

27178-2
Vancouver Registry

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

Vancouver, B.C.
April 24, 2017

REGINA

v.

PATRICK HENRY FOX

PROCEEDINGS IN CHAMBERS

COPY

BAN ON PUBLICATION; INHERENT JURISDICTION

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JURISDICTION

Crown Counsel:

M. Myhre

Appearing on his own behalf:

P. Fox

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Proceedings**BAN ON PUBLICATION; INHERENT JURISDICTION**

1 Vancouver, B.C.
2 April 24, 2017
3
4 THE CLERK: In the Supreme Court of British Columbia,
5 at Vancouver, this 24th day of April, 2017,
6 calling the matter of Her Majesty the Queen
7 against Patrick Henry Fox, My Lady.
8 THE COURT: Thank you.
9 MR. MYHRE: My Lady, Mark Myhre for the Crown, M-y-h-
10 r-e.
11 THE COURT: Thank you. And you're Mr. Fox?
12 THE ACCUSED: Yes, I am.
13 THE COURT: All right.
14 MR. MYHRE: Your Honour, the Crown wouldn't be opposed,
15 with Your Ladyship's permission, to have -- and
16 with the sheriff's consent, that Mr. Fox sit at
17 counsel table. I can tell you that he's made a
18 number of court appearances and --
19 THE COURT: Right.
20 MR. MYHRE: -- there have been no issues.
21 THE COURT: No difficulty from Mr. Sheriff's
22 perspective. Mr. Fox, if you would like to sit --
23 THE ACCUSED: Thank you.
24 THE COURT: -- at counsel table. I understand you are
25 representing yourself in this proceeding.
26 THE ACCUSED: Yes, that is true.
27 THE COURT: All right.
28 MR. MYHRE: Now, My Lady, I'm not -- I hope there is no
29 confusion, but the Crown's intention today is to
30 make an application under s. 486.3 of the *Criminal*
31 *Code* to have counsel appointed to cross-examine
32 Desiree Capuano at the trial.
33 THE COURT: All right. When you say confusion, are
34 you --
35 MR. MYHRE: I just --
36 THE COURT: -- concerned that Mr. Fox may not be aware
37 of what the application is?
38 MR. MYHRE: No, I just -- in discussions with Madam
39 Clerk this morning, I understand there may have
40 been some irregularity in how the Crown filed the
41 materials, but --
42 THE COURT: I'm not aware of that. The materials --
43 your materials are here. I haven't --
44 MR. MYHRE: And I know --
45 THE COURT: -- received anything from Mr. Fox. I don't
46 know whether Mr. Fox filed anything that he
47 expects the court to have received.

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1 THE ACCUSED: I have not filed anything.
2 THE COURT: All right. You are aware of the
3 application, Mr. Fox?
4 THE ACCUSED: Yes, I am.
5 THE COURT: You understand what it involves, what the
6 Crown is asking for?
7 THE ACCUSED: Yes.
8 THE COURT: And I understand from something I read in
9 the file that you're opposed to the Crown -- or
10 opposed to the order that the Crown is making --
11 THE ACCUSED: That is correct.
12 THE COURT: -- or seeking, I should say.
13 THE ACCUSED: That's correct, yes. I -- I should
14 explain, perhaps, a large part of the reason that
15 I have not filed anything is I'm having
16 complications with the jail. They're -- they're
17 making it very difficult to obtain evidence or to
18 obtain photocopies, etc. And that's an ongoing
19 issue, something that I was hoping that we might
20 be able to address somewhat today.
21 THE COURT: All right. Are -- do you feel ready and
22 equipped to respond to the Crown's application?
23 THE ACCUSED: Yes. Yes. My only concern, though, is I
24 do have some documents and audio recordings that I
25 was hoping to submit as exhibits. I've been
26 unable, though, to obtain the photocopies for the
27 Crown and for the court.
28 THE COURT: All right. When you say unable to obtain
29 the photocopies, do you mean unable to make
30 photocopies?
31 THE ACCUSED: Correct, yes.
32 THE COURT: But you've got the material you want to
33 file.
34 THE ACCUSED: Yes.
35 THE COURT: All right. So it's just a question of
36 getting it copied.
37 THE ACCUSED: Yes, correct.
38 THE COURT: And was there something else you've not
39 been able to --
40 THE ACCUSED: I have a DVD containing some audio
41 recordings that I would want to submit as exhibits
42 as well. I'm not familiar with -- or I'm not
43 certain what the court's procedure is for
44 submitting that.
45 THE COURT: Well --
46 THE ACCUSED: Would I be required to make a copy of the
47 DVD and submit that or --

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1 THE COURT: -- it depends. What I suggest is if -- if
2 the only issue is making copies of materials that
3 you have here with you, what I suggest is we
4 start, we deal with the application, we deal with
5 your response. If there's a problem with copies
6 or something like that, then we'll deal with it at
7 the time.

8 THE ACCUSED: Okay.

9 THE COURT: I'm not saying that your material will
10 necessarily be admitted. Sometimes people hope to
11 tender evidence of video recordings that turns out
12 to be considered not relevant in the application.
13 But I don't know what your video recording is, and
14 we can get to it when the time comes and make a
15 determination.

16 THE ACCUSED: Okay.

17 THE COURT: So apart from those concerns about making
18 copies, you feel ready to go ahead with --

19 THE ACCUSED: I do.

20 THE COURT: -- and respond to this application? All
21 right.

22 And I should say I have been appointed as the
23 trial judge on this matter. I am not 100-percent
24 sure that I will be able to continue as the trial
25 judge, and I was hoping that we would have a
26 pretrial conference at some point and discuss the
27 trial scheduling and so forth. And it was
28 suggested to me that today, after this
29 application, might be a good opportunity to have
30 that type of discussion.

31 If there's any concern about -- if I end up
32 not being the trial judge, if there's any concern
33 about my making a decision on this application of
34 the Crown's, then I should hear about it now. I
35 suppose one possibility is I could be appointed as
36 the case management judge up to the point of
37 trial. Do you have any concerns, Mr. Myhre?

38 MR. MYHRE: I have seen one case where the judge who
39 ruled on the 486.3 application was not the
40 eventual trial judge, and I believe the way that
41 they dealt with it was that the trial judge simply
42 affirmed the order once they were appointed, to
43 comply with the *Criminal Code*.

44 So, My Lady, the way I propose to proceed
45 this morning, then, and I was going to suggest
46 myself, that we deal with a few other issues once
47 this application is heard or once we've heard as

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1 much of it as we can today, and so there are a
2 couple things I want to bring up then just to
3 alert Your Ladyship to. But I propose to
4 highlight some of the things that I said in the
5 written submission, depending -- probably look at
6 a couple of the cases that I submitted, and then
7 -- and then hear what Mr. Fox's response is.

8 I think probably in my submissions I'll be
9 about 20 minutes right now, My Lady.

10 THE COURT: All right.

11 MR. MYHRE: And so do you have that written submission
12 there?

13 THE COURT: I do.

14 MR. MYHRE: I see you have an open book.

15 THE COURT: And I assume Mr. Fox does as well.

16 THE ACCUSED: Yes. Yes, I do.

17

18 **SUBMISSIONS RE 486.3 FOR CROWN BY MR. MYHRE:**

19

20 MR. MYHRE: So of course the person that we're seeking
21 to have counsel appointed to cross-examine is the
22 complainant, the alleged victim in this matter,
23 Desiree Capuano. And given that Mr. Fox is
24 charged with criminal harassment, that order is
25 presumptive. That means, in my submission, that
26 Your Ladyship must issue it unless Mr. Fox can
27 establish that he -- I don't want to -- I just
28 want to get the exact wording. The proper
29 administration of justice requires that he
30 personally conduct the cross-examination.

31 And so Your Ladyship has the legislation
32 there in the Crown's materials. You also have the
33 preamble from the bill that introduced -- made
34 this -- this appointment of counsel presumptive in
35 these circumstances. And the point there is
36 really both to deal with individual cases, to
37 facilitate complainants giving their evidence, and
38 to encourage complainants more broadly to come
39 forward and to participate in the criminal justice
40 system. So it has both an intention with respect
41 to the individual in this case, Ms. Capuano, to
42 facilitate her giving evidence, and more --

43 THE COURT: Can I just stop you for a minute? You've
44 given me the preamble to the bill introducing
45 what? Because I -- that bill is 2005. Was it a
46 change to --

47 MR. MYHRE: It was with --

Submissions re 486.3 for Crown by Mr. Myhre**BAN ON PUBLICATION; INHERENT JURISDICTION**

1 THE COURT: -- the section under which you're applying
2 or was it introducing it? I have to think it must
3 have been a change.

4 MR. MYHRE: It was Bill C-2 that made it presumptive
5 when an accused is charged with criminal
6 harassment. So prior to that, the Crown could
7 always apply -- I don't know when the previous
8 change to the legislation came in that allowed the
9 Crown just to apply for any adult witness to have
10 counsel appointed to cross-examine, but it was
11 with Bill C-2 that that order became presumptive.

12 THE COURT: Bill C-2? What was the bill?

13 MR. MYHRE: So in the -- in the Crown's submissions, I
14 have the exact citation under paragraph 3.

15 THE COURT: I'm -- I'm asking these questions because
16 I'm trying to determine what the preamble was
17 speaking to. And if it was Bill -- to the
18 entirety of Bill C-2, if I remember correctly,
19 that was a vast range of amendments.

20 MR. MYHRE: There were a number of things in there.
21 And so I could take Your Ladyship to it. It's at
22 Tab 3. And many of the changes that were brought
23 in clearly dealt with children and facilitating
24 the testimony of children. And the -- the first
25 two paragraphs of the preamble deal with -- speak
26 specifically of children, but then the third
27 paragraph talks about children and vulnerable
28 witnesses. And so clearly, in my submission, the
29 inference is that Parliament's saying, "The
30 provisions we're bringing in that deal with
31 vulnerable witnesses have this intention," that
32 they speak to in the third paragraph of the
33 preamble.

34 THE COURT: All right. Thank you.

35 MR. MYHRE: And that -- that purpose is mentioned as
36 well at the *J.S.* -- in the *J.S.* case at paragraphs
37 26 and 27. And the *J.S.* case is important in this
38 case because it stands for the proposition, I say,
39 that the Court of Appeal says that the wording --
40 this wording eliminates the requirement that the
41 applicant establish an evidentiary basis for need.
42 And in my submission, that's a -- that's a very
43 important part of this legislation and the Crown's
44 application today.

45 THE COURT: So where is that, please, in *J.* --

46 MR. MYHRE: So Tab 4, the *J.S.* case. This case dealt
47 with having children testify from behind a screen

Submissions re 486.3 for Crown by Mr. Myhre**BAN ON PUBLICATION; INHERENT JURISDICTION**

1 or via CCTV. But I say the same logic applies
2 because the exact same wording is used in both of
3 those sections that make the order presumptive.
4 And specifically, when I say it eliminates the
5 requirement that the applicant establish an
6 evidentiary basis, I'm referring to paragraph 19.
7 And Justice Smith says:

8
9 The provision eliminates the requirement that
10 an applicant establish an evidentiary basis
11 for need ...

12
13 And this is the last sentence in the paragraph.

14
15 ... mandates the court to grant such an
16 application unless to do so would interfere
17 with the proper administration of justice.

18
19 And, My Lady, you can see the legislation
20 they were dealing with in that case is set out at
21 paragraph 18, and it's s. 486.2(1), that required
22 the court to make the order that the witness
23 testify outside the courtroom or behind a screen
24 unless the judge or justice is of the opinion the
25 order would interfere with the proper
26 administration of justice.

27 So in this case the wording -- Your Ladyship
28 shall make the order unless you are of the opinion
29 that proper administration of justice requires Mr.
30 Fox to personally conduct the cross-examination.
31 So what does that mean? And Mr. Fox, at the
32 pretrial conference, was asking for clarification
33 of what is the -- what is "the proper
34 administration of justice" referring to. And that
35 term, as far as my research has shown, is not been
36 really clearly spelled out as it relates to these
37 applications. Probably the most serious look at
38 it, and it's not -- Justice Smart doesn't really
39 get into it but he does address it in the *S.B.T.*
40 case at Tab 5.

41 And *S.B.T.* dealt with a different issue.
42 And, My Lady, please stop me if -- I'll tell you
43 just a little bit about the case so you know how
44 to situate this, but please stop me if I'm just
45 saying things that aren't helpful.

46 *S.B.T.* was an application by -- it was -- it
47 was an application to review an order made at

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1 Provincial Court. The Crown had made an
2 application to allow two child witnesses to
3 testify outside the courtroom. And the judge
4 hearing the application said, "Well, it's up to me
5 to decide whether it's outside the courtroom or
6 behind a screen, and our screens work really well,
7 so I'm going to order the screen." And the Crown
8 sought a review of that decision and Judge Smart
9 overturned it and said, "No, that -- that -- the
10 legislation gives that discretion to the Crown to
11 decide what they're asking for, whether it's CCTV
12 or -- or testimony behind a screen."

13 Now, in the course of doing it, or looking at
14 the application, Judge Smart does consider the
15 proper administration of justice at paragraph 40.
16 That's at page 11. So he says:

17
18 The phrase "the proper administration of
19 justice" is a phrase of wide import. In the
20 context on this subsection it may include
21 many factors and considerations ... the judge
22 ... will likely consider the age of the
23 witness, the nature of the charges, the
24 relationship between the witness and the
25 accused ...

26
27 And there he's referring to -- Your Ladyship will
28 have seen that in s. 486.3, and it's similar in
29 486.2, sub (3) of that section -- and it might
30 assist, maybe, if I could ask Your Ladyship to
31 open your *Criminal Code* just to s. 486.3. And sub
32 (4) says:

33
34 In determining whether to make an order under
35 subsection (3), the judge or justice shall
36 consider ...

37
38 A list of factors. And you can see Judge Smart,
39 in paragraph 40 of *S.B.T.*, is referring to some of
40 those factors.

41 Now, in my submission, it's a difficult
42 question, the extent to which Your Ladyship
43 actually takes into consideration these factors,
44 because on the one hand *J.S.* says it's
45 presumptive, the Crown need not establish an
46 evidentiary basis, but on the other hand it would
47 seem, and Judge Smart seems to be saying, that the

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1 proper administration of justice requires not just
2 a consideration of, in this case, Mr. Fox's right
3 to challenge the witness, but also a consideration
4 of the vulnerability of Ms. Capuano, including
5 some of the factors that are set out here.

6 And I have to confess, My Lady, I'm not
7 exactly sure how Your Ladyship should walk that
8 line, because on the one hand *J.S.* says you don't
9 need any evidence, on the other hand Judge Smart
10 says that when you look at the proper
11 administration of justice, you actually do look at
12 some of these factors. Well, that's, to some
13 extent, evidence.

14 And I'm going to touch on that a little bit
15 more in a second, but I thought it might be
16 instructive to consider how some of the few cases
17 that I was able to find that look at this -- that
18 were challenges to s. 486.3, what the challenges
19 were, what the objections were to that order
20 issuing, and how the courts dealt with them. And
21 you'll see that several of them actually do take
22 into account different characteristics of the
23 complainant.

24 Did Your Ladyship have a chance to -- I'm --
25 just to decide how much to go through the facts,
26 did you have a chance to read these four cases
27 that are listed?

28 THE COURT: Not really.

29 MR. MYHRE: Okay. So I'll spend a little bit more time
30 on them. If I could take you to Tab 6, the *D.P.G.*
31 case.

32 THE COURT: I had a quick look at them but I haven't
33 read them start to finish.

34 MR. MYHRE: I have to say, My Lady, these -- it's not
35 clear to me to what extent these applications are
36 thoroughly argued at the Provincial Court. I
37 mean, I can tell you that at Provincial Court I've
38 never argued one, and it's not clear to me from
39 these cases -- some of them are clearly in-depth
40 considerations, and I just ask Your Ladyship to
41 take that into account when you decide how much
42 weight to put on the reasoning.

43 In any event, the earliest case I was able to
44 find, *D.P.G.*, in the first paragraph there you can
45 see [as read in]:

46
47 The accused was charged with making available

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1 child pornography and voyeurism, and several
2 witnesses for the Crown were between nine or
3 10 and 15 years of age.
4

5 So it dealt with -- this was -- these were
6 children, and the Crown was applying to have
7 counsel appointed to cross-examine them. And at
8 paragraph 3 [as read in]:
9

10 The accused opposed the motion because his
11 past experience with lawyers left him without
12 any confidence that the questions he wishes
13 to ask will be put to them. He cites
14 examples of prior trials where he was unable
15 to communicate with counsel in the courtroom,
16 even to the point of being prohibited from
17 passing notes.
18

19 Paragraph 5, you can see the court states what
20 I've already been submitting and what I say
21 follows -- or is the ratio of the *J.S.* case, or
22 part of it is decided by *J.S.* [as read in]:
23

24 Once the Crown ...
25

26 The last sentence in paragraph 5:
27

28 Once the Crown makes the application, the
29 presumption arises and the accused must
30 satisfy the court that the proper
31 administration of justice requires the
32 accused to conduct the cross-examination
33 personally.
34

35 And then at paragraph 6:
36

37 The court finds that he will be able to
38 instruct counsel about the areas he wishes
39 explored with the witnesses. Even though he
40 has had no problem with communicating with
41 them outside of court prior to this, this is
42 a different environment for them.
43

44 And those are really the salient parts of *D.P.G.*
45 So here, not a case that's really looked at -- at
46 any cases; a fairly brief decision.
47

I will say that none of these cases -- in

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1 none of these cases was the accused allowed to
2 personally cross-examine the witnesses.

3 C.M., the next case at Tab 7. So I believe
4 C.M. was a youth. He was charged with second
5 degree murder, and he initially consented to have
6 counsel appointed to cross-examine another child
7 witness. But then after that witness testified in
8 direct, C.M. said, "No, no, I want to cross-
9 examine him myself." And there are some fairly
10 glaring facts here that certainly aren't present
11 -- well, I shouldn't say that. There are some
12 glaring facts that rendered the order quite
13 necessary. But at paragraph 12, you can see the
14 reason the accused was applying is he said he
15 didn't trust Mr. Anderson or any members of the
16 bar to conduct the cross-examination.

17 Now, there was some history of intimidation
18 between the accused and the witness. You can see
19 at paragraph 20 it talks about how they threatened
20 him -- the accused and another had threatened him
21 with harm if he talked to the police, and that
22 another person at that point had held a gun to the
23 witness and threatened him.

24 Over at page 6, at paragraph 28, the court
25 just reiterates what the accused said in the voir
26 dire into 486.3 application.

27
28 [The accused] explained why he had no
29 confidence in the Amicus --

30
31 The court's referring to this counsel as *amicus*,
32 but that's just this court's wording.

33
34 -- to adequately cross-examine on his behalf
35 and why he did not trust any member of the
36 bar to do that.

37
38 Now, down to paragraph 30, and this is consistent
39 throughout all the decisions:

40
41 The onus is on the Crown to satisfy me that
42 the presumption ... applies and then the onus
43 is on the accused to satisfy me that the
44 proper administration of justice requires
45 that the presumption should not apply.

46
47 And here there is some consideration of what the

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1 right to cross-examine means, down at paragraph
2 33. Clearly it's an integral part of the trial
3 process. Cross-examination, that is.
4

5 It is of fundamental importance. It is a
6 right not only to frame questions, but also
7 to phrase and express them in the manner of
8 the examiner's choice. The way in which a
9 question is asked is sometimes as important
10 as its contents.
11

12 This provision for appointing counsel to
13 cross-examine trumps that right for the
14 limited purpose of this cross-examination.
15

16 Over at paragraph 36, the court concludes
17 that the standard on the accused in establishing
18 that he should personally cross-examine should be
19 on a balance of probabilities. That's the second-
20 last sentence at paragraph 36.

21 I should say this is the only court I see
22 that actually addresses a standard of proof. The
23 other cases the court just seems to consider
24 whether they're satisfied that the proper
25 administration of justice requires it. In my
26 submission, that's not a -- that's not a really
27 important point. It's -- it's whether or not Your
28 Ladyship is satisfied.

29 So down at paragraph 40, the court notes that
30 the accused in this case was:
31

32 ... careful, capable, respectful cross
33 examiner. This [sic] witness is not
34 especially young or under a disability or ...
35 disadvantage over other young people ...
36

37 And there, of course, the court had heard -- had
38 the benefit of hearing that witness already in
39 direct examination. But:
40

41 The relationship --
42

43 At paragraph 42,
44

45 -- between the accused and the witness is one
46 of power. The accused exercised power over
47 the young person and intimidated him.

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1
2 And it was really -- you know, at paragraph 45 the
3 court bluntly states:

4
5 This young witness was threatened at gun
6 point.
7

8 And so has no problem granting the order.

9 THE COURT: Can I take you back to the factors in
10 subsection (4)?

11 MR. MYHRE: Yes.

12 THE COURT: I may have missed this when you took me to
13 these before when you were discussing Mr. Justice
14 Smart's case, *S.B.T.*, but the application is not
15 under subsection (3) so, strictly speaking -- and
16 I think you said this, strictly speaking, the
17 factors seem to apply -- are stated to apply only
18 to subsection (3) applications. And so one could
19 construe the provision as a whole, 486.3, as not
20 including those factors [indiscernible/coughing]
21 when the application is under subsection (2), as
22 this one is. Am I reading that in the way you
23 suggested it to be read?

24 MR. MYHRE: Yes, entirely, and that's why I'm saying
25 *S.B.T.* seems a little incongruous. Because on the
26 one hand Judge Smart was considering the actual
27 facts of the case, evidence, and *J.S.* at the same
28 time is saying there's no need for an evidentiary
29 foundation.

30 THE COURT: All right. Thank you.

31 MR. MYHRE: And you see -- and, I mean, this -- the
32 most recent case we just looked at, the court is
33 considering the evidence, the history of the
34 relationship between the witness and the accused.
35 Clearly seems to be a factor in their
36 determination. And there's a tension, because on
37 the one hand considering evidence and then
38 requiring evidence to inform what the proper
39 administration of justice requires on the one hand
40 can work to subvert the intent of that section,
41 which is clearly to be presumptive and -- and that
42 would seem contrary to the ruling in *J.S.* On the
43 other hand, the -- the proper administration of
44 justice is a very broad consideration.

45 And so it seems to me that the right answer,
46 My Lady, is that *J.S.* is the law. The
47 vulnerability of the complainant in this kind of

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1 case is presumed because the order is presumptive.
2 And -- and at the end of the day, the position the
3 Crown takes here is that Your Ladyship shouldn't
4 get into the actual specifics of this case when
5 you're deciding whether Mr. Fox -- whether the
6 proper administration of justice requires that he
7 personally cross-examine Ms. Capuano.

8 I'll take you next to Tab 8 and the *Fazekas*
9 case, another example. Now, this -- this one is a
10 criminal harassment case, which the Crown applied
11 to have counsel appointed. At paragraph 5, again
12 what's consistent in all the cases:

13
14 The accused has the onus of rebutting this
15 presumption by demonstrating that the proper
16 administration of justice requires him or her
17 to personally cross-examine the complainant.

18
19 And then down at paragraph 7, the basis for the
20 opposition of Mr. Fazekas. In the second line he
21 said:

22
23 ... he knows her well and could get her to
24 admit certain facts under oath that no lawyer
25 could. Furthermore, Mr. Fazekas is concerned
26 that the jury will draw an adverse inference
27 if he conducts his own defence, except for
28 the cross-examination of the complainant ...

29
30 The court does go through quite a bit of case law,
31 including *J.S.* But at paragraph 22, ultimately
32 concludes that the accused had not satisfied the
33 court that the proper administration of justice
34 required personal cross-examination of the
35 complainant. The court cites particularly:

36
37 His conduct in this matter to date, although
38 polite and civil, demonstrates that he has
39 difficulty staying focused. He has a
40 tendency to get excited. No good can come
41 from allowing him to confront the complainant
42 personally.

43
44 My Lady, to be fair to Mr. Fox, I have seen
45 nothing that would suggest that in this case, and
46 the Crown isn't relying on any -- anything like
47 this for the -- as the basis for its application.

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1 The last example, the *Jones* case at Tab 9.
2 Here, the Crown applied to have counsel appointed
3 to cross-examine two very young witnesses. It was
4 an assault charge against -- in a domestic
5 context. Assault both against the former partner
6 and against one of the very young children. You
7 can see in the headnote they were -- the two child
8 witnesses were daughters of the accused, age three
9 and six years old. And so the -- this decision
10 deals both with the presumptive application for
11 the children and the -- the discretionary
12 application with respect to the complainant.

13 So at paragraph 9, again what's reiterated in
14 all the cases:

15
16 As can be seen from the language of section
17 486.3(1), there is a presumption that a
18 lawyer will be appointed where the witnesses
19 are under 18 unless [the accused] is able to
20 satisfy me that the proper administration of
21 justice requires that he conduct the cross-
22 examinations personally.

23
24 And this court flips the issue around or tries to
25 state it in another way at paragraph 10:

26
27 ... [Mr. Jones] must show me why his personal
28 conduct of the cross-examination of his very
29 young daughter and step-daughter is required
30 for the proper administration of justice. I
31 can put the issue this way: How will a
32 disservice be done to the proper
33 administration of justice if a lawyer on
34 behalf of [Mr. Jones] conducts the cross-
35 examination of the girls rather than [Mr.
36 Jones] himself?

37
38 And in my submission, that is the correct way to
39 look at it. That is what Mr. Fox has to establish
40 here. And I think we can be more specific about
41 -- than saying what -- how will a disservice be
42 done, and that's what I get into in the rest of my
43 submission.

44 So those -- just see if there's anything else
45 I thought was relevant to this case.

46 Well, at paragraph 30, this was another
47 accused who --

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BAN ON PUBLICATION; INHERENT JURISDICTION

1
2 ... he described himself as being able to
3 understand [his three-year-old daughter]
4 better than anyone, even [the complainant].
5
6 And:
7
8 He said that he knows [the older daughter]
9 better than anyone, even her mother ...
10
11 Now, this was a case where the Crown had called
12 the lead investigator to talk about how vulnerable
13 these witnesses were, and so the court says, at
14 paragraph 33 at the top of page 7:
15
16 The Crown has presented a persuasive case
17 that the girls have been traumatized by
18 whatever they have experienced in the home
19 ...
20
21 Etc., etc. And then grants the application.
22 At paragraph 42, the court -- this is -- so
23 the court concludes that that order should go at
24 paragraph 35, and then goes on to consider the
25 application with respect to the adult. There are
26 some relevant comments at paragraph 44, and maybe
27 I'll just let Your Ladyship read that over rather
28 than reading it myself.
29 THE COURT: Thank you.
30 MR. MYHRE: So in my written submission, I've tried to
31 be a little bit more specific about what we're
32 talking about, the proper administration of
33 justice, in the context of this kind of
34 application. And my submission is -- I mean,
35 obviously we're talking about cross-examination of
36 the complainant, and so that's where the focus
37 should be. So what -- what is -- what are the
38 rights that surround cross-examination of a
39 witness in a criminal case? Well, that's dealt
40 with in the *Little* [phonetic] case, which really
41 affirms the right of a robust challenge to a
42 witness's credibility as being essential to the
43 court process of seeking the truth.
44 The *Faulkner* case helps to put into context
45 the parameters of what self-appointed counsel is,
46 the nature of their relationship with the accused
47 once they're appointed. And Justice Code -- this

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1 is -- this was -- as you may have seen, it's an
2 11(b) application, and a case -- obviously a case
3 that went on and on for some time. But counsel
4 was appointed to cross-examine and the accused
5 purported to have the right to review all of
6 counsel's questions and specifically sign off on
7 them.

8 And so Justice Code, in analyzing what took
9 so long in this case, spent some time explaining
10 why the accused was mistaken when he believed that
11 he had the right to very specifically direct
12 appointed counsel as to the questions that were to
13 be asked. And Justice Code, over the course of
14 about 12 paragraphs in that judgment, essentially
15 concludes that appointed counsel has the same
16 relationship with an accused as -- as retained
17 counsel in any other case. They have the same
18 ethical obligations, they're bound by the same
19 solicitor-client relationship, and so they are
20 expected to do everything retained counsel would.
21 Meet with the accused, understand the defence
22 theory of the case, thoroughly review all of the
23 disclosure and, on the basis of that, conduct a
24 cross-examination in the way they determine best
25 appropriate but obviously on the instructions as
26 to the defence theory given from -- by the
27 accused.

28 So at paragraph 9 of my written submission --
29 THE COURT: So where do we have that case?

30 MR. MYHRE: Oh, the *Faulkner* case?

31 THE COURT: The discussion that you've just referred
32 to.

33 MR. MYHRE: Yes. Tab 11, and it starts at paragraph 35
34 and goes to paragraph 47. So Justice Code does
35 spend some time on it.

36 THE COURT: All right. Thank you.

37 MR. MYHRE: So, My Lady, it seems to me to follow that
38 if the relationship between the accused and court-
39 appointed counsel is the same solicitor-client
40 relationship that every accused has when they
41 retain counsel, either using legal aid or
42 privately, there is no way, based on this section,
43 that an accused can say, "There's something about
44 this case, my particular situation, the facts of
45 this case, that make it impossible for court-
46 appointed counsel to effectively represent me."
47 Counsel appear in all sorts of cases, the most

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1 complex, so an accused can't say, "Well, this case
2 is just too complex." Well, then, how do lawyers
3 in very complex cases deal with cross-examination
4 of witnesses?

5 It seemed to me, as I reflected on it, that
6 the only way that an accused could establish that
7 the proper administration of justice, that is that
8 their ability to make full answer and defence
9 requires them to personally cross-examine the
10 complainant, would be if there were some external
11 factors relating to how counsel was appointed.
12 For example, if in a jurisdiction there were not
13 counsel available for enough time to adequately
14 prepare for the case, or if the funding was only
15 available so that -- to give them one day of
16 preparation time when the case clearly required
17 two weeks of preparation time. Something
18 logistical in the nature of being unable to bring
19 counsel to the particular case. I just can't
20 imagine how any particular case could require a
21 personal cross-examination unless there was some
22 deficiency with the way the lawyers were being
23 appointed or their availability.

24 My experience with these orders and having
25 counsel appointed, I -- once the order is made, I
26 get in contact with the Legal Services Branch,
27 they get in contact with the Legal Services
28 Society, they then source counsel. Counsel
29 usually contacts me to talk about disclosure, and
30 then meets with the accused the same way that any
31 other lawyer would to prepare their cross-
32 examination. So I'm aware of no logistical
33 impediment, and we are still two months before
34 trial. I've talked to the Legal Services Branch.
35 They say, "That's no problem, we'll find counsel."
36 And so I just -- my submission is, absent some
37 logistical difficulty like that, there's no way
38 any accused under this section can say that,
39 "There's something about this particular case that
40 requires me to personally cross-examine the
41 complainant."

42 I do want to just let Your Ladyship know a
43 couple things about the history of this file that
44 may bear in some small way on this application.

45 As I said when we discussed the *Fazekas* case,
46 in my dealings with Mr. Fox, he is organized, he's
47 intelligent to the point of doing his own case law

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1 research, and he's polite. This application is
2 not made on that basis. I do not plan, unless
3 Your Ladyship requires me to after hearing from
4 Mr. Fox, to get into why I say this complainant is
5 vulnerable and exactly the kind of witness for
6 whom counsel should be appointed because, in my
7 submission, as I said, that would defeat the
8 purposes of this legislation.

9 Mr. Fox has been at times represented by
10 counsel in this matter. He was represented by
11 counsel at his initial bail hearing, he conducted
12 his second bail hearing on his own. He did not
13 oppose an order for counsel to be appointed to
14 cross-examine the complainant at the preliminary
15 inquiry. And my understanding is that he actually
16 fully retained that -- once counsel was appointed,
17 I could be wrong but he appeared to represent Mr.
18 Fox for the entire prelim not just for the cross-
19 examination. My understanding was that he -- Mr.
20 Fox actually retained him.

21 So he was represented at the preliminary
22 inquiry but the complainant didn't testify because
23 the Crown made an application under s. 540(7) to
24 tender her statement, which the court granted.
25 Mr. Fox applied to cross-examine her, or his
26 counsel did, and that application was denied under
27 s. 540(9). And then at this stage now, of course
28 Mr. Fox is unrepresented. So he has at times been
29 represented by counsel in this matter.

30 My Lady, those are my submissions. I hope --
31 I hope the Crown position is clear on this
32 application.

33 THE COURT: Yes.

34 MR. MYHRE: The reason I'm not -- this is probably
35 obvious, but I'm not getting into the specifics of
36 this case both because I don't have to and because
37 I don't want to spend the court's time doing
38 something that I say is actually irrelevant to the
39 legislation. But I don't know the basis exactly
40 -- I have some idea of why Mr. Fox opposes this.
41 We were speaking in cells before court today. But
42 I don't want to respond to what he's going to say
43 until he actually says it so I can hear in full
44 why he's opposed to this order. But I do ask for
45 that opportunity, if necessary, to present
46 evidence. It would likely just be in the form of
47 statements and submissions, if necessary.

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1 THE COURT: All right. Thank you.
2 Now, Mr. Fox, you have a response you want to
3 make today, I understand.
4 THE ACCUSED: Yes.
5 THE COURT: We started late, but Madam Registrar has
6 had a long morning. She had another matter this
7 morning. So I think we will take the morning
8 break now, which is the usual time that we take
9 it. So we'll break for 15 minutes and then when
10 we come back you can make your submission, Mr.
11 Fox.
12 THE ACCUSED: Okay.
13
14 (PROCEEDINGS ADJOURNED FOR MORNING RECESS)
15 (PROCEEDINGS RECONVENED)
16
17 THE COURT: Mr. Fox. If you'd like to use the lectern
18 there, if that makes things easier, feel free to
19 do that.
20

SUBMISSIONS RE 486.3 FOR ACCUSED BY PATRICK FOX:

21
22
23 THE ACCUSED: Thank you.
24 The first point that I would like to address,
25 Your Honour, is that with respect to s. 486.3 it's
26 my understanding that Parliament's intention with
27 that was to protect the so-called vulnerable
28 witnesses and certainly not to protect or to
29 facilitate the abuse of the system or the abuse of
30 statutes such as criminal harassment by people who
31 were pursuing some ulterior motive, which I
32 strongly believe is entirely what Ms. Capuano is
33 doing in this -- in this case. And I believe that
34 that can be demonstrated from the most recent RCMP
35 interview that she had conducted, which I would
36 ask that we can play some excerpts for the court.
37 THE COURT: Of what?
38 THE ACCUSED: Oh, of some of the interview, the
39 statement I believe they call it, of Ms. Capuano
40 being interviewed by the RCMP where some of the
41 issues that, in the previous interviews and when
42 she went onto the news media, she was very somber
43 about them. In this interview, though, she's
44 laughing and making jokes about them, which I
45 believe strongly demonstrates that there is no
46 sincerity to her claims of fear for her safety and
47 that I think it is unreasonable to consider her a

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1 vulnerable witness.

2 THE COURT: Right. Let me just think for a moment
3 about what you're suggesting. If I have it
4 correctly, you're saying that because she laughed
5 and made jokes in her police interview, she's not
6 serious in her approach to being a witness in this
7 case?

8 THE ACCUSED: What I would say is that it's my position
9 that she's not serious about her claims of being
10 afraid for her safety or about any claims of
11 psychological damage or psychological harm that
12 she has apparently or that she claims that she has
13 experienced as a result of my conduct, which is,
14 of course, the crux of the Crown's case.

15 THE COURT: All right.

16 THE ACCUSED: See --

17 THE COURT: That, it appears to me, is something that
18 the trier of fact, and you've elected trial by
19 jury --

20 THE ACCUSED: Yes.

21 THE COURT: -- will have to determine in the trial.

22 THE ACCUSED: For -- I agree certainly for the purposes
23 of determining innocence or guilt on the charge.
24 But if we're trying to determine whether or not
25 she can be considered a vulnerable witness, as
26 intended by Parliament when they enacted s. 486.3,
27 that's where I think that this might be certainly
28 relevant.

29 THE COURT: I'm not persuaded.

30 THE ACCUSED: Okay.

31 THE COURT: I'll tell you why. Because we, as courts,
32 are very cautious about in any way pre-empting the
33 jury's role when there's to be a trial by jury.
34 So there are often situations where, for example
35 -- let's take things the other way around. The
36 Crown might be trying to prevent the defence from
37 putting a certain type of defence before the jury,
38 saying there simply isn't enough evidence to
39 support it, we'd be inviting the jury to
40 speculate, you shouldn't allow that defence to go
41 before the jury. And the courts will typically
42 say if there's an air of reality to the defence,
43 it should go before the jury, the jury makes that
44 decision.

45 If I were to watch your video and say, "Hmm,
46 yes, it looks to me as though she's not very
47 serious in her stated fears for her safety," I

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1 would essentially be making a decision that
2 ultimately the jury is going to be asked to make I
3 this case, and it's simply not appropriate that I
4 do that at this stage.

5 THE ACCUSED: Okay.

6 THE COURT: So unless there's another basis for showing
7 that video, I cannot see how it would be relevant.

8 THE ACCUSED: No. No, Your Honour. There was just
9 that.

10 Now, I do have another group of or set of
11 concerns that directly relates to the s. 486.3
12 application. And as Mr. Myhre had mentioned,
13 throughout this proceeding or throughout the
14 course of these proceedings I had at two points
15 been represented by counsel, and my experience
16 with the three attorneys that I dealt with have
17 left me very little confidence not in the
18 abilities but in the -- what the attorneys' goals
19 or intentions might have been. Specifically -- I
20 have specific examples I can provide that might
21 give some idea of why I would be concerned.

22 Initially at the bail hearing, the first bail
23 hearing, I was represented by David Hopkins, and I
24 brought to his attention some very critical
25 issues. For example, I was charged with s. 103,
26 which, when charged with that, the presumption is
27 that a person should not be entitled to bail
28 unless they can convince the court of otherwise.

29 THE COURT: S. 103 --

30 THE ACCUSED: Oh, sorry.

31 THE COURT: -- is what?

32 THE ACCUSED: Unlawful exportation of firearms, knowing
33 it to be unlawful.

34 THE COURT: All right.

35 THE ACCUSED: And there was no question that I had
36 exported my firearms to the United States. I had
37 -- I had told Mr. Hopkins that there's an
38 exemption for the United States, that no
39 authorization is required. He refused at the bail
40 hearing, though, to bring that point up.
41 Eventually, when I started representing myself, I
42 brought this to Mr. Myhre's attention and that
43 charge was stayed.

44 Also, at the bail hearing Mr. Hopkins refused
45 to challenge any of the points that the Crown was
46 making, much of which was based on a particular
47 blog post on the website that I believe the

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1 statements were being taken very much out of
2 context. And given the appropriate context, I
3 think that the judge at that time would have
4 realized that there wasn't any threatening
5 behaviour or conduct or statements being made. In
6 fact, at the second bail hearing where I was
7 representing myself, the Crown had presented the
8 same arguments about the same blog post and it was
9 determined by the court that there wasn't any
10 threat -- anything threatening there, so that was
11 not the basis of denying me bail when I was later
12 representing myself.

13 And then we skip ahead to the preliminary
14 inquiry. I was represented by Mr. Clint Bauman at
15 that. And I was actually -- I was actually being
16 represented by Mr. Mark Swartz but he wasn't
17 available for the date of the preliminary inquiry
18 and so he had referred me to Mr. Bauman.

19 Now, the first time I had spoken to Mr.
20 Bauman over the telephone from the jail, he had
21 already spoken, I understand, with the Crown and
22 had a bit of familiarity with the case, and he was
23 putting a lot of effort into trying to convince me
24 that there were some recent cases that would
25 support the Crown's position. When I pressed him,
26 he admitted to me the cases that he was thinking
27 of were *R. v. Elliott* [phonetic] from Toronto and
28 *R. v. Kelly* [phonetic] from Alberta. I disagreed
29 with him on that. He suggested I should read the
30 cases again. I did. And after that he never
31 brought them up again because he realized I was
32 correct on that. At the preliminary inquiry, he
33 agreed with me about my position on the case, yet
34 didn't bring up any of those arguments.

35 Another serious -- what I thought was a
36 serious issue was I insisted that he not concede
37 to the s. 93 charge, which is the possession of a
38 firearm in a place not authorized. He disregarded
39 that completely and conceded to -- or agreed not
40 to challenge that at the preliminary inquiry.

41 So having had those types of experiences with
42 the attorneys in this case so far, I have a
43 serious concern that if counsel is appointed they
44 are going to refuse to pursue topics or lines of
45 questioning that I would consider to be critical.
46 One area of concern I have, and the judge had
47 brought it up at the previous hearing, is a

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1 potential *Browne v. Dunn* issue that might arise,
2 because if counsel is appointed, since I would
3 have no confidence in them not sharing information
4 with the Crown, I would want to withhold certain
5 evidence until I actually testify.

6 A lot of that evidence is going to prove that
7 Ms. Capuano is -- is lying. And I think it would
8 be much more appropriate to confront her with that
9 evidence while she's on the witness stand rather
10 than questioning her about it at that time and
11 then providing the evidence later when I testify.
12 And that's assuming that appointed counsel would
13 even actually question her about that. Because if
14 he doesn't, then that raises the possible *Browne*
15 *v. Dunn* issue.

16 THE COURT: I think I need you to go through that
17 again.

18 THE ACCUSED: Sure. Sorry.

19 THE COURT: You're concerned that if you have counsel
20 appointed on your behalf, you'll run into a *Browne*
21 *v. Dunn* problem. Is that what you're saying?

22 THE ACCUSED: Potentially, yes.

23 THE COURT: And explain to me why that would come up if
24 counsel's appointed on your behalf but wouldn't
25 come up if you were conducting the cross-
26 examination yourself.

27 THE ACCUSED: If I were conducting the cross-
28 examination myself, then I would confront Ms.
29 Capuano with the evidence that I have, which would
30 refute her statements, which would prove
31 essentially that she is lying about the majority
32 of her claims. If I'm appointed by counsel on the
33 other hand, since I have no confidence or faith
34 that counsel is not working against my interests,
35 I would want to withhold the disclosure of that
36 evidence until I actually testify, which would be,
37 of course, after Ms. Capuano is finished
38 testifying. That would require, then, that the
39 appointed counsel would have to at least cross-
40 examine her on these alternate theories.

41 THE COURT: Now, I don't understand why, if there were
42 to be counsel appointed on your behalf, you -- I
43 do understand that you've -- you say you've had
44 experience with previous counsel in which they
45 have not taken the steps you wanted to take or not
46 brought to the court the analysis -- the legal
47 reasoning that you wanted put forward. But I

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1 haven't heard anything about why you wouldn't tell
2 counsel about evidence you could give and expect
3 to be given -- giving.

4 THE ACCUSED: I would inform counsel of the evidence,
5 but what I would not do is provide him the actual
6 evidence or copies of the actual evidence. That I
7 intend to withhold until -- until I testify,
8 unless, of course, I was cross-examining Ms.
9 Capuano personally, in which case I would confront
10 her with the evidence on the witness stand. It's
11 a strategic decision. I just -- I don't want the
12 Crown to have knowledge of that evidence until
13 it's actually presented.

14 THE COURT: And what makes you think the Crown would
15 have knowledge of it? Oh, you're thinking in the
16 cross-examination.

17 THE ACCUSED: Well, no, no. No, no, based on my
18 experience with the attorneys so far, I believe
19 that if I'm appointed counsel, there's a good
20 probability that if I provide the evidence, the
21 documentary or the audio/video evidence, to that
22 attorney, that he may provide a copy of it to the
23 Crown ahead of time. I know that that would be --

24 THE COURT: Generally --

25 THE ACCUSED: -- inappropriate but --

26 THE COURT: -- disclosure goes -- well, it is required
27 to go from the Crown to the defence.

28 THE ACCUSED: Yes.

29 THE COURT: It's -- there's no requirement that the
30 defence make disclosure to the Crown, except in
31 very limited circumstances, for instance there has
32 to be notice of any expert witnesses that are
33 going to be called for the defence. But there's
34 no general rule that the defence has to make
35 disclosure to the Crown. There's nothing parallel
36 to the Crown's obligation of disclosure.

37 THE ACCUSED: I'm sorry, maybe I -- I should clarify a
38 bit. What I believe would happen would be some
39 level of misconduct perhaps, that the attorney
40 would not be acting in my best interests of what I
41 believe are my best interests. And again, this is
42 based on my experiences with these three other
43 attorneys since I've been working on this, plus
44 the unfortunate reality that this case has drawn
45 so much media attention in February and March of
46 last year. According to what CBC says, anyway,
47 the B.C. Ministry of Justice and the Canadian

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1 government have received a lot of criticism about
2 not taking Ms. Capuano's claims more seriously
3 when they originally dismissed these charges.
4 I do also, though, want to state for the
5 record, I certainly don't believe that I would be
6 more competent or more skilled at cross-examining
7 Ms. Capuano. It's got nothing at all to do with
8 -- with that. I mean, it's not about ego or -- or
9 pride at all, it's purely because I don't have
10 confidence that whatever attorney would be
11 appointed -- I shouldn't say I don't have
12 confidence in whatever attorney. I believe that
13 there's a high probability that whatever attorney
14 would be appointed may not act in my interests and
15 may do things, for lack of a better term, to
16 sabotage the cross-examination. Yeah.

17 THE COURT: All right.

18 THE ACCUSED: May I ask a question?

19 THE COURT: You can try.

20 THE ACCUSED: If during the cross-examination -- if
21 counsel is appointed and during the cross-
22 examination I suspect that counsel is refusing or
23 failing to pursue a line of questioning that might
24 relate to evidence I intend to raise later,
25 thereby possibly raising a *Browne v. Dunn* issue,
26 would it be acceptable in court to express that
27 concern to the court? I mean, certainly that
28 might not look good in front of the jury.

29 THE COURT: Well, at some point, not right now but at
30 some point I plan to have a much more detailed
31 discussion with you and with Mr. Myhre about how a
32 jury trial is conducted so that you can start
33 thinking about, and perhaps -- I'm sure you've
34 done this already, but just to make sure that you
35 understand what's going to be expected of you in
36 conducting your own defence.

37 But, yes, I can answer that question now, at
38 least I can begin to answer -- answer it.
39 Generally in a jury trial, if there are concerns
40 about the way the proceedings are being conducted,
41 and they can be a great range of concerns, I'll
42 give you some examples in a minute, generally what
43 one does is either immediately or at the next
44 appropriate break, so that you're not making a
45 fuss in front of the jury that might send the
46 wrong message, you wait till the jury's left the
47 courtroom and then you raise the issue with the

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1 judge and opposing counsel present, and we discuss
2 what the concern is and settle on a resolution.
3 And often the jury will be completely unaware that
4 that discussion has taken place. It may be that
5 they'll have to be told something as a result of
6 the discussion, and sometimes they don't need to
7 be told anything.

8 And it -- the kinds of things that can come
9 up are all sorts of things. Counsel could take
10 the position that the other party is raising their
11 voice too much, I'm sure this isn't going to be
12 the case for you, or trying to intimidate
13 witnesses by standing too close to them, or that
14 there are spectators in the gallery who are making
15 faces at the jurors, or there can be all sorts of
16 things.

17 And my short answer is, yes, we -- if those
18 problems come up, we address them, but we
19 generally make sure the jury's out of the room
20 while we discuss them.

21 THE ACCUSED: Okay.

22 THE COURT: Now, the one example you've outlined is a
23 little different because it would be a problem
24 you're raising about your own relationship with
25 the lawyer who, if the order is made, had been
26 appointed to represent you. There's a difficulty
27 for that being discussed in a public way because
28 your relationship with the lawyer representing you
29 is a private thing that you may not want and
30 should be very, very cautious about revealing to
31 Mr. Myhre or to me.

32 But probably the first thing I would do in
33 that type of situation, if you raised a concern,
34 was suggest that we all stand down and you have a
35 chance to talk privately to the lawyer. And it
36 might be that after that discussion the issue
37 would be ironed out and we could start up again.
38 If the issue wasn't ironed out, then I would
39 probably hear from the lawyer, who would tell me
40 what the problem is seen to be and who would
41 probably do that in a way that would not disclose
42 the particular issue that you were concerned about
43 so as to protect the secrecy of your own
44 discussions with that lawyer.

45 Mr. Myhre is there anything I should add to
46 the response I've given Mr. Fox?

47 MR. MYHRE: Not from my point of view.

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1 THE COURT: Does that answer your question, Mr. Fox?

2 THE ACCUSED: Yes. Yes, it does.

3 THE COURT: All right. Anything else?

4 THE ACCUSED: That would be all for me.

5

6 **REPLY RE 486.3 FOR CROWN BY MR. MYHRE:**

7

8 MR. MYHRE: Just a couple things in reply, My Lady.

9

Three points.

10

First of all, while acknowledging that Mr.
11 Fox's previous experience with counsel in this
12 matter is unfortunate, particularly if they didn't
13 follow explicit instructions as he said he gave,
14 nevertheless they don't nearly, in my submission,
15 rise to the level of disclosing protected
16 solicitor-client discussions to Crown counsel.
17 That is a degree of misconduct that is absolutely
18 egregious.

19

Which leads me to my second point, which is
20 that, I think to state the obvious, this entire
21 legal system depends on -- heavily on counsel
22 fulfilling their ethical obligations. That, at an
23 extremely basic level, means, for defence counsel,
24 not disclosing their client's defence until they
25 have to, unless there's some strategic advantage
26 to their client. And of course counsel can be
27 depended on to fulfil that obligation. I mean, if
28 it needed to be said, I would think that would be
29 grounds for at least suspension, if not possible
30 disbarment, if -- if a defence lawyer engaged in
31 that kind of misconduct. This court can depend on
32 counsel not to do that, even if because of his
33 dissatisfaction to this point has led Mr. Fox to
34 conclude that he can't.

35

The third point is that lack of trust in
36 counsel did come up in two of the cases that we
37 looked at and was not a sufficient basis for
38 denying the order.

39

Subject to any questions, those are -- that's

40

my response.

41

THE COURT: All right. Anything further from you, Mr.

42

Fox?

43

THE ACCUSED: No.

44

THE COURT: Thank you. I think what I'd like to do is

45

just take a little while longer to reflect on the

46

submissions you've each made, look at the

47

materials a bit more closely, the cases I've been

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1 given, and I expect I will be able to give you a
2 decision at two o'clock.

3 Would it be suitable to then go on and have a
4 pretrial conference in which we discuss the plan
5 for the trial, time estimates, that sort of thing,
6 and make sure that we've got enough time scheduled
7 and that, Mr. Fox, you are starting the process of
8 preparing? It looks to me that you are, but I --
9 I'd like to hear it from you and talk about ways
10 in which you may need assistance or may need some
11 additional resources to help you prepare.

12 THE ACCUSED: Certainly, yes. Thank you.

13 THE COURT: All right. So let's do that. I expect
14 I'll be in a position to give you judgment at
15 2:00. It won't be a long one, so we can then go
16 on after that to embark on a pretrial conference.

17
18 (PROCEEDINGS ADJOURNED FOR NOON RECESS)
19 (PROCEEDINGS RECONVENED)

20
21 [REASONS RE CROWN APPLICATION FOR COUNSEL TO
22 BE APPOINTED UNDER S. 486.3(2) TO CROSS-
23 EXAMINE THE COMPLAINANT]

24
25 MR. MYHRE: So, My Lady, I have written out a list of
26 issues that I think it might be worth at least
27 canvassing.

28 THE COURT: All right. Are you ready to proceed, then,
29 Mr. Fox? We'll essentially start a pretrial
30 conference at this point.

31 THE ACCUSED: Yes.

32 THE COURT: All right.

33 MR. MYHRE: My Lady, I thought I might just talk about
34 the orders that have been made and the things that
35 have been accomplished to date. We did have a
36 fairly lengthy pretrial conference -- two fairly
37 lengthy pretrial conferences, the first in front
38 of Justice Silverman when we set the trial dates,
39 and the second in front of Justice Duncan about
40 three weeks ago.

41 And so what's been accomplished to date is
42 that we have orders for a screen for Ms. Capuano
43 and a support person to sit next to her. Those
44 are on file. Mr. Fox has agreed to an admission
45 about the nature of the firearms that he -- the
46 Crown says he shipped to California. So he's --
47 he's signed an admission that essentially admits

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1 that they are restricted firearms. But I see Mr.
2 Fox maybe --
3 THE ACCUSED: Oh, I --
4 MR. MYHRE: -- would like to add to that.
5 THE ACCUSED: -- I didn't admit to them being shipped
6 to California.
7 MR. MYHRE: No, that's --
8 THE ACCUSED: Okay.
9 MR. MYHRE: Yeah. Just the nature of the firearms that
10 the ATF agents found in California.
11 He has, prior to the preliminary inquiry,
12 been given notice of firearms affidavits that the
13 Crown is tendering. So I have already told him in
14 a letter that we -- that I rely on that notice for
15 the purposes of trial as well for tendering those
16 affidavits.
17 In front of Justice Silverman there was a
18 fairly --
19 THE COURT: Just before you go on, it might be helpful
20 one by one with these things. Mr. Fox, if you
21 have any dispute with what Mr. Myhre is saying or
22 if you're not understanding the significance of
23 what he's saying, just let me know and we'll deal
24 with those things.
25 Do you understand what Mr. Myhre means by
26 firearms affidavits and what the Crown is
27 intending to rely on?
28 THE ACCUSED: Yes, I do.
29 THE COURT: All right. Thank you.
30 MR. MYHRE: In front of Justice Silverman, Mr. Fox and
31 I and Justice Silverman all canvassed the
32 voluntariness of Mr. Fox's statement to police in
33 the summer of 2016. Mr. Fox indicated that he
34 understood what voluntariness meant and was not
35 contesting the voluntariness of that statement.
36 THE ACCUSED: That is correct, I don't contest that.
37 THE COURT: Now, one thing I should point out to you,
38 Mr. Fox, is that voluntariness is something the
39 Crown has to prove unless you are admitting it.
40 It's not one of these applications like a *Charter*
41 application where you would have a burden of
42 proof. The burden of proof is on the Crown,
43 beyond a reasonable doubt, to prove that any
44 statement it says you made to a person in
45 authority was made voluntarily.
46 All right. So unless you are confident that
47 you can agree that there's no question, beyond a

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1 reasonable doubt, that you spoke voluntarily, you
2 should be not making this admission and we would
3 have a voir dire on it. I may have phrased that
4 in a slightly confusing way.

5 THE ACCUSED: No, no. No. I completely understand
6 what you're -- what you're saying. I would say
7 that the statements were completely voluntary and
8 I think it would be an ineffective use of the
9 court's time to expect the Crown to have to prove
10 that.

11 THE COURT: Well, that's not the test. The test is --
12 without an admission, the test is, in a voir dire,
13 whether the Crown has proven beyond a reasonable
14 doubt that the statement is voluntary, and your
15 rights as an accused person are not a question of
16 good use of court time. There comes a point
17 where, obviously, we take that into consideration,
18 but on a very fundamental point about whether your
19 statement was voluntary you shouldn't be making a
20 decision based on a good use of court time. All
21 right?

22 If you are completely satisfied that your
23 statements were voluntary and you're willing to
24 agree that they were and relieve the Crown of the
25 obligation of proving that they were, I'll accept
26 that, but I want to make sure that you understand
27 what you're doing and that you understand that if
28 you don't make this agreement, the Crown faces a
29 high standard of proof on this point.

30 THE ACCUSED: Thank you. I do understand and I agree
31 that the statements were voluntary. Thank you.

32 THE COURT: Thank you.

33 MR. MYHRE: The last thing that has been discussed and
34 settled, obviously, is the trial time estimate.

35 So --

36 THE COURT: The trial ...?

37 MR. MYHRE: Time estimate. When we were in front of
38 Justice Silverman prior to setting the dates, Mr.
39 Fox and I had a discussion in cells. We went
40 through the witness list, we talked about how much
41 time would be required for each witness, in
42 particular the cross-examination of Ms. Capuano,
43 and time for defence evidence, and we both agreed
44 that two weeks was appropriate.

45 I don't think it's entirely predictable, but
46 that leaves approximately four days for Ms.
47 Capuano to testify. And I think there are a lot

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1 of questions that Mr. Fox would like -- that are
2 -- there's a long history to their relationship.
3 In any event, all that to say we fairly
4 thoroughly, I think, looked at the witness list
5 and decided between us, after discussion, that
6 that's a reasonable time estimate. I can't say,
7 obviously, for sure that we wouldn't go over, but
8 it does seem reasonable to me.

9 THE COURT: Well, can we -- well, there's two things we
10 need to do. One is to canvass whether there are
11 any other issues that are going to need
12 determining. I gather there's no *Charter* issues
13 you're raising, Mr. Fox, or have you fully
14 considered that?

15 THE ACCUSED: I don't believe that there are any
16 *Charter* issues with respect to this case
17 specifically, but there's the *Charter* issues with
18 the jail, with them interfering with my ability to
19 prepare my defence. I believe that will be s. 7
20 and 11(d).

21 THE COURT: All right.

22 THE ACCUSED: But that has nothing to do with the
23 trial.

24 THE COURT: Are you contemplating bringing an
25 application or are you simply telling me that
26 you're finding it difficult to prepare and you
27 would like some help in making things easier for
28 you?

29 THE ACCUSED: The latter, yes. At this point I'm
30 saying that I'm finding it difficult to prepare
31 because of the restrictions they're putting on me
32 in the jail, and I would like some help with that.
33 If it continues to the point that the trial
34 commences and I'm not able to get the evidence, I
35 guess then I'd probably have to look at a civil
36 suit or a civil issue with the jail at that time.
37 I mean, at least that's how it would work in the
38 U.S. I'm not familiar with how it would -- these
39 situations would work here.

40 THE COURT: Well, we wouldn't want to have a situation
41 where we've started a trial in front of a jury and
42 you're having trouble conducting that trial.
43 That's not a good use of court time. And we'll
44 have to come up with a way of making sure that you
45 are able to conduct your own defence.

46 MR. MYHRE: My Lady, can I say something on that point?

47 THE COURT: Yes.

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1 MR. MYHRE: I was going to get to that issue but it did
2 strike me that there is a potential solution to
3 this problem now that Your Ladyship has appointed
4 counsel. I mean, it's somebody, as we've seen, is
5 in -- now, because of your appointment, whoever it
6 is will be in a solicitor-client relationship with
7 Mr. Fox, and so Mr. Fox could avail himself of
8 that relationship to have things sent to that
9 counsel, who's going to have to conduct the cross-
10 examination in any event. So I -- that is one
11 thought that occurred to me about that problem.
12 So I don't know if Mr. Fox has any immediate
13 thoughts on that.

14 THE COURT: I think I don't have a good enough
15 understanding just yet of what the problems are
16 that you're facing. Do we want to get into this
17 now or a little bit later?

18 THE ACCUSED: Perhaps we should come back to that.

19 THE COURT: All right, let's come back to it. But
20 there are no other applications, *Charter*
21 applications, to do with search of seizure or
22 anything like that.

23 THE ACCUSED: No. No, there's --

24 THE COURT: All right. Then perhaps, Mr. Myhre, you
25 could just take me through the witness list and
26 I'll -- with time estimates and we'll just get a
27 better and more precise sense of how this trial
28 would unfold and -- and therefore get a better
29 sense of the -- the overall time.

30 MR. MYHRE: Do you have the synopsis, My Lady?

31 THE COURT: I do.

32 MR. MYHRE: Okay. Take me a while to find it here in
33 my sheath of papers.

34 THE COURT: Well, I can read you your own witness list
35 if you like, and you could tell me more about it
36 if that would help.

37 MR. MYHRE: I'm fairly confident of being able to put
38 my hands on it. There it is. Do you have -- you
39 don't have your copy on you. So -- the witness
40 list and the Crown synopsis.

41 THE ACCUSED: I wrote them down there.

42 MR. MYHRE: I see. Okay. So Desiree Capuano,
43 obviously, the complainant. I would anticipate
44 being approximately a day with her in direct. And
45 then I've budgeted -- in this synopsis I budgeted
46 three days -- or, sorry, two days for her cross-
47 examination. I think Mr. Fox contemplates that

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1 maybe three days would be more appropriate.
2 THE ACCUSED: I think I'm comfortable with two days at
3 this point with recent evidence that I've
4 received.
5 MR. MYHRE: Manvir Mangat and Mohammad Khan [phonetic]
6 are the business owner and an employee at that
7 business of the packaging company who the Crown
8 says Mr. Fox used to ship his restricted firearms
9 to the United States. And Mr. Mangat testified at
10 the preliminary inquiry. Anyway, their -- their
11 evidence is relatively brief, confined to what
12 they did for Mr. Fox and under what circumstances,
13 but they aren't lengthy interactions.
14 THE COURT: Can I ask whether that area of the evidence
15 -- and I'm getting the understanding that this is
16 disputed, Mr. Fox, that the Crown's theory -- on
17 the Crown's theory of the case, is it alleged that
18 Ms. Capuano knew of this shipping of firearms?
19 MR. MYHRE: No.
20 THE COURT: So that would relate only to Count 2.
21 MR. MYHRE: That's correct.
22 THE COURT: Is there a difficulty in having a jury
23 trial with those two counts and evidence of
24 shipping firearms relevant only to Count 2 that
25 potentially having an effect improperly in
26 relation to Count 1? Is that something you've
27 considered, Mr. Myhre?
28 MR. MYHRE: I have not thought about that, My Lady.
29 Off the top of my head, one of the elements of the
30 offence is going to be whether the complainant
31 reasonably fears for her safety.
32 THE COURT: So it would go to reasonableness.
33 MR. MYHRE: Well, if they found that Mr. Fox was taking
34 steps that a reasonable person -- well, of course,
35 it would have to be a reasonable person in her
36 circumstances. I'd have to think about that, My
37 Lady. There is evidence -- I was reviewing Ms. --
38 one of Ms. Capuano's statements yesterday and one
39 of the things that she said caused her fear was
40 just the fact that Mr. Fox was informing her that
41 he was obtaining firearms and could use them. And
42 she coupled that with the idea that he also told
43 her that he would cross the border whenever he
44 felt like it, she said contributed to her fear
45 that he might just show up and kill her one day.
46 So there is already that -- the evidence of his
47 owning firearms and her fear that something of

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1 that nature could happen.
2 THE COURT: My question really relates to evidence, if
3 it's established, that Mr. Fox actually took steps
4 that were in accord with Ms. Capuano's fears, and
5 yet they were steps which, on what you've just
6 told me, she was not aware of. So that evidence
7 would not be relevant to Count 1 and yet it would
8 be tendered in a trial in relation to Count 2. I
9 just have a bit of concern about whether it might
10 taint the jury's consideration of Count 1.
11 MR. MYHRE: Can I think about that, My Lady? I think
12 Mr. Fox has something he wants to say about that.
13 THE COURT: And what I should say is the reasonableness
14 of Ms. Capuano's fears surely are measured by
15 reference to what she knew. In other words, were
16 they ridiculous, hysterical fears on what she knew
17 or, rather, were they reasonable fears that a
18 reasonable person would have had on the basis of
19 what she knew? But to my understanding of the
20 provision, the *Criminal Code* provision, it's all
21 measured according to what she knew. Perhaps I'm
22 wrong on that. But if I'm right, then the
23 evidence going only to Count 2 wouldn't be
24 admissible in relation to Count 1, and I simply
25 wonder whether there's a problem there.
26 MR. MYHRE: Can I think about that, My Lady?
27 THE COURT: Yes. Thank you.
28 MR. MYHRE: Mr. Fox, I think, has something to say
29 about it too.
30 THE ACCUSED: I would just like to say for the record
31 on this particular point, I've expressed the same
32 concern throughout this entire proceeding, and the
33 way that these charges have been presented in the
34 media also goes along with that. They're
35 attempting to link the facts that I had firearms
36 and that I shipped the firearms or sent the
37 firearms down to the U.S. with the criminal
38 harassment to make the criminal harassment seem
39 like it was much more serious, so I'm thankful
40 that you brought that up.
41 THE COURT: All right. Anyway, I interrupted your
42 review of the witness list. The two witnesses
43 from the business, the shipping business, from the
44 Crown's perspective would be fairly short. From
45 your perspective, Mr. Fox, do you expect you would
46 need to cross-examine them for very long?
47 THE ACCUSED: No, not at all. I believe 15 minutes at

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1 most for each.
2 THE COURT: All right. All right. Thank you. Then
3 there's an agent.
4 MR. MYHRE: Yes, there are two ATF agents. As I said,
5 those are the -- the agents who went to the home
6 of a person alleged to be a friend of Mr. Fox's,
7 confiscated 25 boxes that had been shipped there,
8 apparently from Mr. Fox, and found inside those
9 boxes his four registered restricted firearms.
10 THE COURT: ATF.
11 MR. MYHRE: Alcohol, Tobacco, and Firearms.
12 THE COURT: Ah.
13 THE ACCUSED: Full name, Bureau of Alcohol, Tobacco,
14 Firearms, and Explosives now.
15 THE COURT: Thank you.
16 MR. MYHRE: My Lady, I -- one of those agents would
17 have talked particularly about the nature of the
18 firearms that were collected. And so, in light of
19 the fact that Mr. Fox doesn't contest the nature
20 of those firearms, I may only be calling one of
21 those agents, but I have not thoroughly reviewed
22 their evidence just to make sure that that's the
23 case. But certainly we will have the officer who
24 attended the house, seized the boxes, seized the
25 firearms.
26 And then Constable Jason Potts.
27 THE COURT: All right, let me just ask Mr. Fox. Now,
28 again, I'm not ask -- well, I shouldn't say again.
29 I haven't explained this. I think I did say
30 earlier that the obligation of disclosure does not
31 work both ways. You're not obliged to tell Mr.
32 Myhre or me what your defence is. You're not --
33 there are certain exceptions, as I said, expert
34 evidence, if you're calling expert evidence, is
35 one. Alibi may be another if you planned on
36 testifying about an alibi, "I wasn't there, I was
37 somewhere else," there may be some sort of
38 obligation to give some previous notice of that.
39 I can't think of any other exceptions, but Mr.
40 Myhre will help me if I'm missing something.
41 So you're not obliged to say, "Well, my
42 defence is this, so the -- my cross-examination
43 would be only on the following points." You're
44 permitted to if you find there's no reason you
45 wouldn't say it in open court, but you're
46 certainly not obliged to.
47 And there are many situations like this in a

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1 pretrial conference where defence counsel
2 appearing for an accused person will say, "Well,
3 I'm afraid I'm just not in a position to be able
4 to tell the court at this time whether my client
5 will be testifying, what the defence will be," and
6 that's understood and that's fair enough. There
7 are other times when there's no reason, from the
8 defence's strategic point of view, that they can't
9 say, "The only issue in this case is going to be
10 who pulled the trigger or was it self-defence," or
11 something like that. So be aware of that if
12 you're not already.

13 But what I'm asking if you're in a position
14 to respond is roughly how long you think you would
15 need for cross-examining these two agents.

16 THE ACCUSED: For each of the agents, I believe 15 to
17 30 minutes at most.

18 THE COURT: All right. That's helpful. Thank you.
19 Constable Jason Potts.

20 MR. MYHRE: Yes. The last few officers are officers
21 who took statements from Mr. Fox, Potts in 2016
22 and Huggins in 2015, and so their testimony is
23 limited to essentially authenticating the
24 videotaped interviews that --

25 THE COURT: Now, video in each case?

26 MR. MYHRE: Yes.

27 THE COURT: And how long is the video?

28 MR. MYHRE: I confess I just received the Huggins, and
29 I'd say I believe it's a video but I haven't
30 actually reviewed it. I only got it a couple
31 weeks ago. It came up because there was all --
32 some other disclosure requests that Mr. Fox made.
33 But the first one is video and it's about three
34 hours long.

35 THE COURT: All right. The second one, any --

36 MR. MYHRE: And the second one is certainly shorter.
37 It's probably about half as long.

38 THE ACCUSED: It is a video and I believe it's 45 to 55
39 minutes.

40 THE COURT: All right. We'll call it an hour.

41 MR. MYHRE: And --

42 THE COURT: And the other evidence from those officers
43 would simply be, "I was there, I talked to Mr.
44 Fox. Here's the video."

45 MR. MYHRE: Yes.

46 THE COURT: All right.

47 MR. MYHRE: And so I don't know to -- how much cross-

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1 examination there would be.

2 THE COURT: So, Mr. Fox, assuming you're agreeing that
3 these statements are voluntary, the way this type
4 of evidence typically is tendered is the officer
5 will come in holding a DVD, they'll introduce
6 themselves, say they were on duty such and such a
7 date, they'll say they met you wherever it was,
8 give the date, the time, they conducted an
9 interview with you, it was recorded, "Here's the
10 recording," and it goes usually in somebody's
11 computer, it's played for the jury. The officer
12 sits there while it's played. Generally it's not
13 stopped during the playing unless something
14 unusual happens, the officer leaves the room and
15 absolutely nothing happens for an hour or
16 something. We might fast forward it.

17 But other than that -- or something might
18 happen and you can't quite see it on the screen,
19 the officer might be asked to explain what was
20 going on in that lower left corner. Generally we
21 see it through to the end, and the officer says,
22 "Yes, that's the state -- the -- the interview."
23 Oh, and one thing I missed. Generally there's a
24 transcript as well that we're all given to help
25 read along with. It's the video that's the
26 evidence, not the transcript. The transcript is
27 just to help us all read along. But the officer
28 will be asked whether he saw any mistakes in the
29 transcript while the video was playing, and there
30 may be a few, and we'll all make the corrections.
31 And that will be it for the officer's evidence, as
32 I understand it. And then you would cross-
33 examine.

34 So you might cross-examine on what was not
35 discussed or on other conversations you might have
36 had with that officer or on particular features of
37 the interview, perhaps, for example, sometimes
38 it's suggested to officers who have conducted
39 interviews that essentially they're putting the
40 words into the mouth of the person, they're
41 getting to -- them to agree -- they're telling
42 them the evidence and getting them to agree to it,
43 so it's no surprise that the person knew that the
44 gun was black and the victim was shot in the head,
45 for instance, in a murder trial, because the
46 officer told the person that and got them to agree
47 that they had seen the body or something. Those

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1 are types of things that are sometimes cross-
2 examined on. Sometimes there's no cross-
3 examination at all.
4 Have you begun the process of thinking about
5 how you -- what you might want to cross-examine
6 these officers about?
7 THE ACCUSED: Yes. Yes, I have. And I would estimate,
8 preliminarily at this point, that with Officer
9 Potts or Constable Potts, I'm thinking possibly
10 two hours, though probably closer to one hour.
11 THE COURT: All right.
12 THE ACCUSED: Just to clarify some of the statements
13 and the questions.
14 THE COURT: All right.
15 THE ACCUSED: And I would -- I would guess the same for
16 Constable Huggins, one hour.
17 THE COURT: Thank you. That's helpful. Any other
18 Crown witnesses, Mr. Myhre?
19 MR. MYHRE: No, that's it, My Lady.
20 THE COURT: Now, I got the clear impression, Mr. Fox,
21 that you do intend to testify in the trial, or at
22 least you think it's quite likely that you will.
23 THE ACCUSED: Yes. I will definitely be testifying,
24 yes.
25 THE COURT: And do you have any rough idea of how long
26 you would need to give your evidence before you're
27 cross-examined?
28 THE ACCUSED: That, unfortunately, I don't.
29 THE COURT: Now, Mr. Myhre has said that, for Ms.
30 Capuano, he estimates he'll need a day to take her
31 through her evidence in chief. Does that give you
32 any sort of rough guide of how long you might need
33 to go through your evidence in chief? Would it
34 likely be more extensive or less extensive than
35 hers?
36 THE ACCUSED: I would --
37 THE COURT: Just a suggestion as --
38 THE ACCUSED: Yeah. I would say definitely more
39 extensive, if for no other reason I have a
40 tendency to be much more verbose. I might
41 speculate a day and a half.
42 THE COURT: All right. That's helpful. Are you in a
43 position to advise whether you'd expect to call
44 other witnesses as well?
45 THE ACCUSED: I do have additional witnesses that I was
46 intending to call. One thing I'm very concerned
47 about, though, is if we were to increase the

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1 allocation of time from two weeks to something
2 other, if that would result in rescheduling the
3 trial for another date. That's something I want
4 to avoid.

5 So if there's time for it, then I would
6 intend to call some additional witnesses, but
7 otherwise I believe that I have sufficient
8 evidence to make my case and persuade the jury.

9 THE COURT: I think -- what you're describing about
10 rescheduling does sometimes happen, but it's not
11 going to happen on this case. Is it appropriate
12 for me to ask whether Mr. Fox is in custody on
13 these charges? Do you have any difficulty with my
14 asking that?

15 THE ACCUSED: Not at all.

16 THE COURT: Are you?

17 THE ACCUSED: I am.

18 THE COURT: Then you --

19 THE ACCUSED: I'm --

20 THE COURT: -- these -- this trial should go ahead.

21 THE ACCUSED: Thank you.

22 THE COURT: Now, if we need to add time, much better
23 that we do it now rather than have a jury come
24 expecting a two-week trial and then be told that,
25 no, it's going to be longer. Sometimes that
26 happens. There are things that can happen that we
27 just can't predict. Somebody could get ill in the
28 middle of the trial and we have to lose a day or
29 two. But if, in talking about the case now, it's
30 clear that we're going to need longer than the
31 scheduled time, then we'll add time and we'll do
32 it now. All right?

33 THE ACCUSED: Okay. I would say, then, ideally, with
34 the additional witnesses I would like to call, I
35 would propose adding six hours for -- well,
36 somewhere between four and six. And I apologize
37 for not having more experience with scheduling
38 these but ...

39 THE COURT: So you suggest adding four or six hours, so
40 that's essentially a day and a half.

41 THE ACCUSED: Yes.

42 THE COURT: Are you thinking of the time required for
43 them to testify in chief?

44 THE ACCUSED: Yes.

45 THE COURT: So we'd have to add more time for cross-
46 examination of those witnesses as well. So let's
47 say six hours is -- it equates to a day and a half

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1 of court time, so we would need to add three days
2 minimum.

3 All right. Now, other things that take place
4 in a jury trial are at the very beginning of the
5 trial I give some basic instructions to the jury
6 about how they're to perform their task, what to
7 expect and so forth. And that typically takes an
8 hour, an hour and a half. So we lose time there.

9 Then there's an opening statement by the
10 Crown. Mr. Myhre, what are you expecting? An
11 hour?

12 MR. MYHRE: Fifteen minutes.

13 THE COURT: Very short. All right.

14 Before you begin the defence case, so after
15 all -- sit down. Sorry, Mr. Fox. So we have all
16 the Crown witnesses. And I'm -- I'm not spelling
17 out every detail in the procedure because I get
18 the impression you've familiarized yourself with a
19 number of these things, Mr. Fox.

20 THE ACCUSED: Yes, I have. Thank you.

21 THE COURT: All right.

22 THE ACCUSED: I've been provided some literature from
23 the previous --

24 MR. MYHRE: Justice Duncan.

25 THE ACCUSED: Right.

26 THE COURT: Right.

27 THE ACCUSED: And also I've been through a jury trial
28 in the U.S. years ago.

29 THE COURT: All right. So we get through the Crown
30 case and then you're called on to decide whether
31 you're going to testify or not. You're confident
32 you will be testifying. You can always change
33 your mind on that. But if you are going to be
34 testifying or calling witnesses, you then make an
35 opening to the jury. Very important in that
36 opening to make sure that you're not arguing the
37 case and that you're not giving evidence.

38 You are simply outlining for the jury what
39 you expect the evidence to be in the -- that
40 you'll be calling, and then -- but you do it in a
41 neutral way that will allow the jury to form its
42 own opinion about that evidence. It's not like
43 American television where people pound the table
44 and there's no hyperbole, it's simply to help the
45 jury know where you're headed in your case so that
46 they can understand the evidence better as it's
47 given on the witness stand.

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1 Then you call your witnesses and you've
2 testified. It's customary, but it doesn't have to
3 be the case, that you would be the first witness
4 for the defence, and then your other witnesses
5 would follow. But you can depart from that if you
6 have a reason that you'd like to do it in a
7 different order.

8 I suppose something to keep in mind is that
9 if you testify first, which is the usual way of
10 doing things, the jury will have seen you testify
11 before you then call your witnesses. If you do it
12 in the other order, the jury will have seen you
13 listen to the evidence of all your other witnesses
14 and then give your own evidence, so it might
15 affect the weight they would give your evidence.

16 THE ACCUSED: Right, right.

17 THE COURT: When you've given all your evidence, in
18 exceptional cases there's sometimes a right of the
19 Crown to call reply or rebuttal evidence. It
20 doesn't often happen, it does sometimes. It has
21 to be on a point that you led evidence on and the
22 Crown couldn't reasonably have anticipated.

23 And then come the closing addresses. Now,
24 usually before the closing addresses we'll have a
25 discussion without the jury and we'll talk about
26 what's going to be in the judge's charge to the
27 jury at the end of the case. What defences will
28 be described for the jury to consider, things like
29 that. It's often useful to have that discussion
30 before each of the parties makes their closing
31 submissions to the jury so that if, for example, I
32 decide that something the Crown wants to say to
33 the jury would not be proper and the Crown should
34 not be permitted to say it, the Crown knows that
35 ahead of time. If I decide that a certain type of
36 defence is not a proper defence, not recognized in
37 law, it will not be left with the jury to
38 consider, you know not to refer to it in your
39 closing address.

40 So those steps at the end of the trial take a
41 while. And as I said, we usually lose a bit of
42 time just everybody getting prepared to deal with
43 the evidence they've just heard from the defence,
44 getting ready to make closing submissions to the
45 jury, and then finally the judge's charge. So
46 we're probably looking a couple of days at the end
47 for those steps. The judge's charges can easily

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1 take two and a half, three hours to actually
2 deliver.
3 All right, let's do some arithmetic here. I
4 don't think 10 days is enough, Mr. Myhre.
5 MR. MYHRE: No, I agree.
6 THE COURT: In fact, I think 15 is probably about
7 right, but it's not excessive. I'm going to
8 suggest that we add another week. And if it comes
9 in less than that, that's fine, but better to have
10 it booked rather than not have enough time booked.
11 So the trial is scheduled for -- is it June
12 19th?
13 MR. MYHRE: Yes.
14 THE CLERK: Yes, My Lady.
15 THE COURT: For 10 days. Madam Registrar, do we need
16 to phone down and make sure we can add a week?
17 I'm sure we can.
18 THE CLERK: Yeah, I'll just confirm it.
19 THE COURT: Right. That also would take us over a long
20 weekend, the July 3rd weekend, I believe. Or have
21 I --
22 MR. MYHRE: Right.
23 THE COURT: July -- right, Canada Day is July 1. I
24 know what they're going to tell me.
25 THE CLERK: There is a long weekend on the July 3rd, so
26 the 7th would give 14 days.
27 THE COURT: Is there any chance of starting earlier?
28 Mr. Myhre, would that --
29 MR. MYHRE: I just need a minute, My Lady.
30 I wouldn't say it's out of the question, My
31 Lady. It would require reassigning a Provincial
32 Court trial, but two months in advance I would
33 think would be doable.
34 THE CLERK: Sorry, I missed what you were telling her.
35 MR. MYHRE: The short answer is, yes, I could.
36 THE CLERK: Oh. Rhona from trial scheduling said you
37 could start the trial on the 12th of June, that
38 everyone -- the courtroom and you are available,
39 My Lady.
40 THE COURT: I am. The problem is then those final
41 three days, I think, would still be caught,
42 wouldn't they, in that period?
43 THE CLERK: It would be the 12th to the 16th, the 19th
44 to the 23rd, the 26th to the 30th, gives 15 days.
45 THE COURT: Oh. No, that would work. All right.
46 THE CLERK: Does that work for everybody?
47 THE COURT: So start on the 12th.

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1 MR. MYHRE: I wonder, My Lady, just so that we don't
2 really upset my boss, if I can talk to her at the
3 break.
4 THE COURT: Perhaps we should take a break now. And I
5 don't want to push you into this if you're not
6 confident. The other option is we could extend
7 the trial at the other end.
8 MR. MYHRE: Is that just as easy?
9 THE COURT: No. It would mean we'd have to find
10 another trial judge, because I have another matter
11 in that following week that I need to do.
12 MR. MYHRE: Okay. I think the -- the prior week should
13 be doable, so ...
14 THE CLERK: Do you need to make a phone call?
15 MR. MYHRE: Yes.
16 THE COURT: All right.
17 MR. MYHRE: I wonder, could we take the break? There
18 are -- I had about a half dozen issues that I at
19 least wanted to canvass --
20 THE COURT: Yes.
21 MR. MYHRE: -- before the end of the day as well.
22 THE COURT: Well, what we'll do, we'll take the break
23 anyway, because it's the break time. We'll come
24 back, we'll finish up with the scheduling issue
25 and with other issues. If we don't get finished,
26 we'll make another pretrial conference date.
27 All right.
28
29 (PROCEEDINGS ADJOURNED FOR AFTERNOON RECESS)
30 (PROCEEDINGS RECONVENED)
31
32 MR. MYHRE: So, My Lady, I just confirmed I can make
33 June the 12th work.
34 THE COURT: All right. And that's agreeable to you,
35 Mr. Fox?
36 THE ACCUSED: Yes, it is. Thank you for asking.
37 THE COURT: I understand, too, that it works better for
38 the court as a whole. It's easier for courtrooms
39 and so forth than trying to add on at the end.
40 All right. So we'll start the trial on June
41 the 12th and we'll go for 15 days, so through to
42 -- now, when does that take us to?
43 MR. MYHRE: Should be the 30th.
44 THE COURT: All right. So that's right before the long
45 weekend. And so what we'll tell the jury at jury
46 selection is that they should be prepared to be a
47 bit flexible. And if there's anyone with plans

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1 for the long weekend, that could be a problem.
2 All right. If we don't need quite as long as
3 that, that's fine.

4 All right. Mr. Myhre, you had other issues
5 you wanted to raise.

6 MR. MYHRE: So I hadn't specifically canvassed in open
7 court with Mr. Fox the voluntariness of his 2015
8 statement to Constable Huggins. I did mention it
9 last day after the statement came into my
10 possession and asked Mr. Fox to consider it. I
11 did mention to -- it to him before court today. I
12 understand that he has no issue with the
13 voluntariness of that statement either.

14 THE ACCUSED: I have no issue with the voluntariness of
15 that statement.

16 THE COURT: All right. Thank you.

17 MR. MYHRE: Mr. Fox raised the issue, and I think it's
18 a good one, in a letter to me this month, he would
19 like to know what definition of "psychological
20 harm" is going to be put to the jury. And I think
21 it might be useful if at least that element of the
22 offence was spelled out very explicitly as the
23 jury will see it. As I found in my own research
24 and as Mr. Fox pointed out, it is -- the
25 definition in the case law doesn't say much more
26 than psychological harm. And so we may or may not
27 get more specific than that, but I think that we
28 should hammer that -- or nail that down before the
29 trial so Mr. Fox fully understands the case to
30 meet or the definition his actions are being
31 tested against.

32 I do have a proposal in that regard. I'm
33 certainly going to suggest that we have another
34 pretrial conference before jury selection, or
35 maybe close in time to the jury selection, just to
36 make sure that everything's on the rails. But one
37 thing that I could do is make a written submission
38 to Your Ladyship before that and ask Your Ladyship
39 to consider that -- consider anything Mr. Fox
40 might say, perhaps -- I don't know if a written
41 submission will be possible from Mr. Fox as well,
42 but have Your Ladyship then consider those and
43 make a decision on what will be put to the jury in
44 that regard. Or perhaps we could discuss that
45 issue at a pretrial conference and then ask Your
46 Ladyship to give us the definition early on in the
47 trial or at the start of trial.

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1 THE COURT: I'm just wondering if it's a definition
2 that -- it's not -- it's one thing to provide a
3 definition of a term, it's another thing to
4 provide an outline of what will be said to the
5 jury about the term and what's capable of
6 satisfying the requirements of the term. And I'm
7 wondering, for the latter, if one needs to wait to
8 hear what the evidence is in the trial. I'm just
9 wondering, I'm not saying that's the case. At the
10 same time, I'm -- I can well understand Mr. Fox's
11 concern to know what's meant by "psychological
12 harm".
13 I wonder if some of the standard jury
14 instructions would help us on this.

15 MR. MYHRE: I did send Mr. Fox one.

16 THE ACCUSED: There was --

17 MR. MYHRE: He probably looked at it even more closely
18 than I have.

19 THE ACCUSED: Yeah. There was nothing in there on
20 psychological harm at all.

21 MR. MYHRE: So that was out of the CRIMJI manual. I
22 haven't looked at Watts. But this is why I say --
23 or suggest that perhaps written submissions would
24 be useful.

25 THE COURT: Would the Crown be able to provide an
26 outline of what the Crown expects the evidence to
27 be concerning psychological harm and how, in the
28 Crown's submission, that would constitute
29 psychological harm? And that might at least
30 create a starting point for developing a
31 description of that concept.

32 MR. MYHRE: Yes.

33 THE COURT: Would that help?

34 THE ACCUSED: That would help immensely, I think, yes.
35 Thank you.

36 THE COURT: All right.

37 MR. MYHRE: So, My Lady, I can provide -- my
38 understanding of what you're suggesting is that I
39 provide something like that to Mr. Fox, but not
40 actually discuss the issue in court.

41 THE COURT: Well, I was thinking provide it to Mr. Fox,
42 provide it to me, and we could all look at it at
43 the next pretrial conference. And if Mr. Fox has
44 any questions about why it is that the Crown's
45 saying a particular type of result amounts to
46 psychological harm, we could talk about it. And
47 I'll look also at some of the standard jury

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1 instructions on this point and see what they say,
2 and that might be helpful also.

3 MR. MYHRE: So I will do that some reasonable time
4 ahead of our next pretrial conference.

5 THE COURT: That would be helpful.

6 MR. MYHRE: I still need to -- I still intend to draft
7 a proposed admission regarding Mr. Fox's criminal
8 record. We discussed this last day, I just
9 haven't done it yet. But that's an issue more
10 between the Crown and Mr. Fox.

11 The Crown was intending to -- did you want to
12 add anything to that point, Mr. Fox?

13 THE ACCUSED: No, not yet.

14 MR. MYHRE: The Crown was intending to make an
15 application to have the ATF agents testify via
16 videoconference, but I learned this afternoon that
17 actually I will get permission to fly them here.

18 THE COURT: All right.

19 MR. MYHRE: So I believe they will be testifying in
20 person. That should take care of that issue.

21 THE ACCUSED: But I don't oppose that, right? If you
22 want to have them appear by video.

23 MR. MYHRE: Okay. I wasn't sure if you opposed it or
24 not. But anyway --

25 THE ACCUSED: No.

26 MR. MYHRE: -- it looks like it's not an issue.
27 They'll come in person.

28 I also, quite some time ago, told Mr. Fox
29 that around the middle of May I would try to get
30 him a fairly specific list of the documents that I
31 would be tendering at trial. As Your Ladyship saw
32 from the synopsis, this case revolves largely
33 around a number -- a large volume of emails and
34 then a very large website allegedly created by Mr.
35 Fox to perpetuate the harassment. So Crown's not
36 going to be leading every page of that website or
37 every email before the jury, and I would like to
38 get that list of documents to Mr. Fox. I am going
39 to try to do that for the middle of May, so
40 hopefully that will be before the next pretrial
41 conference. So I just want Mr. Fox to know I
42 haven't forgotten about that.

43 THE COURT: All right. Can we put a date on it and
44 then Mr. Fox knows if something's gone wrong?

45 MR. MYHRE: Could we say --

46 THE COURT: May 19? May 19 is a Friday.

47 MR. MYHRE: A Friday. Yes, May 19th. I agree to that.

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1 And I want to say, My Lady, I will endeavour
2 to make that list complete, but I don't take the
3 position that the Crown will be bound not to lead
4 anything else from the website or any other
5 communication. I am trying to, you know, for the
6 purpose of letting Mr. Fox know what evidence I'm
7 going to be leading exactly, give him all the
8 documents, but I'm not saying that -- I'm not
9 going to be holding things in my back pocket, but,
10 as Your Ladyship knows, the closer people get to
11 trial, witness interviews sometimes you discover
12 something has more significance than you thought
13 it did at first.

14 So I can't promise that this would be -- that
15 nothing else from the website or no other
16 communications would come up. I mean, obviously
17 what I can say is that nothing's going to come up
18 that isn't on Mr. Fox's website or hasn't been
19 disclosed to him.

20 THE COURT: All right. But at least a starting point
21 in the middle of May will help you, Mr. Fox, look
22 at what Crown at this point thinks it will be
23 putting in evidence, and then you can start to
24 think about whether there are other documents that
25 you wish put into evidence.

26 THE ACCUSED: Yes.

27 THE COURT: And there are several ways -- if there are,
28 several ways you can approach the matter. You
29 could, if you wish, contact Mr. Myhre and say,
30 "I'd be grateful if you would also include this,
31 this, this, and this," and he may very well agree
32 to do that. Or you could put together your own
33 collection of documents and I would imagine
34 they'll be documents that you'll need to cross-
35 examine Ms. Capuano on. Well, perhaps not. But
36 you'll either be cross-examining a witness on them
37 or you'll be putting them into evidence when you
38 yourself testify. If it's when you yourself are
39 testifying, you'll probably want to have them in a
40 book and organized. If it's to cross-examine
41 Crown witnesses, you might want to do that one by
42 one with the documents. But by middle of May
43 you'll know what the Crown, at least on a
44 tentative basis, proposes to tender, and then you
45 can think about what other documents you want to
46 use. All right?

47 THE ACCUSED: Okay. The only concern that I have about

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1 this, and this is purely my own issue I realize,
2 is the person that is helping me, for example
3 printing documents from the website or emails and
4 then sending them to me, is in Los Angeles, and
5 because of the amount of time it takes to get a
6 hold of her and then have her print the documents
7 and mail them to me. And one thing that I guess
8 has been an issue so far in this case is Ms.
9 Capuano has been providing very select emails and
10 often only one side of the conversation. So once
11 I receive that information from the Crown, I'll
12 need to look at what the email thread was to see
13 what is missing so I can put some context to it,
14 which is why I was hoping that he would be able to
15 provide me a more conclusive list, which he's
16 committing now to May 19th. But I am a little bit
17 concerned that that is getting close to the trial
18 start.

19 THE COURT: Can you move that up a little earlier, Mr.
20 Myhre?

21 MR. MYHRE: Pardon me, My Lady. I'm just looking at my
22 schedule. Yes, I can commit to May the 12th.

23 THE COURT: All right.

24 THE ACCUSED: Thank you.

25 MR. MYHRE: Keeping in mind, obviously, that there are
26 things that Mr. Fox might not want to disclose to
27 me, I think I've made it clear to Mr. Fox that if
28 he thinks that there are logistical things that I
29 can assist with in terms of photocopying documents
30 -- I mean, obviously that tells me something, so
31 he may not want to get my assistance with those
32 things, but that is -- that is an option. And
33 certainly for things like cases or -- you heard --
34 I agree with Your Ladyship that if Mr. Fox wants
35 me to include some additional emails or parts of
36 the website, I would certainly consider it.

37 I think the only other thing I wanted to
38 discuss, My Lady, was going back to the issue of
39 how Mr. Fox is going to be getting the evidence he
40 needs at North Fraser, because I understand that's
41 been an issue.

42 THE COURT: Right.

43 MR. MYHRE: So --

44 THE COURT: So this is what you wanted to discuss, Mr.
45 Fox, I think.

46 THE ACCUSED: Yes. Yes.

47 THE COURT: Do you want to tell me what the

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1 difficulties are and how you think they could be
2 solved?

3 THE ACCUSED: Sure. Certainly. There is -- well, one
4 major hurdle, I guess, has recently been overcome.
5 The Crown, Mr. Myhre, has provided me a copy of
6 the entire website, which helps substantially.

7 But there's additional evidence, particularly
8 audio/video files, that I have on my servers or on
9 some of my computers in Los Angeles that would
10 need to be put onto a DVD and then sent to me.
11 Now, the jail is saying I can only receive such
12 items from an attorney. Since I'm representing
13 myself, I don't have an attorney to send them to
14 me. And I have been going through the complaint
15 process at the jail and we're slowly gradually
16 getting through that. In the meantime, though,
17 the trial is getting closer and closer and I'm
18 still not able to obtain these items.

19 Now, as I had expressed earlier, there's some
20 evidence that I don't want the Crown to have prior
21 to when I submit it at the trial for a strategic
22 reason, the element of surprise and some other
23 reasons. And so for that reason I'm reluctant to
24 have my friend in Los Angeles put the evidence
25 onto DVDs and then send them to the Crown because
26 obviously then he's going to have that well in
27 advance of the trial.

28 And for the concerns that I had expressed
29 earlier about -- with the attorneys that I've had
30 so far appearing to not be, in my opinion, acting
31 in my interests, I would be hesitant to have the
32 appointed counsel receive those as well because
33 then, maybe I'm being paranoid or maybe there is a
34 possibility that he may provide a copy of that to
35 the Crown, which is something that I would want to
36 avoid.

37 THE COURT: Well, I think probably any counsel
38 receiving something for you and then providing it
39 to the jail for you would have an ethical
40 obligation to have a look at it and make sure it's
41 not contraband or --

42 THE ACCUSED: Yes.

43 THE COURT: -- something like that. The only situation
44 I could think of in which a lawyer who reviewed it
45 for that reason would feel they might have to show
46 it to someone else was if they saw some evidence
47 of illegality on the DVDs. I'm sure you can think

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1 of examples of what there might --
2 THE ACCUSED: Oh, yes.
3 THE COURT: -- the kinds of things that might give rise
4 to an ethical obligation to let somebody know. Do
5 you have any concerns on that sort of score?
6 THE ACCUSED: I have no concerns, and I've expressed
7 this to the -- the assistant warden at the jail as
8 well while we were discussing these issues, I have
9 no concerns with any of the jail staff reviewing
10 the contents of any of that material as long as
11 it's done in my presence so that I know it's not
12 being copied and then forwarded to the Crown or
13 the Crown's agents. And they said they would
14 consider that, but then decided ultimately that
15 that wouldn't be acceptable.
16 THE COURT: Is that because they simply don't have the
17 time for jail staff to be doing that?
18 THE ACCUSED: They didn't provide a reason.
19 Another significant issue that I'm having
20 with the jail is the refusal to provide
21 photocopies. Now, they've recently said that they
22 will provide photocopies for legal material but at
23 a cost of 10 cents a page, which, since I've been
24 in custody for almost a year now and have had no
25 income, obviously that's something I need to
26 consider, consider meaning how it's going to
27 affect my -- my financial situation. At this
28 point, everything needs to be taken into
29 consideration in that respect.
30 THE COURT: Do you foresee a need to make a great
31 number of photocopies?
32 THE ACCUSED: Prior to trial, yes, definitely. There
33 are a number of exhibits that -- well, some of the
34 exhibits in their entirety would be quite large,
35 maybe a hundred and some pages. But I'm not sure
36 if it would be acceptable to submit just the
37 relevant pages. Because if that's done, it might
38 be harder to authenticate the document. The --
39 some of the documents in question are declarations
40 that were filed in the family court in Los Angeles
41 by Ms. Capuano or myself which contradicts
42 statements that she's now making to the RCMP, for
43 example.
44 THE COURT: Well, for those kinds of documents, and
45 that's just -- probably just one type that you're
46 looking at, but for something like that,
47 declarations in another proceeding, I take it it

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1 would be something you would cross-examine her
2 about. You would say, "You're saying this now but
3 on an earlier occasion you said something
4 completely different. Let me show you your
5 declaration," and you'd take her to the
6 appropriate part; right? That's roughly what you
7 have in mind?

8 THE ACCUSED: Yes.

9 THE COURT: For that type of cross-examination, the
10 document in question is not usually an exhibit.
11 You simply show it to her, you read it slowly so
12 that the jury can hear what you're saying she said
13 previously, and the jury doesn't get copies. And
14 they certainly don't get copies of the whole
15 declaration because there's no reason they should
16 have a copy of what she said in another
17 proceeding. So you would need to give Mr. Myhre a
18 copy and probably me a copy, but you won't need 12
19 copies for the jury.

20 THE ACCUSED: Right.

21 THE COURT: Unless you disagree on any of that, Mr.
22 Myhre.

23 Now, if the documents you have in mind
24 include, say, other pages from your website or
25 other emails, yes. And if you want them to go in
26 as exhibits, yes, the jury will have to have
27 copies of those.

28 THE ACCUSED: With respect to printing content from the
29 website, there is a lot of content from the
30 website that is going to need to be printed
31 because I intend to present that, but I believe
32 Mr. Myhre said that he would be willing to assist
33 with those types of issues.

34 MR. MYHRE: Yes.

35 THE ACCUSED: Okay. So I guess really the -- the most
36 important thing that that leaves is that audio and
37 video media.

38 THE COURT: Well, the jail will -- let me just think
39 this through. The jail will allow you to have it
40 if it comes from a lawyer.

41 THE ACCUSED: Yes. And if I could find a lawyer I
42 could trust, then everything would be --
43 everything would be fine then. But if I could
44 find a lawyer I could trust, then I probably
45 wouldn't be representing myself. It is not that I
46 have an inherent distrust for lawyers or for
47 attorneys, it's just purely because of my

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1 experiences so far with the few that I've worked
2 with on this case. It's nothing beyond that.

3 THE COURT: I wonder if it wouldn't be best to start
4 the process of your finding a lawyer, under the
5 order I made, to conduct the cross-examination,
6 and you may find in that process that you do come
7 across a lawyer you trust.

8 THE ACCUSED: Would --

9 THE COURT: We have a lot of trustworthy lawyers.

10 THE ACCUSED: Well, let me ask you now, from the cases
11 that I've read dealing with 486.3 issues, one in
12 particular, *Wapass* I believe it is, in
13 Saskatchewan, in that instance the court provided
14 the accused a list of lawyers that were qualified
15 and then he could pick from that list. But in
16 other cases the court chose which lawyer would be
17 appointed. So I'm not sure how it would be
18 handled in this case.

19 THE COURT: In this case I think the court's not going
20 to participate at all.

21 THE ACCUSED: Oh.

22 THE COURT: I will -- I've made the order. Mr. Myhre
23 will make sure it reaches the Legal Services
24 Society. They will get in touch with you and take
25 steps to appoint a lawyer. I imagine they're
26 probably subject to some constraints, but they
27 also, I imagine, want to try to appoint a lawyer
28 that you're comfortable with. Is that how you
29 understand the situation to be?

30 MR. MYHRE: To be honest, My Lady, I'm not sure to what
31 extent the Legal Services Society involves Mr.
32 Fox. I don't know if they just go to their list
33 of lawyers, find one who's available, and say,
34 "This is it. Get in touch with Mr. Fox," or if
35 it's more as you described. I'm not sure.

36 I would think that if a lawyer shows up and
37 says, "Mr. Fox, I'm your lawyer," and after some
38 discussions Mr. Fox isn't comfortable with that
39 lawyer, there -- I would think there could be some
40 discussion with the Legal Services Society, but
41 that's not something I know.

42 THE ACCUSED: I could perhaps contact the Legal
43 Services Society, I think I can reach them from
44 inside the jail, and ask them for more information
45 about how they normally handle this.

46 THE COURT: That might be a good first step. And if
47 you like, we could have a brief pretrial

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1 conference following up and see how you're doing
2 in that regard, because obviously we don't want
3 this to wait too long. Would that be a good idea?
4 Where are we now? End of April. When were you
5 thinking, Mr. Myhre, for another pretrial
6 conference?

7 MR. MYHRE: Well, the issues we want to discuss at that
8 pretrial conference are going to be -- and the
9 outstanding issues are Mr. Fox getting the
10 evidence that he needs at the jail and the
11 definition of "psychological harm". And I -- you
12 know, it's going to take the Legal Services
13 Society a little bit of time to source a lawyer,
14 and that lawyer a little bit of time to get in
15 touch with Mr. Fox and then to have at least some
16 conversation. I mean, May 19th or -- or sometime
17 after May 12th, if that's the deadline when I'm
18 hoping to get Mr. Fox -- or when I will get Mr.
19 Fox a list of documents might make sense. So
20 sometime in the week after that.

21 THE COURT: How about Tuesday, May 23rd --

22 MR. MYHRE: Pardon me again, My Lady.

23 THE COURT: -- at nine o'clock? Now, will there be a
24 difficulty? There will, won't there, Mr. Sheriff.

25 THE SHERIFF: There may be, My Lady. 9:30 probably
26 will be a little more doable.

27 THE COURT: Right.

28 MR. MYHRE: Pardon me, My Lady. What was the date you
29 suggested again?

30 THE COURT: Tuesday the 23rd.

31 MR. MYHRE: I'm available that day.

32 THE COURT: Would that work for you?

33 THE ACCUSED: Yes. Thank you.

34 THE COURT: All right. Then 9:30. Now, when's the
35 jury selection?

36 THE CLERK: Jury selection is May 30th, My Lady, at 10
37 o'clock. So there's already a remand on the file
38 for May 30th for Mr. Fox. So if he needs to come
39 in beforehand on the 23rd, he would need to come
40 in on a spring order.

41 THE COURT: All right.

42 THE CLERK: So if you ordered that, then the registry
43 would prepare it.

44 THE COURT: All right, then I'll make that order. And
45 also, Mr. Myhre, you were going to give
46 consideration to the issue I raised about evidence
47 admissible on one count and perhaps not relevant

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1 on Count 1.
2 MR. MYHRE: Yes. And the other issues that I have
3 noted to discuss on that day include the
4 definition of "psychological harm" --
5 THE COURT: Yes.
6 MR. MYHRE: -- so I'll endeavour to have materials to
7 Mr. Fox and the court the week prior to that
8 pretrial conference on that issue. And then we'll
9 also confirm with Mr. Fox that hopefully
10 everything is on the rails with respect to
11 appointing counsel.
12 THE COURT: All right. Does that sound reasonable, Mr.
13 Fox?
14 THE ACCUSED: Yes. May we add one thing to that,
15 though? The disclosure issue with the RCMP
16 interviews where there are significant chunks that
17 are removed.
18 MR. MYHRE: Right.
19 THE ACCUSED: Would there be time for that or ...?
20 MR. MYHRE: I'll state what I think the issue is and
21 correct me if I'm wrong.
22 There are, on a few different statements,
23 there -- I have vetted out parts of the
24 transcripts of some of these statements, either
25 because what's said in them is, in my opinion,
26 clearly irrelevant or irrelevant and private
27 information.
28 Mr. Fox has an issue with at least some of
29 the vetting. Is it all of the vetting or some of
30 the vetting?
31 THE ACCUSED: Some. Some. Addresses, telephone
32 numbers, etc. I understand. I have no issue with
33 those. But it's where there are significant
34 chunks where it's showing both sides of the
35 conversation are removed so that I can't even see
36 what it is the RCMP is asking.
37 MR. MYHRE: Could we do this, Mr. Fox? Could you send
38 me a letter that says specifically --
39 THE ACCUSED: Sure.
40 MR. MYHRE: -- what you think should be unvetted? I'll
41 reconsider the vetting.
42 THE ACCUSED: Yeah.
43 MR. MYHRE: And then we can come to court on May the
44 23rd. And if there's still an outstanding
45 dispute, we can discuss it with Her Ladyship.
46 THE COURT: All right. That seems fair?
47 THE ACCUSED: Yes.

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1 MR. MYHRE: My Lady, my only concern is that that's
2 potentially quite a few issues to discuss in half
3 an hour, if that's all that's set aside.

4 THE COURT: Well, let's -- I was trying to do this
5 without intruding on the normal court day, but it
6 may not be possible, and we are constrained by the
7 fact that Mr. Fox will not be able to get here
8 before about 9:30. And frankly, 9:30s can be a
9 bit optimistic.

10 So another day is not going to be any better.
11 Why don't we just say ten o'clock and we'll call
12 it an hour. I'm not scheduled to be doing
13 anything in particular that day. What day was
14 that? The 23rd.

15 THE CLERK: So at ten o'clock, My Lady?

16 THE COURT: Yes. Do you want to phone down and just
17 double check that with scheduling, Madam
18 Registrar? And explain that Mr. Fox can't be here
19 early and we're going to need at least an hour.

20 THE CLERK: He has to call me back, My Lady.

21 THE COURT: Have you discussed jury selection at any
22 point?

23 THE ACCUSED: We've not.

24 MR. MYHRE: No. I was just going to bring that up.

25 THE COURT: That's something we do need to discuss.
26 Not now but certainly at this next pretrial
27 conference. Your experience has been with
28 American courts, Mr. Fox?

29 THE ACCUSED: Yes.

30 THE COURT: It's -- it's very different here,
31 particularly in jury selection. I don't purport
32 to know American procedure, but I do know that the
33 jury selection process here is a lot more
34 straightforward than the American one.

35 THE CLERK: That's fine, My Lady.

36 THE COURT: All right. It's actually going to, I
37 think, be at least an hour so --

38 THE CLERK: So should we start at 9:30 or --

39 THE COURT: No, we'll start at 10:00.

40 THE CLERK: Okay.

41 THE COURT: And I think book it for an hour and a half.
42 So do you have access to resources that would
43 explain how jury selection is done here?

44 THE ACCUSED: I do. Typically what I've been doing so
45 far is having my friend order me the books from
46 Amazon. They have a law library at the jail but
47 it's typically very out of date. So I'll go in

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1 there, find out which books exist, and then have
2 my friend purchase them for me.

3 I have been reading somewhat on the jury
4 selection. I did have a lot of questions because
5 it did seem very different from the process in the
6 U.S., but I'm coming to the conclusion that it's
7 because it is just much more streamlined. Well,
8 maybe not streamlined. Not as much control over
9 jury questions.

10 THE COURT: Exactly. There's no opportunity to ask
11 questions of the potential jurors --

12 THE ACCUSED: Right, right.

13 THE COURT: -- unless you are bringing what's called a
14 challenge for cause. In order to bring a
15 challenge for cause, you have to apply ahead of
16 time to be able to bring one, and there is a
17 notice requirement. I'm not sure offhand what it
18 is but it -- you'd have to get on it very soon.

19 There are not many challenges for cause in
20 this jurisdiction. There are some. And the main
21 bases for cause are things like prejudice on the
22 basis of ethnic background, or media publications
23 about the case that might have caused a potential
24 juror to form an opinion about the case that they
25 would not be able to put aside in the trial.

26 THE ACCUSED: That I do have some concerns about.

27 THE COURT: Let me just finish explaining --

28 THE ACCUSED: Sure.

29 THE COURT: -- how a challenge for cause works.

30 If you wish the court to consider letting you
31 challenge jurors for cause, you have to make an
32 application and there are -- and you'll need an
33 affidavit and so forth. And in this situation you
34 would probably attach media reports. The test is
35 not whether jurors have seen things in the media,
36 it's whether, having seen them, they would be able
37 to put any opinions they may have formed aside and
38 judge the case impartially. And we rely on jurors
39 to follow the instructions they'll get in the
40 trial, which repeatedly tell them that, "If you've
41 read anything in the media, seen anything on
42 television about the case or about anyone involved
43 in the case, that's not evidence." The only
44 evidence is what they hear in this courtroom and
45 that's the only basis on which they can judge the
46 case. So they do get instructions to try and
47 remedy the effect of anything they've read.

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1 Nonetheless, there are cases where the extent
2 of media publication has been extreme and jurors
3 are put through a process in the challenge for
4 cause procedure where they're asked questions.

5 Now, unlike what you see on American
6 television, and I have no idea whether it's
7 realistic or not, jurors don't get cross-examined
8 on anything, they get asked a simple question, and
9 it typically would be, in that type of situation,
10 something like, "Would" -- or might be, "Have you
11 read anything about this case in the media?"
12 "Yes, I have." "Would you be able to set aside
13 any opinions you may have formed and judge the
14 case impartially on the basis of what you hear in
15 court?" And the juror will answer and there will
16 be two what are called triers who will decide
17 whether that juror is impartial or not. The
18 lawyers don't participate in that process, it's
19 the judge who asks those fairly neutral questions.
20 But it is a process that all of the potential jury
21 members are put through if there's a challenge for
22 cause.

23 One reason we have notice requirement for
24 applications to bring a challenge for cause is
25 that if we're using that procedure, we need more
26 time for the jury selection, and we also need more
27 jury panelists because the chances are greater
28 that people are going to be excluded, so we -- the
29 sheriffs will need to bring in more people for
30 that process.

31 If you think it's something you're likely to
32 pursue, you would need to get on it very quickly.
33 The notice requirement is in the court's criminal
34 rules. I don't have them here. I think it's not
35 a great deal of notice. It might be 30 days
36 before the trial, something like that. It's
37 actually not enough notice because the jury
38 notices will have gone out by then. And if we're
39 going to need more jurors, better to know it
40 sooner.

41 THE ACCUSED: I would say, though, that I think it's
42 unlikely that I would put in the application for
43 that.

44 THE COURT: All right. Now, if there's no challenge
45 for cause, there is still a process in which you
46 can challenge potential jurors, and so too can the
47 Crown, but you don't ask them questions. You have

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1 certain very basic information from a jury list
2 and it's on the basis of that and the simple
3 appearance of the juror that you either indicate
4 you're content with them or you challenge.

5 It's nearly 4:15. We should stop. There's a
6 lot more to be said about the jury selection
7 process, but I encourage you to start reading
8 about it and considering how you are going to
9 approach it.

10 If anything comes up that needs to be dealt
11 with before May 23, kindly contact Supreme Court
12 scheduling and I will make myself available to
13 deal with it. Otherwise, we'll go over to May 23
14 at 10 o'clock, and we'll deal with those various
15 issues.

16 Anything else we should address today?

17 THE ACCUSED: I would just like to apologize. It was
18 brought to my attention that earlier in the day I
19 erroneously referred to you or addressed you as
20 Your Honour.

21 THE COURT: Oh, don't worry.

22 THE ACCUSED: Habit, that's all.

23 THE COURT: Thank you, but it happens all the time.

24 It's very confusing for people.

25 Nothing else?

26 MR. MYHRE: No, My Lady. Thank you.

27 THE COURT: All right. Thank you. We'll adjourn.

28

29 (PROCEEDINGS ADJOURNED TO MAY 23, 2017, AT
30 10:00 A.M.)

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34 Transcriber: K. Lowe

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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.

KS Lowe

K. Lowe
Court Transcriber