

27178-2
Vancouver Registry

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

Vancouver, B.C.
May 23, 2017

REGINA

v.

PATRICK HENRY FOX

PROCEEDINGS IN CHAMBERS
(Pretrial Conference)

COPY

BAN ON PUBLICATION - INHERENT JURISDICTION
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Crown Counsel:

M. Myhre

Appearing on his own behalf:

P. Fox

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Nil

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1 Vancouver, B.C.
2 May 23, 2017
3
4 THE CLERK: In the Supreme Court of British Columbia,
5 at Vancouver, this 23rd day of May, 2017, calling
6 the matter of Her Majesty the Queen against
7 Patrick Henry Fox, My Lady.
8 THE COURT: Thank you. Madam Registrar, just a moment,
9 please.
10 MR. MYHRE: Pardon me, My Lady. Mr. Fox and I were
11 just discussing a disclosure issue before you came
12 in and I just didn't want to let it fall by the
13 wayside.
14 THE COURT: All right. Would you rather we stood down
15 briefly?
16 MR. MYHRE: No, maybe let's just move on with the
17 pretrial conference. We can -- we'll pick this --
18 THE ACCUSED: Sure.
19 MR. MYHRE: -- up.
20 THE COURT: Well, if you would rather get it resolved
21 while you're talking about it, that's fine, and I
22 also have forgotten to bring something, so --
23 MR. MYHRE: Oh, okay.
24 THE COURT: -- I wouldn't mind the time as well.
25 MR. MYHRE: Okay.
26 THE COURT: All right. So we'll do that and we'll
27 stand down for what, three or four minutes?
28 MR. MYHRE: We'll be -- we'll -- yes, it will take two
29 more minutes.
30 THE COURT: All right.
31 THE SHERIFF: Order in court.
32 THE COURT: Thank you.
33
34 (PROCEEDINGS ADJOURNED)
35 (PROCEEDINGS RECONVENED)
36
37 MR. MYHRE: My Lady, I've typed out a list that
38 includes the issues that were to be discussed
39 today, as well as a few more issues that we need
40 to discuss, and I think there may be one or two
41 more issues that Mr. Fox needs to bring up. So
42 what I propose to do is just go through them, go
43 through this list one more time.
44 THE COURT: All right. No objection to that, Mr. Fox?
45 THE ACCUSED: No, My Lady.
46 THE COURT: All right. Go ahead.
47 MR. MYHRE: Your Ladyship had asked the Crown to get

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1 Mr. Fox a list of documents that we would be
2 tendering at trial and I did that on the 11th.
3 Your Ladyship, we'd also discussed the Crown
4 being --
5 THE COURT: Now, just let me ask you about that, Mr.
6 Myhre. You've given him a list of the document
7 that you propose to tender?
8 MR. MYHRE: Yes.
9 THE COURT: And I take it Mr. Fox has received copies
10 of all of those at an earlier time?
11 MR. MYHRE: They are all in the disclosure, whether
12 they are sort in document format or in the format
13 of the website we created.
14 THE COURT: I see. And --
15 MR. MYHRE: In fact, every document is on the website
16 that Mr. Fox created.
17 THE COURT: And can you give me an idea of the volume
18 of these documents?
19 MR. MYHRE: Yes, actually my assistant had it printed
20 out this morning double-sided and a page and a
21 half.
22 THE COURT: All right.
23 MR. MYHRE: I can advise there are approximately 10
24 blog codes, which would be one or two pages each.
25 There are about 60 emails which range from one
26 page to five pages, and then other documents on
27 the website.
28 THE COURT: And is this the time to discuss whether
29 there'll be any issue about admissibility of these
30 documents?
31 MR. MYHRE: Well, I did have on the list a little
32 further down.
33 THE COURT: All right.
34 MR. MYHRE: So we can didn't discuss it right now if
35 you'd like.
36 THE COURT: Well, we're on the topic, unless there's a
37 reason not to, perhaps now's the time.
38 MR. MYHRE: So, when I sent Mr. Fox the list of
39 documents I also mentioned to him the general rule
40 that obviously has to be -- these documents would
41 have to be relevant in some way to the charges,
42 and their probative value would have to exceed any
43 prejudicial effect, prejudicial effect being
44 things that make him just do nothing more than
45 make him look like a bad person or unduly distract
46 the jury by taking up too much time.
47 So, I did mention that general rule to him.

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1 I've been fairly selective. There are -- there
2 are probably about a thousand emails, for example,
3 on the website, and I have chosen about 60 from
4 them. And there are probably about 30/40 blog
5 books and I think I've chosen about 12.

6 THE ACCUSED: There's actually about 1,800 emails on
7 the website, and about a little over a hundred
8 blog posts.

9 THE COURT: All right.

10 MR. MYHRE: There is some content that I'm going to be
11 vetting, in particular, from the blog posts. The
12 blog posts, there'll be something that -- that --
13 something's written on the topic, say, for
14 example, Desiree Capuano's potential employment,
15 and then under every blog there's the opportunity
16 for people looking at the website to comment.

17 Now, my intention is to vet the content of
18 people's comments without -- while still leaving
19 in their -- their -- their user name they signed
20 in with and the date and time of their -- their
21 blog posting because the Crown says it's relevant
22 just to show that people are actually reading this
23 material.

24 To some extent, I think what they say
25 actually has some relevance to the extent that
26 their thoughts might impact on Ms. Capuano, but
27 the probative value is small so I'm just editing
28 it. I'm not -- not trying to put that before the
29 jury what random people think about this website.
30 Some people like it, some people don't. People
31 say lots of -- lots of things in those blog
32 entries.

33 So, yes, I do think there needs to be some
34 vetting, and that's the extent of the vetting I'm
35 doing. I don't know if Mr. Fox has any --
36 anything he wants to add to that. I was thinking
37 that it might be prudent for me to give Your
38 Ladyship a copy of this -- this binder ahead of
39 time so that if you see anything that you think is
40 -- is -- that really shouldn't --

41 THE COURT: I think that's a good idea.

42 MR. MYHRE: -- go before the jury.

43 THE COURT: I think that would be a good idea, and
44 perhaps that could be done, I think we're going to
45 need to have another pretrial conference before
46 the trial, and so perhaps that could be done
47 before then --

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1 MR. MYHRE: Yes.

2 THE COURT: -- and we can discuss it at the next
3 pretrial conference. But perhaps it's worth this
4 time canvassing, at least in a preliminary way,
5 Mr. Fox, whether you have any concerns about these
6 documents going in to evidence to be considered by
7 the jury, and I'll just back up to what Mr. Myhre
8 said about the really basic principles about the
9 admission of documentary evidence.

10 Like all types of evidence, documentary
11 evidence has to be relevant, in other words, it
12 has to relate to the subject matter of the charges
13 in some way, and so, for example, if these blog
14 posts, emails didn't connect to you in any way,
15 there was no way of showing that you had posted
16 them or sent them, they wouldn't be relevant
17 because they're just blog posts or emails by
18 somebody, who knows who, so that wouldn't be
19 relevant to the charges against you. And they
20 need to be relevant in addressing the subject
21 matter to the charges.

22 And, as Mr. Myhre says, there's a really
23 fundamental rule of evidence that applies to all
24 kinds of evidence, that if its probative value is
25 less than its prejudicial effect, it doesn't go
26 in. So what that really means is, if it's more
27 harmful in a legally improper way than useful in
28 the trial, then it doesn't go in, and it's for
29 that reason, because of that rule that Mr. Myhre
30 is proposing to vet out or edit out some of the
31 content of the blog posts -- of the comments on --
32 on the blog because -- and I, of course, haven't
33 seen them, but it may be that there are people
34 expressing opinions that could be harmful to you,
35 might taint the jury in some way, and yet those
36 opinions are hearsay, the people who posted them
37 aren't here to be cross-examined, it's not
38 admissible, he thinks it's hearsay, and so its
39 prejudicial end should come out.

40 Now, you've been nodding along and you're
41 also holding something. Is there something
42 specific you want to raise about this?

43 THE ACCUSED: Yes. Yes, there is, My Lady. First of
44 all, what I'm holding was a copy of the letter and
45 the list I received from -- from the Crown. The
46 concern that I have with using any of the content
47 from the website, first, is that I don't believe

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1 it directly relates to criminal harassment in that
2 none of the content of the website was intended to
3 be received by Ms. Capuano, and it's merely a
4 public forum, so it's, in my opinion, nothing more
5 than public free speech.

6 There is no threatening statements and, as I
7 said, no statements that were directed to Ms.
8 Capuano or to -- well, to Ms. Capuano's boyfriend,
9 but I guess he's not relevant in this matter
10 anymore.

11 Now the Crown has submitted at one point that
12 they believe that the website constitutes indirect
13 communication because people would go to the
14 website and then from that they would be inclined
15 to contact Ms. Capuano to ask her if she had read
16 what's on the website or some other, and -- but I
17 don't think that that falls under what Parliament
18 intended by direct -- or indirect communication
19 for the purpose of 2 -- 264.

20 THE COURT: Let me just look at the language again --

21 THE ACCUSED: Sure.

22 THE COURT: -- of 264. All right. So, if we look at
23 264(1), it's framed very broadly about engaging in
24 conduct but it has to be conduct referred to in
25 subsection (2) that causes the young person
26 reasonably to fear for their safety. And then if
27 we look at subsection (2), there are four types of
28 conduct that may give rise to the offence. So I
29 take it from what you're saying, posting on a blog
30 cannot be any -- or creating a blog, making blog
31 posts is none of these. Is that what you're
32 saying?

33 THE ACCUSED: Correct, unless the content or the
34 statements being posted on the blog post are being
35 put on there for the purpose or with the intention
36 of them being read by the complainant. For
37 example, if I had posted messages on there that
38 were directed to Ms. Capuano with the intention of
39 Ms. Capuano reading them, but that's not the case
40 with anything that's on the website.

41 THE COURT: All right. Can I just ask Mr. Myhre a
42 question about the Crown's position concerning the
43 charge? Does the Crown rely exclusively on (b),
44 repeatedly communicating?

45 MR. MYHRE: No, My Lady, there's also conduct that the
46 Crown says is threatening.

47 THE COURT: And separate from the blogs and emails?

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1 MR. MYHRE: No, there are things in the blogs that the
2 Crown says are not a threatening conduct and the
3 emails.
4 THE COURT: All right. But, Mr. Fox, you're saying
5 that the blog, and I apologize if I'm using the
6 wrong terminology, the blog posts and the emails
7 don't amount to communicating with Ms. Capuano
8 because there's going to be no evidence that, I
9 won't say *you*, but obviously the Crown will have
10 to prove that it's you, you intended to
11 communicate with her.
12 THE ACCUSED: In --
13 THE COURT: Is that your position?
14 THE ACCUSED: With respect to the website, yes. With
15 respect to the emails, that is clearly direct
16 communication. So, concerning myself right now,
17 just with the content on the website, exclusive of
18 any email communication, I disagree with the Crown
19 about anything on the website being threatening
20 conduct directed at the -- the complainant, and I
21 think that that's probably something that the
22 court would have to look at whatever blog posts or
23 whatever content it is that the Crown is saying
24 could be construed as being threatening.
25 THE COURT: All right. So your concern is about the
26 documents going in is only about the website?
27 THE ACCUSED: Yes, only content on the website, not the
28 emails, and part of the reason, or a large part of
29 the reason that I would have a concern about the
30 content on the website is I'm certain there's
31 going to be some jurors that will find it
32 offensive, but this isn't really a question or a
33 matter of taste or speech being offensive, and I
34 -- I don't want -- I wouldn't want the jurors to
35 be influenced because they disagreed with my
36 opinions or with my views on my ex-wife.
37 THE COURT: Mr. Myhre, I'm think -- do you have
38 something else to say --
39 THE ACCUSED: No, that's all.
40 THE COURT: -- on that? All right. Mr. Myhre, I'm
41 thinking this might be something that, although
42 I've essentially received the arguments, I haven't
43 seen the material and it might be useful for me to
44 see the material and then perhaps hear from you
45 both again, and make a determination of whether
46 the material will go in or not. It sounds as
47 though there's no objection to the emails going in

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1 or is there any objection on some other basis?
2 THE ACCUSED: Over all, I have no objection to the
3 emails going in. I do have some concern though
4 about the ability to authenticate any given email.
5 As long as the emails that the Crown is submitting
6 match or -- or are identical to the ones that are
7 on the website, then clearly those are emails that
8 were written by me.
9 However, there's really nothing to prevent
10 Ms. Capuano from making up emails and claiming
11 they were from me.
12 THE COURT: All right.
13 MR. MYHRE: Well, I can answer that simply. My
14 intention at this point, and unless I discover
15 from Ms. Capuano that there are additional emails
16 between the two of them that don't appear on this
17 website, I'm just entering the copies directly
18 from the website.
19 THE ACCUSED: Then I -- I have no objection to that.
20 THE COURT: All right.
21 MR. MYHRE: The next item on my list, My Lady, you had
22 asked or Mr. Fox had asked and you had directed
23 that I should enumerate specifically, as the Crown
24 says, that his actions constitute criminal
25 harassment, and I did so in a fax to Mr. Fox on
26 May the 15th. I think I set out 10 specific ways
27 that I say his conduct amounted to criminal
28 harassment. Mr. Fox has something to say about
29 that.
30 THE COURT: Now, is that something I can see that might
31 be helpful to me in managing the trial,
32 understanding the context of the trial better?
33 THE COURT: Thank you. Is there any objection to that
34 being marked as an exhibit for identification, Mr.
35 Myhre?
36 MR. MYHRE: It seems like a good idea, except --
37 THE COURT: You haven't got another copy of it.
38 MR. MYHRE: -- could you make me a copy of that,
39 please?
40 THE COURT: I am guessing that Madam Registrar might be
41 willing to make us a copy. Thank you.
42 THE CLERK: Mark that as Exhibit A for Identification,
43 My Lady?

44
45
46
47

**MARKED A FOR IDENTIFICATION: Letter to
Patrick Fox from Mark Myhre dated May 15,
2017**

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1
2 THE COURT: All right. Does that answer your question,
3 Mr. Fox?
4 THE ACCUSED: Well, I'm -- there seems to be possibly
5 some misunderstanding or maybe miscommunication on
6 this issue because the uncertainty was with
7 respect to the term *psychological harm* or
8 *psychological safety*, and it was my understanding
9 that what Mr. Myhre was supposed to provide me was
10 some cases or some information to help clarify how
11 he was going to -- or how he felt or how the Crown
12 felt that I was psychologically harming Ms.
13 Capuano.
14 THE COURT: Now, just stop there for one moment. I
15 remember you raising that --
16 THE ACCUSED: Right.
17 THE COURT: -- and I actually was going to come back to
18 this as well. I've looked at some standard jury
19 instructions, but as I got more closely into the
20 issue, well, actually before we get to that, can
21 we consider that a separate issue?
22 THE ACCUSED: Sure.
23 THE COURT: And get to it in just a moment, but this
24 fax that Mr. Myhre has sent to you outlining the
25 ways in which he said -- he says -- what the Crown
26 says you've caused Ms. Capuano to fear for her
27 safety, is there anything that confuses you or
28 concerns you about what he's outlined?
29 THE ACCUSED: No, no, I'm clear on what he's saying in
30 here.
31 THE COURT: All right. So let's turn to the question
32 you raised about, well, what does psychological
33 harm mean, and as I went away looking to help
34 answer that question I realized I need to ask you
35 where are you getting that term from? It's not in
36 s. 264.
37 THE ACCUSED: Right. I believe it was first brought up
38 in *R. v. McCraw* [phonetic] which was a Supreme
39 Court case from the '80s? At any rate, ever since
40 then all of the courts have consistently ruled
41 that psychological harm is generally as legitimate
42 or valid as physical harm in matters relating to
43 uttering threats or criminal harassment or similar
44 such offences.
45 Now, in this instance, both Ms. Capuano, and
46 I'm sure the Crown, openly admit that there's
47 never been any threat or attempts at physical

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1 harm, so really their entire case can be based
2 only on this concept of psychological harm, and
3 since the relationship between Ms. Capuano and
4 myself is not one of power or the other, I'm very
5 unclear on how it is that the Crown can be
6 suggesting that I could psychologically harm her.
7 I mean, from the material that I've read on that
8 matter, particularly when she is claiming that her
9 -- my opinion means nothing to her and that she
10 doesn't care what I think or I say.
11 THE COURT: Well, I think again you're -- you're quite
12 right about your reading of the *McCraw* case --
13 THE ACCUSED: Right.
14 THE COURT: -- but again I'm not sure, and I can
15 certainly hear from you and from Mr. Myhre, I'm
16 not sure that translates into the charge that
17 you're facing because the words of the *Criminal*
18 Code for criminal harassment, well, there's no
19 mention of harm. It's causing Ms. Capuano,
20 through your conduct, to reasonably fear for her
21 safety or the safety of someone known to her.
22 THE ACCUSED: Right. From the cases that I've read, in
23 the instances of criminal harassment, it's not
24 a -- it's not psychological harm, but the courts
25 have stated that fear for safety includes fear of
26 psychological harm.
27 THE COURT: I see. So psychological safety is
28 essentially what you're saying?
29 THE ACCUSED: Yes. And --
30 THE COURT: And so you're saying, in the same way that
31 physical harm can include psychological harm, your
32 fear for your physical safety can include fear for
33 your psychological safety?
34 THE ACCUSED: Yes.
35 THE COURT: All right.
36 THE ACCUSED: Now, if this was a situation where Ms.
37 Capuano was, say, financially dependent on me or
38 we were in love or lived together or something,
39 maybe then I could understand, but we have no real
40 emotional or psychological bond with each other,
41 so I'm -- I'm having a lot of difficulty in
42 understanding how the Crown is coming up with this
43 idea that anything that I could do could
44 psychologically harm her. Like, from what he's
45 listed in here, and from based on her own
46 statements in her emails, she doesn't care about
47 my opinion, so my taunting her really I don't see

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1 how that could harm her psychologically.
2 THE COURT: Well, Mr. Myhre's fax that we marked as
3 Exhibit A talks about, for example, in number 2,
4 "taunting Ms. Capuano to cause her distress."
5 THE ACCUSED: Mm-hmm.
6 THE COURT: Perhaps that is what the Crown means by
7 trying to cause psychological harm. And, of
8 course, number 1 is essentially a stated purpose
9 of causing some psychological harm. Number 7,
10 making statements, now I appreciate that this is
11 all the Crown's position and yours may well be
12 very different, but this is the Crown's position,
13 number 7 [as read in]:
14
15 Making statements that cause Ms. Capuano to
16 fear that she's being watched, fear that
17 she's being tricked...
18
19 Arguably, that could be psychological harm. So
20 are you asking -- are you saying that you don't
21 understand what the Crown is trying to say in this
22 or are you saying you can't see how they can
23 possibly prove it?
24 THE ACCUSED: The latter. I understand what it is that
25 they're trying to accomplish with it, but from
26 also speaking with other attorneys over the past
27 few weeks, I -- I have difficulty seeing how
28 they're possibly going to be able to prove
29 anything close to it. But I think at this point
30 the information that I have now clarifies some of
31 the issue.
32 THE COURT: All right. Well, we'll leave it at that
33 for now, and if, as you reflect on it, you have
34 more questions or concerns, raise them next time
35 or the time after. This isn't a one-shot thing.
36 The idea of this pretrial conference, and I -- and
37 we will have at least one more, and during the
38 trial we'll have discussions. The idea is to help
39 you conduct your defence, and it's not going to be
40 a situation where I say, well, I told you that two
41 weeks ago, so I'm not saying anymore. I want to
42 make sure that you have a fair trial, and that
43 you're in a position to conduct your defence. All
44 right.
45 THE ACCUSED: Thank you.
46 MR. MYHRE: My Lady, on that topic, obviously having
47 had the preliminary inquiry, thought about this

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1 case a fair bit and I have done quite a bit of
2 research into psychological harm in the context of
3 criminal harassment.
4 THE COURT: Yes.
5 MR. MYHRE: And so what I intend to do is provide Your
6 Ladyship with probably a half-dozen of the most
7 relevant cases that look at what that means and
8 for the purpose of assisting in drafting a -- a
9 jury instruction, and I know that Your Ladyship
10 will canvass with both myself and Mr. Fox the jury
11 instructions, but I -- I know -- and I know Mr.
12 Fox does his own research so I would suggest that
13 if he has any cases that he wants to point out to
14 Your Ladyship --
15 THE COURT: All right.
16 MR. MYHRE: -- ahead of time when we're talking about
17 what that term means that it might be helpful
18 since it's not something that comes up every day.
19 THE COURT: Good idea. At what point do you expect to
20 have those cases for me?
21 MR. MYHRE: I could have them to you by the end of the
22 week.
23 THE COURT: All right. Then that might be helpful.
24 Sooner is always better, so how do we want to do
25 that? Are you able to get the material to Mr.
26 Fox?
27 MR. MYHRE: I can just -- I can just fax the cases to
28 Mr. Fox, and him send Your Lady a mailed copy.
29 THE COURT: Thank you.
30 MR. MYHRE: The next topic on the list that I had was
31 just canvassing the issue of appointed counsel.
32 There was a little hiccup, but I don't know if we
33 need to go into it, but my understanding is that
34 it's on the rails.
35 THE ACCUSED: I don't understand what the idiom means.
36 MR. MYHRE: Things are as they should be.
37 THE ACCUSED: Yes.
38 MR. MYHRE: So counsel has been appointed and Mr. Fox
39 has been in touch with them, they appear to have a
40 working relationship, at least that's my
41 understanding.
42 THE ACCUSED: Yes.
43 THE COURT: Is it appropriate to advise me who counsel
44 will be? Who's conducting the cross-examination?
45 MR. MYHRE: Go ahead.
46 THE ACCUSED: Oh, yeah, it's Tony Lagemaat with the
47 firm Johnson Doyle Sugarman Ferguson.

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1 THE COURT: Can you spell it? Sorry?
2 THE ACCUSED: Lagemaat is L-a-g-e-m-a-a-t.
3 THE COURT: Thank you.
4 MR. MYHRE: And so he was -- I think it was just early
5 last week that it was confirmed that he would be
6 doing the cross-examination the next day we
7 occurred and all of the disclosure, and printed
8 copies of Ms. Capuano's statements so -- and I've
9 also sent him the list of the documents the Crown
10 intends to rely on, and basically he knows that he
11 can ask me if he needs anything.
12 THE COURT: Thank you, Mr. Myhre. So everything fine
13 on that point, Mr. Fox?
14 THE ACCUSED: Yes. Yes. Things have been moving a
15 little bit slowly due to some complications we had
16 with LSS, but we got past that. I'm a little
17 concerned because it is getting close to the trial
18 date now. Hopefully his schedule will be
19 conducive with it so.
20 THE COURT: His schedule fits with the trial though?
21 THE ACCUSED: Oh, yes, yes, but --
22 THE COURT: Okay.
23 THE ACCUSED: -- with respect to preparation time.
24 THE COURT: All right.
25 MR. MYHRE: And I've tried to, I mean I'm sure you have
26 as well, but when I -- when Mr. Lagemaat and I
27 discussed getting him the disclosure
28 [indiscernible] to him, there is a lot to go
29 through.
30 THE ACCUSED: Likewise when I spoke with him, I pointed
31 out that much of what he's going to receive is
32 probably completely irrelevant, and so when I meet
33 with him I'll be able to direct him towards the
34 things that I think are the most relevant.
35 THE COURT: All right. And while we're on the subject
36 of appointed counsel, that reminds me I have an
37 edited copy of the reasons that -- the brief
38 reasons I gave making the order that counsel be
39 appointed, and I can give you copies. Madam
40 Registrar, if you could hand these, please, and
41 there's one for the file.
42 MR. MYHRE: Thank you, My Lady.
43 THE ACCUSED: Thank you.
44 THE COURT: Now, you'll see on the front page there are
45 two bans on publication, and I'd like to just
46 spend a moment or two on these now, partly to make
47 sure that I've got them accurately, and partly to

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1 make sure that it's understood what these mean for
2 the purposes of the trial.

3 The first one says that there's an automatic
4 publication ban under s. 648(1) of the *Criminal*
5 *Code*, and you can read that. And essentially, Mr.
6 Fox, s. 648(1) of the *Criminal Code* says that
7 anything that happens in a jury trial, when the
8 jury is not present, cannot be the subject of
9 publication until the jury retires, is the word,
10 to consider its verdict at the end of the trial,
11 and I'm sure you can understand the reasoning
12 behind that. We don't want things going on in
13 court when the jury is out because an argument
14 comes up instantly appearing on the television
15 that the jury sees when they go home in the
16 evening.

17 But once the jury has retired, as it's
18 called, they're kept sequestered, and you may or
19 you may not know this, Mr. Fox, but they are not
20 able to see the news, they don't see newspapers,
21 they don't have cellphones. They're really kept
22 in a little cone of silence for their
23 deliberations. And that even includes overnight
24 if they need to go overnight.

25 So, at that point, there can be publication,
26 but the jury won't see it.

27 So, for your purposes, Mr. Fox, that means
28 that at all times, it's not just once the trial
29 starts, but it's also now, you can't be blogging
30 about this case or anything like that. You are
31 just like a newspaper, subject to that
32 restriction. All right?

33 THE ACCUSED: Thank you. May I ask for a clarification
34 on one point, though? On the second paragraph
35 identifying Ms. Capuano as DC?

36 THE COURT: Yeah, that one I -- I'm just getting to.

37 THE ACCUSED: Oh, okay. Sorry.

38 THE COURT: And what's your concern about that one?

39 THE ACCUSED: Well, the sentence that follows, this
40 publication ban applies indefinitely, now the
41 first one of course expires after the trial is
42 complete?

43 THE COURT: Yes.

44 THE ACCUSED: The second one though -- well, these
45 publication bans apply only to this hearing,
46 right, the 486.3 hearing?

47 THE COURT: They apply -- well, let me --

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1 THE ACCUSED: Sure.
2 THE COURT: -- first of all, make sure that Mr. Myhre,
3 it's your understanding that this publication ban
4 was made at some point, I understand. The court
5 record indicates it was, but I'm not sure that I
6 was the one who made it.
7 MR. MYHRE: And then I'm sure that's correct. I
8 just --
9 THE CLERK: It was made on November the 7th last year,
10 My Lady.
11 THE COURT: All right. So that was made, and that is,
12 I assume, the Crown and Ms. Capuano's wish that
13 there be no publication of her name.
14 MR. MYHRE: That's certainly our wish.
15 THE COURT: All right. So the way it works, Ms. -- Mr.
16 Fox, is it only applies to publication, so it only
17 applies to news reports or radio reports or blogs
18 or anything that goes out into the greater world.
19 In the courtroom we use her name, we don't call a
20 witness DC to the witness stand, and likewise when
21 I'm instructing the jury I'll be talking about Ms.
22 Capuano. You will use her name, Ms. Capuano. Mr.
23 Myhre will be using her name, Ms. Capuano.
24 It's simply publication that has to use DC,
25 not her name, and it's founded in sect -- it's an
26 order, it's a discretionary order, not necessarily
27 made in every case, but there's a strong
28 presumption in favour of making that type of order
29 when it's asked for. And the idea is to protect
30 the privacy of people who are alleged victims of
31 certain kinds of offences where there may be
32 strong privacy interests involved.
33 All right? Does that answer your question
34 about that second one?
35 THE ACCUSED: Not entirely. I mean, clearly I intend
36 to write about this entire experience after it's
37 all finished so I just -- I would like to clarify
38 the publication ban on any identification or
39 identifying characteristics of Ms. Capuano if it
40 only applies to that 486.3 hearing or to all of
41 the proceedings in this matter?
42 THE COURT: It applies to all of the proceedings.
43 THE ACCUSED: Okay.
44 THE COURT: And the idea of putting it on this -- these
45 reasons is just to make sure that the reader of
46 these reasons knows about it.
47 THE ACCUSED: Right.

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1 THE COURT: But it does apply more generally to
2 everything.
3 THE ACCUSED: Okay.
4 THE COURT: So, if you are planning to publish a blog
5 or whatever it is, after the trial or before or
6 during, you will not be able to use Ms. Capuano's
7 name. You'll have to use initials.
8 THE ACCUSED: When writing about any matters relating
9 to the proceedings, correct?
10 THE COURT: Correct.
11 THE ACCUSED: Okay.
12 THE COURT: And the wording that the *Criminal Code* uses
13 and it's repeated in the wording of the ban is
14 quite broad, so you need to be careful about --
15 well, you -- let -- let me put it a little
16 differently.
17 You couldn't be clever by saying "Well, what
18 happened in court related to DC, and I'm obliged
19 to use initials because of the ban on publication
20 of her name, but now I need to tell you about
21 something that happened in my personal life with a
22 woman called" using her full name because clearly
23 you would have made it obvious to the reader who
24 DC was. All right. So that would violate the
25 ban, in my view. So you need to be very careful.
26 It's any information --
27 THE ACCUSED: Mm-hmm.
28 THE COURT: -- identifying her that it is banned from
29 publication.
30 Now, the publication ban is indefinite,
31 subject to further order of the court. If you get
32 to the end of the trial and it's your view that
33 events have unfolded in such a way that you ought
34 to be able to publish her name, or information
35 identifying her, it would be open to you to apply
36 to have the publication ban changed, but you would
37 have to make that application, you'd have to
38 persuade me and, as I said, there's a pretty
39 strong presumption in 486.5 that you'd be facing.
40 THE ACCUSED: I understand everything that you've
41 stated, and I -- obviously I intend to respect and
42 comply with the laws on the matter, but since she
43 has been in the media quite extensively about
44 this, I mean, it's -- I'm not sure how effective a
45 publication ban would really be though. I mean,
46 she's -- the RCMP themselves had to contact her
47 and tell her to stop doing interviews in the media

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1 after I was arrested. But certainly I wouldn't
2 violate the order.

3 THE COURT: All right. Thank you. And what you've
4 just said might be something, if you were to apply
5 to have the ban changed, that might be something
6 you would use to support your application.

7 THE ACCUSED: Thank you.

8 THE COURT: Mr. Myhre, anything else about the bans on
9 publication?

10 MR. MYHRE: So the next issue on my list was the issue
11 raised by Your Ladyship last day about whether
12 these two charges should be on this indictment.

13 THE COURT: Yes.

14 MR. MYHRE: So I've given that a lot of thought,
15 discussed it with quite a few colleagues, and here
16 is what the Crown position is.

17 We should have a severance application. The
18 Crown argues that the evidence that Mr. Fox moved
19 is guns to California is relevant to his intention
20 on the harassment charge, and I think this has to
21 be fully litigated. It's not going to take the
22 Crown a long time to make submissions, but I'm not
23 making full submissions.

24 If Your Ladyship were to rule that it's not
25 relevant, the Crown would take s. 93 off the
26 indictment. And if Your Ladyship were to rule
27 that it is relevant, then of course Your Ladyship
28 would have to consider all of the other factors
29 relevant to severance in deciding whether
30 nonetheless it should be taken off the indictment.

31 So, yesterday, I sent Mr. Fox a fax stating
32 that position, and providing him with the leading
33 Supreme Court of Canada case on severance, the
34 last of *Last*. I don't have the reference right on
35 me. Mr. Fox has my letter.

36 THE ACCUSED: But it doesn't have the full citation on
37 it. Oh, actually, I have the case.

38 MR. MYHRE: Thank you. The site, My Lady, is 2009 SCC
39 45. And the primary authority, and it may be on
40 the only authority to rely on on the application
41 when it comes to relevant is the case of *Taylor*,
42 2014 BCCA 138.

43 THE COURT: And you say relevant to Mr. Fox's intention
44 to harass?

45 MR. MYHRE: Yes. So I can -- I can sketch it out in a
46 couple of sentences for Your Ladyship, but I think
47 really you have to see the specific emails and

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1 blog posts that the Crown relies on to say that
2 the fact that he shipped his firearms to
3 California is relevant to his intent.

4 In brief, Mr. Fox reminded Ms. Capuano on
5 several occasions that he was in possession of
6 firearms in Canada. He reminded her that he could
7 cross the border when he liked, and he made a blog
8 post in which he discussed the logistics of
9 killing Ms. Capuano with his firearms, ultimately
10 concluding that it was logistically not feasible,
11 in the blog post, but nevertheless the Crown says
12 when you have a person saying those things and
13 then actually taking a step consistent with those
14 things, it shows what their intention was with
15 those words, those words being amounting to
16 threatening conduct.

17 So that, in brief, is -- is why the Crown
18 says it's relevant. But I think both myself and
19 Mr. Fox need a change to make full submissions,
20 and I might have suggested we do it today, except
21 I only mentioned this to Mr. Fox yesterday so
22 that's not enough time to prepare, but obviously
23 we'll have to do it very soon. I think Mr. Fox
24 wants to add something.

25 THE ACCUSED: I respectfully disagree with Mr. Myhre.
26 I don't think that such a hearing is necessary at
27 all. I have no interest in severing the counts.
28 With the evidence that I intend to present to the
29 jury at the trial, I think that it would work very
30 much in my favour having the counts together.

31 THE COURT: Can you tell me why?

32 THE ACCUSED: Yes.

33 THE COURT: And -- and before you do that --

34 THE ACCUSED: Yeah.

35 THE COURT: -- bear in mind, and I'm pretty sure I've
36 said this before, you are not obliged to disclose
37 your defence to me. You're not obliged -- or to
38 anyone.

39 THE ACCUSED: Mm-hmm.

40 THE COURT: You're not obliged to even say whether you
41 plan to testify or call witnesses, and one of the
42 reasons for that is that you don't make that
43 decision until the Crown has closed its case, and
44 you might decide that there's nothing there in the
45 Crown's case or it might be that I decide that
46 there's nothing there in the Crown's case. Since
47 you are representing yourself, I'll have an

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1 obligation to consider that at the end of the
2 Crown's case.

3 So you're not obliged to tell me anything
4 about your defence. You can keep it in your back
5 pocket and you've -- there's no negative inference
6 to be drawn from that.

7 If you wish to tell me now to give context to
8 what you want to say about severance, you can do
9 that.

10 THE ACCUSED: For example, with respect to Mr. Myhre's
11 statements a moment ago about a blog post that he
12 claims is some type of plan of how I would go to
13 Arizona and kill or assault Ms. Capuano with my
14 own firearms. To state that that blog post even
15 infers that is a gross misrepresentation and, when
16 that blog post is presented to the jury in full,
17 they will see that, given the timing of it, it was
18 a few days after I had done the CBC interview when
19 Ms. Clancy, Natalie Clancy, the journalist at CBC
20 had informed me of some of what Ms. Capuano was
21 alleging. So that blog post was a response to the
22 allegations that Ms. Capuano was making, and about
23 how ridiculous I believed that it was.

24 For example, in the State of Arizona where I
25 used to live, any person can purchase a firearm,
26 and there's no -- if you don't buy it from an FFL,
27 Federal Firearms Licenced dealer, there's no
28 background check, you just buy it on the spot.

29 So it would be completely irrational and
30 illogical for me to use my own Canadian registered
31 firearms that can be traced back to me very easily
32 to do something like that, and that's a point that
33 I bring up in that blog post.

34 The other -- the other facts that I believe
35 is going to be very significant on this point is
36 the Crown keeps mentioning that I sent my firearms
37 down to Los Angeles, but they don't mention
38 because I actually sent 25 boxes of personal
39 items, because I was in the process of moving out
40 of my apartment. There was nothing significant
41 about the firearms going to Los Angeles. They
42 were just one of all of my other personal property
43 that was going down there.

44 So I think that, when these facts are put
45 before the jury, I think that a jury of reasonable
46 people would see that the Crown is really
47 stretching here, they're really trying to make

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1 this into something that it really isn't.

2 Also, on this issue of the s. 93, the Crown's
3 allegation is that I had the firearms in my
4 possession at the shipping company, yet nobody at
5 the shipping company ever saw any firearms as
6 well. There was parts of a rifle, but that's not
7 restricted, so that doesn't fall under the ATT,
8 but the Crown is going to have to prove that the
9 firearms and I were at the shipping company at
10 that time, and they would also have to prove that
11 I wasn't on my way to the shooting range or to a
12 border after leaving the shipping company, which
13 again I think is going to be very difficult.

14 So, for those reasons, I don't think it's
15 necessary, in my opinion, to sever the counts.

16 THE COURT: All right. Thank you. Mr. Myhre, I was
17 the one who raised the issue, and I raised it out
18 of concern and, of course, having only limited
19 information of the case at that point that I
20 raised it out of concern that evidence admissible
21 in relation to Count 2, the firearms charge, could
22 be more prejudicial than probative in relation to
23 Count 1.

24 Mr. Fox seems to think that that would not be
25 the case. I still have to wonder whether, in my
26 role of assisting Mr. Fox to ensure he has a fair
27 trial, I need to look more closely at the issue.
28 It sounds like the Crown is not -- you're
29 suggesting the severance application, but you're
30 not seeking severance. I think probably the
31 approach you're suggesting is the fairer one in
32 which I look at the matter through the eyes that I
33 originally had when I was concerned there may be
34 an unfairness. I'll obviously take very much into
35 account Mr. Fox's submissions that no, it actually
36 may help him to have both counts on the
37 indictment, but thus far it's not clear to me why
38 that's the case, although I do understand that Mr.
39 Fox is doubting that the Crown is going to be able
40 to prove Count 2.

41 I suppose what I'm saying, Mr. Fox, is I
42 understand that you're saying you don't think the
43 Crown will prove Count 2, but the scenario I'm
44 considering is saying we have a trial only on
45 Count 1 at this point, Count 2 waits for a
46 different trial if the Crown decides to pursue it,
47 and so evidence about firearms going to the U.S.

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1 wouldn't be tendered in this trial.
2 THE ACCUSED: Mm-hmm. But the Crown's position seems
3 to be that they believe the facts that the
4 firearms did make their way to Los Angeles is
5 going to be relevant, even though Ms. Capuano knew
6 nothing about that until after I was arrested.
7 And so they're going to try to argue to provide
8 that evidence at the criminal harassment jury --
9 or trial anyway, and am I correct on that?
10 MR. MYHRE: More the Crown's position is that, if Your
11 Ladyship were to rule against the Crown and say
12 that that is not relevant, we would take --
13 THE COURT: Then --
14 MR. MYHRE: -- s. 93 off the indictment.
15 THE COURT: And the Crown would not then try to lead
16 the evidence saying, all right, well, 93 is off
17 the indictment but we still think it's relevant,
18 so we're going to -- to Count 1 so we're going to
19 lead it anyway. The Crown wouldn't do that.
20 THE ACCUSED: Admittedly, one of the concerns that I
21 have if the counts are severed is that, if the
22 Crown proceeds with the s. 93, which I'm sure that
23 they will, then that would cause me to either
24 remain in custody, although I likely wouldn't be
25 detained just on the s. 93 charge, but then I
26 would be released on bail potentially and be
27 subject to further bail conditions until that
28 matter gets resolved.
29 And not that I dislike British Columbia, but
30 I'm not sure, after all of the media attention
31 that this has gotten, that it's going to be in my
32 best interests to remain in Vancouver. I may end
33 up going back to California or to Toronto or
34 somewhere, but if I'm stuck here on bail for
35 another year and a half on some - well, in my
36 opinion - petty and ridiculous charge, then that's
37 going to cause a lot of problems for me.
38 THE COURT: That's something else that I would
39 obviously consider. I do think it's an important
40 enough issue that I need to review it closely, and
41 so the best way of doing that is to, as Mr. Myhre
42 suggests, have a severance application. It'll be
43 an odd one because, I mean, it sounds as though
44 nobody is actually seeking severance, but the
45 Crown will do the fair thing, and say here are the
46 reasons that you could consider ordering
47 severance, meaning that the two charges are

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1 divided and go on separate indictments. And
2 obviously, Mr. Fox, you can argue against it, and
3 I will make a determination about what is the fair
4 thing to do so that your trial will be fair.
5 THE ACCUSED: Okay. And I apologize I'm not entirely
6 familiar with the protocol for when I should stand
7 or sit.
8 THE COURT: Generally people stand when they're
9 speaking to the court, and generally they stand
10 when the court is speaking to them specifically.
11 THE ACCUSED: Okay.
12 THE COURT: But in a pretrial conference such as this,
13 we're a little less formal. It's not necessary to
14 be popping up and down all the time.
15 THE ACCUSED: Okay, thank you.
16 THE COURT: But you can, if you wish, and generally
17 lawyers are so used to doing that, that they can't
18 stop themselves, so.
19 MR. MYHRE: Okay.
20 THE COURT: I think we're going to be a little while
21 still, and at some point we should take a morning
22 break. Mr. Myhre, do you have any time
23 limitations?
24 MR. MYHRE: I have all morning. In fact, I have all
25 day if you need it.
26 THE COURT: I think we'll take the morning break now,
27 unless there's something that would be a good idea
28 to deal with quickly before we break.
29 MR. MYHRE: No, there are three or four more things we
30 need to talk about.
31 THE COURT: All right. And we'll need a date for a
32 severance application.
33 MR. MYHRE: Yes. And I thought maybe we should wait
34 until the end of the pretrial conference to see so
35 we know what issues will have to be dealt with or
36 as much time we'll need.
37 THE COURT: Okay.
38
39 (PROCEEDINGS ADJOURNED FOR MORNING RECESS)
40 (PROCEEDINGS RECONVENED)
41
42 MR. MYHRE: My Lady, I thought next we might address
43 the issue of disclosure that was brought up and
44 vetting -- particular vetting of certain
45 statements that was brought up at the last
46 pretrial conference.
47 Mr. Fox and I have had some back and forth.

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1 As a result of that, I did unvet some things, but
2 I've specifically listed about five things that I
3 said I would not unvet without an order from the
4 court. So I think the most expeditious way to
5 proceed might be for Mr. Fox to specify which of
6 the six items I'm still refusing to unvet that he
7 would like unvetted.

8 THE ACCUSED: First, I'm going to assume that you don't
9 have a copy of the letter with the points here,
10 so...

11 THE COURT: I don't.

12 THE ACCUSED: Okay. The first one, though, and these
13 all pertain to an interview that Ms. Capuano had
14 done with the RCMP, they had gone down to Arizona,
15 interviewed her in person, and there are a few
16 sections from that that were vetted out.
17 According to Mr. Myhre, paragraph 690 to 699
18 contain what he says are Ms. Capuano's views of
19 Gabriel's views and that, for that reason, they're
20 clearly irrelevant.

21 Now, I can't say whether or not I agree that
22 they're clearly irrelevant because obviously I
23 don't know what they contain. I was hoping that
24 perhaps the court might be able to review those
25 statements, and then the court can make a
26 determination whether or not it might be something
27 relevant.

28 MR. MYHRE: So maybe we can just do this one at a time.
29 So I have unvetted --

30 THE COURT: All right.

31 MR. MYHRE: -- copies that Your Ladyship can see. I
32 suppose they should probably be marked and then
33 put in an envelope --

34 THE COURT: They should.

35 MR. MYHRE: -- at some point but --

36 THE COURT: So, Madam Registrar, were you able to make
37 a copy of this document?

38 THE CLERK: I have, yes.

39 THE COURT: I know you've had a lot to deal with.
40 Thank you. That's the one that's going to be
41 Exhibit A.

42 THE CLERK: Yes.

43 THE COURT: And then, Mr. Myhre, you now are going to
44 give me an unvetted copy?

45 MR. MYHRE: Yes, and there'll be four documents.

46 THE COURT: All right. Perhaps give me the first one,
47 and do you have two copies of it or not?

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1 MR. MYHRE: Unfortunately, I don't.
2 THE COURT: All right. Well, give me the first one,
3 please, if you would, or does that leave you with
4 none?
5 MR. MYHRE: Actually, I did have it. I'll take a look.
6 What you see on here, My Lady, is there's a box
7 around the material that's been vetted, so Mr. Fox
8 doesn't have what's in the box.
9 THE COURT: So this is going to be Exhibit B, and it
10 needs to be sealed, subject to what I say about
11 it. All right. I'm just going to take a quick
12 look. And you say this is an RCMP interview?
13 MR. MYHRE: Yes.
14 THE COURT: Is there any plan to introduce any evidence
15 from Gabriel?
16 MR. MYHRE: No.
17 THE ACCUSED: I would love to be able to have Gabriel
18 testify, though I don't think that that's
19 something that I would ever be able to get
20 approval on. Also I wouldn't want to put him in a
21 position where he might have to say things
22 regarding Desiree or Ms. Capuano, and then have to
23 go home to her house and...
24 THE COURT: And could you read me again, Mr. Fox, the
25 explanation Mr. Myhre gave you --
26 THE ACCUSED: Certainly.
27 THE COURT: -- for redacting or vetting out this
28 portion?
29 THE ACCUSED: It says [as read in]:
30
31 Paragraphs 690 through 699 contains Ms.
32 Capuano's views of Gabriel's view. In my
33 opinion, this is irrelevant and will -- and I
34 will not disclose it without a court order.
35
36 I should mention, though, you're probably aware,
37 but much of the animosity and the issues between
38 Ms. Capuano and myself over the years did stem
39 from the child custody disputes and her conduct
40 toward Gabriel over the years.
41 THE COURT: I agree that the description Mr. Myhre has
42 given you, Mr. Fox, is accurate, and so I see no
43 basis for viewing this passage as relevant, and
44 I'll keep in mind as the trial progresses that
45 sometimes the basis for relevance emerges, but
46 based on what I now understand the case to be and
47 to involve this is not relevant and it's

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1 essentially an opinion of someone who's not an
2 expert based probably on hearsay. It's properly
3 vetted out.

4 THE ACCUSED: Okay.

5 THE COURT: So, Madam Registrar, this is going to be
6 Exhibit B, but I will want a copy of it, please,
7 and it needs to be sealed. Thank you.
8

9 **MARKED B FOR IDENTIFICATION: Document re**
10 **Gabriel to be sealed**
11

12 THE ACCUSED: And the next -- the next two, according
13 to Mr. Myhre, pertain to Sage, who is Ms.
14 Capuano's other son from another marriage. If
15 that's correct, then I don't believe that they
16 would have any relevance and I would have no issue
17 with them not being disclosed. That would be
18 paragraphs 933 through 938, and then 942.

19 MR. MYHRE: Madam Clerk, [indiscernible/away from
20 microphone].

21 THE COURT: So you say that's 933 to 938?

22 THE ACCUSED: That's correct, yes.

23 THE COURT: And 942?

24 THE ACCUSED: Yes.

25 THE COURT: There's also a redacted portion at 962.

26 THE ACCUSED: Yes, that's the next point. That one I
27 think I might have an issue with.

28 THE COURT: All right. And again give me Mr. Myhre's
29 given reason --

30 THE ACCUSED: Oh.

31 THE COURT: -- please.

32 THE ACCUSED: Certainly. For 933 through 938 and for
33 942 as well it says [as read in]:

34
35 Relate to Sage and are both private and
36 irrelevant. I will not disclose this without
37 a court order.
38

39 THE COURT: Private and irrelevant?

40 THE ACCUSED: Irrelevant, yes.

41 THE COURT: All right. That's a fair description.

42 THE ACCUSED: Okay.

43 THE COURT: And so those we'll treat in the same way,
44 so that's going to be -- there's -- they fall on
45 two pages, so we'll call them both Exhibit C, and
46 they should be kept again sealed and I would like
47 a copy, please.

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1 MR. MYHRE: So my understanding, and Mr. Fox will
2 correct me if I'm wrong, my understanding of what
3 he's saying is that what's in that vetted portion
4 says something about disappearing with Gabriel, it
5 would be relevant to your --
6 THE ACCUSED: No, no, not --
7 MR. MYHRE: -- [indiscernible/overlapping speakers].
8 THE ACCUSED: -- in disappearing with Gabriel, but
9 if -- if what she's saying in that statement
10 pertains to her intention or play to change her
11 name and then disappear or start a new life in
12 such a way that I can't find her, but the
13 important part being that she would change her
14 name and disappear because that's something that
15 she keeps accusing me of doing even though there's
16 no evidence that I've ever done anything like
17 that.
18 THE COURT: All right. So on the second page of
19 Exhibit C, at paragraph 962 there's a redacted
20 portion, a vetted out portion, and I'm not going
21 to say much about it except that I conclude that
22 it should remain vetted out.
23 THE ACCUSED: Okay.
24 THE COURT: And I encourage your submission on that,
25 Mr. Fox, please. So, Madam Registrar, I can give
26 you these two which are together Exhibit C.
27 MR. MYHRE: Those are the only ones you take issue
28 with?
29 THE ACCUSED: Yes.
30 MR. MYHRE: Well, I think that concludes that item --
31 THE COURT: All right.
32 MR. MYHRE: -- to be dealt with. The next issue -- I
33 think that deals with all the issues that we had
34 discussed except for Your Ladyship discussing jury
35 selection with Mr. Fox, but there is -- he has
36 some other issues, I have one other issue to bring
37 up, and it's the witnesses.
38 THE COURT: All right.
39 MR. MYHRE: When we moved the trial up to June 12th, my
40 understanding from Ms. Capuano was that that no
41 longer worked for James Pendleton, and so I want
42 to alert Mr. Fox that he won't be coming up to
43 Canada. He has to work that week. He was coming
44 for the purpose of accompanying Ms. Capuano, and
45 since he won't be able to do that, he won't be
46 here, I won't be asking him to testify.
47 The second witness, there are two witness

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1 issues --
2 THE COURT: What -- what's -- why are you raising that?
3 Were you expecting --
4 MR. MYHRE: Because I had previously told Mr. Fox that
5 he -- he had told me he wanted James Pendleton,
6 who is Ms. Capuano's current partner, to testify.
7 Mr. Pendleton has given a statement to the police.
8 I wasn't intending to call him as a witness,
9 myself, but because Mr. Fox wanted him, I -- I did
10 call him as part of my case because he was going
11 to be coming here anyway. He wouldn't be under a
12 subpoena, but he was going to be here. That
13 situation has changed.
14 THE COURT: All right. Does anything flow from that?
15 Does that cause you concern, Mr. Fox?
16 THE ACCUSED: No, no, it doesn't cause me concern.
17 It's not unexpected in the slightest bit. At the
18 previous hearing when we were discussing
19 witnesses, Mr. Myhre, I noticed he didn't mention
20 Mr. Pendleton, and I was going to ask him about
21 that because he has previously said that Mr.
22 Pendleton, that he would call him to testify, but
23 I see now that he's officially not going to be
24 coming, so.
25 THE COURT: And he's not a witness you wish to call?
26 THE ACCUSED: I would have liked to -- to speak with
27 him or to examine him, yes, but I can do without.
28 I -- I believe that I have sufficient evidence
29 relating directly to Ms. Capuano. I don't think
30 that it's going to be particularly necessary to --
31 to have his statements as well.
32 MR. MYHRE: The second witness issue relates to
33 Constable Dupont, and the Crown was intending to
34 call him to talk about what he said to Mr. Fox in
35 the summer of 2015. So, Mr. Fox was arrested in
36 the summer of 2015, he was interviewed by
37 Constable Huggins [phonetic]. During that
38 interview, and what Crown says is relevant here
39 was some things that Constable Huggins said to Mr.
40 Fox, things like "Ms. Capuano is scared", so
41 obviously those would go to what Mr. Fox would
42 have known to be the case at that time.
43 Unfortunately with moving the trial,
44 Constable Huggins is in Ottawa on training, and
45 the way that the Crown intends to get around that
46 or deal with that problem is Constable Dupont was
47 also involved in the arrest and he was actively

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1 monitoring the statement at the time, so he can
2 attest to what Constable Huggins told Mr. Fox in
3 the summer of 2015.

4 THE COURT: So essentially he would substitute in for
5 Constable Huggins, and say that he had -- he
6 witnessed the interview as it took place --

7 MR. MYHRE: Mm-hmm.

8 THE COURT: -- and presumably there's a video recording
9 of it, is there?

10 MR. MYHRE: Yes.

11 THE COURT: All right.

12 MR. MYHRE: And so I do want to emphasize that the
13 Crown's not tendering Mr. Fox's statement there.
14 What we are tendering is the evidence of what Mr.
15 Fox was told in terms of warnings and what was
16 going on with Ms. Capuano because it would be
17 relevant to whether Mr. Fox knew she was harassed.
18 And so the Crown position will be that the
19 things that Mr. Fox said in response during that
20 interview are irrelevant, and are inadmissible
21 because he can't tender his own statements,
22 subject, I think, to providing appropriate context
23 to what was being said.

24 THE COURT: All right. Do you understand all of that,
25 Mr. Fox?

26 THE ACCUSED: Yes, I do. Yes.

27 THE COURT: And do you have any concern with that, with
28 Constable Dupont coming instead of Constable
29 Huggins to say essentially what you were told --

30 THE ACCUSED: I --

31 THE COURT: -- about those two things?

32 THE ACCUSED: I don't.

33 THE COURT: No problem?

34 THE ACCUSED: That's correct.

35 THE COURT: All right. Thank you.

36 MR. MYHRE: I understand we may be considering shifting
37 the date of jury selection, and I think Your
38 Ladyship may have heard from Madam Clerk that I
39 have some scheduling difficulties. I have a
40 Provincial Court trial that starts on Monday, May
41 the 29th, and runs through June the 1st, and then
42 again on June the 5th. Those are the dates set
43 for that trial. It's certainly a trial where
44 anything could happen. It could happen that it's
45 over Monday morning at ten o'clock, but it also
46 could happen that the entire time is taken of that
47 trial. It just has witnesses that are very hard

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1 to predict. It is a -- it is a child sexual
2 interference case. It's not something that I can
3 just hand off to another prosecutor,
4 unfortunately.

5 The way the Crown was intending to deal with
6 the jury selection on the 30th was to have a
7 senior colleague sit in and -- and select the
8 jury. But I just wanted to alert Your Ladyship to
9 my schedule.

10 I was also going to say, My Lady --

11 THE COURT: I think the only reason for changing the
12 jury selection that I'm aware of is that, as Madam
13 Registrar, very aptly pointed out to me in the
14 break, if there's to be a severance application it
15 needs to be heard and determined before we do a
16 jury selection.

17 MR. MYHRE: So maybe this would be a good time to
18 address that.

19 THE COURT: Yes.

20 MR. MYHRE: Obviously I have thought about the issue to
21 the point of doing some research and thinking
22 about how it applies to this case. I could be
23 ready to make the application or how -- respond to
24 the application this afternoon, that is provide
25 Your Ladyship with what I say are the relevant
26 documents, and argue based on -- make argument
27 based on the case law. I think I would probably
28 be a half an hour in submissions, maybe 45
29 minutes.

30 THE COURT: Mr. Fox, would that work for you, if we
31 deal with that this afternoon?

32 THE ACCUSED: Certainly.

33 THE COURT: I won't necessarily be able to decide it
34 this afternoon, but presumably -- I'm away for the
35 rest of the week, but presumably I can do that
36 before the jury selection, which is when?

37 MR. MYHRE: May the 30th.

38 THE COURT: May 30, which is Tuesday. So, Madam
39 Registrar, are you trying to find out whether what
40 I was to do this afternoon could go to somebody
41 else?

42 THE CLERK: Yes, My Lady.

43 THE COURT: So if we -- if we did that this afternoon,
44 what I might end up doing is, simply because
45 everyone will need to know before the jury
46 selection, what I might end up doing is simply
47 sending a memo that would give the result of the

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1 ruling only. It would say either there will be
2 severance or there will not be severance. Then
3 you'll know, and then at a suitable time, it may
4 be before the jury selection, it may be after, I
5 will give you my reasons for that ruling, and that
6 would be the official ruling, not the memo. Would
7 that work?

8 THE ACCUSED: Yes.

9 THE COURT: All right. So what's the word on this
10 afternoon?

11 THE CLERK: I'm just waiting for a phone call back, My
12 Lady.

13 THE COURT: All right. Thank you. And how would a
14 memo reach you, Mr. Fox?

15 THE ACCUSED: For legal purposes, I can generally --
16 sorry, I can generally receive faxes. Otherwise,
17 by mail. Oh, also sometimes people have been able
18 to telephone the jail, but I think fax would
19 probably be the easiest for you.

20 THE COURT: When you, Mr. Myhre, send material to Mr.
21 Fox, what do -- means do you use?

22 MR. MYHRE: I fax it, and I am not aware of any not
23 getting through.

24 THE ACCUSED: They usually give it to me fairly quickly
25 because of my circumstances, representing myself.

26 THE COURT: All right. So, Madam Registrar, we need to
27 have a fax number from you.

28 THE ACCUSED: Yeah. I believe this is it here. Yes,
29 it is.

30 MR. MYHRE: Yes, it's on that line.

31 THE ACCUSED: Oh, okay.

32 THE CLERK: It's that one right there?

33 THE ACCUSED: It's -- so it's 604-468-3481.

34 THE CLERK: Thank you.

35 THE COURT: That's the fax number?

36 THE ACCUSED: Yes.

37 THE COURT: Okay.

38 THE CLERK: Yes, My Lady, we could have the afternoon.

39 THE COURT: All right. So let's do that this afternoon
40 then. So, Mr. Fox, this afternoon you should be
41 ready to tell me what you wish to tell me about
42 whether the two charges should remain together on
43 the indictment or be tried separately --

44 THE ACCUSED: Yes.

45 THE COURT: -- one in one trial, one in the other, and
46 I can tell you that you -- you raised a concern
47 earlier about a delay in getting to a second

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1 trial. I don't think you would face much delay.
2 Generally when there's a severance made, every
3 effort is made to have the second trial close on
4 the heels of the first one. Obviously there can
5 be issues about the availability of witnesses,
6 counsel, that sort of thing, but subject to that
7 it gets very high priority because a severance
8 shouldn't have the effect of putting your case,
9 your second case to the bottom of the list, and --
10 and it would not.

11 THE ACCUSED: Okay.

12 THE COURT: All right. All right. Jury selection, is
13 that the next thing to deal with or were there
14 concerns you had, Mr. Fox?

15 THE ACCUSED: I do have some concerns related to --
16 well, one of them is related to disclosure. There
17 are audio-recordings of RCMP interviews with the
18 witnesses that have been in the Crown's possession
19 since -- well, since June and July of last year.

20 There was a lot of debate about them. In
21 August and September the Crown didn't want to
22 provide them to me because they -- they said that
23 they believed I was going to put them on the
24 internet. Eventually I agreed to enter into an
25 undertaking, and the Crown agreed to that, but
26 never actually provided them to me.

27 Eventually I was able to obtain my own copy
28 of them through other means, but since I obtained
29 those through other means, unofficial means, I
30 think, though I could be wrong on this, but I
31 think that I should still have an official copy,
32 should I not, that I received from the Crown as
33 part of disclosure?

34 I mean, the single fact that I have some
35 evidence, that doesn't preclude the Crown from
36 having to still disclose what they have, does it?

37 THE COURT: Well, a number of thoughts come to mind.
38 When -- I'm a little troubled when you say that
39 you obtain things by other methods.

40 THE ACCUSED: Well, say directly from the RCMP as
41 opposed to getting it from -- from the Crown.

42 THE COURT: I see.

43 THE ACCUSED: You see, one of the interviews in
44 particular is very critical because it's the same
45 interview that I'd brought up at the previous
46 hearing where Ms. Capuano admits that the order of
47 protection that she got in Arizona had nothing to

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1 do with the fear for her safety but it was only
2 because she believed that that would require me to
3 take down the website, and in that interview she
4 laughs and makes jokes about getting me deported,
5 etc. Clearly that's something that I want to put
6 before the jury.
7 I also mean to go over that interview, the
8 audio of it with the appointed attorney because
9 that's something he's going to cross-examine her
10 on.
11 THE COURT: And you say that's an RCMP interview?
12 THE ACCUSED: That's correct, yes.
13 THE COURT: And you don't have it or you do have it?
14 THE ACCUSED: Well, I have the unofficial copy that
15 I've obtained, and so what I'm wondering is, is it
16 sufficient that I have that copy or should the
17 Crown still be required to provide --
18 THE COURT: It depends what an *unofficial copy* is. If
19 it's the same that the Crown's got --
20 THE ACCUSED: Right.
21 THE COURT: -- except that you got it from the RCMP,
22 personally I can't see any difficulty, but --
23 THE ACCUSED: Okay.
24 THE COURT: -- Mr. Myhre might have something to say on
25 that. And sometimes we run into just very
26 practical problems if an interview has been
27 printed out on different computers at different
28 times. Sometimes the pages will be differently
29 numbered, and then --
30 THE ACCUSED: Mm-hmm.
31 THE COURT: -- when your time to cross-examine or your
32 -- the lawyer who's appointed is trying to cross-
33 examine on it, nobody else will be able to find
34 the right page.
35 THE ACCUSED: Right, right.
36 THE COURT: You know, we can run into problems like
37 that.
38 THE ACCUSED: In this case, though, we're -- we're
39 talking about the audio-recording as opposed to
40 the transcript, and so those kinds of issues
41 shouldn't arise.
42 THE COURT: No.
43 THE ACCUSED: I mean --
44 THE COURT: So maybe it will be helpful if you could
45 talk to Mr. Myhre about --
46 THE ACCUSED: Sure.
47 THE COURT: -- what you've -- what audio-recordings you

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1 feel have not yet been disclosed, what ones you
2 nonetheless have directly from the RCMP, and
3 whether you -- Mr. Myhre feels that, at least to
4 start with, whether Mr. Myhre feels that there's
5 some difficulty there in either what you have or
6 what you don't have.

7 THE ACCUSED: Okay.

8 MR. MYHRE: Well, can I just say something about that?
9 I think Mr. Fox's concern is, if that gets played
10 for Ms. Capuano, is she going to be able to say,
11 "Well, that's not me" or "that's not an accurate
12 recording" and Mr. Fox maybe thinks that, if it
13 comes from the Crown, then he can say "Well, look,
14 this is what the Crown gave me. It must be
15 accurate."

16 THE COURT: I see.

17 MR. MYHRE: But the fact is, of course, authentication
18 happens through the witness, not through the
19 Crown, so saying that the Crown provided it, it
20 wouldn't actually help authenticate it in court.
21 It's playing it for Ms. Capuano, "That's your
22 voice? This is a statement you took? That's you
23 laughing?" That's how cross-examination would be,
24 and that's how the statement would be
25 authenticated, if that's what he wants to do.

26 THE ACCUSED: That was -- that was a bit of my concern,
27 yes, though, given my history with Mr. Myhre, I
28 think that I'm much more concerned with the Crown
29 objecting to me bringing in a recording from
30 outside as opposed to something obtained from
31 them. You see, had I obtained the recording from
32 Mr. Myhre, certainly he's not going to object to
33 it or question where it came from. However, if I
34 bring in a DVD or a USB drive with a recording
35 that came from outside, there's the chance that he
36 may dispute it, and then that might cause further
37 delays.

38 However, he did state earlier today that he's
39 willing to give a copy of it to the appointed
40 counsel, so I suppose I could just have the
41 appointed counsel bring that copy in.

42 THE COURT: That seems like a good suggestion, if
43 that's acceptable.

44 MR. MYHRE: The only reason Mr. Fox doesn't have
45 unvetted copies of these or the reason I haven't
46 provided some of the audio --

47 THE ACCUSED: I understand.

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1 MR. MYHRE: -- is that there was vetting in some of
2 these.
3 THE COURT: Yes.
4 MR. MYHRE: So he was given a transcript that had
5 vetting, and then I -- there was certainly back
6 and forth between Mr. Fox and the Crown about
7 getting the audio and, to be honest, that was
8 about six months ago and I can't remember where
9 exactly it all fell out, but what I can do is
10 provide specific audio-recordings to Mr. Lagemaat
11 --
12 THE ACCUSED: Mm-hmm.
13 MR. MYHRE: -- on his undertaking that he's not going
14 to put them in your possession.
15 THE COURT: Will that answer -- answer the problem?
16 THE ACCUSED: Yes, I'm agreeable to that.
17 MR. MYHRE: Which statement was it, Mr. Fox?
18 THE ACCUSED: Well, all of them.
19 MR. MYHRE: Well, you have some --
20 THE ACCUSED: I mean, the guys from the shipping
21 company, I would like their statements because
22 we're going to be cross-examining them, right, and
23 then Mr. Pendleton is not going to be appearing,
24 so that's not critical.
25 THE COURT: Just on the issue of other people --
26 THE ACCUSED: Sure.
27 THE COURT: -- will you need audio-recordings for
28 those?
29 THE ACCUSED: I'm sorry, I'm trying to remember from
30 the recordings of the gentlemen from the shipping
31 company, there was nothing in there that I recall
32 that was evident on the audio that didn't also
33 appear on the transcript. As I'm sure you're
34 aware, sometimes there is information that is
35 relayed in an audio-recording or a video that
36 doesn't --
37 THE COURT: Yes, that's true.
38 THE ACCUSED: -- appear in the transcript, like
39 laughing and crying.
40 THE COURT: Yes.
41 THE ACCUSED: Other than Ms. Capuano's statement, no.
42 THE COURT: And the other thing, and I'm just going to
43 interrupt here --
44 THE ACCUSED: Sure.
45 THE COURT: -- because it's an important point in the
46 trial and in your preparation, the jury will be
47 told that the evidence is the recording they hear,

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1 not the transcript. The transcript is just to
2 help everyone follow along.

3 THE ACCUSED: Right.

4 THE COURT: And if anyone, and in -- and if the jury
5 hears things differently --

6 THE ACCUSED: Mm-hmm.

7 THE COURT: -- from what the transcript says, what
8 counts is what the jury hears, not what the
9 transcript says.

10 THE ACCUSED: Sure.

11 THE COURT: And there will be errors. There always are
12 in transcripts.

13 THE ACCUSED: Okay.

14 THE COURT: So that supports your position in a way
15 that you need to have access to audio-recordings.

16 THE ACCUSED: Mr. Minor -- Mr. Myhre and I had
17 discussed earlier this issue of him assisting me
18 by printing some pages from the website and also
19 printing an extensive list of emails that I intend
20 to adduce, we're going to -- he said that he is
21 going to print those, we're going to discuss that
22 more afterwards, but I just wanted to make sure
23 that it was brought up on the record that we have
24 discussed that, and he said that he would provide
25 those. I want it on the record simply because the
26 list of emails is quite long. It's about 400
27 email conversations.

28 And the one other point that needs to be
29 brought up is the issues I'm having with the jail
30 refusing to facilitate me obtaining evidence.
31 That's still going on, and my complaint, I've
32 worked out the complaint process to the
33 ombudsperson department. So maybe I'll get
34 results from there and maybe it won't. I might be
35 able to have my associate in Los Angeles forward
36 the evidence to Mr. Lagemaat, but from my
37 discussions with LSS, it doesn't seem that they
38 are agreeable to paying him for any time related
39 to that, so I'm not sure if he'll be open to it or
40 not, since really the amount of time it would take
41 for -- on his part would be minimal, I mean, to
42 receive them and then forward them to me, but I'll
43 need to speak to him about that. And that is --
44 that is all the concerns I have.

45 THE COURT: All right.

46 THE ACCUSED: Thank you.

47 THE COURT: Are there any of those concerns that you

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1 would like me to address right now or are you
2 simply informing me?

3 THE ACCUSED: No, I don't think that there's anything
4 that you would need to address at this point.

5 THE COURT: Should we turn to the jury selection
6 process?

7 THE ACCUSED: Okay.

8 THE COURT: Is that a good time to do this now? Have
9 you had an opportunity to read about it, Mr. Fox,
10 to know? I simply want to know how much you know
11 and don't know. If you're starting from ground
12 zero, that's fair enough.

13 THE ACCUSED: I have read the material that was
14 provided by the previous judge, I can't remember
15 her name --

16 THE COURT: Yes.

17 THE ACCUSED: -- as well, I do have some law books that
18 I've purchased that I've read. I've read the few
19 chapters on jury selection. It -- it doesn't seem
20 that there's really a lot for me to know with the
21 process here in Canada. I mean, it seems a very
22 straightforward process.

23 THE COURT: It is fairly straightforward, but it's a
24 process that can be daunting simply because you're
25 in a big courtroom with --

26 THE ACCUSED: Mm-hmm.

27 THE COURT: -- a hundred or more people who have come,
28 and so what I suggest, I've printed out a
29 description of the process, and I suggest that we
30 just go through it, I read it, you absorb it, Mr.
31 Myhre raises any point that he thinks might be
32 misleading, and then we'll just make sure you
33 understand it step-by-step, and that you feel
34 comfortable with it. If you have any questions,
35 we'll deal with them. I can show you where people
36 will stand in the courtroom, that kind of thing,
37 and so I suggest that we do that now, and see how
38 it goes.

39 THE ACCUSED: Okay. Hmm, sorry, I just -- I can't help
40 but feel that this is another ineffective use of
41 the court's time. I mean, I -- I understand that
42 you're doing this because you want to make sure I
43 have a fair trial --

44 THE COURT: Exactly.

45 THE ACCUSED: -- but I feel that I'm being a bit of an
46 unnecessary burden by doing so.

47 THE COURT: You're not.

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1 THE ACCUSED: Okay.
2 THE COURT: Selecting the jury is a very important
3 stage of the trial, and I want you to feel
4 comfortable in that process. As I think I said
5 once earlier, it's not like what I understand the
6 American process to be. It's much more limited.
7 THE ACCUSED: All right.
8 THE COURT: But there are ways in which each party
9 participates, and it's important that you
10 understand what those are.
11 THE ACCUSED: Okay.
12 THE COURT: So I'm going to hand these out. Madam
13 Registrar, there's one for each Mr. Myhre, Mr.
14 Fox, and one can be marked as the next exhibit for
15 identification, which is Exhibit D?
16 THE CLERK: D for Identification, My Lady.
17
18 **MARKED D FOR IDENTIFICATION: Document titled**
19 **"Jury Selection"**
20
21 THE COURT: And I'll tell you where it comes from. I
22 took the document that you were given by the
23 previous judge -- don't -- don't read ahead right
24 now, Mr. Fox.
25 THE ACCUSED: Oh, no, I'm just writing down the exhibit
26 here.
27 THE COURT: Right. You were given by a previous judge
28 that sets out a very detailed description of the
29 entire trial process, and I took the portion
30 dealing with jury selection, but I've revised it
31 quite substantially, and printed out just that
32 piece of it, and I will probably update the rest
33 of that document, too, and give it to you perhaps
34 after the jury selection next week, Mr. Fox.
35 All right. So I'll just read it so that
36 you've all got time to think about it and go
37 through it.
38 The jury for your trial will consist of 12.
39 Two alternate jurors will also be chosen.
40 Alternate jurors are available to substitute for
41 any of the 12 jurors who, between the time of
42 selection and the start of the trial, become
43 unavailable to serve as jurors.
44 Once the evidence in the trial begins, any
45 alternate juror who has not been asked to step in
46 is discharged and their responsibilities are over.
47 So you understand that, Mr. Fox? They don't

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1 stay through the trial.
2 THE ACCUSED: Yes.
3 THE COURT: We'll do the selection process Tuesday, May
4 30th at 10:00. Is it at 10:00?
5 THE CLERK: Yes, My Lady.
6 THE COURT: Thank you. So a panel of potential jurors
7 who are randomly chosen will be in the courtroom.
8 There may be a hundred or more people. The size
9 of the panel will depend on whether there are
10 other jurors being selected that day.
11 The sheriff will give you a list of the names
12 and occupations of the potential jurors. And, Mr.
13 Sheriff, do the names go on the list these days or
14 just the juror number?
15 THE SHERIFF: Yes, the names go on the list, My Lady.
16 THE COURT: All right. So for each person there'll be
17 a juror number, a name and an occupation. You're
18 not allowed to keep the list at the end of the
19 jury selection process. Everyone returns the list
20 to the sheriffs.
21 So, if you have notes to make during the
22 selection process, keep them separately from the
23 list, Mr. Fox.
24 So, in the process, the court clerk randomly
25 selects potential jurors by number. It's all done
26 by number, pulling the numbers from a drum or a
27 box which is shaken up first. Calls out each
28 number, as it's selected, and the potential juror,
29 and it'll be a much bigger courtroom, will call
30 out their name, so we know they've heard, and will
31 step forward to the front of the courtroom usually
32 to about here where I'm pointing, and we'll call
33 about 20 people in that way.
34 Then, when we've got about 20 people, the
35 court clerk will recall their numbers in the same
36 order, and the selection process will then relate
37 to each of those people one by one.
38 When a potential juror's number is called for
39 that second time, I will ask him or her if there's
40 any reason they should not serve on the jury.
41 Some will ask me to excuse them for various
42 personal reasons, and I may excuse them for a
43 given reason or I may stand them aside to the end
44 of the list so that we use them only if we haven't
45 got enough other jurors to select from.
46 If a potential juror is not excused, we then
47 move on with that juror to the process for

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1 challenges. I'm going to talk a bit later about
2 challenges for cause, but the other type of
3 challenge is the peremptory challenge, and I'll
4 talk about that now.

5 The peremptory challenge gives a right to
6 reject a potential juror without showing any cause
7 or giving any reason, so you, Mr. Fox, and the
8 Crown, will each have the opportunity to say
9 either *challenge* or *content* for each potential
10 juror.

11 If both you, Mr. Fox, and the Crown say
12 *content*, then that person will be sworn as a
13 juror, and they will go and take a seat in the
14 jury box. If either you, Mr. Fox, or the Crown
15 say *challenge*, that potential juror will not serve
16 on the jury.

17 You can use the right of peremptory challenge
18 in any way you like. You do not give reasons for
19 your challenge, you're not allowed to ask the
20 potential jurors any questions in this process.

21 Your right of peremptory challenge is not
22 unlimited. You have a total of 14 peremptory
23 challenges. I think I'm correct, Mr. Myhre, you
24 can correct me if I'm wrong, the offence under s.
25 264 gives a right to challenge 12 -- 12 peremptory
26 challenges?

27 MR. MYHRE: I'm sorry, without the *Code*, I don't know
28 the answer, My Lady.

29 THE COURT: I think we need to double check that, and
30 then there are two extra because we're selecting
31 two alternates.

32 MR. MYHRE: That sounds right to me.

33 THE COURT: All right. So the other thing we need to
34 talk about in this peremptory challenge process is
35 who goes first in saying *challenge* or *content*
36 because, in theory, you could run out of your
37 peremptory challenges. And the *Criminal Code*
38 gives us the rule on that, and it is in s. 635 of
39 the *Criminal Code* for the first person, potential
40 juror, the defence goes first. So, if the defence
41 says *challenge*, the person's excused. If the
42 defence says *content*, then we turn to the Crown
43 and the Crown either exercises a peremptory
44 challenge by saying *challenge* or says *content*.

45 Then we have the second potential juror, and
46 we reverse the order, start with the Crown, if he
47 says *challenge* or *content*. If the Crown says

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1 *content*, we turn to you, Mr. Fox, and you say
2 either *challenge* or *content*, and we continue in an
3 alternating way.

4 Now, we may run through the 20 who we have up
5 in the front of the courtroom because of jurors
6 being asked to be excused or because of challenges
7 and, when we run out of the 20, we repeat the
8 process. Madam Registrar shakes the box again,
9 calls more numbers, people come forward, and when
10 we've got about 20 again, we'll continue on.

11 So I'll say something now about challenges
12 for cause, and I'm at paragraph 69. A challenge
13 for cause is when you challenge a potential
14 juror's suitability for the juror [sic] because
15 you do not believe that he or she is neutral or
16 unbiased.

17 Now, at a previous pretrial conference we
18 spoke about challenges for cause, and at that time
19 I explained that a person might not be neutral or
20 unbiased because of, for example, racial bias or
21 because the case has been in the media with a lot
22 of publicity that the juror has read and they've
23 formed an opinion.

24 Now, at that time, Mr. Fox, you said that you
25 did not wish to bring a challenge for cause for
26 any of these types of general reasons. If you've
27 changed your mind about that or if you have any
28 questions about that, you should tell me right
29 away, but, in any event, you can also challenge
30 for cause as the individual jurors come forward
31 if, for any reason, a potential juror is not
32 qualified to serve as a juror or for some reason
33 excluded or not able to carry out the duties of a
34 juror. And there are no limits on the number of
35 times you can challenge for cause.

36 I can tell you that challenges for cause on
37 this type of basis for individual jurors for those
38 very specific reasons of not being qualified or
39 able, are relatively unusual because we have a
40 fairly complete process for jurors telling the
41 court or the sheriffs beforehand when they receive
42 their subpoenas or summonses about reasons that
43 they may not be qualified to serve.

44 For example, if they're -- and I've set out a
45 number of examples in paragraph 72, and I won't go
46 through them all. But, for example, if they're
47 not a Canadian citizen or a resident of B.C., or

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1 if they're in one of the occupations that
2 disqualify them from being a juror such as a
3 lawyer, or if they don't understand English which
4 will be the language of the trial. Generally
5 jurors with those types of disqualifying reasons
6 will have brought them to my attention when they
7 first -- when their number is first called for the
8 second time.

9 But if, for some reason, it appears that we
10 have or it appears to you, Mr. Fox, that there's a
11 person coming forward whose name has been called
12 for a second time who may not be qualified or
13 properly able to serve, you are entitled to
14 challenge for cause.

15 If you do that, you should do it before the
16 process for peremptory challenges when each of you
17 and the Crown say either *challenge* or *content*.
18 And we do that essentially so that you don't waste
19 a peremptory challenge. And if you do challenge
20 for cause in that way, I would ask for your input
21 and the Crown's input and I may ask a question or
22 two of the juror. And if I excuse them, that
23 would not count as a peremptory challenge because
24 it -- it's not a peremptory challenge.

25 So that's -- what I haven't said is that we
26 continue on until we have a full jury box and two
27 alternates. At that point generally I will excuse
28 the rest of the panel, they all leave. Generally
29 I will ask the jury who's been selected, and the
30 two alternates to remain for a short while, and I
31 will give them some instructions about things they
32 are not allowed to do between that time and the
33 trial, and they will be things along the line of
34 don't try to find out things about the case or the
35 people in it because it's important that all the
36 jury understand that what they're asked to do in a
37 trial is decide the case on the basis of the
38 evidence they hear in the courtroom only, evidence
39 and submissions in the courtroom, not outside
40 information. So we don't want anyone going off
41 and trying to inform themselves about this case.

42 Now, anything I've missed in the process, Mr.
43 Myhre or, Mr. Fox, questions about the process?
44 THE ACCUSED: It's my understanding that during the
45 selection process, the court will sometimes ask
46 some questions or speak with some of the potential
47 jurors; is that correct?

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1 THE COURT: It can happen.
2 THE ACCUSED: Okay.
3 THE COURT: Let me think about how it may happen. I
4 think what happens the most with jurors who ask to
5 be excused. They may say "I have a holiday booked
6 in trial, you know, that overlaps with the trial,
7 may I be excused?" and I'll ask them questions
8 along the lines of "Well, how long ago did you
9 book your holidays? Is it paid for?"
10 THE ACCUSED: Mm-hmm.
11 THE COURT: That sort of thing.
12 THE ACCUSED: Okay.
13 THE COURT: There can be questions -- requests to be
14 excused for medical reasons. Those I will usually
15 ask the person to put in writing so that they
16 don't have to announce to -- in front of hundreds
17 of people --
18 THE ACCUSED: Mm-hmm.
19 THE COURT: -- their medical circumstances. And I will
20 take their note, I will either, depending on the
21 content of it, I might show it to you and Mr.
22 Myhre and say "My thinking is that this person
23 should be excused, do you agree?" If it's an
24 intensely personal medical thing --
25 THE ACCUSED: Mm-hmm.
26 THE COURT: -- I might ask you and Mr. Myhre if you
27 would agree to not see it, but you, to the extent
28 that it's a matter that could be viewed as
29 effecting your interests in the trial, you may
30 well have a right to see it, if you wish, but it's
31 a right that you might consider foregoing in some
32 extreme circumstances. If -- does that answer
33 your question?
34 THE ACCUSED: Yes.
35 THE COURT: I suppose one other thing I should tell you
36 is sometimes jurors will ask to be excused because
37 they'll say "Well, I am good friends with a police
38 officer, not someone who is going to be a witness
39 on this case, but, you know, I do associate with
40 them, and I may have views about how the justice
41 system should work" or something like that. In
42 that situation I would probably say to the person
43 "Well, has your experience in socializing with
44 this police officer, does it bring you to the
45 point that you think you might be unable to decide
46 this case in an impartial way, taking into account
47 only the evidence in this case and the submissions

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1 and instructions?" And obviously the juror's
2 answer could be quite significant, and you can
3 imagine the answer range from "Oh, oh, of course,
4 I would be able to impartial. I would listen to
5 the evidence", through to "No, I'm firmly
6 convinced that everyone who is charged is guilty",
7 and that person would probably not be suitable.
8 All right?
9 THE ACCUSED: Certainly.
10 THE COURT: Before we start the process, I tell the
11 juror -- the panel what to expect in the process
12 and how we'll conduct it, so I'll be reading
13 instructions to them that are somewhat similar to
14 what I've just said to you. You will be arraigned
15 at the jury selection, which means the charges
16 will be read out to you. That's one reason we
17 need to know before then whether there's one
18 charge or two. What else do I need to say, Mr.
19 Myhre?
20 MR. MYHRE: The Crown would read out a list of the
21 witnesses.
22 THE COURT: Yes, thank you. And one reason we do that
23 is so that the potential jurors hear the names of
24 all of the witnesses, and if they have a social
25 relationship, a professional relationship or went
26 to high school with them, somebody on the list,
27 they can bring that to our attention when they
28 come forward. Sometimes there are people, who
29 will say "Well, I haven't seen him for 15 years,
30 but he was in my elementary school class".
31 Generally, that's not considered a problem.
32 THE ACCUSED: Mm-hmm.
33 THE COURT: But there are situations where it might be
34 a problem, depending on who a witness is and
35 how --
36 THE ACCUSED: Okay.
37 THE COURT: -- central to the case they are. Other
38 questions?
39 THE ACCUSED: No.
40 THE COURT: Think about it some more. If something
41 comes up, don't hesitate to ask. We should
42 probably take the lunch break at this point and
43 we'll come back at 2:00, and deal with the issue
44 of severance.
45 MR. MYHRE: Before we do, can I ask that we come back
46 at 2:15?
47 THE COURT: 2:15, that's fine.

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1 MR. MYHRE: And, My Lady, will you be printing out the
2 *Last and Taylor* cases or should I bring copies
3 [indiscernible/voice low]?
4 THE COURT: I could print them out, I suppose.
5 MR. MYHRE: I mean, if you are going to, it's easy for
6 me to print new copies, but if you want to print
7 them out right now and read them over the lunch
8 hour, then --
9 THE COURT: I actually have a couple of other things I
10 need to attend to over the lunch --
11 MR. MYHRE: Then I'll print them.
12 THE COURT: -- so I won't be reading them before 2:15,
13 so if you could handle that, that would be
14 appreciated. All right. We'll adjourn until
15 then, thank you.
16
17 (PROCEEDINGS ADJOURNED FOR NOON RECESS)
18 (PROCEEDINGS RECONVENED)
19
20 MR. MYHRE: My Lady, please pardon me, I did not have a
21 chance to make it back to the Provincial
22 Courthouse for my calendar.
23 THE COURT: All right. Not to worry.
24 MR. MYHRE: I've --
25 THE COURT: It's been a day that has changed its --
26 changed the course along the way.
27 MR. MYHRE: Thank you. So I guess ordinarily this
28 would be an application by the accused, but in
29 this case I think it obviously makes sense for me
30 to make my submissions first.
31 THE COURT: That would be helpful.
32

SUBMISSIONS RE SEVERANCE FOR CROWN BY MR. MYHRE:

33
34
35 MR. MYHRE: My Lady, I will be relying on these
36 documents, there are three documents I'm handing
37 up; two cases and one, the first document you see
38 there is just a stapled series of documents, there
39 are about four different documents there that I'll
40 be referring to, and then I have a copy of that
41 for -- to be marked as an exhibit. Maybe just so
42 we don't forget, can we mark that as an exhibit at
43 the outset?
44 THE COURT: All right. Does that mean -- so this would
45 just be the next exhibit for identification, or
46 perhaps the first exhibit in the severance
47 application.

Submissions re Severance for Crown by Mr. Myhre**BAN ON PUBLICATION - INHERENT JURISDICTION**

1 MR. MYHRE: I think that makes sense.

2 THE COURT: All right. So this will be Exhibit 1 in
3 the severance application.
4

5 **EXHIBIT 1 (on Severance Application):**
6 **Burnaby RCMP Narrative Text Hard Copy**
7

8 THE COURT: This one, and I have a copy, thank you.

9 MR. MYHRE: So, My Lady, the way I've structured my
10 submissions, first of all, I'll take Your Ladyship
11 through this evidence and then discuss why I say
12 the evidence of Mr. Fox sending these firearms to
13 California is relevant.

14 Then I'll be making submissions on the *Taylor*
15 case, which the Crown says supports the
16 proposition that that evidence is legally
17 admissible on a charge of criminal harassment.

18 And, finally, I'll finish by going through
19 the factors identified in *Last* on a severance
20 application.

21 THE COURT: All right.

22 MR. MYHRE: So, first of all, then with respect to
23 Exhibit 1, I'll say at the outset these are
24 documents that were tendered at the preliminary
25 inquiry, so Mr. Fox has seen what I'm tendering
26 here for the first time, but I think he's quite
27 familiar with these documents.

28 The first two pages are an exc -- are
29 excerpts from a statement that Desiree Capuano
30 gave to police in the summer of 2016. I should
31 give you the exact date. It's dated June 17th,
32 2016. And this -- at page 2 of that -- the
33 transcript for that statement she outlines the
34 things that she says have been causing her grief,
35 the things Mr. Fox has done that have caused her
36 grief, and I just want to point out the parts that
37 relate to the firearms, and the firearms being in
38 California.

39 So, if Your Ladyship looks at line 4, Ms.
40 Capuano says [as read in]:
41

42 At that point...
43

44 Referring to June of 2014:
45

46 ... he ...
47

Submissions re Severance for Crown by Mr. Myhre**BAN ON PUBLICATION - INHERENT JURISDICTION**

1 Patrick Fox:

2
3 ... made it his life's goal to destroy my
4 life and he started...
5

6 THE COURT: Now, I'm sorry, I'm lost.

7 MR. MYHRE: Sorry. If you see at the bottom and it
8 says page 2, I've only given Your Ladyship
9 excerpts from the statement. So you have page 2
10 and page 13 of the transcript.

11 THE COURT: Yes.

12 MR. MYHRE: So if we go back --

13 THE COURT: Oh, so page 2 is page 1?

14 MR. MYHRE: Right.

15 THE COURT: All right. And where is line 4?

16 MR. MYHRE: So there are no line -- there are only
17 paragraph numbers, unfortunately --

18 THE COURT: All right.

19 MR. MYHRE: -- so I'm referring to the fourth line from
20 the top.

21 THE COURT: Yes.

22 MR. MYHRE: So [as read in]:

23
24 At that point he made it his life's goal...
25

26 THE COURT: I see, thank you.

27 MR. MYHRE:

28
29 ... to destroy my life and he's on a campaign
30 of harassment.
31

32 So then she talks about different ways that that
33 was happening, from her perspective, and then on
34 down about six more lines there's a sentence that
35 begins [as read in]:
36

37 Um, he told me at one point he would kill me
38 if he could get away with it.
39

40 About six lines further down there's a statement
41 that starts from the left-hand side of the page
42 that says:
43

44 And then he confirmed he would absolutely
45 shoot me if he could get away with it.
46

47 Does Your Ladyship have that?

Submissions re Severance for Crown by Mr. Myhre**BAN ON PUBLICATION - INHERENT JURISDICTION**

1 THE COURT: Yes. Yes, I do.
2 MR. MYHRE: And then three lines further down [as read
3 in]:
4
5 Um, continuously tells me about how he has
6 guns, how he's allowed to own guns, how he
7 goes to the shooting range all the time. He
8 shows me pictures of where he crosses the
9 border through a park. He's taunts me,
10 telling me there's no authorities present
11 when he crosses the border and he does it all
12 the time, that he's constantly in the United
13 States.
14
15 Then on page 13 of the transcript of the
16 statement, over the page, the police officer, at
17 paragraph 235 --
18 THE COURT: And what's -- what's the context of these
19 first statements?
20 MR. MYHRE: I'm sorry, what is?
21 THE COURT: Is she in the United States?
22 MR. MYHRE: She --
23 THE COURT: What's the significance of him, from her
24 perspective, going to the United States?
25 MR. MYHRE: Well, my submission is that here Ms.
26 Capuano is linking her fear to the fact that he
27 has guns, and that he can cross the border
28 whenever he wants. She --
29 THE COURT: So what's the significance of crossing the
30 border?
31 MR. MYHRE: She lives in Arizona.
32 THE COURT: Thank you.
33 MR. MYHRE: I'm sorry, in that respect it would have
34 been better to give you all of the statement. The
35 next time firearms are mentioned in her statement
36 is page 13 of the transcript, the next page I've
37 given Your Ladyship, and paragraph 235, Ms.
38 Capuano says [as read in]:
39
40 He scares me.
41
42 And the interviewing police officer says:
43
44 So along those lines, obviously he scares
45 you. Do you fear for your safety?
46
47 And she says:

Submissions re Severance for Crown by Mr. Myhre

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Yes.

Officer [as read in]:

And why do you fear for your safety?

Because he does not abide by any of the laws or rules that are set down. He believes that he's above them or he can get out of them no matter what he does. I believe that if he comes back in the country he'll figure out a way to be here without anybody knowing that he's here. I watched him. He's had unregistered firearms in the United States before. I know he owns guns up in Canada, and he's been practising shooting them, and I don't think that it would have taken anything to show up and hide behind a bush, and I really feel like he hates me enough and despises me enough that he would absolutely take the shot if he had it, and if nobody knows where he is and he's in the United States it would be far too easy for him to do that.

So we -- here, Ms. Capuano's expressed concern about the combined facts of Mr. Fox having guns and crossing the border apparently at will because he would shoot her, that's what she's scared of. I should say that appears to be one of the reasons she's scared of him.

The next document is email -- an email sent to Ms. Capuano by Mr. Fox on December the 17th, 2014. Now, if Your Ladyship looks it's slightly confusing at first, this is -- you can see at the very first line says "From Desiree Capuano." It's sent to a police officer at the RCMP, but then below that, below "attachments" it says "Forwarded message from Patrick Fox to Desiree Capuano" and the date of December 17th, 2014.

So, if Your Ladyship looks, the relevant portion regarding firearms appears right above the -- in paragraph -- the top of the paragraph that has highlighting in it at the bottom, and a few lines in he's talking about having a PAL, a possession acquisition license, and I'll just let

Submissions re Severance for Crown by Mr. Myhre**BAN ON PUBLICATION - INHERENT JURISDICTION**

1 Your Ladyship read, if you read the next 10 lines
2 or so you can see he goes on about having this PAL
3 and having firearms.

4 Now, My Lady, I acknowledge that in the
5 context Mr. Fox is clearly telling Ms. Capuano,
6 "Look, I must have a clean background in Canada
7 because I was able to get a PAL." Nevertheless,
8 this is an example of what Ms. Capuano is talking
9 about in her statement of being reminded that he
10 has guns.

11 The next section I'd like to point out is the
12 next email and, My Lady, you can see -- I'll refer
13 to these page numbers in the bottom right-hand
14 corner. Those are the pages of the -- from the
15 exhibit at the preliminary inquiry, and you can
16 see highlighted this was an email ostensibly sent
17 January the 11th, 2015, and if Your Ladyship looks
18 at the first highlighted portion on paragraph --
19 the first large highlighted portion on page 3, Mr.
20 Fox tells Ms. Capuano [as read in]:

21
22 I was pretty direct when I told Detective
23 Tuchfarber that my intention was to do
24 everything in my power and capabilities to
25 make your life as miserable as possible and,
26 if possible, to the point you ultimately
27 commit suicide. That would be my ultimate
28 desire.

29
30 The point here being that Mr. Fox has established
31 to Ms. Capuano that he would really like her dead,
32 and he's planning to do what he can to see that
33 happen by her own hand on that statement, but you
34 -- if you keep going to page 6, right at the very
35 bottom there's a highlighted portion:

36
37 He...

38
39 And the reference there is to their son Gabriel:

40
41 ... once asked if I would shoot you. I told
42 him that murder is illegal in law and can
43 result in spending the rest of one's life in
44 prison, and that the rest of my life in
45 prison is not a risk I'm willing to take,
46 but, otherwise, no, I would have no qualms
47 about it, but that is how much I despise you

Submissions re Severance for Crown by Mr. Myhre**BAN ON PUBLICATION - INHERENT JURISDICTION**

1 for the things you've done and continue to
2 do.

3
4 And then Mr. Fox goes on to add the caveat:

5
6 I would never deliberately cause physically
7 harm other than in self-defence of defence of
8 another.

9
10 And the last document in this -- in this sheaf of
11 -- in this stapled package of documents is a blog
12 post from the website desireecapitano.com, and I
13 don't think Mr. Fox takes any issue that he's the
14 author of this website. Certainly he admits that
15 in his statement to the police.

16 And there's this blog post, which the Crown
17 says is concerning and particularly relevant to
18 this application. The first paragraph under the
19 title "My ex-husband wants to kill me or at least
20 that's what I keep telling people," Mr. Fox
21 summarizes what he understands Ms. Capitano's
22 concerns to be. And -- and again I don't think
23 it's disputed Mr. Fox is the author, but these
24 blog posts are written as if Desiree has written
25 them.

26 Now, the parts that are most relevant, I
27 would suggest that Your Ladyship might read the
28 entire blog post, but if you flip the page there's
29 a section titled "The logistics" about two-thirds
30 of the way down the page, and it starts with [as
31 read in]:

32
33 Now let's consider the logistics that would
34 be involved in Patrick actually attempting to
35 shoot me.

36
37 Under the numbers 1, 2, 3, the next full
38 paragraph:

39
40 He would have to sneak into the U.S. crossing
41 the border without being detected because
42 he'd be illegally smuggling a firearm into
43 the U.S.

44
45 Over the page, the next highlighted portion, the
46 writer contemplates which firearm might be used,
47 and then the last highlighted portion some

Submissions re Severance for Crown by Mr. Myhre**BAN ON PUBLICATION - INHERENT JURISDICTION**

1 logistics of getting rid of whatever gun was used.
2 And then again to that email we saw earlier,
3 the last paragraph there under the last
4 highlighted portion Mr. Fox adds the caveat that
5 really this is just logically -- or logistically
6 impossible without getting caught.
7 This might be a good time to turn to the
8 *Taylor* case before I make very explicit how the
9 Crown says that evidence is relevant to the
10 harassment charge. So if I could take Your
11 Ladyship to paragraph 20, page double 10, maybe
12 I'll just back up and I'll tell Your Ladyship a
13 little bit about the facts of the case because
14 they are of some significance.
15 There was some history between the
16 complainant and the accused in this matter. I
17 believe he'd been previously convicted, put on
18 probation, breached his probation in terms of the
19 no-contact order with the complainant. And at
20 this trial what was at issue was he was charged
21 with criminal harassment in relation to the two-
22 month period after he got out of jail. And during
23 that two-month period there were a couple of
24 instances of direct communication with the
25 complainant, face-to-face. There were a few
26 things left for the complainant, flowers, I think,
27 were left on her car. A target was drawn on her
28 car, and so the identity of who had done that was
29 one of the issues at trial.
30 And then there were other instances of
31 behaviour by the accused testified to by witnesses
32 other than the complainant. One acquaintance of
33 the accused testified that he had met the accused
34 at a McDonald's across the street from where the
35 complainant lived, and the accused had pointed out
36 that's where the complainant lives, and that the
37 accused had also borrowed a video camera from him
38 for the purpose of videotaping the complainant.
39 There were also a number of emails that were
40 sent to various people expressing concern about
41 how the complainant was looking after her
42 daughter, and during the time of the -- that
43 spanned the indictment, the complainant was not
44 aware of those actions. She wasn't aware of the
45 emails, she wasn't aware of the videotaping, or
46 the sitting in McDonald's. And so that's part of
47 what's described in the quoted paragraphs from the

Submissions re Severance for Crown by Mr. Myhre**BAN ON PUBLICATION - INHERENT JURISDICTION**

1 trial judgment at page 7 to 10, the quoted
2 paragraphs 53 and 54 just talks about some of that
3 evidence that was before the court but wasn't
4 known to the complainant.

5 At paragraph 31 on page 9 the court then
6 deals with the admissibility of this evidence, and
7 at paragraph 31:

8
9 There was some evidence of conduct by the
10 appellant of which the complainant was not
11 aware. This evidence was relevant to all
12 elements of the offence except the element
13 concerning the state of mind of the
14 complainant.

15
16 And the court had earlier in this judgment sets
17 out the elements of criminal harassment. The
18 court goes on in paragraph 32 to discuss some of
19 the emails that were sent, and then the last two
20 sentences:

21
22 The judge noted that a police officer did
23 contact the complainant about the content of
24 the messages but there is no evidence that
25 the complainant was specifically aware of
26 what the appellant was up to. However, these
27 facts loudly proclaim the purpose of the
28 appellant and his persistence.

29
30 Paragraph 33:

31
32 There is also no evidence that the
33 complainant was specifically aware of the use
34 by the appellant of Mr. Ramsdale's video
35 camera or the extent of his surveillance of
36 the complainant's residence from the
37 McDonald's ... That evidence supports the
38 conclusion that the appellant was watching
39 the residence, but it does not go to the
40 complainant's state of mind.

41
42 So there were things that were at issue in the
43 *Taylor* case that aren't at issue in this case.
44 Again, the Crown is not saying that this evidence
45 is relevant to identity in any way.

46 Similarly, this evidence in *Taylor* supported
47 a conclusion that when -- with regards to the

Submissions re Severance for Crown by Mr. Myhre**BAN ON PUBLICATION - INHERENT JURISDICTION**

1 *actus reus*, so when the accused was seen outside
2 her residence by her on one occasion, was that
3 actually besetting? Well, the fact that he was
4 there and was videotaping on other occasions
5 suggested that that was actually what was
6 occurring. So I take -- unfortunately the court
7 is, with all due respect, a little bit vague about
8 how exactly this evidence related to each element
9 of the offence, other than the complainant's state
10 of mind, but that's how I understand it.

11 But that evidence was also relevant to, as
12 the court says, the purpose of the appellant, and
13 that's how the Crown says that this evidence is
14 relevant in this case.

15 So, we set that out briefly when we -- when
16 we talked about that this morning, but I'll do so
17 as explicitly as I can right now how the Crown
18 says that -- maybe I should backup and tell Your
19 Ladyship what the evidence -- summarize what the
20 evidence is on the s. 93 count.

21 THE COURT: All right.

22 MR. MYHRE: So the evidence on the s. 93 count is,
23 aside from the fact that Mr. Fox is licensing, the
24 fact of his possession of the actual restricted
25 firearms are that he contacted that shipping
26 company --

27 THE COURT: I'm sorry, what do you mean by those first
28 two things?

29 MR. MYHRE: There are elements of the s. 93 offence
30 that I don't think are -- I don't need to get into
31 right now, were the firearms restricted, was he in
32 possession of them, or were they his firearms? I
33 don't -- I understand Mr. Fox doesn't dispute
34 those facts.

35 In late May 2016 Mr. Fox shipped a number of
36 boxes over a period of a couple of weeks with a
37 place called the Packaging Depot in Burnaby, and
38 there were about 25 boxes in total that were
39 shipped to a woman named Liz Munoz in Los Angeles.

40 In late May 2016 Mr. Fox was arrested by the
41 U.S. authorities after surreptitiously crossing
42 the border somewhere around Surrey. He was
43 detained for a number of reasons.

44 THE COURT: What do you mean by surreptitiously? Do
45 you mean crossing at a normal border point or
46 crossing at some -- and not being forthcoming or
47 crossing the border at something other than a

Submissions re Severance for Crown by Mr. Myhre

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1 regular border crossing?

2 MR. MYHRE: The latter. The latter.

3 THE COURT: All right.

4 MR. MYHRE: He was detained by them for about six
5 weeks. They brought him back to the border --

6 THE ACCUSED: Three weeks.

7 MR. MYHRE: Mr. Fox is correcting me, three weeks, I'm
8 sure he's more accurate than I am on that. They
9 brought him back across the border, turned over to
10 the RCMP, who then took him into Burnaby where
11 they did an interview. He was very candid about
12 crossing the border, said he often did it, and
13 eventually the topic turned to his firearms, and
14 he admitted that he had shipped them to Los
15 Angeles, and that's all part of the statement the
16 Crown will be putting before the jury.

17 Mr. Fox did explain that he was planning to
18 move to Toronto, and he had nowhere else to leave
19 his -- his things.

20 Agents with the Alcohol, Tobacco and Firearms
21 Agency in the United States went to Liz Munoz'
22 house, we don't have the exact date on when they
23 found the 25 boxes. Inside one of the boxes they
24 found Mr. Fox's four firearms packaged inside of a
25 computer hard drive or a computer desktop.

26 So, the evidence, and this is -- goes to some
27 extent towards the time that will be required for
28 this evidence, the jury would also have to hear
29 from someone from the Packaging Depot who talked
30 about receiving these packages from Mr. Fox, and
31 the ATF agent who searched the boxes in
32 California.

33 My estimation is that, combining those two
34 witnesses, I think in their direct will be
35 approximately a half a day each.

36 So, then to deal specifically with the
37 relevance of that evidence, the -- it's not
38 relevant to whether Ms. Capuano feared. I've done
39 a little bit of research and the phrase *in all the*
40 *circumstances* doesn't mean -- it means all the
41 circumstances known to the complainant --

42 THE COURT: Yes.

43 MR. MYHRE: -- and *Taylor* -- *Taylor* sets that out. The
44 jury, however, is going to have to evaluate Mr.
45 Fox's intention with the statements that you saw
46 on the blog post and in the emails. Was he
47 intending to instill fear in Ms. Capuano? And the

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1 Crown says that his ability to carry out any
2 threat, or veiled threat with a firearm is
3 relevant to evaluating his intent.

4 I don't know if it's useful but it seems to
5 me it might bit, an analogy you could think of
6 somewhat more dramatic analogy, somebody, say
7 myself, were to make a threat that I would drop a
8 nuclear bomb on somebody's city, anybody hearing
9 that from me probably wouldn't be scared because
10 obviously I don't have the ability to carry that
11 out. But if somebody heard that from the leader
12 of North Korea, they might think, oh, he's really
13 trying to intimidate me.

14 Now, if that person also learned that the
15 leader of North Korea had moved his nuclear
16 warheads into a perfect position to shoot them,
17 that might make you think, oh, he was -- he was
18 actually being serious when he levelled that
19 threat.

20 THE COURT: But in that analogy you just related, the
21 difference between you making the threat and the
22 leader of North Korea making the threat to the
23 issue of whether somebody hearing it would take it
24 seriously.

25 MR. MYHRE: No, I'm going from the perspective of the
26 jury. They're going to have to evaluate was
27 Mr. -- what was Mr. Fox's intention when he said
28 these things? Was he just spouting off or was he
29 intending to intimidate this woman? If I'm just
30 making outlandish impossible to fulfill threats --

31 THE COURT: Well --

32 MR. MYHRE: -- am I really being serious, am I trying
33 to intimidate somebody? But if I'm making threats
34 that I can carry out --

35 THE COURT: You -- you might be. Whether you can carry
36 out the threat is another issue, but if you make
37 it, it might well be for the purpose of
38 intimidating. All right. Thank you.

39 MR. MYHRE: I think you could also analogize to the
40 situation where somebody is charged with
41 threatening, threatening to shoot somebody. In my
42 submission, evidence that that person carries
43 firearms or even had them on their person at the
44 time they made the threat would surely be relevant
45 to assessing their intention.

46 And so, if the jury is going to hear from Ms.
47 Capuano evidence roughly along what she said in

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1 her statement, "You told me you can cross the
2 border anytime you want." "He told me he had
3 firearms. I was scared he was going to come and
4 shoot me", and without the evidence that he
5 actually did cross the border surreptitiously, and
6 the evidence that he did ship his firearms to the
7 United States, the jury might well conclude these
8 are just idle threats.

9 Mr. Fox was just spouting off, venting his
10 anger, he's not really intending to intimidate
11 this woman because how could she ever take that
12 seriously? I mean, I can't cross the border, I
13 can't sneak across it, but then when they hear,
14 oh, Mr. Fox does sneak across the border, oh, Mr.
15 Fox did send his firearms to California, maybe his
16 threats weren't that idle when he made them.

17 That's all I have to say about how that
18 evidence is relevant to the criminal harassment
19 charge.

20 THE COURT: Thank you.

21 MR. MYHRE: When it comes to severance, I rely on the
22 *Last* case, and the court starts out at paragraph 1
23 on page 5 of 15 by acknowledging that the Crown
24 has a large discretion in deciding to include more
25 than one count in an indictment, and I don't think
26 that's any more than stating the obvious as to
27 what's legally permissible. But, at paragraph 16,
28 the court identifies:

29
30 The ultimate question faced by a trial judge
31 in deciding whether to grant a severance
32 application...

33
34 And that's -- and this is page 8 of 15, and
35 paragraph 16, and that's:

36
37 ... whether severance is required in the
38 interests of justice...

39
40 And that in terms of:

41
42 ... the accused's right to be tried on the
43 evidence admissible against him, as well as
44 society's interest in seeing that justice is
45 done in a reasonably efficient and cost-
46 effective manner. The obvious risk when
47 counts are tried together is that the

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1 evidence admissible on one count will
2 influence the verdict on an unrelated count.

3
4 Then, at paragraph 18, and about the third
5 sentence, the court sets out the fact -- the
6 factors the courts rightly use in evaluating
7 what's in the interests of justice.

8 I'm going to go through them one by one and
9 say how they apply in this case. First of all,
10 prejudice. In terms of moral prejudice, the
11 danger of the jury would see this evidence that
12 Mr. Fox had shipped firearms to the United States.
13 In my submission, that on its own is very bad
14 character evidence. It's somebody who disobeyed a
15 regulation. This isn't a fact like in the *Last*
16 case you had two egregiously violent sexual
17 assaults that occurred one month apart in the same
18 city. Other than the fact that they were somewhat
19 close in time and occurred in the same city, there
20 was no -- there was no connection. I'm getting
21 ahead of myself there.

22 But obviously if the jury was satisfied that
23 the accused in *Last* had committed one of those, it
24 -- they'd be very tempted to infer that he was the
25 sort of person who would have committed the other
26 one as well, and that's just not the case here.
27 There's -- there's negligible moral reasoning
28 prejudice in this case.

29 The other type of prejudice has to do with
30 distracting the jury. In my submission --
31 THE COURT: I'm sorry, I'm -- I'm not sure I understand
32 you on that first point.

33 MR. MYHRE: Okay.

34 THE COURT: You say there's negligible risk of moral
35 reasoning prejudice in evidence that, if it's
36 established that Mr. Fox illegally crossed the
37 border and with him or shipped with him, ahead of
38 him, restricted firearms that shouldn't have gone?

39 MR. MYHRE: What he's charged with in s. 93 is -- is
40 breach -- his -- is very close to a regulatory
41 offence. It's possession of those firearms at a
42 place that he wasn't authorized.

43 THE COURT: Well --

44 MR. MYHRE: It doesn't seem to me that a jury's going
45 to conclude that the kind of person who would
46 breach a rule on his PAL is the same kind of
47 person who would harass his ex-wife, I mean, other

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1 than in the permissible relevant route that I've
2 identified.

3 THE COURT: Are you going to get to the danger of
4 prejudice that I referred to earlier at a previous
5 pretrial conference, and that is, given that Ms.
6 Capuano had no knowledge of Mr. Fox shipping these
7 firearms, if indeed that's what he did, it can't
8 be evidence going to her state of mind, but when
9 the jury is considering whether Ms. Capuano had
10 reasonable grounds to fear for her safety, the
11 jury might improperly reason that, well, of course
12 she did because here he is shipping firearms
13 across the border so that they're available to him
14 in the United States.

15 MR. MYHRE: My Lady, it seems to me that, if -- if the
16 evidence is relevant to one element of the
17 criminal harassment offence, it doesn't -- it
18 shouldn't matter if -- I guess you evaluate on --
19 you have to evaluate the overall prejudicial
20 effect versus probative value.

21 So, Your Ladyship, in saying is it a problem
22 that they may --

23 THE COURT: Well, let me come at it in another way. If
24 the two counts remain on the indictment, it would
25 seem to me that I will have to give the jury an
26 instruction that would go something along these
27 lines. If you find that Mr. Fox shipped
28 restricted weapons, I think it was restricted,
29 across the border surreptitiously, that can have
30 nothing to do with your consideration of whether
31 Ms. Capuano -- Capuano had reasonable grounds to
32 fear for her safety, you cannot take into account
33 -- let me put it this way.

34 When she testifies, or she has testified,
35 that's assuming that she does, that she was afraid
36 that Mr. Fox would pursue her into the United
37 States, would sneak across the border and
38 surreptitiously bring guns with him, when you are
39 assessing whether that's a reasonable belief, you
40 must not consider the fact that, if you find that
41 he actually did that. I'm putting it fairly
42 bluntly in order to point out in the strongest way
43 what may be a problem, whether it is a problem in
44 -- considered in the entire context is something
45 I'll have to consider, but that's what I see as
46 being the difficulty.

47 MR. MYHRE: Well, and I think that's the instruction

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1 that would have to be given. This evidence is --
2 THE COURT: We rely a great deal on jury's to follow
3 the instructions they're given, and I simply
4 wonder whether that one is asking a bit much of
5 them.
6 MR. MYHRE: And, again, Your Ladyship has to weigh out
7 against the probative value.
8 THE COURT: So, on the probative value, one
9 consideration is what, if any, weight it will have
10 in the context of all of the evidence. Is there
11 other evidence indicating -- in the Crown's
12 submission indicating intention to cause her to
13 fear for her safety or is that the only evidence
14 indicating that?
15 MR. MYHRE: When Ms. Capuano talks about fearing for
16 her safety, she's primarily concerned -- she has
17 that concern for her physical safety, and I think
18 it is just that, that -- that it's quite
19 conceivable to her that Mr. Fox would come across
20 the border and shoot her. And her other main
21 concern can broadly be said to her fear for her
22 psychological safety, Mr. Fox's intention to make
23 her so miserable that she'll commit suicide, and
24 the things that he's done related to that, which
25 -- all of which I tried to be more detailed about
26 and whether it was marked at the pretrial
27 conference.
28 But, no, in terms of her physical safety,
29 that is her concern that that could happen based
30 on the statements and emails and the blog posts.
31 THE COURT: Is there other evidence other than, if it's
32 proven, Mr. Fox shipping the firearms into the
33 U.S., is there other evidence that the conduct he
34 engaged in was intentional in the sense that it
35 was intended to cause her to fear for her safety?
36 MR. MYHRE: Well, Your Ladyship has seen a few of the
37 statements that he made, so there's that evidence.
38 "I have firearms, I could send you the pictures, I
39 go to the shooting range, I cross the border
40 whenever I want to," so there are those statements
41 that he has made to her, and then there is the
42 blog posts, so that is the other evidence around
43 this threat that she perceives to her physical
44 safety and, I suppose, in the context of all of
45 the evidence of a person who has made it their
46 life's goal to have her end her life.
47 THE COURT: Okay.

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1 MR. MYHRE: The other type of prejudice that we talked
2 about is the potential to distract the jury. In my
3 submission, because this evidence is relevant to
4 the criminal harassment charge, it can't even
5 really be said to be a distraction. It's not a --
6 in terms of the amount of time that would be spent
7 on this at the trial, it may be one-tenth of the
8 overall evidence.

9 The next factor is the legal and factual
10 nexus between the counts. Because of the way they
11 arise close in time, they are both, as I said,
12 discussed in the -- Mr. Fox's statement to police,
13 which raises a side issue if Your Ladyship rules
14 that there should be severance and -- and also
15 rules that that evidence is not relevant or not
16 sufficiently probative, the Crown's going to have
17 -- [indiscernible] that statement so that the
18 discussion around the firearms being shipped is
19 removed from the statement.

20 The next factor in *Last* is complexity. I've
21 already discussed that, whether Mr. Fox might want
22 to testify on one count but not the other, and I
23 can't speak to that. Efficiency, there's some
24 minor efficiency in that the statement, there's
25 the overlap with the statement, that's not a
26 factor that's going to swing the balance here.

27 The next factor is the length of the trial,
28 again that's been discussed. Mr. Fox's right to a
29 speedy trial, it does put him under the thumb of
30 the justice system for a while longer, that's
31 true, but as Your Ladyship pointed out, it
32 wouldn't be that much longer. Mr. Fox would, once
33 one charge is dealt with, would certainly be
34 entitled to apply for bail.

35 The court also mentions the possibility of
36 similar fact or antagonistic defence, which aren't
37 factors here.

38 So, to summarize, My Lady, clearly what the
39 Crown is saying is that the factor that should
40 carry this application is the factual legal nexus
41 because of the probative value of this evidence.
42 And, in my submission, when the jury hears about
43 those steps that he took, with a strong inference
44 that his threats were not idle threats when he
45 made them, and that goes directly to his
46 intention. And that view is consistent with what
47 our Court of Appeal says in *Taylor*.

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1 Those are my submissions.
2 THE COURT: Thank you. All right. We're at the time
3 for the afternoon break. We'll take a break --
4 THE ACCUSED: Okay.
5 THE COURT: -- unless you wish to say something
6 first --
7 THE ACCUSED: No, no nothing.
8 THE COURT: -- Mr. Fox, or have a question?
9 THE ACCUSED: Take the -- I have lots of things I'd
10 like to say in response to that, but --
11 THE COURT: All right.
12 THE ACCUSED: -- thank you, My Lady.
13 THE COURT: We'll take the break and then we'll come
14 back. All right.

15
16 (PROCEEDINGS ADJOURNED FOR AFTERNOON RECESS)
17 (PROCEEDINGS RECONVENED)
18

19 **SUBMISSIONS RE SEVERANCE FOR ACCUSED BY PATRICK FOX:**
20

21 THE ACCUSED: And the first thing, My Lord -- or, My
22 Lady, that I would like to clarify, the s. 93
23 charge does not relate in any way to the sending
24 of my firearms to the U.S. because the s. 93 only
25 has to do with having the firearms in my
26 possession at a place not authorized by my ATT.
27 In this allegation it's merely coincidental that
28 it happened to be the shipping company, and I -- I
29 went there because I think it's very -- it's very
30 relevant in considering I was originally also
31 charged with s. 103 which is unlawful exportation
32 of firearms knowing them to be unlawful, and that
33 charge was stayed after I brought it to Mr.
34 Myhre's attention that no authorization was
35 required for me to export my firearms to the U.S.
36 So I think that that's something that might cause
37 some confusion with the jury or might mislead
38 them.

39 Like unless it's clearly stated to them that
40 the s. 93 charge in the allegation is only that I
41 possessed my firearms in a place where my ATT
42 didn't authorize to do so, but it's not
43 necessarily related to the shipping or the sending
44 of those firearms to the U.S.
45 THE COURT: All right. Mr. Myhre can correct me if my
46 understanding is wrong, but I would think that
47 what the Crown relies on here is your, if it's

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1 proven, taking the firearms to the depot in
2 Burnaby to have them shipped, and that that would
3 the offence because at that point they're not in
4 the place that's authorized. And the Crown would
5 then propose to lead evidence not directly
6 supporting the Count 2 charge, but it would be in
7 a way the gateway to the Crown lead -- leading
8 evidence of the firearms being in the U.S., and
9 where they went to. Am I correct on that, Mr.
10 Myhre? Without that Count 2 charge --

11 THE ACCUSED: But in the context of s. 93, would it
12 really matter, would it be relevant at all what
13 the reason was that they would have been taken to
14 the shipping depot? I mean, the simple fact that
15 they were at the shipping depot and that I was
16 there at that same time would make the requirement
17 of s. 93 regardless of why I brought them there.

18 MR. MYHRE: Well, if I could explain the evidence of
19 the guns being in California is relevant to the s.
20 93 charge because it proves that they were in the
21 boxes that were taken to the Packaging Depot, so I
22 can't prove that they were in there unless I have
23 that evidence.

24 THE ACCUSED: Mm-hmm.

25 MR. MYHRE: And to go to Your Ladyship's point, for
26 example, even if Mr. Fox conceded they were in
27 those packages, I would still be seeking to lead
28 that evidence that he did send them to California
29 for the reasons articulated on the criminal
30 harassment charge.

31 THE ACCUSED: And I would -- I would like to or maybe
32 request some clarification from Mr. Myhre, hmm, I
33 had never stated nor admitted that I had shipped
34 the firearms to Los Angeles. I had said that I
35 had sent them to Los Angeles. It was the
36 constable that had used the word *shipped*, and then
37 because he used the word *shipped*, I used it once,
38 but then immediately corrected myself because I
39 didn't want to create the impression that I had
40 formally done the process of putting them into a
41 box and then actually shipping them, as opposed to
42 simply taking them to the border and handing them
43 over to somebody, or simply taking them myself
44 down to California.

45 Because Mr. Myhre, I did notice, was using
46 the word *shipping* frequently, and then yourself as
47 well. Of course, you were assuming that I had

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1 shipped them because that's what Mr. Myhre was
2 saying.

3 THE COURT: All right.

4 THE ACCUSED: And there's also another point I would
5 like to clarify, the use of the word *sneaking*
6 across the border or entering the United States
7 illegally. Now, I have maintained over the course
8 of my entire life almost that I am a United States
9 citizen by virtue of being born in the United
10 States. If that is the case, then I'm not
11 required to go through a port of entry to enter
12 the United States.

13 So, if what I believe and what I maintain is
14 the truth and the reality, then I didn't actually
15 enter the United States illegally, and I think
16 that's further supported by the fact that, on
17 numerous occasions, U.S. -- U.S. authorities had
18 arrested me in the United States, charged me with
19 illegal re-entry and various other related
20 charges, including this most recent time only to,
21 once they've done their investigation, drop all of
22 the charges and simply hand me over to Homeland
23 Security or to ICE to be sent back here to Canada
24 again.

25 Okay. Now, I could address or would like to
26 address some of the points in the exhibits here.
27 The first, with respect to Ms. Capuano's
28 statements, unfortunately she's not present to be
29 cross-examined on any of these statements, so we
30 would just have to assume that they're true and
31 correct, so I can't really say anything further
32 about this until the trial, and I'm sure at that
33 point the truth will come out on these matters.

34 So, then if we move, though, to the first
35 email, which was marked as page 1, now the
36 highlighted section by Mr. Myhre toward the bottom
37 of that page kind of starts in the middle of the
38 paragraph, and if you were to start reading from
39 the beginning of that paragraph so it provides a
40 lot more context, I think it makes a lot more
41 sense, but if we even take it a step -- take it a
42 step farther back than that, and understand that
43 what's being responded to in this email was that
44 Desiree has over the years, or Ms. Capuano has
45 over the years consistently accused me of being a
46 compulsive liar, saying that I can't be trusted,
47 that everything that I say and do is false, saying

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1 that my identification here in Canada is false,
2 that my name is not really Patrick Fox, etc. So
3 that's what I was responding to in this email.
4 Now, the issue of the PAL, the reason the PAL
5 was brought up in here is, on the one hand, Ms.
6 Capuano is insisting that I assumed the fake
7 identity, and got fake identification up here
8 under the name Patrick Fox, and I'm telling her,
9 if that was the case, I would not be able to pass
10 the background check to obtain a PAL because it
11 would be too stringent. They would find out very
12 quickly that such a person doesn't really exist.
13 And on the next page, the P.S., the post script, I
14 actually explained that to her, and that's why I
15 mention the PAL.
16 And then on page 3, now this email, oh, this
17 email has received a lot of attention in media and
18 throughout this case, and much of the Crown's
19 case, I believe, hinges on one statement in this
20 email. Now, on the first page of it, page 3, the
21 highlighted section there's a paragraph that comes
22 before it where Ms. Capuano -- oh, and I should
23 say, unfortunately the way this email is formatted
24 and it's very difficult sometimes to see whose
25 actually writing a given part. So the paragraph
26 before that, Ms. Capuano says [as read in]:
27
28 Your stocker-like obsession with me is truly
29 impressive. The amount of time and energy
30 you spend thinking of me is flattering but
31 honestly a little pathetic.
32
33 So the next paragraph, which is written by me, is
34 responding to what she's saying there because,
35 again, over the past few years she's repeatedly
36 brought up these claims that I'm in love with her,
37 that I'm obsessed with her, that I just need to
38 let go and move on and find some new woman or --
39 or something of that nature.
40 But this particular email, as I've said, it's
41 very long, and it had built up over the period of
42 a few days, so to put this -- these responses in
43 context, I think that one really has to start at
44 the very beginning and understand the entire
45 conversation, and I think to do that at this point
46 would go beyond the scope and purpose of this
47 hearing. I think that's something that we could

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1 leave for the trial.

2 But in that same email on page 6 is where the
3 comment is made about the basis of her repeated
4 claims that I have said that I would shoot her and
5 that I would kill her and murder her, etc. Once
6 again, the paragraph that comes before, the part
7 that was highlighted, let's see, no, sorry, that's
8 me speaking. It was the one line paragraph before
9 that where Desiree says [as read in]:

10
11 He is the one [indiscernible] Gabriel. He is
12 the one being hurt by your actions, scheming
13 and manipulation.

14
15 Which again is another repetitive claim that she's
16 been making.

17 And finally the blog posts at, well, I don't
18 know what the page would be, but the -- the last
19 few pages, the first thing that is relevant is, if
20 you look at the date, if you look at the beginning
21 of the blog posts, February 13th, 2016, so the
22 post was written the day after I had done the CBC
23 interview and, as I had stated earlier, Ms. Clancy
24 had informed me of the allegations that Desiree
25 was making and that those allegations were going
26 to be broadcast on international television and on
27 the -- the internet.

28 My main purpose with this blog post was to
29 respond to those allegations before they got all
30 over the television and all over the internet so
31 that there would be another side for people to
32 see.

33 Now, I personally don't think that there is
34 anything threatening in any way in this entire
35 blog post. The logistic section just tries to
36 explain how, from my perspective, these
37 allegations or these claims that I would go
38 through all this trouble to go to Arizona to shoot
39 her using my own guns, even though I could easily
40 buy one in Arizona that could not be traced back
41 to me, as we'll see at the trial, I'm sure, a lot
42 of these stories are not going to stand up to much
43 scrutiny.

44 So, the purpose of this blog post was to try
45 to apply some scrutiny to some of the allegations
46 that I was anticipating were soon going to be on
47 the television and on the internet about me.

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1 Unfortunately I don't have all of Ms.
2 Capuano's statements with me at the time, so, I
3 mean, I can refer to things that she said, but I
4 don't have the proof to put it before the court.
5 One thing that I think would be certainly relevant
6 on the topic of firearms is that Ms. Capuano has
7 admitted herself in a number of her statements
8 with the RCMP that she has known that I've had
9 firearms for all of my life, that I've been an
10 avid shooter for all of my life, and I don't think
11 it's a coincidence that these claims of fear for
12 her safety related to my ownership of firearms
13 coincided almost immediately with her moving in
14 with the boyfriend that she had at the time when
15 she filed the order of protection.

16 And speaking of the order of protection, that
17 also, I think, would be relevant because the first
18 time she ever claimed to have any fear for her
19 safety from me was in the application for the
20 order of protection, which she later stated in her
21 statements to the RCMP that she actually only got
22 an order of protection to try and get the website
23 taken down, not because there was truly a fear for
24 her safety, that statement that you have -- though
25 Mr. Myhre has a copy of it here.

26 MR. MYHRE: Yeah, do you want it?

27 THE ACCUSED: If the court would want to? If you --

28 MR. MYHRE: You can't have it marked because I need
29 that, but --

30 THE ACCUSED: Sure.

31 MR. MYHRE: -- you can read it.

32 THE ACCUSED: Shall I read to you what --

33 THE COURT: If you wish to bring something to my
34 attention.

35 THE ACCUSED: So the constable -- okay, she says [as
36 read in]:

37
38 And at that point, I mean, yeah, when she --
39 when she says you -- hang on, when she...

40
41 I'm not sure who she's referring to here, but:

42
43 ... when she says, you know, you can't come
44 around...

45
46 Oh, she's talking about the judge that issued the
47 order of protection, I'm sorry.

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1
2 ... you can't come around, but it's like,
3 well, that's not really going to do me any
4 good but my thinking and my feeling on this
5 was that the order of protection is what is
6 required to take down the website, right is.

7
8 And then the constable says:

9
10 Yes.

11
12 And then she says:

13
14 It's -- I need that in order to have any
15 legal basis to remove any of the things that
16 he's done, and that's what I needed it for,
17 and so while it didn't really help with him
18 coming into contact with me, it did help with
19 court in other ways, and that's why we went
20 after it.

21
22 So, I think statements like that, I -- I think
23 that that's a fairly significant contradiction on
24 her part because a lot of this started from that
25 order of protection that she obtained in Arizona,
26 but I think that that goes, to some extent, to
27 show that I don't believe there's a lot of
28 credibility to her claims that she's afraid for
29 her safety or that she truly believes that I would
30 ever do anything with respect to firearms or with
31 respect to harming her period. It just --

32 THE COURT: Now, you don't need to be addressing the
33 ultimate merits --

34 THE ACCUSED: Sure.

35 THE COURT: -- of the Crown's case against you on
36 either of the two counts. Obviously that's what's
37 going to be addressed in the trial, but tell me,
38 if you would, what you have to say about the two
39 charges staying together on the indictment, and
40 going together into one trial as opposed to being
41 in separate trials.

42 THE ACCUSED: I will admit, for the most part, I don't
43 really have a preference or an opinion either way.
44 I do believe there is some possibility that having
45 the firearms charge on the indictment may mislead
46 the jury into thinking that firearms or conduct
47 with firearms are somehow related to the criminal

Submissions re Severance for Accused by Patrick Fox**BAN ON PUBLICATION - INHERENT JURISDICTION**

1 harassment, possibly giving them the false
2 impression that I have used my firearm ownership
3 to intimidate or threaten Ms. Capuano.
4 Now, she, herself, has admitted again in
5 statements to the police that no such threats have
6 -- have ever occurred, and that she doesn't
7 believe that I would ever physically harm her,
8 which I realize completely contradicts the other
9 statement that she thinks I'm going to go there
10 and shoot her.
11 That's really the only reason that I would
12 have a concern about the two counts being on the
13 same indictment.
14 THE COURT: All right. Thank you. Anything else you
15 want to add?
16 THE ACCUSED: No.
17 THE COURT: Mr. Myhre, anything else?
18 MR. MYHRE: My Lady, I would just ask that when you do
19 provide us with the memo specifying plainly what
20 your decision is on the severance application,
21 that you also inform us of your view of the
22 admissibility of the evidence that the guns are in
23 California because it's conceivable you could say
24 that is admissible evidence on the criminal
25 harassment count, there should nonetheless be
26 severance.
27 THE COURT: Wouldn't that be unlikely because wouldn't
28 it be that the concerns that would lead to an
29 order for severance would also militate against
30 the evidence being admitted or am I missing
31 something?
32 MR. MYHRE: No, I think that is --
33 THE COURT: Is there an avenue in which you could get
34 to --
35 MR. MYHRE: It's quite likely they would both go
36 together, but it's conceivable because there are
37 so many factors to be considered on severance that
38 you would decide should be severed, that the
39 evidence could still be tendered.
40 And maybe just so there's no ambiguity, if
41 Your Ladyship does rule that that evidence is not
42 admissible, the evidence that the Crown won't be
43 calling is the evidence from the ATF agent, the
44 evidence from the person at the Packaging Depot,
45 and the Crown will be vetting portions of Mr.
46 Fox's statement that deal with shipping his
47 firearms.

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1 I don't think -- and I think that would be it
2 then.
3 THE COURT: All right. Thank you. Anything further
4 from either of you?
5 THE ACCUSED: No.
6 THE COURT: I will take away the materials I've been
7 given, think some more about the submissions
8 you've each made. I'll send a brief memo which
9 will simply have the result, no reasoning, and the
10 reason I'm doing it that way is that it's not
11 appropriate for a court to be issuing reasons
12 through a memorandum because that's not a publicly
13 available document, and also that sometimes
14 there's a temptation to give very brief reasons in
15 the memorandum and then expand on them later in
16 the official reasons, but it's not appropriate to
17 be giving essentially two sets -- two sets of
18 reasons. So you'll get a yes/no kind of answer.
19 Now, for the jury selection on Tuesday, Mr.
20 Myhre, you're not going to be there?
21 MR. MYHRE: It is possible, but --
22 THE COURT: Ah.
23 MR. MYHRE: -- that would mean my trial had collapsed.
24 THE COURT: I'm thinking we're probably going to need
25 another pretrial conference before we start the
26 actual trial.
27 MR. MYHRE: I think that's prudent.
28 THE COURT: Should we book one now, choose a date now?
29 MR. MYHRE: My Lady, I'm available the morning of June
30 6th, anytime on June the 7th, and the morning of
31 June the 8th and the morning of June the 9th.
32 THE COURT: And then when do we start the trial, on the
33 12th?
34 MR. MYHRE: Yes.
35 THE COURT: And how long are you thinking we might
36 need, and I suppose it's hard to know?
37 MR. MYHRE: It could be quite brief if everything is
38 ready to go. I am going to get Your Ladyship the
39 book of documents ahead of time. I'll try to do
40 that -- I've asked my assistant if she could get
41 it done for Monday. She's juggling a few things
42 so she said she would try.
43 THE COURT: If those could come to me at the jury
44 selection, that would work.
45 MR. MYHRE: Okay.
46 THE COURT: Should we say the morning of the 9th, the
47 Friday before the actual trial; is that --

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1 MR. MYHRE: Well, I think earlier in the week would be
2 better, but that's subject to your availability.
3 THE COURT: Well, it's that interrupts other trials
4 that I may be doing and Fridays tend to be better.
5 Unless we simply have something from 9:30 to
6 10:00, but once we're into the regular scheduled
7 court time, it makes it very awkward to have it
8 through the -- the day. If it's --
9 MR. MYHRE: I was thinking a morning at 9:30.
10 THE COURT: Oh, I see. Well, then --
11 MR. MYHRE: And if it turned out that we need more
12 time, then maybe re-adjourn until Friday.
13 THE COURT: That's a good idea. So how about --
14 MR. MYHRE: Could I suggest the morning of the 7th?
15 THE COURT: Yes.
16 MR. MYHRE: Thank you.
17 THE COURT: Is that all right for you, Mr. -- Mr. Fox?
18 THE ACCUSED: Yes, it is. Thank you.
19 THE COURT: So 9:30, Wednesday June 7th.
20 THE SHERIFF: My Lady, might I inquire where -- where
21 he is, North Fraser or --
22 THE ACCUSED: North Fraser.
23 THE SHERIFF: It may be a challenge to get him here at
24 9:30.
25 MR. MYHRE: Should we -- that's the only thing
26 that's --
27 THE ACCUSED: How much time for a pretrial conference?
28 THE COURT: Shall we --
29 MR. MYHRE: Is a lunchtime pretrial conference a
30 possibility? I realize that's draining if you're
31 in a trial already.
32 THE COURT: That could be. Would that be better?
33 THE SHERIFF: Lunchtime is fine, My Lady. It's just
34 the 9:30 sometimes the truck doesn't get here
35 until about a quarter to 10:00.
36 THE COURT: All right. So 1:15, does that work?
37 MR. MYHRE: That's fine with me.
38 THE SHERIFF: I will check, My Lady.
39 THE COURT: Thank you.
40 MR. MYHRE: My Lady, just with respect to if -- if Your
41 Ladyship does order severance, in terms of the
42 procedure, can that count simply be stayed by the
43 Crown on the morning of jury selection -- or not
44 stayed, but be -- do we have to swear a new
45 indictment?
46 THE COURT: I think you do.
47 MR. MYHRE: It's probably the simplest and the

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1 cleanest.

2 THE COURT: I think -- well, perhaps you should look
3 into this, but bear in mind that usually a jury is
4 given the indictment. Now, ooh, I have done cases
5 in which, for some reason, the jury is not to see
6 a count on the indictment that is not going to be
7 before them, and in that case, with everyone's
8 agreement, we did a mock-up of the indictment and
9 gave it to the jury with the missing information
10 taken off it so that it looked like an ordinary
11 indictment.

12 MR. MYHRE: Well, I think if -- if I was to know Your
13 Ladyship's decision late Friday or even very early
14 Monday I could be in court Monday, but I can ask
15 one of my colleagues at the 865 Hornby office to
16 have a new indictment sworn on Monday so it's
17 ready for Tuesday.

18 THE COURT: If you're worried about the jury selection
19 process, I guess that's probably a wise idea. I
20 was going to say the court clerk could be told to
21 simply read one charge -- charge, but I may not be
22 the presiding judge and one never knows if all
23 will go as smoothly as intended if we're taking
24 unusual steps.

25 All right. We will adjourn.

26 THE CLERK: Order in court.

27

28 (PROCEEDINGS ADJOURNED TO JUNE 7, 2017, AT
29 1:15 P.M., FOR PRETRIAL CONFERENCE)

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33 Transcriber: C. Banks

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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.

A handwritten signature in cursive script, appearing to read "C. Banks".

C. Banks
Court Transcriber