

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v. Fox*,
2017 BCSC 2361

Date: 20171110
Docket: 27178
Registry: Vancouver

Regina

v.

Patrick Henry Fox

**A publication ban (based on the Court's inherent jurisdiction)
prohibits the publication of the names of the two young people
referred to as "G." and "S." in these reasons.**

Before: The Honourable Madam Justice H. Holmes

Oral Reasons for Sentence

Counsel for the Crown:

M. Myhre

The Accused Patrick Henry Fox:

Appearing in person

Place and Dates of Trial:

Vancouver, B.C.
September 12, 13, 14, 22
and November 10, 2017

Place and Date of Judgment:

Vancouver, B.C.
November 10, 2017

INTRODUCTION

[1] A jury found Patrick Fox guilty of two offences: (1) criminally harassing Desiree Capuano, who is his former spouse, and causing her to reasonably fear for her safety or the safety of people she knows (contrary to s. 264 of the *Criminal Code*); and (2) being in possession of firearms at a place other than where he was authorized to possess them (contrary to s. 93(1) of the *Criminal Code*). The criminal harassment took place between January 11, 2015 and May 27, 2016 – throughout that period, on the Crown’s evidence in the trial – while the firearms offence took place between May 17, 2016 and June 3, 2016.

[2] The task now is to determine the appropriate sentences.

THE OFFENCES

[3] In outlining the circumstances of the offences, I bear in mind the principles in s. 724(2) of the *Criminal Code*, and the more detailed guidance in *R. v. Ferguson*, 2008 SCC 6 at paras. 16-18. Subsection 724(2) addresses how the facts are to be determined after a jury trial, given that the jury gives only its verdict, without reasons. Its material part reads as follows:

- (2) Where the court is composed of a judge and jury, the court
 - (a) shall accept as proven all facts, express or implied, that are essential to the jury’s verdict of guilty; and
 - (b) may find any other relevant fact that was disclosed by evidence at the trial to be proven . . .

[4] I will begin by outlining the circumstances of the criminal harassment offence.

Count 1: Criminal Harassment between January 2015 and May 2016

[5] In brief overview, Mr. Fox conducted a campaign to, as he put it, make Ms. Capuano’s life as miserable as possible, hoping to drive her to suicide if that could be done within the confines of the law. It was a campaign conducted by means of hundreds – probably thousands – of emails he sent her, and sometimes to people she knew, as well as by means of a website he created in her name. These communications were designed to embarrass and humiliate Ms. Capuano by

disseminating personal information about her, to undermine her relationships with her family members, friends, and employers and work colleagues, to ruin her financially by preventing her from keeping or gaining employment, and generally to intimidate her.

[6] Before I describe the criminal harassment in greater detail, I will briefly outline the relationship between Mr. Fox and Ms. Capuano.

[7] They first met in January 2000, in Arizona, where they both lived at the time. He was in his mid-twenties, and she was 19. They married in August of that year, and their son G. was born prematurely shortly afterwards.

[8] The marriage broke down the following year, and a high-conflict custody dispute followed. At one point, a joint custody order provided for G. to spend some of his time with Mr. Fox, who lived in California at the time, and some of his time with Ms. Capuano, who lived in Florida. That arrangement continued for a while, but by late 2001 or early 2002, G. was with Mr. Fox entirely and had almost no contact at all with Ms. Capuano for approximately ten years. Mr. Fox and Ms. Capuano have different positions about the reason for the change from shared custody to the absence or exclusion of Ms. Capuano as a parent.

[9] Contact between Ms. Capuano and G. resumed in mid- or late 2011, and so too did the custody dispute. Court proceedings in California eventually led to an order for joint custody under which G. would live mainly with Mr. Fox, and would visit Ms. Capuano on school breaks. That arrangement went relatively smoothly until, in late 2012, Mr. Fox advised Ms. Capuano that he was thinking of moving to Vancouver, BC, to take up a job offer, and he asked for Ms. Capuano's consent to take G. with him. Ms. Capuano did not agree, and Mr. Fox filed a motion with the California court seeking authority to take G. to Canada, and to have Ms. Capuano's access time with G. suspended.

[10] Ms. Capuano understood that Mr. Fox had been living and working illegally in the USA. Fearing that he would succeed in taking G. to Canada, Ms. Capuano on

two occasions, in late 2012 and early 2013, notified US immigration authorities of Mr. Fox's status in the USA, as she understood it, and his whereabouts. On both occasions Mr. Fox was removed from the USA without G.

[11] Mr. Fox has lived in Canada since early 2013, after he was removed from the USA for the second time. In the fall of 2013, G. began to visit him during school breaks, and continued those visits for most of the time until early 2016, when Mr. Fox was detained in custody on these charges (on June 16, 2016) after having been detained by US authorities the month before.

[12] Back in 2013, following his removal from the USA, Mr. Fox told Ms. Capuano that if she did not return G. to him, he would devote the rest of his life to destroying her, within the confines of the law. In or around early 2014, he created the website in Ms. Capuano's name containing a very large amount of private information about her and the people associated with her. The website includes a "welcome" message that includes the following:

The goal of this website is to increase awareness of Desiree Capuano, by informing the public of the atrocious, the despicable, and the downright evil things Desiree has done.

We hope that by publishing the truth, together with hard proof (e.g. police reports, court testimony, recordings) of the countless horrendous acts Desiree has been committing all her life, we may help others to avoid being manipulated, exploited and harmed by this seemingly charming and sweet sociopath.

[13] The website includes personal details about Ms. Capuano, as well as purportedly biographical details and information about her character, preferences, and history. It includes dozens, probably hundreds, of photographs of Ms. Capuano in various aspects of her life, sometimes also showing her children (including her younger son in his underwear), her current partner and her previous partners, and the interior of her home. The website details the location of the home, with maps.

[14] The website also details the history of the custody dispute, from Mr. Fox's perspective, and includes copies of the vast email correspondence between him and Ms. Capuano.

[15] Another section of the website focuses, individual by individual, on the people associated with Ms. Capuano. These include her younger son (S.), her mother and her father, her current partner and his mother, and dozens of her friends and work associates. A photograph of each person is shown, together with contact information and a description in, it seems, as much detail as Mr. Fox was able to gather.

[16] A further section purports to detail contact, by Ms. Capuano and people associated with her, with courts of different types of jurisdiction in the USA.

[17] Finally, a series of dozens of blogs or posts, most of them purportedly written by Ms. Capuano, contains content designed to humiliate and degrade her. For example, one post has Ms. Capuano purportedly declaring, in some detail, raging hatred of people of non-white ethnic background. Another post, entitled, "An Open Letter to All Prospective Employers: Why You Should Hire Me", speaks sarcastically and in vulgar language (purportedly in Ms. Capuano's voice) about why she should be hired, the given "reasons" all weighing heavily against her (e.g. "I've never accepted responsibility for anything -- which is okay because so far there's always been someone else to blame it on").

[18] In an email in March 2014, Mr. Fox told Ms. Capuano about the website. He told her that he had sent a link to the website to her colleagues at work, as, in fact, he had, and he taunted her that colleagues would read about what a fool and a poor parent she was, and would see her in her underwear. He sent generally similar emails and many others on countless other subjects over the course of the next several years. I will highlight a few examples.

[19] For example, in December 2014, shortly before the period of the indictment, Mr. Fox outlined in clear terms (in an email, "The Ugly Proof") his objective and the approach he would be taking. He emphasized that his approach was a long-term one: "I'm methodical and think things through. I look at the long term. Sometimes my plans take years to complete, but I always see them through". Mr. Fox also noted that he had a changed identity (as Patrick Fox) with a "squeaky clean

background”, that he travelled easily into the USA, and that he had handguns (although he noted, as he always did, that his statements and references to his firearms should not be taken as a threat). He claimed that for years he had been paying Ms. Capuano a salary through his company, and that he may choose to notify the IRS so that they could collect back taxes from her.

[20] Over the period of the indictment (as well as before that period) Mr. Fox sent Ms. Capuano a vast number of emails in which he told her about the various steps he was taking to humiliate her, to damage her reputation, to undermine her relationships with her children, her spouse, her friends, and her employer, and, he stated he hoped, to make her unemployable and homeless.

[21] He was always explicit about his intentions. In an email on July 23, 2014, before the period of the indictment, he said: “I will destroy you - slowly and incrementally ... [e]very moment of my life is focused on the single goal”. He said similar things through the period of the indictment. In a blog post on May 23, 2016, near the end of the period of the indictment, he struck out at critics of his website, and gloated that their criticism had increased the website’s public profile. He concluded that, “every day this website continues to make Desiree’s life a little more dreary”, and that, “[e]very day Desiree gets a few steps closer to that inevitable rock bottom”. He made similar comments to the RCMP officer who interviewed him after his arrest.

[22] Mr. Fox succeeded in many of his appalling objectives.

[23] He placed untenable challenges on Ms. Capuano’s relationship with G. His purpose in doing so he had outlined in an email in December 2014, shortly before the period of the indictment:

I know that the best way to hurt you, permanently, is emotionally, not through your reputation, finances, or career (remember I told you many months ago that that other stuff I was doing was just to distract you?). And what could be more effective than for your child to utterly despise you because of your own actions?

[24] Mr. Fox gloated about his success in damaging Ms. Capuano's relationship with G. He told Ms. Capuano in numerous emails that she was a terrible parent, and taunted her by saying that G. viewed her and her other, younger son with hatred and disgust. In another email, he told her that he had discussed with G. his plan to ruin her life, using G. as a pawn to do so, and that G. was "okay" with that plan. In an email with the subject line "Your favourite child?", he said he had told G. that Ms. Capuano preferred S. In emails in June and July, 2015, he told her that he and G., who was then around 14 years old, had been "having fun" at her expense by identifying 51 specific defects (which he then listed) relating to her personal appearance, her style of dress, her character, her cooking, and her parenting. In another email, he predicted that G. would be withdrawn and sullen on returning to Ms. Capuano's home, and said that "the misery that will bring you and your home is far greater than a court order for you to return him". These are just some of many examples. Most – probably all – of them were copied to G.

[25] Indeed, most of Mr. Fox's emails to Ms. Capuano, no matter the subject, were also sent to G. This compounded the humiliation Mr. Fox caused Ms. Capuano, and damaged her relationship with G. It no doubt also caused psychological harm to G. as well.

[26] With a reorganization within her company employer, Ms. Capuano lost her job as a systems analyst shortly before or during the period of the indictment. There was no clear evidence that the harassment was the reason that she was selected to be laid off. However, one may reasonably infer that the harassment did not help Ms. Capuano's position because it intruded significantly into the workplace, placing an extra burden on the employer, and it was seen to put other employees at risk. Ms. Capuano certainly saw the situation that way.

[27] Mr. Fox delighted in Ms. Capuano's loss of her employment. In an email in November 2015, he said: "You will soon be homeless; you have no money; nobody believes anything you say anymore; nobody is coming to your aid or defense; you

will not be able to secure another job as long as that website exists – and it's not going anywhere as long as you're alive".

[28] At another time, Mr. Fox made a thinly veiled threat to interfere with Ms. Capuano's partner's livelihood, by calling into question the partner's entitlement to the security clearance he required for his employment. Mr. Fox also posted personal information identifying the partner and the partner's mother, including the mother's place of work.

[29] The harassment was particularly insidious because Mr. Fox kept Ms. Capuano in perpetual fear of new ways he would devise to torment her. Mr. Fox's professional expertise is in information technology, and he appeared to Ms. Capuano to have an alarming ability to gain access to confidential information about her and the people in her life. In an email in late January 2015, he threatened to infiltrate and expose her most personal life:

Desiree:

As a show of good faith, I'll fill you in on one of the plans that I'm working on for you. What I'd like, very much, is to be able to add some "intimate" pictures of you to your web site. To do that, of course, I'd have to hire someone to get close to you, pretend to be interested in you. Eventually, gain your trust, then eventually sleep with you. That should take...what? About 3, 4 days? Difficult to find people that unscrupulous. But for the right price there's always someone willing to do what you want. Hooray America!

There's nothing criminally illegal about it. You may be able to pursue a claim in civil court, but I'm not going to worry about that.

Okay, good evening.

Patrick

In another email around that time, Mr. Fox casually told Ms. Capuano that he had acquired her medical records, "(unofficially of course)". Then, in an email in November 2015, he threatened future action of several types:

I was pretty direct when I told Detective Tuchfarber that my intention was to do everything in my power and capabilities to make your life as miserable as possible, and, if possible, to the point that you ultimately commit suicide. That would be my ultimate desire. But before you reach that point it is imperative that you experience as much misery, disappointment, and suffering as possible first. At this point in your life you have very little to lose

so there is not much incentive for me to actively publish your information. I shall wait, patiently, until you rise up a bit, THEN proceed with the billboard campaign around Phoenix; I'll wait until you actually have some financial significance, THEN publish your complete credit and financial history - including your social security number and birth certificate (not illegal as long as it's done outside the US).

[30] As for the other emails to which I have referred in discussing other aspects of the offence, these emails are but a few examples of a vast number of similar communications.

[31] In various of his emails, Mr. Fox reminded Ms. Capuano that he had firearms, and the ability to cross the border (into the USA) surreptitiously. In one email, he detailed the logistics of bringing his firearms into the USA and using them to kill Ms. Capuano, while also adding that he would never do so – despite his wish to – because to kill would be illegal and immoral. In an email in January 2015, he told Ms. Capuano that G. once asked him if he would shoot her, and he explained how he responded as follows:

He [G] once asked me if I would shoot you. I told him that murder is illegal and immoral and can result in spending the rest of one's life in prison. And that the rest of my life in prison is not a risk I'm willing to take. But otherwise, no, I would have no qualms about it; that that is how much I despise you for the things you've done and continue to do. ... To be clear, I told Tuchfarber the same thing. There is nothing illegal or threatening about /wanting/ to harm someone - as long as you don't act on it. I am reasonable and rational enough to know the difference, and to refrain from engaging in such activity.

And let me be absolutely clear on this point: I would never deliberately cause you physical harm, other than in self defense or defense of another. Though that is nothing special toward you - I have that rule for *ALL* people. Also, I emphasize that G brought up the question and I only responded to it truthfully.

There can be no doubt that these communications were meant to intimidate Ms. Capuano, despite the caveat Mr. Fox always included about remaining within the confines of the law.

[32] Ms. Capuano contacted various authorities in the USA and Canada at various times, but was unsuccessful in her efforts to have the website removed. Her employer, in the early days, tried to assist, but also did not succeed.

[33] As to Mr. Fox's emails, both before the period of the indictment and during it, she took different approaches in trying to stop or reduce them. She tried ignoring the offensive messages, or responding aggressively with sarcasm or insults, but nothing succeeded. The barrage of emails continued, the abusive nature of the content unchanged.

[34] Undoubtedly to thwart Ms. Capuano's efforts to have the website taken down, Mr. Fox moved it to a different server. Also, during the sentencing proceedings, when Crown counsel suggested that the Court impose a probation order with a condition requiring Mr. Fox to take down the website, Mr. Fox advised that he no longer owns or controls the website, having transferred ownership of it at around the start of the trial. I am told that the website remains online and publicly accessible.

[35] Mr. Fox submits that the jury's verdict may be taken as relating to the emails alone, and not the website, but I disagree. The existence of the website, with its harmful content, underlays much of the harm caused by Mr. Fox's emails. As I have noted, in some of his emails, he reminded Ms. Capuano of the website, or told her of new content recently or soon to be added. In one email, he asked her to let him know if anything on the website was inaccurate. In some emails, he told her about people whose attention he had drawn to the website. In some, he told her how many people had visited the website, and he sometimes included usage graphs. The harassment by way of the emails thus relied in large part on the existence and content of the website, even if Ms. Capuano did not personally read all of that content. She had a fair idea of what the website included, based in large part, though not entirely, on what Mr. Fox told her about it. His emails were part of the way in which Mr. Fox made sure that Ms. Capuano suffered the intended effects of the website.

[36] Throughout, and during these proceedings, Mr. Fox has maintained that the website and his emails do not amount to harassment because what they say is true. His position that there was no harassment is obviously inconsistent with the jury's verdict, but I will also make some comments about it.

[37] From the earliest stages, and continuing through these proceedings, Mr. Fox held firm to the view that all of his statements about Ms. Capuano were true and therefore incapable of amounting to criminal harassment.

[38] Mr. Fox's concept of truth in this context is somewhat elastic and disingenuous. For example, cross-examination in the sentencing hearing revealed that Mr. Fox's sole basis for describing Ms. Capuano as a "white supremacist" numerous times on the website was that her former partner owned a dagger decorated with a swastika design. In another example, Mr. Fox's sole basis for describing Ms. Capuano's current partner as having had "a life of chronic drug abuse" was Mr. Fox's assumption (without actual knowledge) that the partner used caffeine, which Mr. Fox understood to be a drug.

[39] But even if Mr. Fox was convinced that his statements were true, it is abundantly clear from the evidence in the trial, as well as the evidence and submissions in the sentencing hearing, that Mr. Fox's objective was to harm Ms. Capuano, not to provide information to the public. Purporting to provide information simply gave him a convenient vehicle for the harm he was intent on causing.

[40] I turn now to the firearms offence.

Count 2: Possession of Firearms in a Place Other than Authorized

[41] Mr. Fox had a licence in Canada to acquire and possess firearms, including restricted firearms, as well as an authorization to transport his restricted firearms to certain places under certain conditions. He committed the offence when he was in possession of his firearms in violation of the conditions, which was while the firearms went from his home in Burnaby, BC to a shipping depot, also in Burnaby, and while they stayed there until UPS picked them up and transported them into the USA.

[42] The firearms had left Mr. Fox's home packed inside the CT unit of a computer in one of numerous – likely between 15 and 25 – boxes of household items sent to the home in California of Mr. Fox's friend.

[43] Four handguns were in the computer, and another firearm, a Mauser rifle, disassembled, was in another of the boxes. A total of seven pistol magazines, as well as ammunition, were also found.

THE EFFECTS OF THE OFFENCES

[44] It is no surprise that Ms. Capuano lost friends as a result of the harassment, and had trouble keeping or regaining employment. She was also concerned for her own and her family's safety in their home. Her relationship with her partner suffered, particularly after he and his mother were brought within the circle of abuse and his career was threatened. Ms. Capuano offered to leave the relationship for the partner's and his family's sake.

[45] Ms. Capuano felt isolated, beaten down, frustrated, and powerless. She felt that Mr. Fox might be right when he frequently told her that he had designed a campaign that simply could not be stopped. The harassment was all the more insidious for this.

[46] Ms. Capuano testified that she struggled every day. She apologized to the friends and associates who had been drawn in to the circle of harassment, and she refrained from making any new friends. She became depressed, but tried to conceal her depression for the sake of her son S. She considered relinquishing custody of G., but concluded that even if she did Mr. Fox would not stop. She was also scared, always looking over her shoulder.

[47] Ms. Capuano questioned whether she had the strength to keep going. Evidently, it was only her inner strength that prevented Mr. Fox from achieving his stated goal of driving her to suicide.

[48] It should be noted that although Ms. Capuano was aware that Mr. Fox had firearms, and was afraid that he would use them against her, she was not aware until after Mr. Fox was charged that he had actually arranged to have his firearms transported from his home in Burnaby into the USA. The effects on her of the firearms offence were therefore irrelevant to the jury's verdicts. However, that

Mr. Fox committed the firearms offence leaves Ms. Capuano now yet more unsettled about Mr. Fox's intentions in the future.

MR. FOX'S BACKGROUND AND CIRCUMSTANCES

[49] The Court made orders for a pre-sentence report and a psychological assessment. A probation officer and Dr. Randall Kropp, of the Forensic Psychiatric Services Commission, were prepared to assist. However, Mr. Fox then stipulated that he would not participate unless the sessions were audio-recorded and copies of the audio-recordings provided to him. These conditions were not acceptable to the professionals, and the interviews and the psychological evaluation therefore did not proceed.

[50] Only scant evidence about Mr. Fox's background and circumstances is available, namely the evidence in the trial – which is mainly Ms. Capuano's evidence, as Mr. Fox did not testify in the trial – together with Mr. Fox's evidence and his submissions in the sentencing proceedings.

[51] Indeed, little more is known about Mr. Fox's background than I have already recounted in the course of explaining the background to the criminal harassment offence. Still unclear, at this point, is how and why Mr. Fox changed from using the name Richard Riess, in the summer of 2014, and whether Mr. Fox is a citizen of the USA or Canada or both, despite some documentary and other evidence on the latter point.

[52] Mr. Fox has evidently enjoyed an education. He worked in information technology in the USA and, through his own company or companies, in Canada. He appears to be intelligent and capable, although with a profound lack of insight into his offending conduct.

[53] Mr. Fox has no criminal record in Canada.

[54] However, under the name of Richard Riess, Mr. Fox was convicted in Arizona of perjury and of falsely claiming US citizenship (on October 31, 2007). He was

sentenced on July 8, 2008 to 24 months' imprisonment on each count, to be served concurrently, with credit for time served, followed by supervised release for three years.

THE APPLICABLE SENTENCING PRINCIPLES

General Principles

[55] The fundamental purpose of sentencing is to protect society and to contribute to respect for the law and the maintenance of a just, peaceful, and safe society. There are six main objectives in sentencing: (1) denouncing the offending conduct; (2) deterring the offender and other people from criminal conduct; (3) separating the offender from society when necessary; (4) rehabilitating the offender; (5) making reparation to victims or the community; and (6) fostering the offender's acknowledgement of responsibility and of the harm done to victims and the community.

[56] I will mention this next point only briefly. Mr. Fox submits that the *Criminal Code*, in setting out the fundamental purpose of sentencing as being to protect society, expresses an intent that is confined to the protection of people within Canada. He submits that the purpose does not extend to people such as Ms. Capuano in the USA.

[57] I am not able to accept that submission. It is clear that the *Criminal Code* uses the word "society" broadly, to refer to the public in the same way that the common law did before the enactment, in the *Criminal Code*, of the sentencing provisions that codified the common law. Parliament's intent, like that of the common law that Parliament codified, is to protect all of those damaged by offences which courts in Canada have the jurisdiction to address.

[58] Sentencing involves the exercise of a broad discretion in balancing all of the relevant factors to meet the applicable objectives. The relative emphasis given to the various objectives will vary according to the particular offence and the particular offender.

[59] Case authorities make clear that criminal harassment is an offence to which courts must respond, in the sentences they impose, in forceful and effective terms. Denunciation and general deterrence are therefore often the primary sentencing objectives. See, for example, *R. v. Finnessey*, [2000] O.J. No. 3316 (Ont. C.A.) at para. 12.

Available Range of Sentence

[60] The maximum available sentences for the offences provide general guidance about Parliament's view of the seriousness of the conduct they each encompass, while also recognizing that for each type of offence a very wide range of conduct may be involved.

[61] For the criminal harassment offence charged in Count 1, the maximum sentence is ten years' imprisonment.

[62] For the firearms offence charged in Count 2, the maximum sentence is five years' imprisonment.

THE PARTIES' POSITIONS

[63] The Crown submits that the extent and the huge scope of the harassment, together with Mr. Fox's malicious intent and his lack of insight into his conduct even now, would merit a sentence longer than the Crown seeks. The Crown seeks a somewhat shorter sentence because, the Crown submits, in all the circumstances it is important that Mr. Fox be subject to court-imposed conditions for as long as possible, to prevent him continuing the harassment. The Crown therefore seeks a sentence of imprisonment that, after credit for time in pre-sentencing custody, would also allow for a three-year probation order. Such an order is available in conjunction with sentences of imprisonment of up to two years.

[64] For the firearms offence, the Crown submits that the appropriate sentence is between six and twelve months' imprisonment to be served consecutively to the sentence for the criminal harassment. In the particular circumstances of this case, the Crown suggests a sentence of ten months.

[65] Mr. Fox has been in custody since June 16, 2016, when US authorities handed him over to the RCMP, thus for a total of approximately 17 months. With credit at one-and-a-half times, he would receive credit of 25½ months. The Crown seeks a “net” sentence (after credit for pre-sentencing custody, and with the two sentences consecutive to one another) of two years’ imprisonment less a day, followed by probation for the maximum available period, which is three years.

[66] Mr. Fox submits that the criminal harassment offence was not the serious offence the Crown describes. He submits that, with a few minor exceptions brought to his attention during the court proceedings, the content of his communications was true, and much of the information he communicated was publicly available. He submits that it was often Ms. Capuano who initiated the hostile email exchanges, and that his actions and communications toward her were no worse or different in their underlying character than her conduct and communications toward him.

[67] Mr. Fox submits that, in view of this background, both offences merit an absolute discharge.

DISCUSSION

Aggravating and Mitigating Circumstances

[68] The determination of a sentence must take into account the aggravating and mitigating circumstances relating to the offence and the offender, when considering where, within the applicable range of sentence, the particular sentence should fall.

[69] There are a number of aggravating circumstances in this case, relating to the criminal harassment.

[70] The harassment had a life-altering effect on Ms. Capuano.

[71] The harassment was conducted maliciously, with significant planning and a clear and sustained intent to inflict severe emotional harm.

[72] The harassment was conducted on a vast scale. It endured for the almost one-and-a-half year period of the indictment. It took many avenues, including by

victimising children. It made use of other people to damage Ms. Capuano, such as G. and Ms. Capuano's potential employers and her co-workers.

[73] As I have noted, Mr. Fox has a criminal record for two offences in the USA. However, the Crown fairly suggests that, in the circumstances, the record not be treated as an aggravating factor. I agree with that approach.

[74] Little appears to mitigate the offences.

[75] However, it is somewhat mitigating concerning the offender that Mr. Fox presented his defence in a polite, organized, and capable manner, and conducted himself throughout with apparent respect for the Court and its process.

Case Authorities

[76] No case is exactly like another. However, other case authorities help a sentencing judge identify the applicable range of available sentences and to gauge where, in that range, the particular sentence should fall.

[77] The Crown submits that other case authorities indicate that the applicable range of sentence for the criminal harassment is between one and four years' imprisonment. The Crown refers to the following cases, in which most of the offenders were sentenced to imprisonment for between two and three years, with one lower sentence (*R. v. Wenc*), and one for 4.5 years (*R. v. Taylor*):

- *R. v. J.S.M.*, 2006 BCCA 377;
- *R. v. Wenc*, 2009 ABCA 328;
- *R. v. Fader*, 2014 BCPC 327;
- *R. v. Cholin*, 2011 BCCA 116;
- *R. v. Kelly*, 2015 ABCA 332;
- *R. v. Malakpour*, 2008 BCCA 326;
- *R. v. Taylor*, 2014 BCCA 304.

[78] Mr. Fox submits that these cases do not assist at all, because in none of them did the complainant do as much harm to the accused as the accused did to the complainant.

[79] I do not agree, for reasons I will state briefly now and will develop shortly. Even if Ms. Capuano precipitated some of the aggressive or vulgar exchanges, Mr. Fox's response was out of all proportion. While Ms. Capuano sometimes tried to defend her position with strong words, Mr. Fox made it his life mission to destroy Ms. Capuano in every way, and to keep her constantly aware that he was dedicating his life to doing so.

[80] The cases on which the Crown relies involved sentences of different lengths, reflecting the particular circumstances. Each of them differs in one or more ways, sometimes significantly, from Mr. Fox's case. However, I agree with the Crown that, taken as a whole, the cases support the range of sentence the Crown puts forward.

Determining the Sentences in this Case

[81] The sentencing principles of specific deterrence and rehabilitation can have little play in the sentence for the criminal harassment, because Mr. Fox has no insight at all into his offending.

[82] It was beyond the scope of the trial to allocate fault, as between Mr. Fox and Ms. Capuano, in the various stages of their lengthy custody dispute. However, certain hurts obviously resulted, whether or not one party or the other was to be faulted for them. For example, whether or not – and it is unnecessary to make a finding on this point, and I do not do so – Ms. Capuano was to be faulted for notifying the US authorities that Mr. Fox was unlawfully in the USA, there can be no doubt that her doing so had a devastating effect on Mr. Fox: he was removed from the USA, and had no contact with G. until, in approximately October 2013, G. began to visit Mr. Fox in Canada during holiday breaks.

[83] However, that result or others, in the custody dispute, did not in any way justify Mr. Fox's reaction or explain it in a way the law can support or excuse.

Mr. Fox submits that Ms. Capuano's conduct in the custody dispute diminishes his own moral culpability in the criminal harassment, but I cannot agree.

Though temporarily stymied in the court proceedings concerning the custody dispute, Mr. Fox was not entitled to take his own action against Ms. Capuano outside those proceedings as he did in criminally harassing her. If anything, his conduct in doing so increases his moral culpability because he chose an essentially vigilante course of action.

[84] Mr. Fox submitted a large volume of emails in the sentencing proceeding, additional to those that were tendered in the trial, in an effort to support his position that his moral culpability is reduced because Ms. Capuano initiated any abuse, and inflicted more than he did. However, the emails do not bear this out.

[85] The emails show the types of conflicts, many of them trivial, which, unfortunately, can be typical in a high-conflict custody dispute: for example, arguments about G.'s travel arrangements to visit Mr. Fox, or receipts for expenses, or things purportedly said to G. by one parent or the other. Ms. Capuano's emails do show frustration and, sometimes, antagonism on her part, but to nowhere near the level of Mr. Fox's excessive responses. Mr. Fox uses every opportunity, in the emails, to criticize Ms. Capuano, often in terms that are sarcastic, extremely insulting, and, in at least one instance, gratuitously unkind when he knew her to be at a low ebb.

[86] It is troubling that Mr. Fox appears to sincerely believe that, in the email correspondence tendered in the trial and in the sentencing proceedings, he was more victim than abuser. The emails make abundantly clear that this was not so.

[87] As I have mentioned, Mr. Fox appears not to understand that harassment is not lawful even where the harassing communications are "true". (I put quotation marks around "true" for reasons I mentioned earlier, and also because, for many of Mr. Fox's communications, his statements represent his opinion, rather than objective fact.) In his sentencing submissions, he said he is baffled that anyone can view the situation as one of harassment, given what he describes as Ms. Capuano's

stronger position than his, and given the goal of the website to, as he puts it, inform the general public.

[88] What Mr. Fox's attitude disregards is that individuals are entitled to go about their lives without every detail relating to their personal lives -- even if true -- being conveyed to their family, friends, and co-workers, and published to the world at large. The harassing effect increases when the widely disseminated information is accompanied by disparaging opinion; it increases yet more when those who express concerns about the publication or who try to help the victim stop or resist the harassment are themselves brought within the circle of people to be harassed.

[89] Mr. Fox tormented Ms. Capuano in every way he could, taking considerable time and effort to do so. He delighted publicly in the harm he was causing her. In another example, in a blog post in October 2015, he noted that users from a particular hospital in her area had made several visits to the website, and he then located a hiring advertisement for a systems analyst at the hospital. He was amused that Ms. Capuano had evidently been considered for the position, but, after the visits to the website, obviously, in his view, would not be hired. Ms. Capuano had, in fact, applied for the position at the hospital, and was not hired.

[90] As I have explained, Mr. Fox did everything he could to humiliate and torment Ms. Capuano to the point that she feared reasonably for her own and her family members' safety. Her and their psychological or emotional well-being was under serious threat, and, because of Mr. Fox's comments about firearms and about shooting her, Ms. Capuano also feared reasonably for her physical safety.

[91] In all the circumstances, the sentencing objectives of denunciation and general deterrence require a significant sentence of imprisonment for the criminal harassment. I agree with the Crown's submission concerning the appropriate sentence for that offence.

[92] Firearms offences -- though often offences under s. 95(1) of the *Code*, rather than offences under s. 93(1), as here -- are often placed on a continuum, with

offences akin to regulatory infractions at the low end, and true criminal offences at the high end. The Crown does not suggest that Mr. Fox's firearms offence falls at the high end, or that the offence represented an attempt on his part to carry out a plan to enter the USA in order to shoot Ms. Capuano.

[93] Nonetheless, the firearms offence takes on a disturbing aspect in the light of the criminal harassment, with the later portion of which it coincided. Mr. Fox had deliberately made references to his firearms and to the logistics of entering the USA in order to shoot Ms. Capuano – although always with the caveats that he would not contravene the law – and he cannot have made the arrangements to transport his firearms without knowing that this action would seriously disturb her, or anyone else knowing of the situation, had they learned that he had done so. As Mr. Myhre noted during his submissions in the sentencing hearing, the firearms offence cannot be attributed to mere carelessness as, above all, Mr. Fox is not a careless person.

[94] Mr. Fox refers to cases where courts have imposed modest fines for offences under s. 93(1). However, I agree with the Crown that, in the circumstances, a more significant sentence is required to denounce the offence and to deter others from similar conduct, and, particularly in view of the poor prospects for rehabilitation, to specifically deter Mr. Fox.

[95] In my view, the sentences proposed by the Crown properly reflect the sentencing principles in light of the circumstances of the offences and those of Mr. Fox. Although a longer sentence of imprisonment could well be appropriate, in my view the overall sentence should not exceed two years less a day, so that a probation order may follow Mr. Fox's eventual release from custody and assist, as best can be done, with his rehabilitation. I have taken into account that the Crown made this submission on September 14, and that Mr. Fox has served more time in pre-sentencing custody since then. In my view, Mr. Fox should not be disadvantaged by the lapse of time between then and today.

SENTENCE

[96] Mr. Fox, I ask you to stand, please. I am going to impose sentence.

[97] On Count 1, which is the charge of criminal harassment, I sentence you to three years' imprisonment, followed by probation for three years on the conditions I will outline shortly.

[98] On Count 2, which is the charge of possessing firearms in a place other than where authorized, I sentence you to ten months' imprisonment.

[99] The two sentences of imprisonment are to be served consecutively.

[100] You will have credit for the approximately 17 months you have served in pre-sentencing custody. With credit at one-and-a-half times, this gives you credit of 25 ½ months.

[101] If the credit is applied against the total of the two consecutive sentences, which is three years and ten months, this leaves you a total of 20 ½ months remaining to be served.

[102] The three-year probation order which will follow your release will include the conditions in the written document provided to you and the Court on September 22, 2017.

[103] I will come to these terms shortly. Before I do, I will make the ancillary orders that are to be made.

[104] Mr. Fox, you are to have no communication with Desiree Capuano, James Pendleton, or S. That order is made under s. 743.21(1) of the *Criminal Code*.

[105] You are now prohibited from possessing any type of firearm, ammunition, cross-bow, or restricted or prohibited weapon, or explosive substance. That order is made under s. 109 of the *Criminal Code*, and its duration is for your lifetime.

[106] You are to provide a sample of bodily substance suitable for DNA analysis. That order is made under s. 487.051(3) of the *Criminal Code*. I have concluded that the order is appropriate, given the nature of the offences.

[107] You are also to pay a victim surcharge of \$200 for each offence, for a total of \$400.

[108] Returning to the probation order. It will apply for three years, and it will include the following conditions [as revised following submissions, below]:

Statutory

1. You must keep the peace and be of good behaviour.
2. You must appear before the court when required to do so by the court.
3. You must notify the court or the probation officer in advance of any change of name or address, and promptly notify the court or the probation officer of any change of employment or occupation.

Supervision

4. You must report in person to a probation officer at 275 East Cordova Street, Vancouver, BC, within 48 hours of your release from custody, and after that, you must report at least once every four days, in person, as directed by the probation officer.
5. You must attend, participate in, and successfully complete any intake, assessment, counselling or program as directed by the probation officer, including but not limited to attendance at Forensic Psychiatric Services for assessment, counselling, and treatment, except that you shall not be required to submit to any treatment or medication prescribed or recommended by the Forensic Psychiatric Services to which you do not consent.
6. If you do not consent to the form of treatment or medication which is prescribed or recommended by Forensic Psychiatric Services, you shall forthwith inform your probation officer as to the reason you do not consent.

7. When first reporting to the probation officer, you must inform him or her of your residential address and phone number. You must not change your residence or phone number without written permission from your probation officer, given in advance.
8. You must provide your probation officer with the particulars of your employment, including any self-employment. You must inform your probation officer within two business days of any change in your employment.

Restrictions on Movement

9. You must not leave British Columbia unless you have the written permission of the probation officer, and you must carry the permission when you are outside the province.
10. You must not be within 100 metres of the United States border.
11. Immediately upon your release from custody, you must attend the Burnaby RCMP Detachment at 6355 Deer Lake Avenue, you must present a copy of this order to a peace officer there, and you must accompany a peace officer to the location of all travel documents in your possession, including any passport, Nexus card, travel visa, or enhanced driver's licence. You must surrender all such items to the peace officer and thereafter not obtain any further travel documents.

Restrictions to Prevent Harassment

12. You must have no contact or communication, directly or indirectly, with Desiree Capuano, James Pendleton or [S.], or any of their friends, relatives, employers or co-workers, except you may have contact with [G.].
13. You must not disseminate, distribute, publish or make publicly available in any manner whatsoever, directly or indirectly, information,

statements, comments, videos or photographs which refer to or depict, by name or description, Desiree Capuano, James Pendleton or [S.], or any of their friends, relatives, employers or co-workers.

14. Within 24 hours of your release from custody you will take all necessary steps to ensure that any website, social media page or other publication, which you have authored, created, maintained or contributed to, which contains any information, statements, comments, videos, pictures which refer to or depict, by name or description, Desiree Capuano, James Pendleton or [S.], or any of their friends, relatives, employers or co-workers, including the website published under the domain www.desireecapuano.com, is no longer accessible via the internet or by any other means.
15. You must not use the internet or any computer or cellular network except as required to fulfill condition 14 for the purpose of employment, or for sending personal emails.
16. You are to provide any email address you use, and a list of any email addresses you correspond with, to your probation officer.

Weapons Restrictions

17. You must not possess, either personally or through another person, any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition or explosive substance, anything that resembles a weapon or firearm, any weapon as defined in section 2 of the *Criminal Code*, or any related authorizations, licences, or registration certificates.
18. Immediately upon your release from custody, you must attend the Burnaby RCMP Detachment at 6355 Deer Lake Avenue, you must present a copy of this order to a peace officer there, and you must accompany a peace officer to the location in Canada of all firearms,

cross-bows, prohibited weapons, restricted weapons, prohibited devices, ammunition or explosive substances and all weapons, imitation weapons including imitation firearms possessed by you or through another person, and any related authorizations, licences or registration certificates. You must surrender all such items to the peace officer. You are also to advise the peace officer of the location outside Canada of any of the items described in this condition (condition 18).

[109] Is there anything further which should be addressed? Does anything require clarification, Mr. Myhre, Mr. Fox?

[110] THE ACCUSED: There is one point of clarification that I would like. With respect to bringing the RCMP to where I might have any weapons or firearms, etc., shall I take that to mean only within Canada? Because it seems to me that I could not take them -- well, given the terms of the probation, I would not legally be able to bring them to firearms outside of Canada, since I can't leave Canada.

[111] THE COURT: Yes, I see your point. Mr. Myhre, how do you wish that to be addressed? There is a condition that he not go anywhere within X metres of the U.S. border.

[112] MR. MYHRE: It seems to me that if Mr. Fox does have other firearms or weapons in the United States that were not seized and destroyed by the ATF, probably the best thing to do would be to have him inform that officer of their whereabouts, so that that officer can take steps to inform the ATF and they can take whatever steps they think are necessary.

[113] THE ACCUSED: Well, I was thinking more -- well, okay. That's fine.

[114] THE COURT: Would it assist, Mr. Fox, if I modify that condition so that that is clear?

[115] THE ACCUSED: What I was hoping was that it could be modified to be restricted only to weapons or firearms that are within Canada. At this point, I am

still quite confident that, upon my release from custody, I am going to be deported, and so I'm not really overly concerned about many of these probation conditions. But I just wanted some clarification on that one particular one, because the way it's worded, literally I would have to take an RCMP officer to wherever those firearms are located in the U.S., which would seem somewhat nonsensical.

[116] THE COURT: All right. The final condition will be modified, so that it will read, the portion that requires you to accompany a peace officer "to the location in Canada of all firearms, cross-bows, etc.". Then there will be an additional sentence that will say, at the very end of that condition, you are also to advise the peace officer of the location outside Canada of any of the items described in this condition.

[117] Is there anything else that should be addressed?

[118] MR. MYHRE: Not from the Crown, My Lady.

[119] THE COURT: Mr. Fox?

[120] THE ACCUSED: Nothing that would require clarification, but I would like to just point out that with respect to the probation conditions, once it is determined officially that I have no legal status in Canada and am not permitted to be here, if I am released from custody I would be immediately upon my release be in violation of probation, but I'll deal with that at that time if it becomes an issue.

[121] THE COURT: All right. Now, one further matter I will raise, because Mr. Fox, you have raised this a number of times. You wanted an opportunity to apply to be given audio recordings of the court proceedings in the trial, I think you said.

[122] THE ACCUSED: Yes. However, I have decided I am going to have an attorney do that for me. I don't want to risk that request being denied because of lack of knowledge of relevant case law on the matter, and so I'd rather have someone who's very experienced in those matters address that for me. So that will be at some point in the near future, I am sure.

[123] THE COURT: All right, are you content to leave things that way, Mr. Myhre?

[124] The application, if it is going to be brought, should be to me. You understand that?

[125] THE ACCUSED: Yes.

[126] THE COURT: All right. Thank you then, we will adjourn.

“The Honourable Madam Justice H. Holmes”