

27178-2
Vancouver Registry

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

Vancouver, B.C.
June 21, 2017

REGINA

v.

PATRICK HENRY FOX

PROCEEDINGS AT TRIAL

COPY

BAN ON PUBLICATION - INHERENT JURISDICTION
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JURISDICTION

Crown Counsel:

M. Myhre

Appearing on his own behalf:

P. Fox

Appearing as Agent for CBC News:

Y. Brend (in a.m.)
N. Clancy (in p.m.)

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MARKED G FOR IDENTIFICATION: Document titled "R. v. Fox Final Instructions to the Jury"	1
MARKED H FOR IDENTIFICATION: Handwritten note from Juror 8 dated June 21, 2017	1

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1
(Jury Out)
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1 Vancouver, B.C.
2 June 21, 2017
3

4 (JURY OUT)
5

6 THE CLERK: Recalling the matter of Her Majesty the
7 Queen against Patrick Henry Fox, My Lady.

8 THE COURT: Yes. The first order of business is that
9 the draft of the charge that I made available to
10 Mr. Myhre, and Mr. Myhre to give to Mr. Fox,
11 should be marked as an exhibit for identification.

12 THE CLERK: That will be Exhibit G for Identification,
13 My Lady.
14

15 **MARKED G FOR IDENTIFICATION: Document titled**
16 **"R. v. Fox Final Instructions to the Jury"**
17

18 THE COURT: Thank you. And here's a copy, Madam
19 Registrar, that will be Exhibit G.

20 Second, one of the jurors has a problem. Mr.
21 Sheriff has asked the juror to write it in a note.
22 The juror is Juror 8, who sits in the front row,
23 second from the left, and I'm not going to read
24 out the note. It deals with a medical issue. I'm
25 going to hand it to Madam Registrar and ask that
26 Mr. Myhre and Mr. Fox have an opportunity to read
27 it. It sounds like not a severe medical issue,
28 but obviously one that would prevent the juror
29 continuing today and, depending on the diagnosis,
30 possibly for longer.

31 THE ACCUSED: It's my understanding that the loss of
32 one juror --

33 THE COURT: Just -- just a moment, Mr. Fox.

34 THE ACCUSED: Oh, sorry.

35 THE COURT: Have you had an opportunity to read that
36 note?

37 THE ACCUSED: Yes, I have.

38 THE COURT: Could I have it back? I didn't make copies
39 of it, and I'd like to just look at it for now.
40 It will end up marked as an exhibit for
41 identification. That should be Exhibit H, please,
42 for identification, and it should be sealed.
43

44 **MARKED H FOR IDENTIFICATION: Handwritten**
45 **note from Juror 8 dated June 21, 2017**
46

47 THE COURT: That juror is here in the building but not

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1 with the other jurors at the moment. Where --
2 what you are probably going to say, Mr. Fox, is
3 that the *Criminal Code* does permit the trial to
4 continue with fewer than 12 jurors. It can
5 continue with either 11 or with 10. What I will
6 tell you, because you're representing yourself and
7 you may not be aware of this, is that it would be
8 very unusual for the defence to wish, and -- and
9 sometimes the Crown to wish to immediately to
10 proceed without a full jury box.

11 Part of the reason for that is that, because
12 the burden of proof is on the Crown to prove each
13 element of the charges beyond a reasonable doubt,
14 and because the jury must be must be unanimous in
15 order to reach a verdict, generally it's seen as
16 advantageous to the defence to have a full jury
17 box. There are circumstances where that's simply
18 not possible, but one usually doesn't leap to that
19 result with allowing a little time to see if, for
20 example, the juror's problem could be quickly
21 addressed and corrected. It sounds as though that
22 is possible, although obviously we don't know
23 that, and nor does the juror.

24 Mr. Fox, do you have a submission, you're on
25 your feet?

26 THE ACCUSED: No, no, I was on my feet because you were
27 addressing me.

28 THE COURT: All right. Mr. Myhre?

29 MR. MYHRE: No submissions, My Lady.

30 THE COURT: Well, it would be helpful to have some
31 submissions. It seems that the options are
32 proceed immediately to excuse the juror and
33 continue with 11, stand down for a half a day or a
34 day for the juror to seek medical attention and
35 report back on his condition. It's likely to take
36 a full day, I would think, rather than a half-day.

37 At that point we are looking at Thursday for
38 closing, this Friday for a charge. I'm never keen
39 to charge a jury on a Friday -- Friday because
40 it's quite likely that they'll then be required to
41 deliberate on the weekend. It's not inevitable,
42 but it's a fair possibility.

43 There's a balancing exercise obviously moving
44 the trial along, keeping the jury box as full as
45 we reasonably can, and inconveniencing the jury as
46 little as possible, while also having a fair
47 trial.

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(Jury Out)
Proceedings

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1 So, Mr. Fox, do you have a submission or a
2 preference?
3 THE ACCUSED: In this circumstance, would it be
4 inappropriate for me to defer to yourself and Mr.
5 Myhre on this, and I would like to keep the jury
6 box full, and I would like to get this over with
7 as quickly as possible, but at the same time I
8 understand the juror's predicament.
9 THE COURT: I think there's no question that the juror
10 cannot and should not continue this morning, for
11 all sorts of reasons. So the options are, as I've
12 outlined them, unless you or Mr. Myhre have other
13 ideas.
14 MR. MYHRE: My Lady, there are no good options. I
15 guess, on balance, as I think about it, the
16 Crown's preference would be to excuse that juror,
17 if that's Mr. Fox's preference. If Mr. Fox's
18 preference is to keep a full complement, we should
19 respect that and adjourn a day, hoping that
20 tomorrow the juror will be in better shape.
21 THE COURT: So when you say excuse you mean for the
22 day?
23 MR. MYHRE: No, I mean, reduce the number of jurors.
24 THE COURT: I see.
25 THE ACCUSED: I might propose then that we could give
26 that juror an opportunity to deal with this,
27 perhaps a day, because there are going to be some
28 issues that we're going to need to address the
29 charge, right. I mean, when I was looking through
30 it, there were some -- some wording that I would
31 like to discuss. And we were -- I believe maybe
32 we were going to address that either this
33 afternoon or tomorrow.
34 THE COURT: Yes, we were. Mr. Sheriff, do we have any
35 indication from the juror about how long he needs
36 to get medical advice? Would that be something he
37 could do in the morning?
38 THE SHERIFF: I can ask him, My Lady, if he can do that
39 sometime today, get back to us today.
40 THE COURT: I'm thinking about the morning, whether
41 that could be done in the morning so that we might
42 be in a position -- actually, no, he's not going
43 to be fit to continue this afternoon.
44 All right. Let's go step by step. I think
45 we'll start by giving the juror the day to seek
46 medical attention, and I will ask Mr. Sheriff to
47 ask that juror to contact Mr. Sheriff before the

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1 end of the day and let him know how he's doing, so
2 that we'll have that information --

3 THE SHERIFF: Yes, My Lady.

4 THE COURT: -- for tomorrow morning, and I'll ask the
5 jury, the remainder of the jury to come in, I will
6 tell them simply that there is a personal issue
7 with one of the jurors, and we're going to have to
8 postpone things by a day, and come back tomorrow.

9 And then we'll see how we do with that other
10 juror, we'll probably have a discussion at the
11 very end of today once we know how the juror is --
12 what the diagnosis is and estimated time before he
13 would be able to continue, and then we'll make a
14 decision about whether in fact we ask the jury to
15 come back tomorrow as they've been requested to
16 do, or whether we phone them and put them off for
17 another day or over until Monday.

18 Is that agreeable?

19 MR. MYHRE: Yes, My Lady.

20 THE ACCUSED: Yes, My Lady.

21 THE COURT: All right. Thank you. So, perhaps first,
22 since the jury is here, they should be asked to
23 come in and I will excuse them for the day.

24 THE SHERIFF: The jury, My Lady.

25

26 (JURY IN)

27

28 THE COURT: Good morning.

29 Members of the jury, you've probably noticed
30 that there are 11 of you today. One of the
31 members of the jury has a personal issue today
32 that prevents him serving today. You do not need
33 to be concerned about that, and you do not need to
34 ask yourselves what it involves.

35 But I am going to excuse you for the day, and
36 ask you to come back tomorrow. There is a slight
37 chance that I may need to excuse you for a little
38 longer and, if that is the case, Mr. Sheriff or
39 one of the other sheriffs will be in touch with by
40 telephone toward the end of the day. But I'm
41 hopeful that we'll be able to continue tomorrow.

42 So essentially this sets us back by a day
43 from the time -- the plan or the schedule that I
44 outlined for you the other day. I regret the fact
45 we can't continue today. These things do happen,
46 and it's an unavoidable situation.

47 I thank you for attending today.

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(Jury Out)
Proceedings

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1
2 (JURY OUT)
3
4 THE COURT: All right. Now, you've probably not had
5 the draft charge for long enough to have read it
6 through.
7 THE ACCUSED: That's correct.
8 THE COURT: All right. Shall we stand down and give
9 you an opportunity to review it?
10 THE ACCUSED: All right, please.
11 THE COURT: I've been told also that Ms. Natalie Clancy
12 has an application. Is Ms. Clancy present in the
13 courtroom?
14 YVETTE BREND: No. My name is Yvette Brend, I'm
15 standing in for her. She had another assignment.
16 THE COURT: All right. I'm not proposing to deal with
17 it now, but simply wanted to acknowledge the fact
18 that I've received an application and suggest that
19 steps be taken to set it down at a time that's
20 convenient for everyone, who will include Crown
21 counsel and Mr. Fox. So, how do you propose to
22 deal with that or how does Ms. Clancy propose to
23 deal with that?
24 YVETTE BREND: I'm happy to present it now or whenever
25 it's convenient to you. We're basically asking
26 for access to the exhibits.
27 THE COURT: All right. Mr. Myhre, have you received
28 this application?
29 MR. MYHRE: Yes, My Lady, and the Crown has no
30 opposition to the media having access to any of
31 the exhibits.
32 THE COURT: For all purposes, including publication?
33 MR. MYHRE: Yes.
34 THE COURT: All right. The question I need to ask is
35 if, and obviously the jury hasn't made a finding,
36 but if the material in say the Crown book of
37 documents were to be found to amount to evidence
38 constituting criminal harassment, would the court
39 not have some obligation not to essentially
40 contribute to the compounding of the problem?
41 There's an *if* in there, but...
42 YVETTE BREND: If I may, most of the exhibits that
43 you're referring to have already been
44 [indiscernible/not at microphone] exhibits
45 [indiscernible].
46 THE COURT: Can I ask you to come forward partly so
47 your voice gets picked up on the recording?

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1 YVETTE BREND: Sure, I can do that. I haven't done
2 this before.

3 MR. MYHRE: You can stand here.

4 YVETTE BREND: Most of the exhibits that you're
5 referring to have already been in media reports.
6 There would only a be few exhibits that haven't
7 been made public before.

8 THE COURT: So what ones would you be looking for then?

9 YVETTE BREND: We wanted access to all videos and
10 photographs and -- and exhibits because of the
11 organization, because of the accuracy issues, but
12 also because they help illustrate the story that
13 we're going to tell at the end of the trial. We
14 make journalistic decisions at CBC not to name
15 certain parties and to -- and be respectful in all
16 cases of what --

17 THE COURT: All right.

18 YVETTE BREND: -- people's wishes were around this
19 before it's ever ruled by the court, we'd never
20 name the children, we have very high journalistic
21 standards around that.

22 THE COURT: I don't doubt that. I suppose if the
23 exhibits were, for example, in support of charges
24 of child pornography and were pictures, the court
25 might feel uncomfortable making them available for
26 publication because the harm, if there was a harm,
27 would be repeated or compounded by further
28 disclosure or publication, and I -- I'm simply
29 wondering out loud whether we're in a similar
30 situation here in relation to some of the
31 exhibits, certainly not all of them.

32 YVETTE BREND: And just to respond to that, in a case
33 like that, we would have raised very serious
34 standards and -- and serious discussions about
35 what's in the public interest to publish. We
36 would never publish pictures of a child or, you
37 know, something that would --

38 THE COURT: I see.

39 YVETTE BREND: -- perpetuate something like that. I
40 mean, I can't speak for other media organizations,
41 but CBC has some of the highest standards in the
42 world now.

43 THE COURT: All right. Thank you. That's helpful to
44 know.

45 I think our first order of business has to be
46 to keep this trial going. As you've just seen
47 it's been thrown back a little bit. That may give

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1 an opportunity for your application to be heard if
2 Mr. Myhre and Mr. Fox feel ready to respond to it,
3 in other words, that they've had sufficient time
4 to think about the issues.
5 Mr. Myhre, do you have a suggestion about
6 timing? Mr. Fox obviously needs time now to
7 review the draft charge, and that is the first
8 order of business. Mr. Fox?
9 THE ACCUSED: I would just like to say with respect to
10 this application from CBC or from Ms. Clancy, I
11 have no opposition to it.
12 THE COURT: And does your lack of opposition apply to
13 all of the exhibits, and I know you're obviously
14 thinking about those exhibits that came from the
15 website, but there are also, for example,
16 photographs of things seized in Carson County.
17 What else are there?
18 THE ACCUSED: If there were any that I would have any
19 concern about it would be my recorded statement to
20 the RCMP, but even that I don't have opposition
21 to. I believe this should be as public as
22 possible, this entire proceeding.
23 THE COURT: All right. I'm sorry, I missed your name?
24 YVETTE BREND: It's Yvette Brend, B-r-e-n-d.
25 THE COURT: Thank you. There are some exhibits that
26 are sealed. Those, I'm pretty sure all, relate --
27 oh, that may not be the case, but many of them
28 relate to juror issues, such as the one you saw
29 this morning where a note has been sealed. And
30 I'm assuming those are not exhibits you're
31 concerned about?
32 YVETTE BREND: Those are not of great interest to us,
33 to be honest. We'd never report that unless there
34 is -- cogent to the verdict.
35 THE COURT: All right. There's an order that is marked
36 here as being sealed. I don't recall what that
37 is. Do you, Mr. Myhre? Two orders actually on
38 May 23.
39 THE CLERK: Let's just have the -- I don't know what
40 clerk did that. They've put the order was made,
41 meaning the sealed order, is how they worded it.
42 THE COURT: Oh, an order that there be a --
43 THE CLERK: A seal --
44 THE COURT: -- seal.
45 THE CLERK: -- so they worded it that way.
46 THE COURT: It's not that I made an order and the order
47 was sealed?

(Jury Out)
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1 THE CLERK: No, just --
2 THE COURT: All right.
3 THE CLERK: -- that the...
4 THE COURT: Would it be appropriate timewise to deal
5 with this application perhaps sometime this
6 afternoon? Would that work from the perspective
7 of also dealing with the issues concerning the
8 charge, which I think have to have priority?
9 MR. MYHRE: Yes.
10 THE COURT: All right. Mr. Fox, yes, would that work
11 for you?
12 THE ACCUSED: Yes.
13 THE COURT: Ms. Brend?
14 YVETTE BREND: [No audible response].
15 THE COURT: All right. Shall we say two o'clock? Does
16 that suit you, Ms. Brend?
17 YVETTE BREND: Thank you.
18 THE COURT: All right. Then we'll deal with it at
19 2:00. Madam Registrar, you probably have all the
20 exhibits in the courtroom, do you?
21 THE CLERK: Yes, I do, My Lady.
22 THE COURT: All right. It would be helpful for them to
23 be there at two o'clock so, if there's any doubt
24 as to what something is, it's there to be seen.
25 Ms. Brend, have you given any consideration
26 to an order for certain purposes and not for
27 others or not?
28 YVETTE BREND: We'd prefer to be able to use it for
29 broadcast and for print, if possible, because it
30 just seems to be more open, but I could speak to
31 that at two o'clock, if you like, I can speak to
32 Natalie in the meantime.
33 THE COURT: Thank you. And my concern is, at this
34 point and I've not heard submissions, but my
35 concern is that we don't know at this point
36 whether the body of material that the Crown has
37 tendered is going to be found by the jury to
38 essentially amount to criminal harassment and, if
39 it is, there's a potential issue in the court
40 simply handing it over for further publication at
41 somebody else's discretion without any constraints
42 on -- on that, but it's something to think about.
43 YVETTE BREND: Yes.
44 THE COURT: Thank you. All right. So we'll deal with
45 that application at 2:00, thank you. We'll stand
46 down now. How long would you like roughly, Mr.
47 Fox?

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1 THE ACCUSED: It's very difficult for me to -- to
2 estimate. I'm sure a lot of the --
3 THE COURT: I won't hold you to it. If you need more
4 time, you'll have it.
5 THE ACCUSED: Can we say an hour? Is that too long or?
6 THE COURT: No, that's not too long.
7 THE ACCUSED: Okay.
8 THE COURT: Mr. Myhre, is that long enough for you?
9 MR. MYHRE: Yes, My Lady.
10 THE COURT: So what is it now, 20 to 11:00, shall we
11 start at quarter to 12:00, 11:45?
12 THE ACCUSED: Okay.
13 THE COURT: Anything else we should deal with right
14 now?
15 MR. MYHRE: No, I don't think so.
16 THE COURT: All right. Thank you.
17 THE CLERK: Order in court. This court stands
18 adjourned until 11:45 a.m.
19
20 (PROCEEDINGS ADJOURNED UNTIL 11:45 A.M.)
21 (PROCEEDINGS RECONVENED)
22
23 THE COURT: I seem to be missing most of what I need.
24 Oh, I've got my copy of the charge, all right. Go
25 ahead.
26 MR. MYHRE: I have three comments, My Lady. The first
27 one relates to page 19, paragraph 84.
28 THE COURT: Yes.
29 MR. MYHRE: My Lady, I'm content with your phrasing in
30 paragraph 84, and I don't -- as I've reflected on
31 it more, I don't really think the jury needs to
32 think about indirect communications because my
33 submission to the jury will be that Mr. Fox made
34 the website direct communication by telling Ms.
35 Capuano about it and referring her to it
36 repeatedly.
37 THE COURT: All right.
38 MR. MYHRE: Paragraph 86, My Lady, I do think there
39 should be an instruction on threatening conduct
40 since my submission certainly is that some of the
41 things Mr. Fox did could constitute both because
42 they are repeated communication and some of them,
43 in my submission, are threats, and --
44 THE COURT: That's not really my question.
45 MR. MYHRE: Oh.
46 THE COURT: My question is whether it adds anything to
47 charge on (d) as well as (b), and I suppose

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1 another way of asking that question would be if
2 the jury did not find conduct that fell within (b)
3 could it possibly find conduct that fell within
4 (d)? I would think that would be extremely
5 unlikely, and by charging on (d) as well, I --
6 subject to submissions Mr. Fox may have, I don't
7 disagree that there's evidence there that supports
8 a charge on (d), but when I look at trying to make
9 the description of the defence as the -- of -- of
10 the offence as easy as possible for a jury to deal
11 with, I have to wonder about the utility of
12 charging on (d) as well.

13 And, as I've attempted to say in that little
14 note built into paragraph 86, when you start to
15 charge on threatening conduct, you start to cover
16 some of the issues that are -- have to be
17 separately dealt with as separate issues
18 concerning harassment, such as Mr. Fox's intent,
19 Ms. Capuano's state of mind, and so forth.

20 MR. MYHRE: I see.

21 THE COURT: It just appears to me to make the charge
22 more complex, potentially more confusing, and
23 likely for no reason that would assist the Crown
24 and certainly wouldn't assist the defence.

25 MR. MYHRE: Could I think about that --

26 THE COURT: Yes.

27 MR. MYHRE: -- a little bit more? My comment on the --
28 I -- on the paragraph relates to both how Your
29 Ladyship has phrased fear in this section and --
30 and a further section. In my submission, if this
31 does remain in the charge, it should be made clear
32 to the jury that the concerns -- the sense of fear
33 include concerns for physical and mental
34 wellbeing.

35 THE COURT: Now, that is covered in the other portion
36 where it's addressing --

37 MR. MYHRE: Yes.

38 THE COURT: -- the separate issue, but you'd like to
39 see it addressed here, as well? That seems
40 reasonable.

41 MR. MYHRE: If we do leave this part in. And so
42 flipping ahead to that next section where Your
43 Ladyship does mention it at page 24, paragraph
44 112, I would ask Your Ladyship to include the what
45 I take to be a statement of the law in the *Goodwin*
46 case at paragraph 22, that the victim need not
47 suffer ill-health or major disruption so that the

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1 jury has some idea of the extent of the fear that
2 would be required to make out the offence.
3 THE COURT: I actually had that in a previous draft and
4 took it out. All right. Thank you.
5 MR. MYHRE: That's all, My Lady.
6 THE COURT: Was there another question I had embedded
7 in this document? Perhaps not. Perhaps you've
8 addressed them both. Are you content with the
9 reference to the types of evidence the jury may
10 want to consider in relation to various issues?
11 MR. MYHRE: Yes.
12 THE COURT: One other question, if you would look at
13 the description of Count 2, which begins on page
14 26, I could find no model instruction for this
15 offence, so I basically crafted it from my review
16 of what the elements appear to be as they relate
17 to what appears to be in issue in this case. I
18 wondered whether to -- if you look at the third
19 issue that's listed on page 27, whether Mr. Fox
20 was in possession of firearms while they were
21 transported from his residence to the Packaging
22 Depot until they were released to UPS.
23 I wondered whether to subdivide that into two
24 issues; one being whether the firearms that
25 ultimately were found in the boxes in Ms. Munoz'
26 residence were transported from Mr. Fox's
27 residence to the Packaging Depot and then released
28 to UPS.
29 That would be one issue, and the other would
30 be, if they were, was Mr. Fox in possession of
31 them during that time, but it occurred to me that
32 all of the evidence concerning both of those
33 issues would be identical and that there might be
34 no utility to subdividing the issue as I've
35 expressed it. But there is, I should point this
36 out, there is arguably an assumption built in to
37 issue 3 that the firearms did travel that route,
38 and that may be problematic from Mr. Fox's
39 perspective or from the Crown's. So I'd
40 appreciate your submissions on that, Mr. Myhre.
41 MR. MYHRE: My Lady, could I give some thought to that
42 while Mr. Fox raises whatever issues he has?
43 THE COURT: All right.
44 THE ACCUSED: First, on page 19, paragraph 83, it reads
45 [as read in]:
46
47 It may be to Ms. Capuano or to anyone she

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1 knows...
2
3 THE COURT: Can I just get there --
4 THE ACCUSED: Sure.
5 THE COURT: -- and --
6 THE ACCUSED: Sorry.
7 THE COURT: -- make sure I understand what the context
8 is? Page 19, paragraph 83. All right.
9 THE ACCUSED: Now, the part that reads "or to anyone
10 she knows," that the way it's written would
11 include Gabriel, though I'm sure that my
12 communication with Gabriel would not be included
13 in this charge; is that right?
14 THE COURT: Remember this is only one issue. It's just
15 the threshold issue of was there repeated
16 communication.
17 THE ACCUSED: Right.
18 THE COURT: And on that point, I think arguably, yes,
19 communication with Gabriel gets repeated could
20 fall within -- could satisfy --
21 THE ACCUSED: Hmm.
22 THE COURT: -- this first element, but there would
23 be -- well, would there -- what's troubling you
24 about this and then I can address with the Crown
25 whether there's a way of dealing with it? Does
26 the Crown -- first of all, does the Crown rely on
27 any communication with Gabriel?
28 MR. MYHRE: No, it's more the communication has with
29 Ms. Capuano about Gabriel, about how he's using
30 Gabriel as a pawn to hurt her emotionally.
31 THE COURT: All right. And then tell me what's
32 troubling you about it, Mr. Fox, and I'll try and
33 find a way to fix it.
34 THE ACCUSED: I just wouldn't want a jury to think that
35 that might -- that my communication with Gabriel
36 maybe included in that since I have very frequent
37 -- or had until the time I was arrested very
38 frequent communication with Gabriel long after the
39 point of the first arrest where I was -- there was
40 the no-contact order. Now, I'm not sure, I mean,
41 there hasn't been any evidence submitted of my
42 contact with Gabriel.
43 THE COURT: Well, there was evidence that you were
44 copying Gabriel on most of the emails.
45 THE ACCUSED: Right, right. But, for example, my
46 telephone calls with Gabriel say on a weekly or
47 every few days speaking with him on the phone, but

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1 the jury never heard about that so I don't think
2 that that would be an issue, although under the
3 statute, that could be a problem.
4 THE COURT: And, as I think about it, Mr. Fox, it may
5 be part of the Crown's position that, by copying
6 Gabriel with a number of the emails that we've
7 seen, you were contributing to the harassing
8 effect on Ms. Capuano.
9 THE ACCUSED: Hmm. But then she also was copying him.
10 THE COURT: All right.
11 THE ACCUSED: Next, in paragraph 84, the next paragraph
12 there's a segment that reads [as read in]:
13
14 If the person who posted the material or sent
15 an email intended the person who read or
16 received it to bring it to Ms. Capuano's
17 attention...
18
19 THE COURT: And they did.
20 THE ACCUSED: I'm sorry?
21 THE COURT: And they did.
22 THE ACCUSED: Right, right. So that gets into the --
23 the intended is -- the intention of the -- the
24 speaker or the writer, I assume.
25 THE COURT: Yes.
26 THE ACCUSED: I wonder if it would be acceptable to
27 maybe clarify that a little bit for the jurors
28 because there is a lot of content on the website,
29 and some of the -- I mean, my position is that all
30 of the content on the website was not intended for
31 Ms. Capuano to -- to read. And if -- if that's
32 the case, then from what you have here, it seems
33 that the burden -- hmm, somebody would have to
34 establish or convince the jury that it was my
35 intention that she actually read or receive that
36 material, no?
37 THE COURT: Yes. Now, does it answer your concern if
38 you read on in paragraph 85 and I'm starting at
39 the second line [as read in]:
40
41 Keep in mind that material is not direct or
42 indirect communication with Ms. Capuano
43 unless it came to her attention.
44
45 THE ACCUSED: But, see, with that, if I write something
46 on the website with no intention of Ms. Capuano
47 seeing it --

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1 THE COURT: Ah, yes, that's a different issue.
2 THE ACCUSED: -- but it comes to her attention -- you
3 see, my big concern here is that Ms. Capuano --
4 THE COURT: How about this? How -- unless it was
5 intended to come to her attention, and it did.
6 THE ACCUSED: Would it be okay if we said "intended by
7 Mr. Fox to come to her attention"?
8 THE COURT: Yes.
9 THE ACCUSED: Thank you.
10 THE COURT: All right.
11 THE ACCUSED: In paragraph 86, and I know that Mr.
12 Myhre was just speaking with you about paragraph
13 86 a few moments ago, so I'm not sure what the
14 status of the wording of that paragraph is going
15 to be or if it's going to be removed or, but --
16 THE COURT: Mr. Myhre wants to think about that. It's
17 an alternative way of committing the conduct for
18 the offence and I've asked him to consider whether
19 the Crown needs to rely on that.
20 THE ACCUSED: Right.
21 THE COURT: But let's assume for now that the Crown
22 does with so rely on it, and so if you have
23 comments, perhaps let me know what they are.
24 THE ACCUSED: The -- well, the first line outside of
25 the question bracket, the phrase or term *directed*
26 *at* was used, and that is a term I've had issue
27 with with respect to Ms. Capuano's order of
28 protection in Arizona. Some people misconstrue
29 the term *directed at* to include, for example,
30 statements about Ms. Capuano, but which weren't
31 actually to her, and I would ask maybe we could
32 provide some clarification for the jury so that
33 they understand that *directed at* would mean, for
34 example, statements made to Ms. Capuano as opposed
35 -- as opposed to statements made about Ms. Capuano
36 but to other parties.
37 THE COURT: I see. Let me just check the language in
38 the *Criminal Code*. Well, it's threatening
39 conduct, and I think probably the intent here is
40 that it be that the threat part of is directed at
41 Ms. Capuano. So conceivably there could be a
42 statement to someone else that would amount to a
43 threat to Ms. Capuano. I'll -- I'll think about
44 that one --
45 THE ACCUSED: Okay.
46 THE COURT: -- here and I'll hear Mr. Myhre's
47 submissions on that, too.

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1 THE ACCUSED: Thank you.
2 THE COURT: Do we want to deal with that now, Mr.
3 Myhre, or while, if you wouldn't mind, Mr. Fox, to
4 deal with issues one by one and that's --
5 THE ACCUSED: Sure.
6 THE COURT: -- probably easier.
7 MR. MYHRE: My Lady, the thing that comes to mind with
8 that is one of the examples the Crown cites of
9 threatening conduct by Mr. Fox is posting the
10 pictures of Sage that Ms. Capuano perceives as
11 threatening to Sage, and he's not directing any
12 statement to Ms. Capuano or to Sage, but it is
13 conduct on his part that could be interpreted as
14 designed to instill a sense of fear.
15 THE COURT: I see. Would it help solve the problem,
16 Mr. Fox, and would it conform with your
17 understanding of the law, Mr. Myhre, if I were to
18 revise that slightly. The first line would stay
19 the same [as read in]:
20
21 Threatening conduct is conduct directed at
22 Ms. Capuano and her family that was used as a
23 tool of intimidation toward her...
24
25 And I would add that in:
26
27 ... and was designed to instill a sense of
28 fear in her.
29
30 As it now reads. Would that help, Mr. Fox?
31 THE ACCUSED: Yes, yes. I believe that would, yeah, it
32 would be directed at the issue.
33 THE COURT: And that's agreeable, Mr. Myhre?
34 MR. MYHRE: Yes, My Lady.
35 THE COURT: Thank you. All right.
36 THE ACCUSED: While we're on the topic of threatening
37 conduct in that just little paragraph though, Mr.
38 Myhre did bring up just a moment ago something
39 that I guess would be a bit of concern for me. On
40 -- when trying to determine or prove that
41 something was threatening conduct, is it the --
42 the perception of the person being threatened
43 that's relevant or the intention of the person who
44 is allegedly threatening is relevant? I believe
45 it's the intention of the person who's allegedly
46 threatening, right, if his intention was not
47 necessarily how the other party perceived it.

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1 THE COURT: I think it's both.
2 THE ACCUSED: Hmm.
3 THE COURT: It's the -- the intent of the person doing
4 the act is implicit in directed at Ms. Capuano and
5 her family and implicit in designed to instill a
6 sense of fear.
7 THE ACCUSED: Right.
8 THE COURT: And the understanding of the other person
9 is implicit in what I've said at paragraph 88,
10 conduct is threatening only if a reasonable person
11 in the same circumstances would find it
12 threatening.
13 THE ACCUSED: Now, there are some circumstances in this
14 case, some of the emails, for example, some of the
15 communication where statements that I made were
16 certainly not intended to be threatening at all,
17 for example, referencing as to my PAL, Mr. Myhre
18 might argue that she felt threatened or
19 intimidated by it, so is it threatening conduct
20 simply because she misinterpreted something or?
21 My understanding of the threatening conduct is
22 that there also must be an intent on the part of
23 the person engaging in that conduct. I mean,
24 otherwise -- otherwise, I think that there's a lot
25 of room for potential abuse there for people to...
26 THE COURT: All right. I understand your concern, and
27 I will revise either this passage here or I will
28 say something when I'm doing the description of
29 the position of the defence to say that it's --
30 essentially it's the position of the defence that,
31 on the face of the communication itself, the
32 reasonable inference is that it was intended
33 simply as information, not threatening, and that
34 Ms. Capuano's interpretation of it as a threat is
35 not a reasonable one or something along those
36 lines. All right.
37 THE ACCUSED: In paragraph 89, on the same page, the
38 second to last line that starts with the word
39 *ship*, referring to shipped firearms from Burnaby
40 to Los Angeles.
41 THE COURT: Ah, I might want to put those two lines,
42 that entire sentence in a slightly different way.
43 THE ACCUSED: If it helps at all, there's no dispute
44 that I certainly caused or sent my firearms to Los
45 Angeles.
46 THE COURT: What would you prefer that that say?
47 THE ACCUSED: I think *sent* would be the most generic.

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1 THE COURT: And you're prepared for it to say that you
2 sent the firearms or would you like it put in a
3 more neutral way that you must not take into
4 account the evidence about firearms being found in
5 Ms. Munoz' residence or something along those
6 lines in Carson, California?
7 THE ACCUSED: I would think for the purposes of the s.
8 93, just changing the *ship* to *sent* should be
9 probably sufficient. I mean, unless you'd rather
10 go with the other [indiscernible].
11 THE COURT: All right. Thank you.
12 THE ACCUSED: And if at any point you would like to
13 break for lunch, I have no issue with that.
14 THE COURT: All right. Okay. Let's see how we do --
15 THE ACCUSED: Sure.
16 THE COURT: -- and see how many more points you have to
17 make.
18 THE ACCUSED: In paragraph 90, and, sorry, there was
19 just a lot that were clustered in this one area,
20 but in paragraph 90, the third to last line, it
21 says "constantly referring to her website." My
22 concern is with the use of *constantly* because, as
23 far as I know, there was only two or three
24 references in the emails to the website and, given
25 that there were literally hundreds of emails, I --
26 that might give the wrong impression.
27 THE COURT: All right. I'll take that out.
28 MR. MYHRE: I'm sorry, what paragraph was that?
29 THE ACCUSED: Oh, that was paragraph 90, third to last
30 line.
31 THE COURT: All right.
32 THE ACCUSED: Also in paragraph 90 on page 21, on the
33 next page, the first line "an email saying Mr. Fox
34 was willing to shoot", the email in quest -- well,
35 not just in that email but in the entire universe
36 throughout my entire life I've never stated that I
37 was willing to shoot Ms. Capuano. The word that
38 was used was that I would have no qualms of
39 shooting Ms. Capuano. Maybe an --
40 THE COURT: Shall I change it to that?
41 THE ACCUSED: Maybe, please, if you don't mind?
42 THE COURT: Yes.
43 THE ACCUSED: In that same sentence it says also
44 "except for the risk of being caught". Now, in
45 that email though that wasn't the only qualifier
46 that was used, I also said that shooting someone
47 would be illegal and immoral, and so even -- even

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1 if there wasn't a risk of being caught, I was
2 still saying the fact that it's immoral would
3 prevent me -- would prevent me from doing that.
4 THE COURT: All right. I'll make a revision.
5 THE ACCUSED: Thank you. And then page 23, paragraph
6 107, the last line, "taking his email about
7 wanting to shoot her' and word *wanting* there,
8 maybe change that also to having no qualms about
9 it because certainly I would not want to shoot Ms.
10 Capuano, unless of course it's self-defence,
11 but...
12 THE COURT: All right.
13 THE ACCUSED: On page 24, paragraph 112, the term
14 *psychological or emotional security or wellbeing*
15 is used there, and you may recall in the past I
16 had expressed the concern about the uncertainty of
17 those terms. Maybe because I'm not from Canada,
18 those terms are unclear to me, but what -- do we
19 believe that this is -- that these are concepts or
20 words that the jury would have a fair idea on or?
21 THE COURT: Well, they are words that are used in the
22 case law.
23 THE ACCUSED: Right.
24 THE COURT: I think it was at this paragraph that Mr.
25 Myhre suggested, yes, it was, that I --
26 THE ACCUSED: Yeah.
27 THE COURT: -- add something along the lines of it's
28 not necessary for there to be ill-health or a
29 major disruption to life, and I could add
30 something like "so long as the fear is not of
31 trivial harm" or something like that.
32 THE ACCUSED: Hmm. Okay.
33 THE COURT: And, Mr. Fox, I know you're going to want
34 the same change about having no qualms --
35 THE ACCUSED: Right in 113.
36 THE COURT: -- in paragraph 113.
37 THE ACCUSED: Also on that same line it states "if the
38 risk was removed," could we mention also about if,
39 if it was also not immoral?
40 THE COURT: And did the email say illegal as well?
41 THE ACCUSED: I have a copy of it here, but I'm quite
42 certain it did. It would be illegal and immoral
43 and could result in one spending the rest of their
44 life in prison, I believe is how it's phrased.
45 Yes.
46 THE COURT: All right.
47 THE ACCUSED: Page 26, paragraph 119, on the fourth

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1 line again it makes reference to Mr. Fox shipped
2 his -- shipped the firearms.
3 THE COURT: Yeah, sent.
4 THE ACCUSED: Thank you. On page 27, point 3, I
5 actually had the same concern that you had brought
6 up about if those two points should possibly be
7 separated. But additionally I believe the way
8 it's phrased "while they were transported from his
9 residence to the Packaging Depot" seems to be
10 somewhat suggestive that -- that going to that
11 aspect has been conceded to.
12 THE COURT: "While they travelled"?
13 THE ACCUSED: Oh, well, no, what I mean is it's never
14 actually been established the firearms did get
15 transported from my home to the Packaging Depot.
16 That would be one of those --
17 THE COURT: I see.
18 THE ACCUSED: -- the that jury would have to determine
19 before they could determine the second point. Oh,
20 until they were released -- oh, yeah, yeah. First
21 they would have to determine that the firearms
22 were actually present at Packaging Depot before
23 they could determine whether they were in my
24 possessions to get there.
25 THE COURT: All right. So you'd like to see those
26 issues sub -- subdivided out and dealt with as two
27 separate issues?
28 THE ACCUSED: Well, that -- that would be one way.
29 Otherwise -- otherwise, we'd end up with a
30 compound statement there, right, where they would
31 have to address two points at the --
32 THE COURT: You're -- you're correct. You're correct.
33 So I'll deal with them separately.
34 THE ACCUSED: Okay. Thank you.
35 THE COURT: The only circumstances in which one can
36 essentially compound two issues is if there's
37 really no disagreement that, if one happened, then
38 the other happened, and if --
39 THE ACCUSED: Right.
40 THE COURT: -- one didn't happen, then the other didn't
41 happen.
42 THE ACCUSED: Okay. Let's see, page 29, the same issue
43 of [indiscernible] at the top, possession of his
44 firearms during transport from his residence, etc.
45 THE COURT: Oh, I'm on the wrong page. I'm sorry.
46 THE ACCUSED: Oh, sorry, page 29.
47 THE COURT: So, yes, we need to subdivide the two

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1 issues.
2 THE ACCUSED: And then in paragraph 37 -- [reading
3 quietly]. The second line says "While they were
4 in those places", again that is suggestive --
5 THE COURT: Well, that is now going to --
6 THE ACCUSED: Right.
7 THE COURT: -- that paragraph is going to have to now
8 come under a fourth issue.
9 THE ACCUSED: Right, right.
10 THE COURT: And the jury will only get to that fourth
11 issue if they've found that the firearms did go to
12 the Packaging Depot.
13 THE ACCUSED: In paragraph 139, there is some
14 clarification of what's meant by *possession*, and I
15 guess this stems from the discussions that were
16 had yesterday and the day before. However, the
17 way it's raised, it seems to suggest that the
18 firearms would be in my possession even if they
19 were still at home at that time because
20 technically, if I have them at home, they're still
21 under my control and I have access to them.
22 THE COURT: Well, they would be in your possession.
23 THE ACCUSED: Right.
24 THE COURT: But you wouldn't be committing an offence
25 because you're authorized to have them at your
26 home.
27 THE ACCUSED: Hmm, yes, that's true. Okay. Paragraph
28 140, it's just the same issue about "while they
29 were transported to the Packaging Depot" which
30 presumably that will all be changed when it gets
31 split into the two. And at the end of paragraph
32 140, where it talks about Agent Spizuoco's
33 testimony, one admission that was left out that
34 I'm hoping could be added in is his admission that
35 he has no knowledge of whether or not I was
36 present at Ms. Munoz' place while the box was
37 there. Clearly the suggestion there is that I may
38 have brought the guns down and then put them into
39 that box after that -- after they were delivered.
40 THE COURT: Whether or not you were present at Ms.
41 Munoz' residence when?
42 THE ACCUSED: Well, I didn't state --
43 THE COURT: When?
44 THE ACCUSED: -- present at her residence, but present
45 in the U.S. Between the time that -- well, I
46 believe I phrased it as before he seized the
47 boxes. It would have to be before he seized the

21
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1 boxes because I was in custody by then.
2 THE COURT: Let me just check his evidence. I don't
3 have a note of you asking him anything about
4 whether you were in the U.S.
5 THE ACCUSED: It was after we stood down because I had
6 a question, and then when we came back I asked him
7 two follow-up questions, one about the ammunition,
8 if they were all different calibres.
9 THE COURT: Oh, yes, I have it there, thank you.
10 THE ACCUSED: Okay.
11 THE COURT: In or around Los Angeles
12 THE ACCUSED: Oh, okay.
13 THE COURT: But since I've been talking about Carson,
14 perhaps we'll just say in California?
15 THE ACCUSED: Sure. If it helps at all, Carson is a
16 suburb of Los Angeles.
17 THE COURT: The jury might not know that.
18 THE ACCUSED: Right.
19 THE COURT: All right. Thank you.
20 THE ACCUSED: And finally paragraphs 141 and 142 again
21 say "while they were transported to the Packaging
22 Depot" or while they were in, etc. And that's
23 all.
24 THE COURT: Sorry, what's your issue with those?
25 THE ACCUSED: Oh, they say "while they were transported
26 to Packaging Depot" again, there the suggestion
27 from that would be that they were actually
28 transported --
29 THE COURT: I see.
30 THE ACCUSED: -- which would mean one --
31 THE COURT: But if we split the issues --
32 THE ACCUSED: Right.
33 THE COURT: All right.
34 THE ACCUSED: And I apologize for being so picky.
35 THE COURT: This is very useful, a very useful process.
36 Mr. Myhre, anything further? We can certainly
37 come back to it. It's not now or never.
38 MR. MYHRE: I wouldn't mind having a chance to reflect
39 on the issue of putting threatening conduct to the
40 jury.
41 THE COURT: All right.
42 MR. MYHRE: I might -- as we reviewed it again, I did
43 just note one thing, though, in paragraph 87, the
44 threat must be intended or that "the threat was
45 intended to be taken seriously," the case law
46 suggest that it's "intended to intimidate or to be
47 taken seriously," and I think those are -- that's

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1 an important distinction or an important area.
2 THE COURT: Well, this paragraph is trying to talk
3 about how much conduct does there have to be in
4 order for it to amount to threatening conduct, and
5 it says it doesn't have to be repeated, but it has
6 to be meaningful, essentially, taken seriously, or
7 intended to be taken seriously.
8 The earlier discussion has tried to talk
9 about the character of threatening conduct used as
10 a tool of intimidation, designed to instill a
11 sense of fear. I don't disagree with the notion
12 that the threat as defined in the case law to --
13 as being something intended to intimidate or to be
14 taken -- well, to be taken seriously speaks of the
15 magnitude, not the character of what is said or
16 done.
17 If your concern is that the idea of the
18 threat being an intimidating act or words, doesn't
19 come through, there may be a better way or
20 expressing that in this draft or somewhere else.
21 I'm not sure that it goes there, but I'll think
22 about it and perhaps you would, too. Mr. Myhre.
23 We should break for lunch. We've got Ms.
24 Clancy's application at 2:00, and after that we
25 can certainly come back to the draft, and there'll
26 be further opportunities clearly, I would think,
27 I'll be making revisions after the closing
28 addresses are done, but the more we can get
29 settled ahead of time, the better.
30 All right. Thank you.
31 THE CLERK: Order in court. This court stands
32 adjourned until two o'clock p.m.
33
34 (PROCEEDINGS ADJOURNED FOR NOON RECESS)
35 (PROCEEDINGS RECONVENED)
36
37 THE COURT: All right. Are we dealing with Ms.
38 Clancy's application now?
39 THE ACCUSED: I believe so, yes.
40 THE COURT: Is there anything else that should be dealt
41 with first?
42 MR. MYHRE: I do have a response to that one issue on
43 the charge so whatever order Your Ladyship wants
44 to do this.
45 THE COURT: Perhaps while that's in everyone's minds
46 before we switch gears.
47 MR. MYHRE: My Lady, my comments are very simple.

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1 After reflecting on it and discussing it with one
2 of my colleagues, it does seem to me that both
3 modes should be left in the charge simply because
4 we could -- the jury should have both modes
5 because they don't have to pick one. There is
6 also, you may recall, I mentioned that --
7 THE COURT: Because they don't -- I'm sorry? I missed
8 that?
9 MR. MYHRE: Just because some of them could say, well,
10 look, this is a lot of communication, some others
11 might say, well, look, that's not really that
12 much, I mean, if they were in a custody dispute,
13 but that same person might perceive some of it to
14 be threatening conduct.
15 THE COURT: I see.
16 MR. MYHRE: There is also the issue of -- I think the
17 only one that couldn't be said to be repeated
18 communication would be posting pictures of Sage on
19 the website and that's debatable, I think, because
20 of Mr. Fox referring her to the website, but in
21 any event...
22 THE COURT: All right. Thank you. So I'll leave both
23 modes and, Mr. Fox, there were a number of
24 comments you had that related to the second mode,
25 and the description of it, and I'll make the
26 changes that -- to that section that I indicated I
27 was going to make.
28 THE ACCUSED: Thank you.
29 THE COURT: Anything else on the charge at this time?
30 As I said, it's not now or never. You can
31 continue to make comments as things occur to you.
32 The important thing is to get it right, and make
33 sure it's balanced and fair.
34 THE ACCUSED: There is nothing further from me, My
35 Lady.
36 THE COURT: All right. Thank you. Ms. Clancy's
37 application then.
38 NATALIE CLANCY: My Lady, I've put out our arguments in
39 a -- in a letter to you, in a brief. We rely on
40 several cases, including the *Dagenais* case and the
41 *Dagenais* test.
42 THE COURT: Right. You're -- you're Ms. Clancy, I take
43 it?
44 NATALIE CLANCY: I'm Ms. Clancy. I should have
45 introduced myself
46 THE COURT: All right.
47 NATALIE CLANCY: With the Canadian Broadcasting --

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1 THE COURT: Mr. Myhre is going to be responding and Mr.
2 Fox, as well. I have a notice of application
3 which has some legal principles attached. It's
4 not very specific about what it is you're seeking.
5 In one area it says "access to exhibits, including
6 any video, photographs, audio and documents" at
7 the end of the trial, and in the other it says,
8 the other area it seems to confine itself to
9 firearms, any photographs or video involving the
10 firearms.

11

12 **SUBMISSIONS RE MEDIA FOR CBC BY NATALIE CLANCY:**

13

14 NATALIE CLANCY: Yes. Very specifically, it's standard
15 in a case like this, and many others for us to
16 seek access to exhibits to examine them to see
17 them, and then chose what to photocopy. In this
18 case, I have volumes and volumes off the website
19 and the information already, and I've had that
20 since for more than a year now.

21 But there are aspects of this case that are
22 new and came out at trial, and we intend to do an
23 explanation of this case a little after, so the
24 photographs and video having access to electronic
25 copies of that would be most helpful. I know in
26 other cases we've been just granted access to
27 exhibits to go look through them and choose what
28 we need to make copies of for the future.

29 In this case, we're very specifically asking
30 for electronic copies of any photographs,
31 particularly in relation to the ATF witness, and
32 any other photographs in the case, and video, of
33 course, but I don't believe there's been video.

34 THE COURT: All right. I'm still not completely
35 understanding what you're asking for and I -- that
36 part of the reason for that is that what you're
37 saying is a little bit inconsistent, as I
38 understand it, with what Ms. Brend said this
39 morning, which was that you were seeking access to
40 all the exhibits except -- I pointed out to her
41 that there are a few that relate to juror issues
42 that were sealed, and she said not interested in
43 those.

44 NATALIE CLANCY: We have no interest in that, just
45 evidence that the --

46 THE COURT: All right.

47 NATALIE CLANCY: -- jury would have heard that would

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1 have helped them make their decision. In the past
2 in cases like this we've gone downstairs and
3 they've let us have access to a box, and we have
4 taken photographs of things we wanted or chose to
5 photocopy things we wanted.

6 THE COURT: All right.

7 NATALIE CLANCY: In this case, there's specifically,
8 I'm aware of, photographs that were shown to the
9 jury and ideally in this modern age getting an
10 electronic copy is certainly much better than a
11 photocopy, if there's a way that Your Ladyship
12 could order an electronic copy be shared with me,
13 that would be ideal.

14 THE COURT: I don't have an electronic copy, and I
15 don't think the court has, but --

16 NATALIE CLANCY: The Crown does.

17 THE COURT: Well, that's the Crown.

18 NATALIE CLANCY: If it's a paper copy that I could
19 digitally see and take a photo of that, would
20 suffice.

21 THE COURT: So you're interested in the books of
22 material that are taken from the website that's
23 involved in this case?

24 NATALIE CLANCY: No, I would be interested in the book
25 of material that Mr. Fox provided where he has
26 provided other parts of emails that weren't in the
27 blue book as part of his defence. There was a
28 second black binder that I didn't have, that he
29 submitted to the court that had different parts of
30 -- of what was posted online, so that would be, if
31 I had access to it, I would choose to photocopy
32 that document.

33 The big binder I wouldn't because I already
34 have that material.

35 THE COURT: All right. So, you're not seeking the
36 Crown book of excerpts from the website.

37 NATALIE CLANCY: I --

38 THE COURT: Exhibit 2 --

39 NATALIE CLANCY: -- I think what Ms. Brend was trying
40 to say is ideally we would like access to all
41 exhibits so we could go look through them, and
42 give them back to the court, and we can select to
43 be photocopied. That's our ideal position, but --
44 and specifically we would like that and we would
45 like to have access to electronic photo --
46 electronic access to photographs, if that's
47 possible.

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1 THE COURT: So ideally you would like to see all of
2 the exhibits except the sealed ones.
3 NATALIE CLANCY: Yes.
4 THE COURT: And --
5 NATALIE CLANCY: And the opportunity to photocopy
6 selectively as set out in my -- my brief.
7 THE COURT: Can you show me where it says that because
8 I just --
9 NATALIE CLANCY: It's just there's case law that says
10 we had -- it -- it is part of --
11 THE COURT: No, I -- I'm not getting to the point at
12 which you support your application, but just to
13 know what the application is.
14 NATALIE CLANCY: What it is?
15 THE COURT: So, can you --
16 NATALIE CLANCY: So, if I clarify, we'd like access to
17 all exhibits, excluding anything that's sealed,
18 and if there was a way Your Ladyship could order
19 electronic access to photographs, that would be
20 ideal or even okaying the Crown to provide the
21 electronic version of photographs. A lot is
22 missed when you try to photocopy a photograph.
23 And they only have a black and white copier
24 downstairs, so a lot of the meta data, a lot of
25 the information is missed if we just photocopy it.
26 THE COURT: I have a colour photo -- photocopier.
27 NATALIE CLANCY: Well, when we go downstairs, and have
28 access to exhibits and copy, they only have a --
29 THE COURT: Oh, I see.
30 NATALIE CLANCY: -- black one.
31 THE COURT: I see.
32 NATALIE CLANCY: In a recent application in December
33 the Crown did order and we did get a coloured copy
34 by order, by specific order in another matter.
35 THE COURT: And are you seeking access to the audio
36 recording of a police interview with Mr. Fox?
37 NATALIE CLANCY: Yes.
38 THE COURT: And I'm just looking on the exhibit list to
39 see what else there is. All right. That's
40 helpful, thank you, and what I'd like to do next
41 is ask each of Crown counsel and Mr. Fox what
42 their position is concerning your application, and
43 then we'll go from there. Is there somewhere Ms.
44 Clancy can sit at the front of the courtroom?
45
46
47

(Jury Out)

Submissions re Media for Crown by Mr. Myhre

BAN ON PUBLICATION - INHERENT JURISDICTION

SUBMISSIONS RE MEDIA FOR CROWN BY MR. MYHRE:

MR. MYHRE: My Lady, I have thought about it over the last few hours, and I maintain the position I stated this morning. The Crown doesn't have any opposition to Ms. Clancy having access to any of those materials. I don't think Your Ladyship would need to go so far as ordering the Crown to provide digital copies.

The Crown wants to be sure that the court is aware of and controls the exhibits, but if Your Ladyship grants access to Ms. Clancy, I'm happy to email her digital copies of those particular photographs that were in the ATF exhibit.

THE COURT: All right. And have you considered what I raised earlier about the fact that the jury has not yet been asked to determine whether the body of material in the Crown book, together with some other alleged conduct, amounts to criminal harassment?

Now, I appreciate Ms. Clancy is not seeking that material in the Crown book, but she is seeking access to material in the defence book and some of that is similar material, defence binder, I should say. Have you considered that, Mr. Myhre?

MR. MYHRE: And do I have -- Your Ladyship is wondering whether I've thought about the fact that, you know, the Crown is saying that this, along with everything, amounts to harassment, has the Crown thought about whether promulgating that or allowing it to be further put out there would just perpetuate the harassment?

THE COURT: Yes. And the court would be in effect, if it is harassment, and if the defence binder is of a similar -- has content of a similar nature, is the court somehow implicated in furthering a criminal harassment, if it releases material intended for publication? There may be a couple of ifs in there that aren't accurate, but Ms. Clancy can correct me.

MR. MYHRE: My Lady, I think those considerations are the same as the ones that went into the Crown inviting the court to lift the publication ban. There's certainly a concern for Ms. Capuano's privacy but Ms. Capuano is content to waive that because she wanted other people to know that this

(Jury Out)

Submissions re Media for Crown by Mr. Myhre

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1 sort of thing was unacceptable, and the fact is
2 the website is out there. The website includes,
3 and Mr. Fox can correct me if I'm wrong, but it
4 includes the defence book, everything in the
5 defence book, as well.

6 THE ACCUSED: That is correct, yes.

7 MR. MYHRE: And the only thing I think the media or CBC
8 or Ms. Clancy would be doing with it would be
9 putting that in the context of other evidence that
10 was heard in the case, and so I don't have any
11 concerns about perpetuating harassment by
12 releasing the exhibits.

13 THE COURT: Thank you. Mr. Fox?

14

15 **SUBMISSIONS RE MEDIA FOR ACCUSED BY PATRICK FOX:**

16

17 THE ACCUSED: I have no opposition to the request, and
18 just as Mr. Myhre, if there's anything that I can
19 do to assist, I'd be more than happy to provide
20 any electronic copies of any photographs or
21 documents or anything else that she would like.

22 THE COURT: All right. And, Mr. Fox, you said this
23 this morning, and I want to make sure it's still
24 the case, and also Ms. Clancy is now present, are
25 you content that she have a copy of the audio
26 recording of your police interview?

27 THE ACCUSED: Yes, I am.

28 THE COURT: All right.

29 THE ACCUSED: For that matter, she may have a copy of
30 both of my RCMP interviews if she would like.
31 There was one in 2015 and then another in 2016.

32 THE COURT: Well, I'm not sure that the other one was
33 the subject of an exhibit.

34 THE ACCUSED: Right, right.

35 THE COURT: All right. Ms. Clancy, I'm content to make
36 the order that you're seeking. I think we are
37 going to have to go back over it a little bit more
38 precisely so that it's clear for Madam Registrar,
39 and it might be the -- the best way of doing that
40 might be for us to go exhibit by exhibit number.

41 Well, perhaps that's not necessary because
42 the one exhibit you're not seeking access to is
43 Exhibit 1, that's the Crown --

44 NATALIE CLANCY: If it makes it easier, My Lady, we
45 would like to have access to all of it. I could
46 look through in case there's something I'm
47 missing. I have a large volume of material on

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1 this file prior to there being a court case, so if
2 it makes it easier, we are seeking access to all.
3 I just know that's not what I'm going to be
4 photocopying. If it makes it easier, we'd like
5 access to all of those exhibits.

6 THE COURT: I suppose I would prefer to make the order
7 in the most restrictive way that conforms to what
8 you're seeking, so that it isn't automatically
9 repeated in the case of another applicant, for
10 instance, who may be in a different situation at a
11 different stage of the proceedings. So I need to
12 think ahead to that possible situation.

13 NATALIE CLANCY: And I also should clarify I'm not
14 seeking access to these exhibits to do anything
15 with them before this jury is sequestered. I'm
16 happy to wait until a time of your choosing, if
17 it's next week. I'm not in a rush to -- to do
18 anything with these exhibits publicly until after
19 this case is finished. So we're in absolutely no
20 rush.

21 THE COURT: Yes, that should certainly form part of
22 the --

23 NATALIE CLANCY: And I work in a unit that's mandate is
24 to only do stories in the public interest with
25 journalistic discretion, and I take the concerns
26 about perpetuating any future harassment of this
27 lady or this woman.

28 THE COURT: Thank you. So the order I'll make and I --
29 I'll say this, and then if it causes any concern
30 to any of you, you can let me know and we can
31 revise it as necessary.

32 Is that there will be access in the sense of
33 the ability to look at all of the exhibits except
34 the sealed exhibits, and I think I'm correct in
35 saying that all of the sealed exhibits relate to
36 matters concerning individual jurors, mostly at
37 the jury selection, that were clearly private.

38 And in addition, Ms. Clancy will be permitted
39 to make copies of -- I suppose it's all of the
40 exhibits except Exhibit 1.

41 And should this be confined, Mr. Myhre, and
42 Mr. Fox, to numbered exhibits rather than lettered
43 exhibits? The lettered exhibits have not gone and
44 will not go to the jury, and they include things
45 like some of the juror notes concerning juror's
46 individual situations, they include the draft of
47 the proposed charge that we were talking about

BAN ON PUBLICATION - INHERENT JURISDICTION

1 this morning, they include a written copy of the
2 opening instructions given to the jury at the
3 beginning of the trial. Do you wish to see those,
4 copies those?
5 NATALIE CLANCY: No.
6 THE COURT: No. All right. So we'll say the numbered
7 exhibits, this order relates to numbered exhibits.
8 And does that do it, access to all of them,
9 ability to make copies of all of them except
10 Exhibit 1?
11 NATALIE CLANCY: Perhaps just a matter of when.
12 THE COURT: Access, I would think whenever --
13 essentially at your convenience when the registry
14 can conveniently accommodate you, on your
15 assurance that there'll be no publication until --
16 I would suggest it'd be the jury's rendered a
17 verdict --
18 NATALIE CLANCY: Absolutely.
19 THE COURT: -- in case there's a jury who's unable to
20 render a verdict. Now, is any of that cause any
21 concern, does anything need to be clarified,
22 added, changed? Mr. Fox?
23 THE ACCUSED: I have no concerns.
24 THE COURT: Mr. Myhre?
25 MR. MYHRE: Me neither, My Lady.
26 THE COURT: Madam Registrar?
27 THE CLERK: No, I'm fine, My Lady.
28 THE COURT: Ms. Clancy?
29 NATALIE CLANCY: Thank you, My Lady.
30 THE COURT: All right. Thank you.
31 Now, Mr. Sheriff advised me that the juror
32 will be getting medical attention this afternoon,
33 and would telephone immediately afterwards. I'm
34 thinking that it's quite likely that I may suggest
35 that we simply put the next steps over to Monday
36 and Tuesday because, at the very best, we could be
37 -- if we don't do that, at the very best we would
38 be doing closing addresses tomorrow, Thursday, and
39 the charge on Friday morning, and as I think I
40 said this morning, that's not an ideal time to be
41 charging the jury and asking to start their deli
42 -- asking them to start their deliberations.
43 Do you have any preliminary thoughts about
44 that, Mr. Myhre? Well, perhaps I don't need any
45 submissions on that now. I suggest that we stand
46 down, hope to hear from the sheriff in an hour or
47 so, and then we go from there.

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1 THE ACCUSED: Go ahead.
2 MR. MYHRE: My Lady, I was just going to suggest maybe
3 I could leave my direct line with Madam Registrar
4 and she could give me a call if we have an update
5 on the juror.
6 THE COURT: Yes, please.
7 THE ACCUSED: I just wanted to make sure that I'm
8 clear, so we're suggesting that I would just stay
9 at the courthouse and then wait to see if we hear
10 back from --
11 THE COURT: Yes.
12 THE ACCUSED: Okay.
13 THE COURT: Yes, and then once we know what the
14 diagnosis/prognosis is for the juror, then we can
15 make a decision about next steps.
16 THE ACCUSED: Okay.
17 THE COURT: It may become more clear what the obvious
18 thing to do is once we know a bit more about the
19 juror's situation.
20 THE ACCUSED: Okay.
21 THE COURT: All right. We'll stand down.
22 THE CLERK: Order in court. This court stands down.
23
24 (PROCEEDINGS ADJOURNED)
25 (PROCEEDINGS RECONVENED)
26
27 THE COURT: I understand that the juror has had medical
28 attention and has been told that he may feel well
29 enough and be fit enough to continue tomorrow, but
30 that there is no way of knowing until tomorrow.
31 So, it would have to be a case, excuse me, of wait
32 and see until tomorrow.
33 Tomorrow is Thursday, so even if the juror is
34 fit and better tomorrow, the best we would be able
35 to do would be closing addresses tomorrow,
36 Thursday, the charge on Friday, and we face the
37 problem that we're then charging the jury before a
38 weekend, and a sunny one as well from the looks of
39 it.
40 The other possibility is that the juror will
41 not be better tomorrow and we'll be adjourning
42 things once again, and inconveniencing the 11 who
43 have come. It sounds as close to for sure as one
44 can be that the juror will be better by Monday.
45 There's never any knowing if someone else will be
46 ill by Monday, but I'm thinking the best approach
47 might well be to adjourn everything over to

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1 Monday. I'm assuming in this that, well, perhaps
2 I shouldn't make that assumption. Another
3 possibility would be to have the closing on
4 Friday, then the charge on Monday. Then there's a
5 gap of time, the weekend, after you've each made
6 your closing addresses and you may not wish to
7 have the jury go away having heard your closings,
8 and spend two full days away from the case.
9 Mr. Myhre?
10 MR. MYHRE: I'm content to proceed in the first way you
11 suggested.
12 THE COURT: Go till Monday?
13 MR. MYHRE: Just because it provides certainty rather
14 than everybody getting geared up for tomorrow
15 and --
16 THE COURT: There's never any complete certainty
17 because one never knows, but, Mr. Fox?
18 THE ACCUSED: I am open to either, though I would
19 prefer whatever would be the least inconvenience
20 for the jurors.
21 THE COURT: Well, one thing to take into account, as
22 well, is that this juror -- jury was told this
23 would be a three-week trial.
24 THE ACCUSED: Right.
25 THE COURT: And we're not even at the end of week two,
26 so it's not as though we're asking them to give an
27 additional week.
28 THE ACCUSED: Hmm.
29 THE COURT: They may have -- now, we did tell them
30 earlier in the week that that they would likely be
31 deliberating by tomorrow, but if you go back to
32 the beginning of the trial, they were asked to be
33 available for three weeks. So really we're
34 reverting to that timeline.
35 So, I'm inclined to do that. We will ask the
36 sheriffs to make 12 phone calls and let all of the
37 jurors know that they are now asked to come on
38 Monday morning at the usual time, please.
39 THE ACCUSED: And that's for the closing addresses?
40 THE COURT: Closing addresses and then deliberations
41 would be Tuesday. Thank you for raising that.
42 They'll want to know that. And I'm sure the
43 sheriffs will as well.
44 Is there anything else we need to deal with
45 between now and Monday morning?
46 MR. MYHRE: Might I just ask Mr. Fox something, My
47 Lady?

BAN ON PUBLICATION - INHERENT JURISDICTION

1 THE ACCUSED: My Lady, when I was downstairs earlier, I
2 was re-reading *R. v. George* about threatening
3 conduct in the context of criminal harassment.
4 Because of the uncertainty about if it's supposed
5 to be determined from the perspective of the
6 complainant or of the accused, and what it seems
7 to me in here is that it's supposed to be
8 evaluated from the perspective of the accused, the
9 intention of the accused, first, and then once
10 that's met as it being prohibited conduct, then
11 the perspective or the subjectivity of the
12 complainant is supposed to be taken into account.
13 And so I'm wondering if maybe we could word that
14 into the charge when we talk about the -- the
15 threatening conduct? Is that right or not? It
16 makes reference to, was it in *Croft* [phonetic]?

17 My understanding of it would be that first
18 there has to be an objective determination that
19 the complainant intended to have that effect, that
20 intimidating or threatening effect. Once that's
21 determined, then you would look at whether the
22 complainant was intimidated by it.

23 MR. MYHRE: It seems to me they both need to be there
24 and I think that's clear in the charge.

25 THE ACCUSED: Both? Sure, both can be there. I guess
26 it doesn't matter which order you evaluate them
27 in, either way they would have to determine that I
28 intended her to be threatened or intimidated.

29 THE COURT: All right. Thank you. I will be -- in
30 fact, I've started revising that portion, and I
31 will keep in mind the concern you've just raised,
32 Mr. Fox. Anything else?

33 THE ACCUSED: Not from me, My Lady.

34 THE COURT: Mr. Myhre?

35 MR. MYHRE: No, My Lady.

36 THE ACCUSED: Did you want to -- you didn't want to
37 mention that about [indiscernible] just in case, I
38 don't know, if there's a possibility it might
39 occur?

40 Earlier today Mr. Lagemaat came to speak with
41 me downstairs and there was some brief talk of the
42 possibility of maybe him taking over the case, the
43 remainder of the case or some of the closing
44 arguments, but it was just a very brief mention,
45 and so I'm just bringing it to the court's
46 attention that there is a possibility that that
47 might occur.

34
(Jury Out)
Proceedings

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1 THE COURT: All right.
2 THE ACCUSED: I mean, he's certainly very familiar with
3 the criminal -- criminal harassment aspects of the
4 case, and the firearms charge, he's not very
5 familiar with, but I think that's a very small
6 part of the case, but I will certainly keep you
7 apprised of any changes or decision making of that
8 effect.
9 THE COURT: If -- if -- hmm, when do you expect you
10 would know that, Mr. Fox?
11 THE ACCUSED: Sorry, I couldn't say. I mean, at this
12 point there's nothing definite anyway, and so I
13 would say at this point most likely it's not going
14 to happen. I mean, I don't know if it's conducive
15 with his schedule or if he's really even
16 particularly interested in it. He did express
17 some interest, but I would need to speak with him
18 further.
19 THE COURT: If he is to come in as counsel, then he may
20 see himself having a role in reviewing the charge,
21 for instance, making submissions, further
22 submissions on your behalf, and well, you might
23 want to do that Thursday or Friday if --
24 THE ACCUSED: One thing I had --
25 THE COURT: -- I suppose there's always Monday
26 afternoon, isn't there?
27 THE ACCUSED: One thing though that I can assure both
28 the court and Mr. Myhre of is that, if it would
29 cause any kind of delay, then it's not going to
30 happen. So it would only happen if it wouldn't
31 delay anything.
32 THE COURT: Well, thank you for advising that it's a
33 possibility. And if -- if it does come to pass,
34 then, as I think on it, we will have Monday
35 afternoon most likely to discuss any consequence
36 that that may have for the content of the charge
37 or anything else. Anything else before the end of
38 the day?
39 THE ACCUSED: No, My Lady.
40 MR. MYHRE: No, My Lady.
41 THE COURT: If something comes up tomorrow or Friday
42 that needs to be addressed, kindly contact the
43 scheduling and we'll arrange some sort of hearing.
44 THE ACCUSED: I would have no idea how to do that.
45 MR. MYHRE: You can contact Mr. Lagemaat to contact me
46 or --
47 THE ACCUSED: Mm-hmm.

35
(Jury Out)
Proceedings

BAN ON PUBLICATION - INHERENT JURISDICTION

1 MR. MYHRE: -- you could send you me fax [indiscernible
2 voice low].
3 THE ACCUSED: Okay. I don't anticipate anything will
4 come up though in the -- on my end.
5 THE COURT: All right. Thank you.
6 THE ACCUSED: Thank you, My Lady.
7 THE CLERK: Order in court stands adjourned to Monday
8 morning at ten o'clock a.m.
9
10 (PROCEEDINGS ADJOURNED TO JUNE 26, 2017, AT
11 10:00 A.M.)
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15 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