has been treated for a mental
17 illness; has a history of behaviour that includes
18 violence.
- 19 THE COURT: That doesn't mean that no -- no entity can
20 be person unless they're capable of -- well,
21 anyway, I think if your submission rests on the
22 fact that "person" is used in s. 5, then you've
23 got a problem.
- 24 MR. MYHRE: It -- well, it's considering all the -- all
25 the sections that I've handed up to Your Ladyship.
26 So we could move on to the next ones.
27 Section 13, again, contemplates a person
28 holding a registration certificate.
29 And then s. 17 is the default position that I
30 mentioned.
31 So subject to ss. 19 and 20, a restrictive
32 firearms, the holder of the registration for which
33 is an individual may be --
- 34 THE COURT: Sorry, just back to s. 13. Is that engaged
35 here? Is it the Crown's position that Mr. Fox had
36 such a licence authorizing him to possess that
37 type of firearm?
- 38 MR. MYHRE: He did; yes.
- 39 THE COURT: All right. And then we go to...?
- 40 MR. MYHRE: Section 17. So the default position; a
41 restricted firearm "may be possessed only at the
42 dwelling house of the individual".
- 43 THE COURT: Well, that's interesting actually. That is
44 starting to narrow the analysis to an individual.
45 So it's -- appears to be saying that, whereas in
46 the previous section, it's a person that the
47 statute is speaking about, now in s. 17, we're

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Submissions re Firearms for Crown by Mr. Myhre

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1 looking at a sit -- a subset in which the holder
2 is an individual. That's how I read that. Is
3 that how you read that, Mr. Myhre?

4 MR. MYHRE: Well, I think Your Ladyship has just picked
5 up on something that I didn't pick up on, which is
6 the difference in using the terms individual and
7 person. So it -- I mean, I didn't realize that,
8 but it makes sense to me.

9 THE COURT: So in s. 17 where the holder of the
10 registration certificate is an individual, the
11 firearm may possess -- be possessed only at the
12 dwelling house of the individual, or a place
13 authorized by a Chief Firearms Officer. Is that
14 how you're reading that?

15 MR. MYHRE: Yes. So I include s. 19 because it's
16 referred to in s. 17; but if I could take Your
17 Ladyship to s. 19(2.1). So:

18
19 ... an individual who holds a licence
20 authorizing the individual to possess ...
21 restricted firearms must, if the licence is
22 renewed, be authorized to transport them
23 within the individual's province of
24 residence...

25
26 To the five listed locations. And then at s. (e),
27 we see the one that's potentially in contention
28 here.

29 And My Lady, when you're thinking about the
30 purpose of this Act and how to interpret these
31 provisions, in my submission, the restrictions set
32 out in s. (e) has a pretty clear intention. It
33 specifies port of exit so that the person who is
34 carrying -- the individual who is carrying the
35 firearm with them will go through customs, will
36 declare their firearm, and will give the border
37 personnel the opportunity to decide whether they
38 are appropriately allowed into their country, and
39 that's particularly germane here because that's
40 exactly what --

41 THE COURT: Well, how do we know that's the purpose?
42 Maybe the purpose is just to recognize the
43 jurisdictional limitations of the Act, that it
44 extends only to the border.

45 MR. MYHRE: Well, if one of the purposes of the Act is
46 to combat smuggling, then of course, we need to
47 know when firearms are going back and forth across

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1 the border. And that can't be done unless the
2 person actually uses a port of exit.
3 THE COURT: I see.
4 MR. MYHRE: So the holder of an ATT couldn't jump in a
5 boat and go across the border between the Gulf
6 Islands. They have to use a port of exit.
7 THE ACCUSED: I'm sorry to interrupt, but is the term
8 "border exit" clearly defined anywhere?
9 THE COURT: Does -- I don't know that; do you know
10 that, Mr. Myhre?
11 MR. MYHRE: I can't say --
12 THE COURT: Right.
13 MR. MYHRE: -- My Lady. I don't think so, but I didn't
14 check specifically in the definitions for that.
15 THE ACCUSED: I bring that up only because if it's not
16 defined, then couldn't a port of exit be
17 interpreted as meaning any point at which the
18 person exits the country?
19 THE COURT: Right, Mr. --
20 THE ACCUSED: Or does it have to be -- sorry.
21 THE COURT: Mr. Fox, I'm going to invite you to just
22 make notes of what you want to --
23 THE ACCUSED: Sure.
24 THE COURT: -- ask or say and, essentially, I'm going
25 to hear from Mr. Myhre about his submissions.
26 THE ACCUSED: Thank you.
27 THE COURT: I may ask him questions, but I'm going to
28 ask you to keep yours for now. And then when Mr.
29 Myhre's finished, I'll -- I'll ask you to make
30 your submissions, raise the questions you wish to
31 raise.
32 MR. MYHRE: So My Lady, I've included two more sections
33 that I'd like to refer you to. If you could flip
34 over a couple of pages to s. 23 that deals with
35 the transfer, and in a similar vein, right below
36 it, s. 33 which deals with lending. And Mr. Fox
37 actually referred to the lending provision
38 yesterday when he pointed out that you can have
39 another person carry your firearms or lend them to
40 another person as long as they have a licence.
41 THE COURT: Go on.
42 MR. MYHRE: And so in my submission, what this Act
43 clearly contemplates is a very tight regulation of
44 restricted firearms. And it certainly, and very
45 obviously, doesn't contemplate transport by an
46 unknowing third party.
47 THE COURT: Do you have -- did you look at a French

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Submissions re Firearms for Crown by Mr. Myhre

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1 version of the Act?

2 MR. MYHRE: I did not, My Lady.

3 THE COURT: That might be useful. Sometimes the French
4 version will speak about something in a way that
5 casts light on Parliament's intent. And I'm
6 looking at s. 19(2.2) that seems to deal with
7 transporting and transferring; both. Does that
8 cast any light on the intended meaning of
9 "transport"?

10 MR. MYHRE: I'm not sure -- I'm not sure that it does,
11 My Lady.

12 THE COURT: All right.

13 MR. MYHRE: My last submission relates to the
14 Regulations. And in my submission, they support
15 the interpretation urged by the Crown in two ways.

16 First of all, as you can see in s. 11 of the
17 Regulations in sub (d), it contemplates a
18 situation in which the vehicle containing the
19 firearm that's being transported may end up being
20 unattended, and so the individual transporting
21 this restricted firearm, if they're going to leave
22 their vehicle unattended, would have to be sure to
23 comply with s-s. (d), and they would not be able
24 to do that if they didn't know they were carrying
25 the firearm. And so you -- it's conceivable that
26 the person who wanted to ship their firearms, if
27 transport can include shipping, would be able to
28 make sure it was unloaded, as specified in sub
29 (a), it was rendered inoperable, and it was in a
30 locked container. But they wouldn't be able to
31 ensure sub (d).

32 THE COURT: So you're saying that if the Act intended
33 that an individual could -- intended transport to
34 be read broadly as allowing the licence holder to,
35 essentially, ship the firearm with somebody else,
36 that licence holder would not be able to ensure
37 that the regulations were complied with.

38 MR. MYHRE: Yes, that's my submission.

39 THE COURT: Because they wouldn't be with the firearm
40 as it was traveling. All right; thank you.

41 MR. MYHRE: And the second submission on the Regs, and
42 the much more obvious one, is that s. 16
43 contemplates shipping. Here are the circumstances
44 in which a person can ship their firearms: "only
45 if the destination is within Canada".

46 THE COURT: Are those the only restrictions on shipping
47 a firearm by posting it?

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Submissions re Firearms for Crown by Mr. Myhre

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1 MR. MYHRE: I'll just double check the table of
2 contents, My Lady, but I think that was the only
3 section actually dealing with shipping. Yes, as
4 you can see it's -- and I -- there's not even a
5 sub 1. So I haven't left out any subsections.
6 THE COURT: Isn't that a bit peculiar? There's no
7 restriction on -- there is nothing parallel to
8 11(a) or (b) or (c). So if you look only at
9 s. 16, presumably the firearm could be loaded,
10 operable, not in a locked container, not even
11 declared as being a firearm. I find it hard to --
12 hard to believe that there's -- there are no other
13 restrictions on shipping by post. And if there
14 are no other restrictions, how does that bear on
15 your larger submission that the entire statutory
16 scheme should be read very restrictively because
17 of its purpose of seriously restricting the
18 availability of firearms?
19 MR. MYHRE: Well, I think Your Lady has this point.
20 But the point is that there is a differentiation
21 in the Reg -- in the Regs when it talks about
22 transport versus shipping. The fact that they
23 haven't -- the Regulations don't clamp down more
24 on shipping -- I mean, I agree it doesn't seem
25 particularly consistent with really trying to
26 clamp down on firearms but there is that
27 distinction.
28 THE COURT: And what is it that prevents Mr. Fox from
29 shipping?
30 MR. MYHRE: It's not something he was allowed to do.
31 It's not something he was allowed to do by his
32 licence. He possessed that firearm from the time
33 he left his apartment until the time TNT picked it
34 up from the packaging depot. And there is nothing
35 in his licence.
36 THE COURT: So his licence permits only transporting?
37 MR. MYHRE: Transport to a port of exit.
38 THE COURT: All right; thank you. Mr. Fox?
39

SUBMISSIONS RE FIREARMS FOR ACCUSED BY PATRICK FOX:

40
41
42 THE ACCUSED: There is just a couple of points that I
43 wish to make.
44 First of all, with respect to s. 16, the
45 shipping by post, it is relevant that in the first
46 line of that, they restrict the scope of it to
47 shipping by post only. There is no mention of

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1 shipping by courier. And so I don't believe that
2 any of those would apply so much to this
3 situation.

4 Another point I want to make is, it seems --
5 I get the impression that the Crown is arguing
6 that my ATT or whatever licences I have only
7 authorize me to transport firearms, not to ship
8 the firearms, but there is no such thing as an
9 authorization to ship.

10 And one other point that I think would be
11 certainly very relevant here is that an ATT
12 specifies two end points, typically, the owner's
13 home and then whatever destination they're
14 authorized to transport the firearms to, but it
15 must be implicit that the person is authorized
16 also to possess the firearms in all points between
17 those two. And so if the packaging depot is
18 somewhere between my home and the shooting range
19 and I was intending to go to the shooting range at
20 that time, then I wouldn't have been in violation
21 of the ATT -- or the restrictions of the ATT.

22 And finally though, I understand that these
23 are issues that would need to be addressed or
24 resolved for the purpose of charging the jury, but
25 in all honesty, I don't really see how any of this
26 has much to do with the s. 93 allegation. Because
27 that -- that charge or that allegation is that I
28 possessed the firearms at the packaging depot, and
29 as we saw from the cross-examination yesterday,
30 there is actually no evidence that the firearms
31 were ever there, and I never actually admitted
32 that I shipped the firearms. I only stated that I
33 sent the firearms to Los Angeles.

34 So beyond the purpose of charging the jury,
35 I'm not sure that all of this discussion really
36 has a lot of relevance to the charge.

37 THE COURT: All right. Just on that last point, Mr.
38 Fox. And it -- I -- this doesn't deal with the
39 legal issue that I've asked for submissions on,
40 but with the trial more generally, when you say
41 there was no evidence that the firearms were ever
42 at the packaging depot, I feel I need to point out
43 to you that there is circumstantial evidence from
44 which the jury could conclude that they were. And
45 that is the evidence that -- from Mr. Mangat, that
46 he came and met you at your home, outside your
47 apartment, picked up boxes, took them back to his

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1 packaging depot, did this, did that, sent them
2 off, ultimately, with UPS. And then we have the
3 evidence from the agent who saw the boxes at Ms.
4 Munoz's home and found firearms in them. So --
5 THE ACCUSED: Okay; fair enough.
6 THE COURT: -- it's some evidence that -- from which a
7 jury could reasonably conclude that they were --
8 the firearms were the boxes at the time Mr. Mangat
9 picked them up from you.
10 THE ACCUSED: Okay.
11 THE COURT: So -- and also, just to be clear, the
12 reason I'm asking for submissions on this point of
13 law, how do we get to the charge in Count 2. How
14 does -- what -- what law is the Crown relying on
15 and how does it get from point A to point B?
16 That's potentially confusing. What -- what's the
17 legal basis for the charge that the Crown has laid
18 or proved in Count 2 so that I can tell the jury
19 about the elements of that charge? And I felt
20 that the Crown needed to explain in greater detail
21 what aspects of the law it's relying on and how --
22 essentially, what the Crown theory is, the legal
23 theory, about why it was that you were committing
24 an offence by, if it's proven that you were,
25 sending those firearms in the way that they were
26 sent.
27 So the Crown has taken me through the aspects
28 of the *Firearms Act*, the regulation that the Crown
29 says supports the interpretation the Crown's
30 relying on. Yesterday, I believe it was, the
31 Crown took me through the provisions that deal
32 with how it is that you came to be licenced and
33 what your licence allows and doesn't allow. I do
34 wish to look at the key *Criminal Code* provisions
35 in the French version because interpreting --
36 where there is any sort of ambiguity, it can be
37 useful to do that.
38 So how do you wish to deal with this, Mr.
39 Myhre? I can stand down. You can consult the
40 French provisions; I can go and look them up.
41 MR. MYHRE: I'm not sure how else to do it?
42 THE COURT: I'm sorry?
43 MR. MYHRE: Yeah; I think that's what we would have to
44 do, My Lady.
45 THE COURT: All right. Then we'll do that, and I don't
46 think that will take very long. Mr. Fox, are you
47 able to sort of hold on to the video connection

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1 and we'll resume in about 10 or 15 minutes. Will
2 that work?
3 THE ACCUSED: Sure.
4 THE CLERK: I'll just leave him dialed up. I won't
5 disconnect it.
6 THE COURT: All right. Then --
7 THE ACCUSED: Okay.
8 THE COURT: -- we'll do that. And Mr. Myhre, are
9 thinking about 15 minutes should be enough?
10 MR. MYHRE: Yes, I think I can just pull it up on my --
11 on my cell phone.
12 THE COURT: All right. So we'll stand down briefly;
13 thank you.
14
15 (PROCEEDINGS ADJOURNED)
16 (PROCEEDINGS RECONVENED)
17
18 MR. MYHRE: My Lady, I was able to look at the French
19 versions of the Regs and the Act. I can't say I
20 have anything else helpful to say.
21 THE COURT: All right. I was able to look at the
22 French version of the Act, and I found that it
23 casts no different light on the intended meaning,
24 and if anything, reinforces the interpretation
25 that Crown counsel was putting forward in that it
26 uses the word "*particulier*" to mean individual in
27 a number of circumstances where the reference is
28 to the holder of the licence.
29 Any further submissions from either Mr. Fox
30 or Mr. Myhre?
31 THE ACCUSED: No, My Lady.
32 MR. MYHRE: No, My Lady.
33
34 [RULING RE *FIREARMS ACT*]
35
36 THE COURT: Now, unless there are questions or anything
37 that needs clarifying on that issue, I do have one
38 other small issue to raise with -- with you. Mr.
39 Myhre, anything before I raise that?
40 MR. MYHRE: There are a couple of things I want to
41 raise, My Lady, but not --
42 THE COURT: But different.
43 MR. MYHRE: -- to do with that issue.
44 THE COURT: All right; Mr. Fox, any questions about
45 what we've just been discussing?
46 THE ACCUSED: No.
47 THE COURT: So the one thing I wanted to raise was

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1 admissions. The very first admission in the trial
2 was -- and I won't have the language exactly, but
3 going by memory, something to the effect of -- and
4 it dealt with the Crown book of documents taken
5 from the website, and it was essentially that the
6 material in that book accurately represents some
7 of the content of the website as of a given date,
8 and I can't remember the date exactly.

9 And I'm simply wondering whether there should
10 be a parallel admission dealing with some of the
11 other exhibits that were, it seems, taken from the
12 website. There was a defence book, for example.
13 And there were a couple of loose emails that were
14 filed. I don't have the exhibit numbers. Is that
15 something you've considered, Mr. Myhre?

16 MR. MYHRE: I did think about that, My Lady. It seems
17 to me that those other things were authenticated
18 to the extent necessary when they were put in
19 through questioning. I'm not sure it was really
20 formally gone through, but certainly the
21 questioning and the answers proceeded on the basis
22 that everyone agreed or appeared to agree that
23 these are accurate copies of the emails that were
24 exchanged between the parties. I don't think
25 there is really any issue there.

26 THE COURT: All right. So are you content it that way,
27 as well, Mr. Fox?

28 THE ACCUSED: Yes, I am.

29 THE COURT: All right; thank you. What did you wish to
30 raise, Mr. Myhre?

31 MR. MYHRE: Two things, My Lady. The first one is, it
32 seems to me that Mr. Fox representing himself is
33 in a slightly difficult position when it comes to
34 making his closing address, and so I wanted to ask
35 Your Ladyship to just caution him about the
36 difference between talking about the evidence,
37 making submissions about the evidence, and giving
38 evidence. And because he's in a position where he
39 is so familiar with everything that happened, it
40 may be difficult for Mr. Fox not to talk about
41 things that aren't in evidence, things that he
42 knows or would like to say but that never made it
43 before the jury. And I expect he knows that, but
44 I thought I should mention it.

45 THE COURT: All right. That seems a cautious approach;
46 thank you. Mr. Fox, you do understand what a
47 closing address can include and not include; do

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1 you?
2 THE ACCUSED: It's my understanding that I can only
3 make reference to information that has been
4 admitted as evidence and not bring up new
5 information at that time.
6 THE COURT: That's a good way of putting it. So you
7 need to be very careful not to refer to, for
8 example, emails that are not in evidence.
9 THE ACCUSED: Right.
10 THE COURT: But also you need to be careful not to
11 start talking about your reasons for having done
12 something unless you're doing it in a way that is
13 based in the evidence. So for example, there
14 might be an email that the Crown says should be
15 interpreted in a certain way, and your position
16 might be, no, that's not the reasonable
17 interpretation, there is another reasonable
18 interpretation. And you could certainly suggest
19 to the jury that there is a different reasonable
20 interpretation. What you cannot do is say to the
21 jury, "Well let me tell you what I meant when I
22 wrote that" because --
23 THE ACCUSED: Right. Right.
24 THE COURT: -- because that's not in evidence. We
25 don't have direct evidence of what you meant. But
26 in the same way that the Crown may be asking the
27 jury to draw inferences from what you wrote, you
28 can ask the jury to draw inferences from what you
29 wrote. You simply can't tell them what you meant
30 because that would be --
31 THE ACCUSED: Okay.
32 THE COURT: -- that would be giving evidence.
33 THE ACCUSED: Right; okay.
34 THE COURT: Are there other areas that might seem like
35 grey areas, Mr. Myhre; that you think it would be
36 helpful to address with Mr. Fox?
37 MR. MYHRE: That's the only one that occurs to me, My
38 Lady.
39 THE COURT: Another example, you might be tempted to
40 tell the jury why you did something. And again,
41 that's not in evidence. And you would be
42 improperly giving evidence through a closing if
43 you were to say, "Well, the reason I did that
44 was".
45 But there may be some situations where you
46 could suggest to the jury that the only reasonable
47 inferences that a person would do something for a

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1 particular reason. People bound by custody
2 orders, for example, usually have a need to
3 communicate about how the child will go from one
4 person to the other, for example.
5 THE ACCUSED: Okay.
6 THE COURT: You -- I think I'm belabouring the point.
7 I think you understand the point.
8 THE ACCUSED: I understand.
9 THE COURT: All right; thank you.
10 THE ACCUSED: Thank you.
11 THE COURT: Mr. Myhre, was there something else?
12 MR. MYHRE: One more thing, My Lady. I just wanted to
13 clarify and canvass my understanding of what the
14 law is when it comes to talking about the elements
15 of the offence, and specifically what evidence is
16 relevant to either repeated communication or
17 threatening conduct. And I'm thinking
18 specifically of the blogs that are included in
19 Exhibit 1. So these are all things the Crown says
20 are statements by Mr. Fox. They could constitute
21 communication if they reach people known to Ms.
22 Capuano. They could also constitute --
23 THE COURT: Well, just stop there. Communication in
24 the abstract, communication to Ms. Capuano; which
25 one?
26 MR. MYHRE: Communication as it's defined in the
27 criminal harassment section. So communication,
28 direct or indirect, with the complainant or anyone
29 known to her.
30 THE COURT: All right.
31 MR. MYHRE: So if -- if it's a communication designed
32 to go to someone known to her, or if it's -- if it
33 contains a threat of some kind, then it would be
34 my submission that those things are things the
35 jury can consider when they are thinking about Mr.
36 Fox's actions. Now those things aren't -- where
37 they aren't relevant is they're not relevant to
38 Ms. Capuano's fear, or the legitimacy of her fear.
39 But they are also relevant to Mr. Fox's intent;
40 understanding what he meant, or intended by other
41 actions he took.
42 And my submission is that's consistent with
43 the *Taylor* case that we've looked at a few times.
44 THE COURT: Well, let me just go back to the first
45 statement you made. The conduct -- so when you're
46 talking about repeated communication or
47 threatening conduct. Let -- let's call that the

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1 conduct. The conduct has to be conduct that
2 causes the other person reasonably in all the
3 circumstances to fear for their safety.
4 MR. MYHRE: So in that, My Lady, I respectfully
5 disagree because I don't think that's consistent
6 with *Taylor*.
7 THE COURT: Well, look at the language of s. 264:
8
9 ...engage[s] in conduct referred to in
10 subsection (2) that causes that other person
11 reasonably, in all the circumstances, to fear
12 for their safety...
13
14 MR. MYHRE: Hmm; it's hard to argue with that, My Lady.
15 It is inconsistent with *Taylor* --
16 THE COURT: Well --
17 MR. MYHRE: -- but --
18 THE COURT: -- that may be.
19 MR. MYHRE: -- so -- so then, I'm not going to disagree
20 with Your Ladyship on that. It makes perfect
21 sense. So then, my submission is and what I will
22 be saying to the jury is that when you're thinking
23 about what Mr. Fox's intentions were with some of
24 the actions that did cause Ms. Capuano to fear,
25 you can consider the things that he said in these
26 blogs. There is no evidence Ms. Capuano actually
27 read them or that those things caused her to fear,
28 but they're relevant to show Mr. Fox's intent with
29 some of his other actions. We did sort of
30 canvass --
31 THE COURT: Well, the way I was thinking of dealing
32 with it is that if it's material on the blogs
33 website that comes to her attention in some way,
34 then it could be considered in relation to the
35 question of whether it -- well, then it could form
36 part of the conduct that the offence must be
37 grounded on, and it could be considered in
38 relation to whether it reasonably caused her to
39 fear for her safety. But if it didn't come to her
40 attention, then it could not be considered in
41 relation to either of those things. But it may be
42 relevant to Mr. Fox's state of knowledge,
43 awareness, intent.
44 MR. MYHRE: I agree with that, My Lady.
45 THE COURT: Do you have any submissions, questions
46 about that, Mr. Fox?
47 THE ACCUSED: Not specifically about that; no. But I

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1 suppose I should ask, just to make sure that I'm
2 not going to be out of line with this tomorrow.
3 In closing arguments, is there -- there won't be
4 an issue with me bringing up my position that the
5 website is really just a question of free speech;
6 right? I mean, because that wasn't brought up
7 during the trial.
8 THE COURT: Free speech is not a defence as such.
9 THE ACCUSED: Right.
10 THE COURT: If the Crown were to prove all the elements
11 of the offence of criminal harassment, then that
12 would essentially supersede your right to freedom
13 of speech.
14 THE ACCUSED: Right.
15 THE COURT: But there may be a more subtle way in which
16 you can put the idea of freedom of speech before
17 the jury in your closing address. I get the
18 impression that it may be your position that you
19 simply cannot foresee any situation in which
20 someone, Ms. Capuano, would be troubled by
21 publication of something that is true. I don't
22 know if that's your position? Do you want to tell
23 me more about what you wish to say about free
24 speech? And then I could be a bit more --
25 THE ACCUSED: Sure.
26 THE COURT: -- helpful. You don't have to.
27 THE ACCUSED: Well, it would come up tomorrow anyway,
28 so.
29 MR. MYHRE: Well --
30 THE ACCUSED: Now I --
31 MR. MYHRE: Sorry, My Lady. I just want to say it. By
32 saying this, Mr. Fox, gives me the opportunity to
33 respond to that in my closing address. And it --
34 it may be that I've already thought of that and
35 put it in there, but I don't want to be in a
36 position where --
37 THE COURT: I was going to point out the same thing. I
38 did yesterday. But, Mr. Fox, you -- by having
39 chosen not to call evidence, you get a -- what's
40 sometimes considered a strategic advantage of
41 making your closing address last. And I do not
42 wish to remove that advantage by having you say
43 now in Mr. Myhre's presence what it is that you
44 want to say to the jury tomorrow.
45 I'm doing -- I'm -- I'm saying these things
46 only -- or asking you these questions only because
47 you asked me a question --

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1 THE ACCUSED: Correct.
2 THE COURT: -- "Can you bring you up free speech?"
3 I -- because you don't want to say something
4 inappropriate. And I should add that if you were
5 to put before the jury something that was
6 completely inappropriate, I might need to tell
7 them that in my charge. So we have to tread very
8 carefully here. I don't want to undermine your --
9 the effect of your closing. I can tell you free
10 speech is not a defence to criminal harassment.
11 THE ACCUSED: I understand that free speech is probably
12 -- first let me say, I have no concerns about if
13 Mr. Myhre hears this at this point. I know that
14 other things that I have said, he has brought them
15 up; for example, on the direct examination of Ms.
16 Capuano. So I would expect that he would bring it
17 up ahead of time. I have no issue with that.
18 Now, I know that free speech would not be a
19 defence for harassments with respect to direct or
20 indirect communication. However, I'm still of the
21 position that a publicly accessible website must
22 be viewed as a public forum. And that's where I
23 expect to bring up the point of free speech. Mr.
24 Myhre's position is that the website somehow
25 constitutes harassment. My position is Ms.
26 Capuano doesn't have to go to the website if she
27 doesn't want to be subjected to it.
28 And if we say that the website, or the
29 contents on the website is somehow harassment and
30 should not occur, it seems that we're really
31 putting a large chilling effect on everybody's
32 pursuit or -- or their exercise of free speech. I
33 mean, I would be a little afraid that a case like
34 this then could result in a lot of angry
35 ex-husbands or single fathers afraid then to voice
36 any opinion of their ex-wives. And that's the
37 type of issue that I would be looking to bring up
38 on closing. Not so much -- not at all with
39 respect to the emails. That's unquestionably not
40 protected by free speech. But rather the publicly
41 made statements that were intended to be received
42 by the general public, not at all by Ms. Capuano.
43 THE COURT: All right. Mr. Myhre, what's your
44 submission on whether that is a -- whether there
45 is anything problematic about Mr. Fox putting that
46 theory of the defence to the jury? Essentially,
47 that Ms. Capuano didn't have to look at the blog

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1 or the website.

2 MR. MYHRE: It seems to me that he's really treading
3 into the area of the law there, and there needs to
4 be - I think we already canvassed this - a pretty
5 clear instruction on the circumstances of this
6 case and what constitutes repeated communication,
7 direct or indirect, with Ms. Capuano or any person
8 known to her. So the jury has to have an
9 instruction on what does that mean when Mr. Fox is
10 sending her emails telling her about the website
11 and what's going on with the website.

12 And my submission is that when that happens,
13 it ceases to be -- I mean, then it's quite clearly
14 direct communication.

15 THE COURT: I think what you're saying is that the
16 emails incorporate the effect of the website into
17 the emails as direct communication.

18 MR. MYHRE: Yes. And in addition, you could also view
19 some of what Mr. Fox says to Ms. Capuano about the
20 website as threatening conduct because he ties the
21 website into her not being able to get a job,
22 which in my submission to the jury will be that's
23 very obviously what one of his purposes was with
24 the website.

25 THE COURT: All right; thank you. Mr. Fox, you have my
26 answer that free speech is not a defence to
27 criminal harassment. You have Mr. Myhre's
28 response which is, essentially, an argument about
29 how the evidence should be characterized. I'm not
30 sure I can say much more to you without more
31 specifics about exactly what it is you may be
32 saying to the jury.

33 THE ACCUSED: Sure; okay.

34 THE COURT: Does that answer your question or does it
35 not answer your question?

36 THE ACCUSED: Well, yeah, that does -- that does answer
37 my question. I mean, it does raise some concerns
38 on my end that probably wouldn't really be
39 appropriate to get into at this point anyway.

40 One thing I am becoming increasingly
41 concerned about is the point that I made yesterday
42 that Ms. Capuano lives in a jurisdiction that has
43 one set of laws. I live in another. And I can
44 see the ruling in this case, if it goes a certain
45 way, or the -- the outcome of this case, causing a
46 lot of complication or concerns about those types
47 of issues that Ms. Capuano is not subject to any

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1 concept of psychological harm or psychological
2 safety, so she could do whatever she wants about
3 me. I was speaking with Ms. Clancy [phonetic]
4 this morning, for example. Ms. Capuano continues
5 to make all these claims and allegations against
6 me, but then I find myself in a position where I'm
7 not even able to respond to those or to defend
8 against those allegations without fear of being
9 subjected to criminal harassment prosecution,
10 which is, to a large extent, what I'm having with
11 this case. Ms. Capuano went on the news and made
12 these allegations, so I wrote a blog post
13 responding to that. All of sudden I find myself
14 being accused of -- of threatening her and now
15 being charged with criminal harassment.

16 But as I said, that's probably something that
17 wouldn't be appropriate to discuss at this point.

18 THE COURT: All right. Anything else, Mr. Myhre, that
19 you'd like to raise? Mr. Fox?

20 THE ACCUSED: No.

21 MR. MYHRE: No, My Lady. Will we -- you did mention
22 the possibility of giving us the draft of the
23 charge tomorrow morning before we do our closings?

24 THE COURT: I did.

25 MR. MYHRE: Is that possible?

26 THE COURT: I'll have to see. I expect so.

27 MR. MYHRE: Would it be possible then to convene
28 briefly at 9:30 or perhaps to come to the registry
29 at 9:30 or...?

30 THE COURT: I have another matter at 9:00. I was going
31 to suggest a quarter to 9:00, but Mr. Fox won't be
32 here at quarter to 9:00. I think --

33 MR. MYHRE: Well, My Lady, I could get the charge from
34 you and give a copy to Mr. Fox.

35 THE COURT: Well, then what I suggest is that -- Madam
36 Registrar, do you know what courtroom I'll be in
37 for the nine o'clock matter? Will it be --

38 THE CLERK: No, I tried to message, My Lady, but --

39 THE COURT: Ah --

40 THE CLERK: -- no one is -- I think they're doing the
41 list right now.

42 MR. MYHRE: We can -- I can find it.

43 THE COURT: All right. I'll certainly have something.
44 There may be some blanks in it, but I'll certainly
45 have something you can have. And what I suggest
46 is that you show up at the courtroom somewhere
47 around 9:00 to 9:15. I don't know how long this

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1 other matter will take. And in any event, I might
2 just briefly interrupt it, give you the copies, or
3 perhaps ask Madam Registrar to give you the copies
4 on your undertaking, Mr. Myhre, that you'll
5 immediately deliver one to Mr. Fox so that he's
6 not disadvantaged by having one later than you, so
7 that you're effectively going to receive them at
8 the same time, Mr. Myhre.
9 MR. MYHRE: Very good, My Lady. Mr. Fox, what time do
10 you usually get here in the morning?
11 THE ACCUSED: 9:30.
12 THE COURT: Ah. All right; nothing else?
13 THE ACCUSED: No.
14 THE COURT: All right. Thank you very much and we'll
15 adjourn until tomorrow morning.
16 THE CLERK: Order in court. This court stands
17 adjourned until tomorrow morning at ten o'clock
18 a.m.

19
20 (VIDEOCONFERENCE CONCLUDES)

21
22 (PROCEEDINGS ADJOURNED TO JUNE 21, 2017, AT
23 10:00 A.M.)
24
25

26
27 Transcriber: J. Vanin
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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.



J. Vanin
Court Transcriber