

**30630-1
Vancouver Registry**

**244069-5
Vancouver Registry**

**In the Supreme Court of British Columbia
(BEFORE THE HONOURABLE MR. JUSTICE EDELMANN)**

**Vancouver, B.C.
September 9, 2022**

REX

v.

PATRICK HENRY FOX

**PROCEEDINGS IN CHAMBERS
(Summary Conviction Appeal)**

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(Summary Conviction Appeal)

Counsel for the Crown (Respondent),
appearing by videoconference:

J.L. Homeland

Appearing on his own behalf (Appellant):

Patrick Fox

INDEX

SUBMISSIONS ON HIS OWN BEHALF BY THE APPELLANT:.....	12
SUBMISSIONS FOR THE CROWN/RESPONDENT BY CNSL J. HORNELAND:	55

EXHIBITS

Nil

RULINGS

Judgment reserved.....	72
------------------------	----

Proceedings

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(VIDEOCONFERENCE COMMENCES)
(COUNSEL J. HORNELAND IN REMOTE LOCATION)

THE CLERK: Calling the matter of His Majesty the King
against Patrick Henry Fox, Justice.

THE COURT: Thank you.

CNSL J. HORNELAND: Good morning, Justice. I can
introduce myself now if you can hear me okay?

THE COURT: Yes, please, go ahead.

CNSL J. HORNELAND: Thank you. My name is Horneland,
first initial J. My last name is spelled
H-o-r-n-e-l-a-n-d. I appear for the Crown
respondent on this appeal.

THE COURT: All right. Thank you. Mr. Fox, if I could
just have you introduce yourself for the record --

THE APPELLANT: Yes, thank you.

THE COURT: -- and just spell your last name if you

THE APPELLANT: Patrick Henry Fox, the last name is
spelled F-o-x and I'm self-represented.

THE COURT: Thank you. So I've just been assigned to
this matter and I've been given a set of
materials. I just want to make sure that
everybody has the same materials.

So I've got one, two, three, four days of
proceedings at trial, I've got transcripts, so
four -- four books of transcripts with -- of the
proceedings at trial.

There is the notice of hearing dated -- or
it's filed on July 2nd, 2020, which is three pages
handwritten.

I also have handwritten materials filed on
September 3rd, 2021, which appears to be two,
three -- five pages.

And then I have two -- two respondent's books
of argument and materials, although one of them
says updated and corrected and is filed October
August 24th, 2022.

I gather that's the one that I should be
relying upon Ms. Horneland?

CNSL J. HORNELAND: Yes. Unfortunately, it sounds as
though you don't have the materials that are most
recent in terms of the transcripts. I don't
believe -- if you have four separate books of
transcripts, my suspicion is you don't have the

Proceedings

1 complete transcripts, so maybe we can start there,
2 Justice.

3 We recently filed and provided to Mr. Fox in
4 custody two volumes, which are a consolidated book
5 of transcripts. There -- this was a 10-day --
6 there were 10 days of proceedings, and they are --

7 THE COURT: All right.

8 CNSL J. HORNELAND: -- white Cerlox-bound books and
9 there is Volume 1 -- 1 and 2, and they were likely
10 filed I think around August the 24th, so fairly
11 recently.

12 Those are the transcripts that my most
13 recently filed argument from August 24 reference,
14 so I -- I -- I would hope that they were in the
15 court file and -- but just to answer your last
16 question, yes, the argument and the book of
17 authorities that I would be referring to today
18 are -- are those that were filed on August the
19 24th, and as I said Mr. Fox was provided with the
20 copies of those in the institution, so he should
21 have those today.

22 THE COURT: All right. What -- what I --

23 CNSL J. HORNELAND: And the updated and corrected, that
24 is -- yes.

25 THE COURT: All right. Well, what I am going to propose
26 -- I see Madam Clerk is -- is trying to locate
27 those transcripts. What I am going to propose is
28 we stand down for a few minutes to see if those
29 transcripts can be found, unless there's any --
30 sorry, I see that you wanted to say something, Mr.
31 Fox?

32 THE APPELLANT: Right, right. Well, I was going to
33 say, and I brought this up at the -- the previous
34 appearance, I think it was on August 8th, that
35 because I'm still in custody in B.C. Corrections I
36 still don't have access to any legal research
37 source material to prepare my argument and
38 submissions for this appeal, and this has been
39 a -- a circumstance that has been ongoing since
40 the appeal began back in 20 -- I think it was
41 2020.

42 So I had informed the court and the Crown at
43 that point that I still don't believe that I am
44 going to be able to be ready today either, because
45 I'm still in custody there and don't have access
46 to that material.

47 Based on that, I would first seek an

Proceedings

1 adjournment. If an adjournment can't be granted
2 again then we would have to proceed, but as I --
3 said I -- I can't possibly be ready at this point.

4 THE COURT: Sorry, when you say you don't have access
5 to legal research material what -- what material?

6 THE APPELLANT: I require access to case law, because
7 some of the issues that I'm raising in the appeal
8 deal with how the Immigration laws are supposed to
9 be imposed at a port of entry, and once that is
10 proven through the case law that would show that
11 the CBSA officer that testified was clearly lying
12 in her testimony, and then for that reason the
13 judge should not have accepted her testimony.

14 THE COURT: And sorry, in terms of access to legal
15 materials is -- is there not -- is there not some
16 access?

17 THE APPELLANT: There is at -- at North Fraser -- it's
18 slightly different at North Fraser and at Fraser,
19 but where I am right now, in North Fraser, there
20 is no access to searchable case law, meaning on
21 the computer. They do have books of case law, but
22 only up to 2011, and there is no way to search
23 them, so it's -- it's unrealistic to say that a
24 person could find what they're looking for in
25 there, because there is literally volumes and
26 volumes of old cases up to 2011 there.

27 So I would say essentially I have no access
28 to searchable case law at either North Fraser or
29 at Fraser.

30 THE COURT: So the computer -- just to be clear, the
31 computers at North Fraser don't have access to
32 CanLII?

33 THE APPELLANT: They're -- oh, they definitely do not
34 have access to CanLII. This is something I
35 proposed to them before. They refuse, because
36 they don't want inmates having any access to the
37 Internet, but I pointed out they could provide
38 access through a proxy server, so that we would
39 only be able to access the CanLII website and
40 nothing else, but they refuse to do that.

41 And the single computer that they do have in
42 the law library has case digests, but only the
43 digest, so it's just a one - paragraph brief summary
44 of each of the cases.

45 THE COURT: All right. Ms. Horneland, have you -- are
46 you -- you familiar with this --

47 CNSL J. HORNELAND: Yes. Sorry to interrupt, Justice.

Proceedings

1 I have heard this from Mr. Fox's justification and
2 reason for asking for an adjournment on five
3 previous occasions he's been before this court.
4 We're on a sixth hearing date.

5 He's also made this argument in respect of
6 his need to adjourn -- or need to have counsel
7 appointed rather, in two separate applications
8 before this court for appointment of counsel,
9 citing need to access legal research and resources
10 and -- and relying on that to ask the court to
11 appoint counsel for him.

12 So the issue has been thoroughly canvassed
13 over the approximate two years that this matter
14 has been outstanding and his applications to have
15 counsel appointed were dismissed, the court
16 finding on each occasion that he was equipped and
17 adequately in a position to make his own arguments
18 in respect of the grounds that he is alleging.

19 And I have to oppose his application to
20 adjourn today, because we have as I said canvassed
21 this issue before the court and the Crown is of
22 the view that, based on the grounds of appeal that
23 Mr. Fox wishes to proceed on, we have all of the
24 materials required -- he's had them in hand for
25 over a year essentially. Nothing has changed.
26 And Your Honour, it just seems to be a constant
27 delay -- or sorry, Justice, a delay tactic on the
28 part of Mr. Fox.

29 I can also advise that we have in the past
30 been happy to provide Mr. Fox with authorities and
31 have done so that -- when he has requested them
32 and so, if he had access to digests in which to
33 have the full case decision we'd be more than
34 happy to provide them to him, but he has not done
35 so and he does write to us, so we are in
36 communication with him, but we haven't received
37 such requests.

38 So, Justice, I -- I can say I am opposed to
39 this adjournment. We're on our sixth hearing
40 date, and I do feel that Mr. Fox has had the
41 materials required and more than adequate time to
42 prepare for this hearing date.

43 We had a prehearing conference on August the
44 10th, specifically to ensure that Mr. Fox would be
45 ready to proceed today and -- but here we are.
46 He's asking for an adjournment on the date of the
47 hearing, and I'm troubled by the continued lack --

Proceedings

1 waste of judicial resources because the -- the
2 matter continues to proceed in this fashion.

3 So subject to any questions Justice may have,
4 those are my submissions.

5 THE COURT: All right, but just to -- just to be clear,
6 Ms. Horneland, your -- your understanding of the
7 situation at North Fraser is that there's access
8 to cases from -- on -- on paper from pre-2011
9 the description given -- you -- you have no
10 information contrary to the description given by
11 Mr. Fox, as to what is available to him at North
12 Fraser?

13 CNSL J. HORNELAND: No, I don't -- I don't, Your
14 Honour -- Justice. I can't refute that. I think
15 more my point is that the matter has been
16 outstanding for so long and based on a very dated
17 notice of appeal that Mr. Fox has had ample time,
18 if he felt that full case law in a digest form was
19 required, he -- he could have requested it.

20 He also -- the view of this court of two
21 previous justices was that he had [indiscernible]
22 and could make the argument on the grounds that he
23 was to proceed on as it stood at that time, and so
24 really I think that what the court was -- was
25 saying is Mr. Fox's view that immigration law is
26 relevant to his appeal is not shared by the court
27 and is not shared by the Crown.

28 His grounds that he is attempting to advance
29 are essentially that the court erred in its
30 assessment of credibility of a witness and erred
31 in its application of law for the test to be
32 applied for breach of probation.

33 The immigration laws that he's referring -
34 essentially, he's -- he wishes to argue that the
35 main witness in this case failed to properly apply
36 immigration laws, and therefore she should not
37 have been found credible, but of course the judge
38 made his decision based on what that immigration
39 officer and key witness testified to, not based on
40 what theoretically she ought to have done.

41 And I pause to note that these arguments that
42 Mr. Fox is making were ones that he made very
43 thoroughly over the course of the 10 days of
44 proceedings at trial, so this matter has been
45 going on now for four years, that he has been
46 trying to advance this argument, which a
47 Provincial Court judge and two justices of this

Proceedings

1 court really found to have no merit, so...

2 THE COURT: All right. Mr. Fox -- sorry, please go --

3 did --

4 THE APPELLANT: I -- I did want to say I strongly

5 disagree with the Crown's claim that they had

6 offered to provide case law or to assist me with

7 that in this case.

8 I have other appeals currently before the

9 Court of Appeal and I am working with David

10 Layton. He's representing the Crown in that. In

11 those cases the Crown has been assisting me with

12 case law and such, but on this matter there has

13 never been any offer that I'm aware of from the

14 Crown to provide any assistance like that.

15 And also I wanted to say that I disagree with

16 the Crown's current characterization or

17 representation of the arguments that I'm raising.

18 I don't agree with how she -- how she presented

19 them just now.

20 THE COURT: All right. So what -- what I'm going to --

21 to propose, given -- and -- and I have -- I have

22 reviewed some -- some of the conference notes

23 in -- leading up to today's hearing some what

24 briefly.

25 What I'm going to propose is given the --

26 that this is a rather dated matter that we will

27 we'll proceed with the appeal. You can make

28 your -- the argument that you're seeking to make.

29 To the extent that you feel there is an

30 unfairness that results from you being unable to

31 present case law, you can explain that to me in

32 the context of the argument that you are making,

33 and it may be that at the end of the day I find

34 that I'm -- it will -- it will be unfair for me to

35 make a decision in this appeal without you having

36 the opportunity to canvass the case law further,

37 and I can give a direction to that effect in -- in

38 the course of the hearing today, but we will go

39 ahead with the -- go ahead with the hearing, given

40 how dated the matter is and -- and what's led to

41 us being here today, assuming, Madam Clerk, have

42 we been able to find the transcripts?

43 THE CLERK: Yes. We don't need to stand down. I have

44 asked them to deliver them.

45 THE COURT: They're going to be delivering -- they're

46 going to be delivered.

47 THE CLERK: Yes.

Proceedings

1 THE COURT: All right. So we've found the transcripts,
2 and you have a copy of those transcripts, Mr. Fox?
3 THE APPELLANT: Yes.
4 THE COURT: All right. In which case what -- what I'm
5 going to do is ask you if you can go ahead and --
6 and give me the substantive argument on the appeal
7 and then if there are parts that you say are
8 missing because you don't have the case law, then
9 you can explain that to me in -- in terms of what
10 it is that you say creates an unfairness in the
11 circumstances, all right?
12 THE APPELLANT: Okay.
13 THE COURT: I -- I can tell you that I am somewhat
14 familiar with immigration law and -- and the law
15 around the border, in terms of the -- the context
16 is quite familiar to me from my practice before
17 being appointed, if that's of assistance to you.
18 THE APPELLANT: Okay.
19 THE COURT: All right. So please
20 CNSL J. HORNELAND: Justice --
21 THE COURT: Ms. -- Ms. Horneland?
22 CNSL J. HORNELAND: Yes, thank you.
23 Before we begin I -- I noted that there
24 are -- Justice, you -- you have the first notice
25 of appeal that was filed on July 2nd, 2020. We
26 should be proceeding on an amended notice of
27 appeal that was filed November 17, 2020.
28 That was filed by counsel who was assisting
29 Mr. Fox, and it is the most recently filed notice
30 of appeal, so that should be the one that we're
31 proceeding on. I did --
32 THE COURT: All right.
33 CNSL J. HORNELAND: -- provide it, but the court didn't
34 have it at our last appearance, they had misplaced
35 it, so I provided a copy at the last day before
36 hearing, so --
37 THE COURT: Sorry, is that in your -- is that in your
38 book or is it --
39 CNSL J. HORNELAND: Yes.
40 THE COURT: No.
41 CNSL J. HORNELAND: No, Your -- no, Justice, it isn't,
42 but we did recently provide one to Mr. Fox, as
43 well, and we couriered our books to him and the
44 transcripts, so I wonder if he might have a copy
45 of it with him or perhaps Madam Registrar can look
46 in the court file, as I said.
47 THE CLERK: I'll --

Proceedings

1 CNSL J. HORNELAND: Alternatively, my -- my -- I was
2 going to say, Justice, alternatively my paralegal
3 from my office, who is assigned to this matter, I
4 believe is in the body of the court and she can
5 certainly obtain a copy of that amended notice, if
6 need be, and provide it to the court.

7 THE CLERK: I only have the June 2020 --

8 THE COURT: Madam Clerk appears to only have the June
9 20 -- sorry, the July 2nd, 2020?

10 THE CLERK: I can show you this --

11 THE COURT: Or, sorry, the -- I have a July 2nd, 2020,
12 and then argument.

13 CNSL J. HORNELAND: Well, Justice, I propose that we
14 proceed as follows. In my argument, at page 7, I
15 have excerpted the grounds as they were written
16 essentially in that amended notice dated November
17 17, 2020, and in the interim if -- if we -- we can
18 proceed with Mr. Fox's submissions and I can
19 impose on -- on Ms. Carmen [phonetic] my --

20 THE COURT: Oh, yes, I have this one.

21 CNSL J. HORNELAND: Thank you.

22 THE COURT: One moment. I think that we found the
23 November 17th amended notice of application.

24 All right. So do you -- do you have a copy
25 of this Mr. Fox?

26 THE APPELLANT: I do have a copy of that, but I did
27 want to say with respect to the amended notices of
28 appeal that Ms. Brown had filed in the process of
29 the 684 application, she had changed or rephrased
30 some of the issues that I was seeking to raise and
31 then she had added a few herself.

32 The ones that she had added I have no
33 intention of proceeding with, because those are
34 matters of law that are far outside the scope of
35 my knowledge or capabilities on, and I'm a little
36 bit concerned with the wording or with the way
37 that she had rephrased the issues that I was
38 seeking to raise.

39 And sorry, this isn't fresh in my memory
40 because it's been some time now since I have
41 looked at them, so I would need to refresh myself
42 on them, but I -- I did want to raise that issue,
43 that I have a bit of concern that Ms. Brown had
44 changed the issues that I had wanted to raise a
45 little bit.

46 And I don't have a copy of the original
47 notice of appeal that I had filed. That wasn't

Proceedings

1 provided to me when the Crown provided me some
2 stuff recently, and I notice that you had also
3 mentioned, My Lord, that there were a few
4 handwritten documents that you have in the court
5 file.

6 THE COURT: Yes.

7 THE APPELLANT: I -- I don't have those either.
8 Unfortunately --

9 THE COURT: The September 3rd, 2021?

10 THE APPELLANT: No. I don't have -- a lot of the
11 documents and the material that I had relating to
12 this appeal and the original offence or the
13 original trial matter have been lost, because each
14 time I get released from custody and then
15 rearrested I lose all of the material that I had.
16 So I really just have what the Crown had provided
17 me a couple of months ago.

18 THE COURT: All right. And so in terms of the
19 material -- I mean this is material from you.

20 THE APPELLANT: Right.

21 THE COURT: Do you want me to consider this -- the
22 this handwritten material or should I not be
23 considering it?

24 THE APPELLANT: I -- I don't even know what it is.

25 THE COURT: All right. Well, what I -- what I am going
26 to propose is I'm going to hand this to -- I
27 believe there's a copy -- is there a copy on file?

28 THE CLERK: I did -- I haven't seen this one, but I'll
29 keep looking, Justice.

30 THE COURT: All right. That's fine. So why -- why
31 don't -- because it doesn't look like the
32 original, so that's the -- that's the handwritten
33 document that I have.

34 THE CLERK: Sorry, Justice, unfortunately my -- I think
35 the registry misunderstood me. They didn't
36 deliver the transcript and I'm still -- they are
37 still searching right now, so --

38 THE COURT: All right. Thank you.

39 THE APPELLANT: Okay. So it looks like this is just a
40 letter to Ms. Horneland that I had sent some time
41 ago. I can't imagine that it would have any real
42 relevance or significance in these proceedings.

43 THE COURT: All right. So that's not something that
44 you'd like me to consider -- I mean they're --
45 they're written submissions. I -- I -- you
46 either -- it's up to you as to whether those are
47 submissions you'd like me to consider or not.

Proceedings

1 THE APPELLANT: I -- I don't really have an opinion
2 either way on it.

3 THE COURT: Well, I -- I -- if you want me to consider
4 them, I will read them and consider them; if you
5 do not want me to consider them, I won't.

6 THE APPELLANT: All right. May I have -- may I have a
7 moment, please, to just read it --

8 THE COURT: Please.

9 THE APPELLANT: -- in its entirety?

10 THE COURT: Please go ahead. I don't -- and just while
11 we're -- while -- while Mr. Fox is looking at
12 that, Ms. Horneland, is your understanding of
13 these two -- I'm just looking at the two notices.
14 It appears to me that the substance of the July
15 2nd notice has simply been copied almost --
16 essentially verbatim into the November 17th
17 notice.

18 Is that your understanding of these two
19 notices?

20 CNSL J. HORNELAND: Yes.

21 THE COURT: And then there's additional --

22 CNSL J. HORNELAND: Yes.

23 THE COURT: -- with -- with additional grounds.

24 CNSL J. HORNELAND: Yes, Justice, that is my --

25 THE COURT: All right.

26 CNSL J. HORNELAND: -- understanding as well.

27 THE COURT: All right. And your understanding is there
28 is nothing in the June 26th notice that has been
29 removed?

30 CNSL J. HORNELAND: No, Justice, nothing was removed,
31 simply a few grounds were added and --

32 THE COURT: Okay.

33 CNSL J. HORNELAND: -- I will note that when we were
34 here before the court August 10th, before Justice
35 Winteringham, we confirmed that Mr. Fox would be
36 proceeding on the amended notice filed November
37 21 -- sorry, November 17, 2021.

38 THE COURT: It's 2020, I believe.

39 CNSL J. HORNELAND: And -- 2020, thank you -- and that
40 the previously filed memorandum of argument that
41 were prepared by his counsel, who had been
42 appointed to assist him on his s. 60 -- 80 -- 684
43 application, were also provided to him. So he has
44 her argument, but also her summary of his argument
45 that he wished to make without her, the s. 684
46 application, so she's provided those materials to
47 him on roughly around August 24, so he should have

Proceedings

1 those in hand as well.

2 THE COURT: All right. Mr. -- Mr. Fox?

3 THE APPELLANT: With regard to what the Crown had just
4 stated, I do want to point out that at the
5 previous appearance in this matter, when I said
6 that we could proceed on the amended notice of
7 appeal, at that point the Crown hadn't yet
8 provided me the amended notice of appeal and I
9 hadn't seen it in who knows how long. So it was
10 provided to me, as the Crown had said, I think
11 around August 24th.

12 And with respect to this letter there is some
13 information in here I believe that might be
14 beneficial to the court regarding the
15 circumstances and such. So, yes, I would like the
16 court to consider this.

17 THE COURT: All right, in which case I will -- perhaps,
18 Madam Clerk, if you could just hand that back to
19 me?

20 THE CLERK: Yes.

21 THE COURT: All right. So I -- I will consider those
22 written -- these written submissions then. So you
23 have these -- this September 3rd, 2021, letter,
24 Ms. Horneland?

25 CNSL J. HORNELAND: I do, thank you, Justice.

26 THE COURT: Thank you. All right. Okay. So just so
27 that you understand, Mr. Fox, I've -- I've
28 reviewed the two notices. The -- all of the
29 grounds in the July 2nd notice --

30 THE APPELLANT: July 2nd of --

31 THE COURT: July 2nd, 2020 -- so there's two notices,
32 one is July 2nd of 2020 and then an amended notice
33 November 17th of 2020.

34 THE APPELLANT: Okay.

35 THE COURT: And I have reviewed the grounds in the July
36 2nd note -- the original notice.

37 THE APPELLANT: Okay.

38 THE COURT: Those have all been copied into the -- or
39 substantively copied -- there has been some minor
40 corrections where --

41 THE APPELLANT: Okay.

42 THE COURT: -- referring to you in the third person
43 instead of the first person and -- and things like
44 that, but otherwise they are verbatim --

45 THE APPELLANT: Okay.

46 THE COURT: -- they're -- they're verbatim what was in
47 your original notice. The only difference appears

Proceedings

1 to be that there are additional grounds.
2 THE APPELLANT: Right.
3 THE COURT: And -- and you're -- you've -- you've given
4 me your position with respect to those additional
5 grounds.
6 THE APPELLANT: Right.
7 THE COURT: Whether you want me to consider the
8 arguments that were prepared by your counsel on
9 those grounds, I'll -- I'll leave that up to you.
10 Ms. Horneland has said she sent you those.
11 I'm also happy to consider just the written
12 version. You don't need to make any further
13 argument. I can -- I can consider the written
14 materials that were -- that were provided by your
15 counsel -- by your former counsel and leave the
16 argument on those points to that, and I will
17 consider those arguments if you want -- if you'd
18 like me to consider those.
19 THE APPELLANT: All right.
20 THE COURT: So you don't need to decide that right now.
21 You -- we will have a break and you can review
22 those materials and decide if you want me to
23 consider those written arguments.
24 What I would -- what I'd recommend at this
25 point is if -- if you want to begin with the
26 arguments that you want to make and take me
27 through those, and then we can -- and then you can
28 decide whether you want me to consider the written
29 materials from your former counsel on these other
30 points.
31 THE APPELLANT: Okay.
32 THE COURT: All right? Does that make -- so we will
33 proceed on the amended notice --
34 THE APPELLANT: Sure, yeah.
35 THE COURT: -- but that -- any of the arguments that
36 you want to make from the original notice are --
37 are essentially there, all right?
38 THE APPELLANT: Okay.
39 THE CLERK: Justice, here are the transcripts.
40 THE COURT: Oh, and we have the transcripts. Perfect.
41 All right. So, please go ahead, Mr. Fox.

SUBMISSIONS ON HIS OWN BEHALF BY THE APPELLANT:

42
43
44
45 THE APPELLANT: I should start by saying that I am
46 literally going off the top of my head here,
47 because as I have mentioned each time I'm re-

Submissions on his own behalf by the Appellant

1 arrested I lose all of my material, so all of the
2 prep that I had done previously, all of my notes,
3 etc., are all lost.

4 I have nothing in writing to go by, so I am
5 going to try to go by -- by memory here.

6 So I guess the most logical way for me to
7 approach this would be to start with Issue 3 in
8 the Crown's -- sorry, I just want to see how
9 they're calling their book -- the respondent's
10 book of arguments and material, in their
11 submissions.

12 THE COURT: Yes.

13 THE APPELLANT: At page 11, they address Issue 3.

14 THE COURT: Yes.

15 THE APPELLANT: That relates to the grounds that I was
16 raising about the court misunderstanding or
17 misconstruing how the immigration laws were
18 supposed to have been applied at a port of entry.

19 THE COURT: Yes.

20 THE APPELLANT: The -- the issue that I was raising
21 there or that I was trying to make was that when a
22 person or -- the law with respect to when a person
23 enters an area designated as a port of entry, CBSA
24 is required to presume that the person is a
25 foreign national seeking entry to Canada,
26 regardless of whether they enter the port of entry
27 from within Canada or from the United States
28 border, but when Officer Polisak testified she
29 was -- she was treating it as though a port of
30 entry is no different than any other location
31 within Canada.

32 And so the fact that I entered the port of
33 entry from within Canada meant that I wasn't
34 subject to inspection, and that the burden was on
35 CBSA to determine or to prove that I wasn't
36 entitled to enter Canada, whereas in reality when
37 a person is within a port of entry the burden is
38 on that person to prove that they are entitled or
39 have a right to enter Canada, even though the port
40 of entry may be located within the Canadian
41 borders or on Canadian soil.

42 And I believe that Officer Polisak's
43 statements in her testimony in that respect were
44 so clear or -- so clearly erroneous and outrageous
45 that the -- the court should have known that what
46 she was saying could not have been true.

47 At one point I had asked her -- or I had said

Submissions on his own behalf by the Appellant

1 to her that -- what -- if what she is saying is
2 correct, then if any foreign national shows up at
3 a port of entry, claims to be a Canadian citizen
4 and has no documentation of their citizenship with
5 them, CBSA would have to allow that person to
6 enter Canada, unless they could prove that the
7 person wasn't a Canadian citizen and Officer
8 Polisak responded yes -- if I can just go grab
9 some water?

10 Now, if the court had accepted my position on
11 how the immigration laws are supposed to be im --
12 supposed to be imposed and enforced at a port of
13 entry, then the court would have had to accept
14 that Officer Polisak's testimony was false and
15 being a Border Services officer, she should have
16 known that what she was stating in her testimony
17 could not possibly have been correct, which means
18 that she would have knowingly been making false
19 statements in her testimony.

20 That then gets or relates to what I believe
21 was Issue 2 -- yes -- which in the Crown's book is
22 addressed starting at page 10, that the judge
23 erred by accepting Officer Polisak's testimony.

24 So, if the judge then would have accepted
25 that Officer Polisak's testimony was false and
26 that she should not have been considered a
27 credible witness, then that should have raised
28 some questions about the reliability of her
29 testimony, where she stated that she did not tell
30 me that I was inadmissible and she did not tell me
31 that I was not permitted to leave the port of
32 entry and return to Canada at that point.

33 My testimony at the trial, after Officer
34 Polisak testified, was that Officer Polisak did
35 tell me that -- based on all of the facts in the
36 evidence and my not being a Canadian citizen and
37 having been convicted of an indictable offence,
38 that I was not admissible and therefore I was not
39 entitled -- or not permitted to leave the port of
40 entry and return to Canada, that the only option I
41 had at that point was then to return to the United
42 States and --

43 THE COURT: So, sorry, are you -- are you suggesting
44 that -- just so that I understand what you're --
45 what it is that you're suggesting happened,
46 you're -- you're -- your position is that you were
47 removed from Canada or --

Submissions on his own behalf by the Appellant

1 THE APPELLANT: Tech --

2 THE COURT: -- that you were allowed to leave?

3 THE APPELLANT: Well, technically I wouldn't have been
4 removed, because since I was at a port of entry I
5 would have been denied readmission or denied
6 admission from the port of entry back into Canada.

7 THE COURT: Well, there's -- there's not a denial of
8 admission -- in terms of what happens at a port of
9 entry, you're either -- when -- when somebody
10 applies to enter Canada --

11 THE APPELLANT: Yes.

12 THE COURT: -- then either the person is allowed
13 entry -- allowed entry, subject to further
14 examination, in other words that there is a
15 continuing examination, or they're allowed to
16 leave in the -- in the sense that they're --
17 they're given permission -- they can withdraw
18 their application to enter Canada and return to
19 their country -- return or they're removed from
20 Canada. So --

21 THE APPELLANT: Okay.

22 THE COURT: So which -- which -- which is it that
23 you -- what is it that you say happened at the
24 port of entry?

25 THE APPELLANT: It wasn't phrased -- at least the way I
26 remember it, it wasn't phrased as I was being
27 removed, and so I guess the closest one would have
28 been that I was allowed to leave.

29 THE COURT: All right. And so what -- what is the
30 relevance -- if you were allowed to leave, I'm
31 just trying to understand the relevance of that
32 with respect to the --

33 THE APPELLANT: Because if -- if I was not permitted to
34 go from the port of entry back into Canada, then
35 that would mean that I wasn't leaving Canada
36 voluntarily, which means that I didn't violate the
37 probation condition, you see, because the
38 condition was that I was not permitted to leave
39 British Columbia without permission from the
40 probation officer.

41 THE COURT: Yes.

42 THE APPELLANT: However, the Crown had stated at the
43 time of the sentencing in the index offence that
44 if I'm removed or asked or told to leave by IRCC
45 or CBSA, that he would not consider that a breach,
46 because then I would not be leaving voluntarily
47 and he wouldn't prosecute me for that.

Submissions on his own behalf by the Appellant

1 THE COURT: Right. So you're -- you're saying that you
2 were -- you -- so you attended the port -- so I
3 just want to be clear on what you --
4 THE APPELLANT: Yeah.
5 THE COURT: -- I -- I'm not familiar with the facts. I
6 just want to understand what the facts are here.
7 THE APPELLANT: Right.
8 THE COURT: You attended the port -- what -- what --
9 you were in Canada --
10 THE APPELLANT: Yes.
11 THE COURT: -- and attended the port of entry?
12 THE APPELLANT: Yes. I went to the port of entry
13 specifically for the purpose of being removed.
14 THE COURT: All right. So you went to the port of entry
15 and were -- for the purpose of being removed --
16 THE APPELLANT: Yes, so that I could -- in that way I
17 would be able to leave British Columbia, return to
18 the United States, but in a way without violating
19 the -- or breaching the probation condition.
20 THE COURT: All right, but wasn't there a condition
21 that said that you couldn't be within a hundred
22 metres --
23 THE APPELLANT: Yes, there was, and --
24 THE COURT: -- and so you -- you accepted that you were
25 breach in that condition?
26 THE APPELLANT: Well, no, because the -- at the Douglas
27 border crossing, where the CBSA office is, it's
28 not within 100 metres of the -- of the border.
29 It's I believe closer to probably 200 metres and
30 so, when I entered the building there, I still
31 wasn't within a hundred metres.
32 THE COURT: All right. So you went to the -- to the
33 you went to the office --
34 THE APPELLANT: Yes.
35 THE COURT: -- with the intention of being removed.
36 THE APPELLANT: Yes.
37 THE COURT: And then weren't removed?
38 THE APPELLANT: Well, that's where the discrepancy or
39 the uncertainty comes in at the trial. Officer
40 Polisak's testimony was that she didn't remove me
41 or she didn't tell me that I wasn't -- I couldn't
42 return to Canada and then my testimony was that
43 she did tell me that I was inadmissible and could
44 not return to Canada.
45 THE COURT: But if -- sorry, I'm just trying to be
46 clear on what -- so what you're saying is that
47 what Officer Pollock [phonetic] did was to remove

Submissions on his own behalf by the Appellant

1 you or what Officer Pollock did was to allow you
2 to proceed to the United States or allow you to
3 return to the United States?

4 THE APPELLANT: Well, the way that she phrased it was
5 that I was not permitted to Canada or I was
6 inadmissible to Canada, and so I was not permitted
7 to return to Canada was the way that she had
8 phrased it. And so, I am not sure, would that
9 then mean that she was saying that I was permitted
10 to return to the United States or if she was
11 removing me, I'm -- I'm not sure which one that
12 would fall under then, because it was my
13 understanding that from a port of entry you could
14 be denied admission or granted admission at that
15 point, and that being denied admission would be
16 essentially similar to being removed, like based
17 on the way that she phrased --

18 THE COURT: Okay. And so you're -- you -- so you're
19 saying that there -- because I just want to be
20 clear at -- at law --

21 THE APPELLANT: Right.

22 THE COURT: -- there was no deportation order issued.

23 THE APPELLANT: There was no order issued, no.

24 THE COURT: There was no order issued to --

25 THE APPELLANT: Right.

26 THE COURT: -- to remove you from Canada.

27 THE APPELLANT: Correct.

28 THE COURT: All right. And so you're saying that
29 you're -- your understanding at law -- I mean
30 there was no -- they most certainly did not
31 physically take you in to the United States. You
32 were not accompanied into the United States, you
33 were not -- you were not escorted to the United
34 States.

35 THE APPELLANT: Correct.

36 THE COURT: All right. And so which -- which are things
37 that would happen in a removal in -- in the
38 sense -- so -- so what you're saying is that at
39 that point you walked out of -- you -- you walked
40 out of the office and into the United States on
41 your own?

42 THE APPELLANT: Yes, on my own, but after the Border
43 Services officer had told me that I was
44 inadmissible.

45 THE COURT: Right, but where -- did -- did the
46 Border -- did the -- did the officer verify that
47 you did not come back into Canada?

Submissions on his own behalf by the Appellant

1 THE APPELLANT: I have no idea. I didn't look back to
2 see --

3 THE COURT: But when you walked out of the office you
4 were 200 metres in -- inside of Canada you said?

5 THE APPELLANT: Right, right.

6 THE COURT: All right. So at that point, when you
7 walked out of the office, you -- was there
8 anything -- was there any thing stopping you from
9 walking back into Canada?

10 THE APPELLANT: There was another Border Services or
11 CBSA officer positioned outside, like in a little
12 booth or something and certainly she could have
13 intercepted me, but I don't know if she was
14 notified by Officer Polisak that I was told that I
15 was inadmissible and once Officer Polisak told me
16 that I was inadmissible, which is what I was
17 seeking to accomplish by going there, I then
18 exited the building.

19 And then I asked the officer outside how do I
20 return to the United States from here, and then
21 she pointed me toward a door that led to a
22 sidewalk that goes past the Peace Arch monument
23 and down to the Customs and Border Protection
24 building on the U.S. side, and then I just walked
25 along the sidewalk.

26 THE COURT: All right. All right. And in -- in terms
27 of -- of what took place afterwards, I guess
28 the -- the -- how did you -- how did you end up
29 back in Canada?

30 THE APPELLANT: So after I proceeded to the Customs and
31 Border Protection and I presented myself to them
32 there, and then they detained me because of a
33 prior removal order from the U.S. to Canada -- oh,
34 and I should say at this point that I have been in
35 the past ordered removed from the U.S. to Canada,
36 even though IRCC and CBSA documentation states
37 that I was born in the United States and there's
38 no documentation that they have that states that
39 I'm a Canadian citizen, but I know that that -- it
40 creates a lot of confusion when I say that I was
41 deported from the U.S. to Canada.

42 People automatically assume that means I'm a
43 Canadian citizen, but IRCC and CBSA records do not
44 state that at all.

45 So I was detained on the U.S. side. I was
46 held in Tacoma by Homeland Security for I think it
47 was about two-and-a-half weeks, by which time a

Submissions on his own behalf by the Appellant

1 warrant had been issued here in Canada for failing
2 to report and for leaving B.C. without permission.
3 So then I was brought back based on that warrant
4 and then handed over to CBSA, who handed me over
5 to the RCMP.

6 THE COURT: Sorry, just to be clear, you -- you are a
7 U.S. citizen?

8 THE APPELLANT: I am, yes, by -- by birth or by virtue
9 of having been born in the U.S., yes.

10 THE COURT: So I just want to be clear you were removed
11 from the U.S. or you were extradited from the
12 U.S.?

13 THE APPELLANT: I was removed.

14 THE COURT: As a U.S. -- a U.S. citizen was removed
15 from the U.S. --

16 THE APPELLANT: Yes.

17 THE COURT: -- or -- or the U.S. does not -- perhaps
18 let me frame it this way --

19 THE APPELLANT: They

20 THE COURT: -- does the U.S. accept that you are a U.S.
21 citizen?

22 THE APPELLANT: Well, Homeland Security's records do
23 clearly show that I was born in Florida, but they
24 were insisting at the time that they believe that
25 I was an illegal alien from Canada, and that
26 ultimately resulted in them prosecuting me for an
27 allegation of perjury and falsely claiming U.S.
28 citizenship.

29 I was convicted of that and then that
30 conviction became the basis for which they ordered
31 me removed.

32 THE COURT: All right. So the immigration authorities
33 in Canada consider you a Canadian citizen and the
34 immigration authorities in the U.S. consider you a
35 Canadian citizen, and neither of them consider you
36 to be a U.S. citizen?

37 THE APPELLANT: No, no, that's not correct. The U.S.
38 authorities -- some of their documentation they
39 claim to believe that I'm a Canadian citizen, but
40 they have my birth certificate and they have other
41 documentation in my U.S. CIS file, that I have
42 received through FOIA --

43 THE COURT: Well, let me put it this way. At the time
44 of the deportation, they did not consider you to
45 be a U.S. citizen?

46 THE APPELLANT: At the time of the deportation, clearly
47 they didn't believe -- or they didn't claim that I

Submissions on his own behalf by the Appellant

1 was a Canadian citizen. However, again though I
2 point out that --
3 THE COURT: Sorry, a U.S. citizen.
4 THE APPELLANT: -- or yes, a U.S. citizen.
5 THE COURT: At the time of the deportation, the U.S.
6 Immigration authorities found that you were not a
7 U.S. citizen?
8 THE APPELLANT: That was their claim, yes.
9 THE COURT: All right. Well, that was their finding,
10 because they deported you.
11 THE APPELLANT: Well, yes, but as I say their own
12 documentation shows that --
13 THE COURT: Well, I -- sorry, I'm just -- I just want
14 to be clear. The -- the finding of the U.S.
15 Immigration authorities is that you are not a U.S.
16 citizen and that -- at the time that you were
17 deported back to Canada.
18 THE APPELLANT: At the time I was deported to Canada
19 back in 2013, I would say that that would be
20 accurate.
21 THE COURT: Well, you're -- sorry, you say 2013, you --
22 THE APPELLANT: Well, that's -- that's when I was
23 removed from the U.S. to Canada.
24 THE COURT: Well, how did you get back to Canada to be
25 arrest -- like with -- oh, this -- this took place
26 in 2013, just --
27 THE APPELLANT: Well, yes, the order of removal in the
28 U.S. was issued in -- I think it was 2011 -- 2010
29 or 2011 and then --
30 THE COURT: No, sorry, I'm -- I'm asking about the --
31 the -- this trial took place in 2019. The
32 underlying charges -- the underlying charges of
33 breach --
34 THE APPELLANT: Right. In 2019, when I was brought --
35 THE COURT: Sorry, the breach -- the breach is in March
36 of 2019. You go into the United States in March
37 of 2019.
38 THE APPELLANT: Right. At that time --
39 THE COURT: How did you end up back in Canada?
40 THE APPELLANT: Homeland Security -- like I said, they
41 were detaining me in Tacoma until a warrant was
42 issued here, at which time they brought me back to
43 Peace Arch and then handed me over to the Canadian
44 Border --
45 THE COURT: All right. So at that time the U.S.
46 authorities made a finding that you were not a
47 U.S. citizen --

Submissions on his own behalf by the Appellant

1 THE APPELLANT: No.
2 THE COURT: -- in 2019 --
3 THE APPELLANT: No, no. No, no. There was no finding
4 made at that time. There was no investigation or
5 anything, because there was the prior order of
6 removal from 2010 or 2011.
7 THE COURT: All right.
8 THE APPELLANT: And so they just detained me in Tacoma.
9 Once the warrants -- or after the warrants were
10 issued up here, they used that as the reason for
11 bringing me back.
12 THE COURT: So they relied on the previous finding that
13 you were not a U.S. citizen?
14 THE APPELLANT: Yes.
15 THE COURT: All right. And so as of 2019, you were
16 still considered by the U.S. authorities not to be
17 a U.S. citizen?
18 THE APPELLANT: I -- I don't know that that's the case,
19 though, because as I say my A file has my birth
20 certificate and there's documents in there that
21 show that they --
22 THE COURT: Well --
23 THE APPELLANT: -- know that I'm a U.S. citizen.
24 THE COURT: Canadian citizens are removed to Canada,
25 U.S. citizens are extradited to Canada. They are
26 two very different processes.
27 THE APPELLANT: Oh, I understand.
28 THE COURT: So if -- if -- if you were not extradited
29 to Canada, then the reasonable assumption is that
30 at that time the U.S. authorities considered you
31 not to be a U.S. citizen. Is that a fair
32 understanding of the facts -- of the facts?
33 THE APPELLANT: I would say that that's a fair
34 understanding of how it's supposed to be, but
35 that's clearly -- I shouldn't say clearly, un --
36 unfortunately in these proceedings, the matters
37 that I have had with CBSA and with Homeland
38 Security over the past 13 or 14 years, how things
39 are supposed to be and how they really are often
40 have not been the same.
41 THE COURT: Okay. So that's why I -- I've -- I -- just
42 so that you -- my questions have been framed very
43 clearly -- very -- very precisely --
44 THE APPELLANT: Yes.
45 THE COURT: I'm not asking about how things are
46 supposed to be. The U.S. Immigration authorities
47 do not consider you to be a U.S. citizen. I

Submissions on his own behalf by the Appellant

1 understand your assertion that you -- you are of
2 the view that they are wrong, but they -- they do
3 not treat you as a U.S. citizen, and did not treat
4 you as a U.S. citizen in March of 2019?
5 THE APPELLANT: I still don't -- I -- I have difficulty
6 agreeing with that statement, because as I said
7 they have the records, they know that I'm -- that
8 I was born in Florida, like --
9 THE COURT: No I understand you -- you are of the view
10 that they are wrong. They put you at in
11 Immigration detention --
12 THE APPELLANT: Right.
13 THE COURT: -- centre. Citizens do not go into
14 Immigration detention centres.
15 THE APPELLANT: Well, they do.
16 THE COURT: I just say, like in the -- in the sense of
17 Immigration authorities, or at least my
18 understanding, I can say --
19 THE APPELLANT: Mm- hmm.
20 THE COURT: -- for Canadian Immigration centres, that a
21 Canadian citizen will not be detained in an
22 Immigration centre unless the Immigration
23 authorities are not satisfied the person is a
24 Canadian citizen.
25 THE APPELLANT: Right.
26 THE COURT: So at -- in March of 2019, the U.S.
27 authorities did not consider you to be a U.S.
28 citizen.
29 THE APPELLANT: Sorry, was that a question or --
30 THE COURT: I'm -- I'm asking -- I -- I just want to
31 be -- I'm just trying to clarify the situation.
32 THE APPELLANT: Okay.
33 THE COURT: The U.S. Immigration authorities do not
34 consider you to be a U.S. citizen.
35 THE APPELLANT: Okay. To be as frank and direct on --
36 on this then as possible, I believe that Homeland
37 Security does know that I am a U.S. citizen and
38 they -- why they would detain me in an Immigration
39 facility and send me to Canada, I think, is
40 probably related more to their refusal to admit
41 that they did anything wrong in the first place,
42 but there is no doubt in my mind that they know
43 exactly who I am and where I was born. And CBSA
44 and IRCC also -- their records also clearly state
45 that I was born in the United States.
46 THE COURT: All right.
47 THE APPELLANT: In fact, the -- my GCMS and FOSS

Submissions on his own behalf by the Appellant

1 [phonetic] reports or records were presented at
2 the trial. I'm not sure if they were entered as
3 exhibits or not in -- in this matter and it
4 clearly states in those records country of birth
5 was United States of America.

6 THE COURT: All right. And sorry, the GCMS and FOSS
7 records -- sorry, in GCMS and FOSS are you -- do
8 Canadian Immigration authorities consider you a
9 Canadian citizen?

10 THE APPELLANT: Under citizenship -- the field for
11 citizen -- citizenship it's blank, but country of
12 birth it says United States, and so if I was born
13 in the United States then I can't be a Canadian
14 citizen, unless I applied for it or request it,
15 and I --

16 THE COURT: We ll, there are many -- there are many,
17 many ways that one can get Canadian citizenship
18 through --

19 THE APPELLANT: Right.

20 THE COURT: -- parents, etc. There -- there -- one can
21 have dual nationality.

22 My question is do Canadian Immigration
23 authorities consider you to be a Canadian citizen
24 and -- and there's a strong indication for me that
25 they do, because you were removed from the United
26 States and are here today, which suggests that
27 Canadian Immigration authorities allowed you
28 entry, presumably because they believe you're a
29 citizen.

30 THE APPELLANT: Right. That would seem to be the case,
31 but I have not been able to get a clear and direct
32 response from them on whether they consider me a
33 Canadian citizen or not.

34 In Officer Polisak's notes that she had made
35 from our encounter in 2019, she states also in
36 there that she was not able to determine that I am
37 or am not a Canadian citizen, and I believe those
38 were entered as an exhibit in the trial --
39 actually, well, that was part of the GCMS and
40 so -- or GCMS report

41 THE COURT: All right. And are the trial exhibits --

42 THE APPELLANT: Oh, sorry, I just kind of -- I took for
43 granted that they would be included in the appeal
44 book, because I'm so used to dealing with the
45 matters in the Court of Appeal, but it occurs to
46 me -- I don't think in summary conviction appeals
47 that there is an appeal book, right?

Submissions on his own behalf by the Appellant

1 THE COURT: Correct. I have transcripts. I do not
2 have -- I do not have the exhibits from the trial,
3 but -- so the G -- but the GCMS notes were
4 exhibits in the trial, and you say that it was
5 unclear whether you were a Canadian citizen or not
6 in those documents?

7 THE APPELLANT: Well, it's -- it's not that it was
8 unclear. Officer Polisak stated in there that she
9 was not able to determine that I am or am not a
10 Canadian citizen.

11 THE COURT: All right. And those were put to her in
12 her testimony?

13 THE APPELLANT: I believe so.

14 THE COURT: All right. So -- so just so that I
15 understand the argument, your -- your argument at
16 trial was that you showed up at the border -- at
17 the port of entry with the intention of getting
18 deported.

19 THE APPELLANT: Yes.

20 THE COURT: So that you could put yourself in a
21 situation where you could avoid the order of Madam
22 Justice Holmes? I -- I just -- I just want to be
23 clear on what the intent --

24 THE APPELLANT: Right. The -- the --

25 THE COURT: The intent was to go to the border to be
26 able to get across the border or to have the
27 Immigration authorities take you across the
28 border, so that you were not in breach of your
29 probation, but could still cross the border?

30 THE APPELLANT: So that I could return to the U.S.
31 without breaching the condition in the probation
32 order, but it's important that the reason I was
33 seeking to return to the U.S. wasn't so I could
34 avoid complying with all of the other conditions;
35 it was because I have no status in Canada, I have
36 no social insurance number, and so I am not
37 legally authorized to work, but the probation
38 order that was imposed was for three years.

39 And so it put me in a situation where I have
40 to remain in Canada, but I can't get any kind of
41 government assistance -- not that I would want
42 government assistance, but I can't get healthcare
43 and I'm not legally authorized to work, and the
44 day before I had gone to the border I had a
45 hearing before Justice Holmes to try to have the
46 condition removed, so that I could go back to the
47 U.S. for those reasons and the -- she denied the

Submissions on his own behalf by the Appellant

1 request.

2 And so then that's why -- and I told Justice
3 Holmes at the hearing that that would be my
4 intention, even if the request is denied that my
5 intention would be to turn myself into CBSA so
6 that I could be removed.

7 THE COURT: All right. So what -- I note the time, so
8 it's -- it's about -- we will normally -- we
9 normally take the morning break at this point.

10 THE APPELLANT: Right.

11 THE COURT: So what I am going to suggest is that we
12 will take the morning break.

13 What -- just so that you understand what I am
14 going to be considering you -- and your -- your
15 explanations have been helpful this morning, in
16 in terms of giving me some context as to what the
17 issues are and what you see the issues as, is --
18 if you can take me to the trans -- in -- in the
19 transcripts to the parts of the evidence that you
20 say I should be considering, in terms of the --
21 both your testimony about what happened at the
22 border that day and the officer's testimony about
23 what happened at the border that day, so that I
24 have a clear understanding -- I expect that the
25 GCMS notes will have been put to the officer in
26 her testimony and -- and ultimately that will be
27 the part that will -- the officer's notes are only
28 as helpful as what happens in cross-examination
29 or -- or in examination.

30 So what I'll ask you to do is if there are
31 parts of the transcripts that you'd like me to
32 consider -- ultimately it's not what was said this
33 morning that I'm going to be considering, it's
34 not -- an appeal is not an opportunity for new
35 evidence and I'm not going to assess your -- your
36 credibility this morning as to whether or not I
37 believe what you're telling me or -- or not.
38 That's not the issue on an appeal.

39 The issue on the appeal is what was said at
40 the trial and was the decision -- can -- should
41 the decision of the judge, given what was before
42 him, be upheld.

43 So I think I have a clear understanding of
44 of what your argument is and I think what would be
45 helpful for me is if you can -- you can take me to
46 the actual evidence that was before Judge St.
47 Pierre, so that I have an understanding of why you

Submissions on his own behalf by the Appellant

1 say his conclusion was unreasonable or -- I say
2 unreasonable -- was -- was in error.

3 THE APPELLANT: Right.

4 THE COURT: All right? So we will take the morning
5 break and we'll come back at 11:30, and we can
6 continue at that time. Thank you.

7 THE APPELLANT: Thank you.

8
9 (VIDEOCONFERENCE PAUSED)

10
11 (PROCEEDINGS ADJOURNED FOR MORNING RECESS)
12 (PROCEEDINGS RECONVENED)

13
14 (VIDEOCONFERENCE RECOMMENCES)

15
16 THE CLERK: We are back on the record, Justice.

17 THE COURT: Thank you. Go ahead when you're ready, Mr.
18 Fox.

19
20 **SUBMISSIONS ON HIS OWN BEHALF BY THE APPELLANT,**
21 **CONTINUING:**

22
23 THE APPELLANT: Okay.

24 First, I want to apologize profusely for not
25 being better prepared for this, and I spent the
26 time on the break trying to quickly scan through
27 some of the testimony in the transcripts, so I can
28 highlight the parts to draw your attention to, but
29 I wasn't able to complete -- completely go through
30 it and this -- this is work that I had done
31 previously and I had all of my notes and again,
32 unfortunately, those were lost when I was arrested
33 again.

34 And since being back in custody and getting
35 this material I haven't had the opportunity to
36 fully go through it all again and recreate all of
37 those notes, so I am amazingly unprepared, and
38 again I apologize for that, but I did find some
39 points in Officer Polisak's testimony that I would
40 want to draw the court's attention to, but first I
41 have to point out it's not -- it's not stated in
42 the transcripts that we have before us here, but
43 it was addressed in those proceedings in other
44 pretrial conferences, the -- the Crown objected
45 sternly or fervently to me making any references
46 to or raising any issues regarding my citizenship.

47 And so when you look at my cross-examination

Submissions on his own behalf by the Appellant

1 of Officer Polisak, you will notice that direct
2 questions about my citizenship never come up and
3 I had to be very careful about how I worded any
4 questions that might bring up any indication of my
5 citizenship, of whether I'm a Canadian or a U.S.
6 citizen, because the judge also made it very clear
7 that he did not want that to become the focus of
8 the -- of the trial.
9 So, having said that, at page 54 of Officer
10 Polisak's testimony [indiscernible] --
11 THE COURT: Sorry, which -- which is which date?
12 THE APPELLANT: Oh, that would be on the 4th, I
13 believe, March 4th.
14 THE COURT: March 4th?
15 THE APPELLANT: I believe so. Sorry, let me -- yes,
16 March 4th --
17 THE COURT: All right.
18 THE APPELLANT: -- which
19 THE COURT: So March 4th, and you said page 58?
20 THE APPELLANT: 50 -- yes, 50 -- no, 54, sorry.
21 THE COURT: 54? Okay.
22 THE APPELLANT: Yes.
23 THE COURT: All right. Yes, I'm at page 54 of March
24 8th.
25 THE APPELLANT: Okay. Now, starting -- starting at line
26 23 --
27 THE COURT: Sorry, line 23?
28 THE APPELLANT: Yes.
29 THE COURT: Yes.
30 THE APPELLANT: I had asked Officer Polisak about --
31 when she test -- testifying on direct, she had
32 testified that -- she had made some comment about
33 not seeing any evidence that I'm not a Canadian
34 citizen, and I realize that's phrased as a double
35 negative, but that's the way it was phrased in her
36 testimony, and so I wanted to cross-examine her on
37 this here, but unfortunately this, I guess, got a
38 little too close to the question of my
39 citizenship.
40 And so then there was some back and forth
41 with the court and with Mr. Wolf, who was the
42 Crown, but going all the way to page 56, line 17,
43 it was very difficult for me to ask certain
44 questions or pursue certain lines of questioning
45 because of not -- not being allowed to raise
46 issues of my citizenship -- sorry, I'll let you --
47 I'll let you [indiscernible] --

Submissions on his own behalf by the Appellant

1 THE COURT: No, please -- if there's portions of this
2 you want to take -- I'm at page 56.

3 THE APPELLANT: Okay, yes -- oh, well, just up to line
4 17. After that it moves on I guess to other --
5 other matters, but I just wanted to point out that
6 it was my opinion, and it still is my opinion,
7 that the issue of my citizenship is a very
8 critical and very relevant matter in this -- in
9 this case, because that would affect how or what
10 Officer Polisak was required to do or should have
11 done at the port of entry.

12 And so it was very difficult to -- I believe
13 it was very difficult for me to cross-examine her
14 and to make full answer and defence without
15 raising the issue of my citizenship, and I think
16 some of that is -- becomes apparent from the
17 cross-examination.

18 And then again, though, at page 58, there is
19 some interaction between myself and the court, due
20 to the questions that I was asking Officer
21 Polisak, from lines 14 to 21, where the judge was
22 again trying to steer me away from issues of my
23 citizenship.

24 Oh, sorry --

25 THE COURT: Please -- please go ahead. I've -- I've
26 had a -- I mean I've had a look at this portion of
27 the transcript.

28 So is -- is your -- is your suggestion --
29 your understanding of what -- of what the -- the
30 testimony from the officer was that they -- they
31 associated you with this -- with this Mr. Reese
32 [phonetic]?

33 THE APPELLANT: Yes, yes, and it would be
34 understandable that they would make that
35 association initially, because admittedly back in
36 the 1990s I did change my name to Richard Reese
37 and I did obtain some identification documents as
38 that person, and I do accept that some of the
39 initial confusion might have been because of that
40 with Homeland Security and with CBSA.

41 It was later determined, though, that I'm not
42 that person and --

43 THE COURT: And do we have evidence of that?

44 THE APPELLANT: Um...

45 THE COURT: Like sorry, we -- when I say we, and just
46 to be clear, was there evidence of that before
47 Judge St. Pierre?

Submissions on his own behalf by the Appellant

1 THE APPELLANT: Sorry, I'm trying to remember. I --
2 no, I don't believe so, and I'm trying to remember
3 Officer Polisak's statements in her declaration
4 are in the GCMS report. I don't believe that
5 there was evidence presented at the trial of that.
6 THE COURT: Are you -- are you looking for something in
7 particular, Mr. Fox, or --
8 THE APPELLANT: Well, yes, but I -- it's -- it's my own
9 fault that I'm not prepared and so I don't
10 expect -- I don't expect leniency because of it.
11 So I -- I'm not going to hold the court and the
12 Crown up with -- with when I spend time looking
13 for stuff in here, but there was some other stuff
14 at pages 64 and 65, which deal with the review of
15 the FOSS record and the GCMS records and --
16 THE COURT: Yes.
17 THE APPELLANT: -- where it states in those records
18 Country of Birth as United States of America, and
19 I questioned Officer Polisak on that.
20 THE COURT: All right. And so she says she didn't
21 see --
22 THE APPELLANT: Right, she --
23 THE COURT: She says she didn't see it be cause it
24 didn't come up on that day or -- or she didn't see
25 it on that day.
26 THE APPELLANT: Right, and then -- but if you continue
27 on to page 66, I believe it is, I point out to her
28 that it seems that the record was actually created
29 in the GCMS in January of 2019, which was before
30 she had encountered me, and so I had trouble
31 believing that it wasn't there at the time when
32 she was -- when she encountered me at the Douglas
33 border crossing.
34 THE COURT: Yes. And -- and are you saying that Judge
35 St. Pierre erred in -- in not -- in not
36 considering that or not giving it more weight, is
37 that --
38 THE APPELLANT: Well, I mean that was just one of the
39 points that I had found, that it seemed that she
40 wasn't being completely forthright or honest in
41 her testimony. There were a few others as well.
42 I just don't have them off the top of my head.
43 THE COURT: Okay. And then ultimately just -- just so
44 that I -- I understand your -- your ultimate --
45 that Judge St. Pierre's finding that the officer
46 was credible, if -- of -- if Judge St. Pierre had
47 found the officer not to be credible, then what --

Submissions on his own behalf by the Appellant

1 what would he have concluded -- he would have
2 concluded that you were ordered to leave Canada?
3 THE APPELLANT: Well, yes. I'm not sure -- I -- I
4 wouldn't have phrased it in that way. I would
5 have phrased it as he should have concluded that
6 my -- my testimony that she had told me that I'm
7 inadmissible was the more reliable version of
8 events that occurred on that day.

9 And having been told that I am not
10 admissible, it would have been illegal -- illegal
11 for me to attempt to return to Canada from the
12 port of entry, but the other thing that I had
13 mentioned earlier about her testimony, where she
14 testified that if a person -- any person shows up
15 at a port of entry and they claim that they're a
16 Canadian citizen, but have no documentation or
17 identification on them, then she would have to
18 allow them entry.

19 THE COURT: But I -- I just want to -- I just want to
20 understand your -- your argument, just so that
21 I -- I understand where it is you're going with
22 this.

23 THE APPELLANT: Right, right.

24 THE COURT: So assuming that you understood that you
25 could not come into Canada --

26 THE APPELLANT: Right.

27 THE COURT: -- and that you -- you understood that you
28 had an obligation to go into the United States,
29 that's -- that's ultimately where you're coming --
30 where -- where you're -- what you're trying to get
31 to is that --

32 THE APPELLANT: Yes.

33 THE COURT: -- you had an obligation to go into the
34 United States --

35 THE APPELLANT: Yes.

36 THE COURT: -- right? In other words, you were -- you
37 were compelled by law to go to the United States?

38 THE APPELLANT: Yes, that is exactly the argument that
39 I have been making.

40 THE COURT: All right. And if there was not an order
41 in place then if -- if your understanding that you
42 were compelled by law to go to the United States
43 was in error, now you're suggesting that that
44 would affect the *mens rea* with res -- your --
45 your -- that you were not intentionally breaching
46 the order?

47 THE APPELLANT: Correct.

Submissions on his own behalf by the Appellant

1 THE COURT: All right. Now, in -- in law there is a
2 difference between a mistake of law and a mistake
3 of fact, in other words if somebody mis -- has a
4 mistake of fact then, you know, if -- if I believe
5 certain facts to be -- even -- even though I'm
6 in -- in error, I think somebody is threatening --
7 I -- I legitimately think somebody is threatening
8 my family and I speed home or something to that
9 effect, even though there is not somebody
10 threatening my family, that might be an excuse
11 because I -- I had a mistake as to what the facts
12 were.

13 THE APPELLANT: Right, right.

14 THE COURT: The defence that's available is very
15 different than a defence of mistake of law. In
16 other words, one is presumed to know the law and
17 so I'm just -- I -- I'm -- I just want to be clear
18 that what you're suggesting here is that you were
19 mistaken as to the law in -- in the sense that you
20 had a legal obligation to go to the United States?

21 THE APPELLANT: Yes, that -- that is correct.

22 THE COURT: That's -- because that's the part that I'm
23 trying to get -- I'm trying to understand one --
24 it -- it does not appear to me or -- and perhaps
25 you can take me to the materials, as to where
26 there was a legal obligation for you to go to the
27 United States on that day --

28 THE APPELLANT: Right.

29 THE COURT: -- or are you suggesting that you had a
30 mistake in understanding of the law that led you
31 to believe that you had to go to the United States
32 after the interaction that you had with the
33 officer?

34 THE APPELLANT: I definitely, without a doubt, believed
35 that I had an obligation to go to the United
36 States after my interaction with the officer.
37 Now, if that understanding was incorrect -- I
38 don't believe it was, but if it was, then that
39 that's another issue obviously, but it was
40 certainly my understanding at that time, after
41 dealing with Officer Polisak, that it was illegal
42 for me to return to Canada and that I must at that
43 point re -- yes, return to the United States.

44 THE COURT: All right, but you were not ordered to do
45 so.

46 THE APPELLANT: I was not explicitly ordered to leave
47 Canada, but as I have -- as I've -- oh, I was

Submissions on his own behalf by the Appellant

1 going to say as I brought up in my arguments, but
2 we don't have those here -- as I brought up in my
3 arguments previously, I think I -- I believe I
4 brought it up at the 684 hearings, I -- the reason
5 I believe that I wasn't explicitly ordered to
6 leave Canada is because, since I was at a port of
7 entry I was not technically within Canada --
8 sorry, air quotes don't show up on transcripts
9 because I was at a port of entry I was not
10 technically considered to be within Canada at that
11 point, and so that's why I believed it wouldn't
12 have made sense for Officer Polisak to tell me
13 that I have to leave Canada, because I technically
14 wasn't in Canada.

15 THE COURT: Okay. And that's based on your
16 understanding of the law at the port of entry.

17 THE APPELLANT: Correct.

18 THE COURT: All right.

19 THE APPELLANT: Like --

20 THE COURT: And if that understanding is in error -- I
21 mean that's the -- that's my -- if your
22 understanding of the law was in error, where does
23 that leave you with respect to Judge St. Pierre's
24 decision?

25 THE APPELLANT: Yes.

26 THE COURT: Because the -- because the officer -- my
27 understanding -- I haven't looked at all of the
28 testimony from the officer, but the officer
29 essentially said -- essentially said that she
30 didn't order you to leave Canada and did not
31 create an obligation for you to leave Canada.

32 THE APPELLANT: Right.

33 THE COURT: All right. And so Judge St. Pierre accepted
34 that.

35 THE APPELLANT: Right, but that's why I believe that --
36 that her -- the credibility of her testimony was
37 significant.

38 THE COURT: Well, the -- just -- just to be clear
39 there's -- there's two -- I just want to -- I
40 just -- this is why I am trying to separate these
41 two issues.

42 THE APPELLANT: Mm-hmm.

43 THE COURT: Questions of fact, witnesses testify to;
44 questions of law, judges decide.

45 THE APPELLANT: Right.

46 THE COURT: Whether the -- whether a witness has views
47 about the law, ultimately I -- I decide the law --

Submissions on his own behalf by the Appellant

1 THE APPELLANT: Right.

2 THE COURT: -- in -- in the -- in the court. A
3 witness's opinion about Canadian law if -- foreign
4 law we -- we have witnesses testify about,
5 Canadian law the judges decide, and so the
6 credibility of a witness with respect to law
7 doesn't make the -- either there was an order or
8 there was not, either there was an obligation or
9 there was not, is a question of law, and so --

10 THE APPELLANT: But --

11 THE COURT: -- if, as a question of law, there was not
12 an obligation for you to leave that's -- I just
13 want to understand where that leaves -- the rel --
14 the credibility of the witness is not relevant to
15 a question of law.

16 THE APPELLANT: Right, but can I ask --

17 THE COURT: Yes.

18 THE APPELLANT: -- if Officer Polisak did tell me that
19 I was inadmissible, and that I was not permitted
20 or authorized to return to Canada from the port of
21 entry, wouldn't that then have -- how would I
22 say -- wouldn't that have imposed on me a legal
23 burden to not return to Canada?

24 THE COURT: Well, the -- the -- the question and this
25 is something that I'll -- and perhaps I'll -- I'll
26 have Ms. Horneland take me through the -- the
27 transcripts with respect to what this interaction
28 was from the Crown's perspective, in terms of what
29 impression you had when you -- what -- what the
30 interaction was, and what you say the interaction
31 was, and perhaps one thing that would be helpful
32 for me is what the version of the interaction --
33 and I don't know where I can find the version of
34 the interaction that you provided. I imagine you
35 testified at your trial?

36 THE APPELLANT: I did.

37 THE COURT: All right. And -- and where is the version
38 that you provided to Judge St. Pierre about what
39 happened on that day?

40 THE APPELLANT: I believe that is in the next tab of
41 the transcript book. It was on the 6th -- March
42 6th.

43 THE COURT: March 6th, yes. All right. And so -- all
44 right, I see that -- I see that there's a -- a
45 version -- and I will -- so this is the version
46 that I should review, and you say that this is the
47 version that ought to be accepted and was the

Submissions on his own behalf by the Appellant

1 version that you provided in your testimony?
2 THE APPELLANT: Yes.
3 THE COURT: And that the -- that it was an error for
4 Judge St. Pierre to accept the officer's version
5 of what happened on that day?
6 THE APPELLANT: Yes.
7 THE COURT: All right. All right. And you're saying
8 that the officer found you inadmissible and then
9 ought to have removed you from Canada at that
10 point, but didn't.
11 THE APPELLANT: I -- I would agree with that, yes.
12 I -- I -- I was not aware that -- well, sorry,
13 it's just -- I'm contemplating how you phrased it,
14 that she ought to have removed me, and this is an
15 area that obviously you know much more than I do,
16 so I am not going to question you on it. I just
17 haven't thought of it in -- in those terms.
18 THE COURT: All right. Well, I just -- I just want to
19 be clear, I mean at -- at the time the officer --
20 based on the available -- information available to
21 me you appear to be inadmissible to Canada, I mean
22 that's -- that's the statement upon which you go
23 to the -- that's the statement based on which you
24 go to the United States.
25 THE APPELLANT: Yes.
26 THE COURT: All right.
27 THE APPELLANT: Could I -- or if I may, could I turn
28 your attention to -- I found that part in Officer
29 Polisak's testimony --
30 THE COURT: Yes.
31 THE APPELLANT: -- at page 69 --
32 THE COURT: 69?
33 THE APPELLANT: -- starting at line 36 through page 70
34 at 12, I guess.
35 THE COURT: Yes, I have it -- I did review that.
36 THE APPELLANT: Okay. I mean that statement right
37 there, when she said that's correct, that in those
38 circumstances that -- like I -- I found that quite
39 shocking. It was so clear that what she was
40 saying was incorrect, and as a Border Services
41 officer she must have known that what she was
42 saying was not correct.
43 THE COURT: Sorry, that the -- that the onus is on CBSA
44 to prove that somebody is a non-citizen --
45 THE APPELLANT: Right.
46 THE COURT: -- if they want to remove them?
47 THE APPELLANT: No, no, if a person shows up at a port

Submissions on his own behalf by the Appellant

1 of entry and CBSA has no knowledge of who they are
2 or where they came from, so any random person,
3 potentially a foreign national, can show up at a
4 port of entry and as long as they don't have
5 documentation or identification on them that CBSA
6 would have to allow them to enter the country and
7 she agreed to that.

8 THE COURT: Why -- would have to allow them to enter,
9 sorry?

10 THE APPELLANT: Oh, yeah, and then you see at line 44,
11 after she says that's correct and then I present
12 that scenario to her.

13 THE COURT: All right. And -- all right, and you're --
14 you're saying that Judge St. Pierre should not
15 have accepted -- I mean the state -- the statement
16 that the onus is on CBSA in -- in order to remove
17 somebody the onus is CBSA to prove that they are a
18 foreign national --

19 THE APPELLANT: When a person is encountered within
20 Canada, other than at a port of entry, the burden
21 is on CBSA to show that the person is removable or
22 doesn't have a -- a right to be present in Canada.

23 However, when a person is encountered at a
24 port of entry, the burden is then on the person,
25 who is presumed to be seeking entry to Canada, to
26 prove that they're entitled to enter Canada.

27 THE COURT: Correct -- well, and I -- and I can -- can
28 see where there's -- there's some confusion in
29 the -- in the -- but ultimately what -- I think
30 this doesn't actually get pursued, the -- I don't
31 believe you're a Canadian, I have to prove you're
32 not a Canadian, or CBSA has to prove -- are you
33 saying that if a person shows up, you don't
34 believe they're a Canadian citizen, the burden is
35 on you to prove and you're unable to prove, and
36 they can enter if you're unable to prove --
37 prove -- all right, and you're saying that -- that
38 assuming that this is a misunderstanding of the
39 law or a -- an unclear statement of the law, that
40 that ought to have gone to the officer's
41 credibility, as to whether she told you you were
42 inadmissible?

43 THE APPELLANT: Well, her credibility in general, I --

44 THE COURT: Well, and in general -- but in -- in terms
45 of what -- the -- the relevance of credibility is
46 to specific --

47 THE APPELLANT: Right.

Submissions on his own behalf by the Appellant

1 THE COURT: -- statements that are either going to be
2 accepted or not accepted. Credibility -- as a
3 general proposition, a -- a witness with marginal
4 testimony can be completely un -- not -- not
5 credible, if their --
6 THE APPELLANT: Right.
7 THE COURT: -- testimony is not relevant to anything it
8 doesn't -- nothing turns on it, so the issue that
9 it turns on is whether or not she told you you
10 were in admissible.
11 THE APPELLANT: Yes.
12 THE COURT: In other words, whether or not she made
13 this statement -- I just want to be clear --
14 whether or not she made the statement, something
15 along the lines of, "Based on the information
16 available to -- to me you appear to be
17 in admissible to correct."
18 THE APPELLANT: Correct, yes. I believe her
19 willingness to make a statement as to the one that
20 I just drew to your attention here on page 69 and
21 70, should have shown the court that she was
22 willing to make false statements in this -- in her
23 testimony.
24 THE COURT: All right. And what does she -- she says
25 she did not tell you you were inadmissible?
26 THE APPELLANT: That's correct. She -- she says that
27 she never said anything like that. I believe she
28 had testified that she told me that I could return
29 to Canada.
30 THE COURT: All right. And both before and after,
31 based on the information in FOSS and GCMS, you did
32 in fact come back to Canada?
33 THE APPELLANT: When you say both before and after --
34 THE COURT: So before the interaction with the officer
35 on --
36 THE APPELLANT: March 15th, 2019?
37 THE COURT: Yes. So in March of 2019, you had already
38 been deport -- been removed to Canada from the
39 United States once.
40 THE APPELLANT: Yes.
41 THE COURT: In other words
42 THE APPELLANT: Yes.
43 THE COURT: -- Canadian Immigration authorities had
44 been satisfied at that time that you were a
45 Canadian citizen.
46 THE APPELLANT: Yes, I was deported. I don't believe
47 that they were satisfied that I was a Canadian

Submissions on his own behalf by the Appellant

1 citizen. I believe that they know I'm not a
2 Canadian citizen, and they're just doing what they
3 are doing probably because Homeland Security
4 requested them to or something.

5 THE COURT: Well, according to Officer -- according to
6 the officer, FOSS indicates that you're a Canadian
7 citizen or -- or GCMS indicates you're a Canadian
8 citizen.

9 THE APPELLANT: Well, according to the officer's
10 testimony, but --

11 THE COURT: That's what I'm saying, according to the --

12 THE APPELLANT: -- the GCMS record --

13 THE COURT: -- the -- the testimony of the officer that
14 was accepted by --

15 THE APPELLANT: Right.

16 THE COURT: -- Judge St. Pierre, you are a Canadian
17 citizen -- the -- the records show you to be a
18 Canadian citizen.

19 THE APPELLANT: That -- that was her testimony, but the
20 record don't -- doesn't actually show that.

21 THE COURT: Well, I -- I'm -- what I'm asking is what
22 her testimony was.

23 THE APPELLANT: Okay.

24 THE COURT: Her testimony is that the records show you
25 to be a Canadian citizen.

26 THE APPELLANT: Yes.

27 THE COURT: You accept that the -- that the Canadian
28 Immigration authorities allowed you entry --

29 THE APPELLANT: Yes.

30 THE COURT: -- returning from the U.S. on -- presumably
31 on the understanding that you were a Canadian
32 citizen or -- or the pretense -- and I -- I say
33 pretense in the sense that you don't accept that
34 you are, but --

35 THE APPELLANT: Right.

36 THE COURT: -- that the justification for allowing you
37 entry at that time would have been that you were a
38 Canadian citizen.

39 THE APPELLANT: Yes.

40 THE COURT: All right. And after Ms. -- after March of
41 2019, but before the trial before Judge St.
42 Pierre, you came back to Canada and at that time
43 the GCMS -- whatever was on the system led the
44 Canadian authorities to allow you entry back into
45 Canada as a Canadian citizen at that time?

46 THE APPELLANT: That I -- I wouldn't be able to comment
47 on, I don't know -- because when I was brought

Submissions on his own behalf by the Appellant

1 back to Canada at that point I was in custody, and
2 so I -- I didn't voluntarily go like into
3 THE COURT: You -- you were not extradited?
4 THE APPELLANT: Correct.
5 THE COURT: All right. So -- and so what you're saying
6 is that the conclusion by the officer that you
7 were a Canadian citizen as -- because that's what
8 she ultimately -- that's what she says happened on
9 that day, she looked at the -- at the system and
10 the system said you were a Canadian citizen and
11 she said you were free to go, something along
12 those lines?
13 THE APPELLANT: I agree that that is what she testified
14 about, but I do want to point out that her notes
15 in the GCMS did not say that at all, and I wish we
16 had those here, but unfortunately we don't.
17 THE COURT: All right. Well, the -- the GCMS notes are
18 only relevant to the extent they were put to her
19 in cross-examination, so if you --
20 THE APPELLANT: Right.
21 THE COURT: -- if you want to take me to the cross-
22 examination where those notes were put to her and
23 you say that Judge St. Pierre didn't consider --
24 because ultimately I'm -- I'm not making a -- a --
25 a fresh decision about this officer's credibility.
26 THE APPELLANT: Right.
27 THE COURT: I'm looking at -- and I will have a close
28 look at -- at Judge St. Pierre's reasons and I --
29 and I want to understand why you say he was --
30 he -- and the -- the wording -- and I don't know
31 that the wording really matters, I mean it --
32 the -- the threshold will be a palpable and
33 overriding error, in other words that there's
34 there's a clear -- there's a clear mistake on the
35 part of Judge St. Pierre.
36 I mean that's -- that -- I don't -- I'm --
37 I'm paraphrasing, but that's what ultimately you
38 will need to show, that Judge St. Pierre made a
39 clear error when you are dealing with errors of
40 fact, in other words that he made a mistake in
41 terms of not considering the evidence or -- or
42 misapprehended the evidence or made some --
43 THE APPELLANT: Right.
44 THE COURT: -- very glaring error in -- in doing that.
45 THE APPELLANT: But if certain documents were entered
46 as exhibits, they were part of the record at
47 trial, shouldn't they then be available on appeal

Submissions on his own behalf by the Appellant

1 for review?

2 THE COURT: Well, but the -- the issue is -- is that
3 you're -- your argument is that this officer is
4 not credible --

5 THE APPELLANT: Yes.

6 THE COURT: -- because of things that are in these
7 documents.

8 THE APPELLANT: Yes.

9 THE COURT: To be fair to a witness, if you are going
10 to challenge somebody's credibility based on
11 documents or information you have to put that
12 information to the witness.

13 So in terms of assessing this officer's
14 credibility it will be what was put to the officer
15 in cross-examination that will be relevant, not
16 documents that --

17 THE APPELLANT: Right.

18 THE COURT: -- were not put to her, because she's had
19 no opportunity -- she was given no opportunity to
20 comment on those one way or the other, so you --
21 you -- even if we had those documents and we were
22 going to -- you were to provide me your
23 interpretation of that, the officer may have had a
24 perfectly plausible explanation or another
25 interpretation of those documents, which is the
26 reason for cross-examination.

27 THE APPELLANT: Right, okay.

28 THE COURT: So ultimately I -- I don't know that much
29 turns on us not having the GCMS notes, as what is
30 relevant is what was put to her in cross-
31 examination.

32 Does that -- so if -- if there are parts of
33 the GCMS notes that you put to the officer in
34 cross-examination, and that you say Judge St.
35 Pierre failed to consider --

36 THE APPELLANT: Right.

37 THE COURT: -- please take me to those and I -- I will
38 consider those.

39 THE APPELLANT: I'm not prepared at this time to do
40 that --

41 THE COURT: All right.

42 THE APPELLANT: -- simply because I don't know --

43 THE COURT: What I'm --

44 THE APPELLANT: -- where they are. I'll have to find
45 them.

46 THE COURT: Okay. What -- what I'm -- what I'm
47 going -- what I'm going to propose is that we --

Submissions on his own behalf by the Appellant

1 we take the -- it's soon time for the lunch break.
2 I do want to give you the opportunity to make the
3 arguments that you want to make, so what -- what
4 I'm going to -- what I'm going to do is I'm going
5 to propose that we -- we'll take the lunch break a
6 bit early.

7 We will reconvene at 2:00 p.m. At that point
8 I will ask you to -- you can just take -- you
9 don't need to read through the transcripts with
10 me. You can take me to the specific points in
11 the transcripts that you want me to consider and
12 I'll ask you to -- and then within -- by say 2:30,
13 if you can have completed your submissions,
14 because I do want to hear from -- I do want to
15 have the -- give the Crown an opportunity to
16 respond --

17 THE APPELLANT: Yes.

18 THE COURT: -- but I do want to give you an opportunity
19 to go through the transcripts, to find the parts
20 that you want me to consider, so what we will do
21 is we will stand down now, you can take the
22 transcripts with you and identify the portions
23 that you want to take me to, as well as any other
24 arguments that you wanted me to consider today.

25 THE APPELLANT: Okay.

26 THE COURT: All right. And then we'll -- I'll hear from
27 the Crown starting at around 2:30. All right?

28 THE APPELLANT: Thank you.

29 THE COURT: So on that -- we will take the -- the lunch
30 break and resume at 2:00 p.m. Thank you.

31

32 (VIDEOCONFERENCE PAUSED)

33

34 (PROCEEDINGS ADJOURNED FOR NOON RECESS)

35 (PROCEEDINGS RECONVENED)

36

37 (VIDEOCONFERENCE RECOMMENCES)

38

39 THE CLERK: We are back on the record, Justice.

40 THE COURT: Thank you. Ms. -- do we have Ms.
41 Horneland?

42 THE CLERK: Yes, she should be there, sorry. Ms.
43 Horneland, can you hear us? Oh, I see, sorry.
44 [indiscernible].

45 THE COURT: Oh, I see. There we are.

46 THE CLERK: There's Ms. Horneland.

47 THE COURT: There's Ms. Horneland. Okay. All right.

Submissions on his own behalf by the Appellant

1 Thank you.

2 You're able to hear us, Ms. Horneland?

3 CNSL J. HORNELAND: Yes, I am. Can you hear me?

4 THE COURT: All right. Thank you.

5 So I apologize for the late start this
6 afternoon. Unfortunately, we had some technical
7 difficulties in another case I was supposed to be
8 giving a decision on, the -- but I will need to
9 break just after 3:00. We're going to give it
10 another try in terms of me giving a decision in
11 the other case, but -- so -- but, please go ahead,
12 Mr. Fox.

13 THE APPELLANT: Okay.

14

15 **SUBMISSIONS ON HIS OWN BEHALF BY THE APPELLANT,**
16 **CONTINUING:**

17

18 THE APPELLANT: Earlier, one of the areas that I drew
19 attention to in the transcripts had to do with
20 Officer Polisak's testimony about CBSA's burden at
21 a port of entry, with respect to people who might
22 claim to be a Canadian citizen but have no
23 documentation to prove it. Shortly after that we
24 had stood down where we had taken the -- the lunch
25 break and when we came back --

26 THE COURT: Yes.

27 THE APPELLANT: -- I expressed my concern about that
28 with the court, and there was some discussion
29 between myself and the judge that I think is
30 relevant to this proceeding, and so that would be
31 in the transcript starting at page 71.

32 THE COURT: This is the March 4th transcript?

33 THE APPELLANT: Yes.

34 THE COURT: All right. So at 71?

35 THE APPELLANT: Yes, 71, at line 16 --

36 THE COURT: Yes.

37 THE APPELLANT: -- through to the bottom of that page.

38 THE COURT: Yes.

39 THE APPELLANT: And there I'm expressing to the court
40 that I believe that what she had said is -- is
41 completely incorrect and the burden is actually
42 the -- the other way.

43 THE COURT: All right, yes?

44 THE APPELLANT: And then on pages 72 and 73 there is
45 further discussion between myself and the -- the
46 judge and I believe that it's quite apparent in
47 that discussion -- it's essentially all of page 72

Submissions on his own behalf by the Appellant

1 and 73. It's apparent there that the judge
2 understood CBSA's burdens and the laws at a port
3 of entry to be as Officer Polisak had stated that
4 they were, but also there was some confusion about
5 what exact areas constituted the port of entry.
6 THE COURT: Right.
7 THE APPELLANT: So the judge then said that --
8 THE COURT: Well, sorry, I think -- I think what the
9 judge says -- my understanding of what the judge
10 is saying here is that you were not seeking entry.
11 THE APPELLANT: That's correct, I wasn't seeking entry.
12 However, the presumption is that any person who
13 enters an area designated as a port of entry is
14 presumed to be a foreign national seeking entry,
15 regardless if they actually are seeking entry or
16 not. I mean from a -- from a CBSA perspective or
17 an Immigration law perspective, that's a
18 presumption that has to be applied to all people
19 who enter an area designated as a port of entry.
20 THE COURT: All right. And did -- had you -- this --
21 what you say is a -- is a presumption when
22 somebody -- sorry, when -- what -- what do you
23 mean by enter a port of entry?
24 THE APPELLANT: Um...
25 THE COURT: like when -- when somebody comes into the
26 booth -- these are at the Peace Arch, so you
27 were -- you were -- this is at Peace Arch or the
28 Pacific crossing?
29 THE APPELLANT: It's Peace Arch.
30 THE COURT: So you're at the Peace Arch, there's --
31 there's two sides.
32 THE APPELLANT: Right, but you see this is one of the
33 areas that there was some uncertainty and
34 disagreement about, but it then gets addressed in
35 the next part, where I had cross-examined Officer
36 Polisak on it, and then --
37 THE COURT: All right.
38 THE APPELLANT: -- she clear -- she clears it up,
39 but --
40 THE COURT: She clears up what -- what does she clear?
41 THE APPELLANT: Oh, the issue about whether or not
42 like the CBSA building that's at the Douglas
43 Border crossing, whether or not the reception area
44 inside that building is considered within the port
45 of entry. And so my questions to her were very
46 specific on it, because I wanted to make sure that
47 the -- the issue was cleared up appropriately or

Submissions on his own behalf by the Appellant

1 accordingly.

2 THE COURT: All right. So did -- did the officer accept

3 that you were seeking entry to Canada?

4 THE APPELLANT: Well, that -- that didn't really come

5 up. That wasn't an issue.

6 THE COURT: All right. So, sorry, what is the -- what

7 is it that you're taking -- I'm -- I'm trying

8 to -- I'm just trying to understand what it is

9 you're taking me to this --

10 THE APPELLANT: Okay. Well --

11 THE COURT: Are you taking me to this for the

12 proposition that --

13 THE APPELLANT: On -- on pages 72 and 73, the reason

14 for those --

15 THE COURT: Yes.

16 THE APPELLANT: -- is to show the disagreement between

17 my position and the judge's position on what

18 constitutes the port of entry and -- and what

19 the -- what CBSA's burden is -- burden of proof at

20 the port of -- for people at the port of entry.

21 So that shows that there was the disagreement and

22 shows what the judge's understanding of it was.

23 THE COURT: All right. And so the --

24 THE APPELLANT: But then --

25 THE COURT: -- the -- the judge says -- because I'm

26 just trying to understand where you say the --

27 the -- where the judge is confused here, because

28 you're saying the judge's understanding is wrong,

29 is that --

30 THE APPELLANT: Right, right. Let me find it

31 specifically, sorry, I just --

32 THE COURT: -- because he says you're showing up at the

33 Border Services office, you're not seeking

34 admission, you seek admission at the border.

35 THE APPELLANT: Okay. So the judge understood the port

36 of entry to mean just the physical border itself

37 up to the -- where the booths are, where you pull

38 your car up to, and that his understanding was

39 that the CBSA building, which is just north of

40 that, was outside of the port of entry.

41 THE COURT: All right.

42 THE APPELLANT: So his understanding was that when I

43 walked into the CBSA building I was within Canada

44 and I was not within a port of entry, and so

45 the --

46 THE COURT: Well, the port of entry is in Canada.

47 THE APPELLANT: Right, right, but the way it's

Submissions on his own behalf by the Appellant

1 phrased -- sorry, I'm trying to remember if it's
2 phrased this way specifically in the -- the *IRPA*.

3 There is CBSA's burdens within Canada, other
4 than at a port of entry, and then there is CBSA's
5 burdens within a port of entry, you see, and their
6 burden within Canada, but not at a port of entry
7 is that they have to establish that the person is
8 removable or not authorized to be in Canada.

9 However, within the area designated as a port
10 of entry, the burden is on the person who is --
11 who is there presumably seeking entry to prove
12 that they're entitled to enter Canada.

13 THE COURT: Well, this doesn't -- I -- I just want to
14 be clear isn't -- you're -- you're saying that
15 the -- that *IRPA* makes a distinction between --
16 creates -- creates the burdens on the basis of
17 being in a port of entry as opposed to on the
18 basis of seeking entry into Canada?

19 THE APPELLANT: Okay. First, I should say I'm having
20 difficulty remembering if that's what I read in
21 the *IRPA* or if it was in the case law, and this is
22 one of the areas that having access to the case
23 law would have been helpful, but it ---- it makes
24 a distinction between everywhere in Canada except
25 at ports of entry and then at ports of entry.

26 THE COURT: All right. And so -- so you're saying that
27 this issue -- so assuming that you are right, in
28 terms of the -- the issue with the port of entry
29 where -- where does that -- where does that get us
30 today?

31 THE APPELLANT: Well, in the -- the next part that I
32 was going to bring you to --

33 THE COURT: Yes.

34 THE APPELLANT: -- Officer Polisak's testimony, she
35 testified in there consistently with what I was
36 saying and that starts at page 74, line 23.

37 THE COURT: Yes.

38 THE APPELLANT: That's where I start questioning her on
39 it all the way up to 76 -- page 76, line 10.

40 THE COURT: All right. Okay.

41 THE APPELLANT: And I would say that where that gets us
42 is once I entered the area designated as the port
43 of entry, CBSA had a duty once there was some
44 question about whether I was or was not a Canadian
45 citizen, and the fact that they did not establish
46 or determine that I am a Canadian citizen, they
47 had a duty to not allow me to return or re-enter

Submissions on his own behalf by the Appellant

1 Canada from the port of entry at that point, so --
2 THE COURT: Sorry, the -- but the hypothetical that you
3 put to the officer you -- you -- you put a
4 hypothetical to the officer that was different
5 than your situation.
6 THE APPELLANT: I -- I think the --
7 THE COURT: Your -- your situation was somebody who had
8 been in Canada for a significant period -- in fact
9 had been admitted to Canada, who shows up at the
10 port of entry. Did you put that hypothetical to
11 the officer?
12 THE APPELLANT: No, I -- I didn't mention that part of
13 it, because I was trying to keep it just --
14 THE COURT: All right.
15 THE APPELLANT: -- focused --
16 THE COURT: Well, then these -- these hypotheticals
17 don't -- I don't see how hypotheticals that don't
18 apply to your situation are -- I mean you -- the
19 hypothetical that I see here, you said somebody
20 who came across the border who hadn't been
21 admitted to Canada shows up at a port of entry --
22 THE APPELLANT: Right.
23 THE COURT: -- I mean they have an obligation to show
24 up at a port of entry if they -- if they cross the
25 border.
26 THE APPELLANT: Yes.
27 THE COURT: And that's set out in the Act, but you --
28 the -- this -- but this wasn't your situation.
29 Your situation was somebody who had been
30 admitted to Canada, because you -- at the time you
31 showed up at the -- at the port of entry you had
32 already been admitted to Canada.
33 THE APPELLANT: Yes.
34 THE COURT: And so you were someone who had been
35 admitted to Canada, who was showing up at the port
36 of entry from the Canadian side.
37 THE APPELLANT: Yes.
38 THE COURT: All right. So was that hypothetical, was
39 that situation put to the officer?
40 THE APPELLANT: That situation was not, but I -- I
41 don't believe that it would be relevant whether I
42 entered the port of entry from the Canadian side
43 or the U.S. side, because once I entered the port
44 of entry then it -- it doesn't matter which side I
45 entered from.
46 THE COURT: Well, I -- I'm -- I'm --
47 THE APPELLANT: I wish I had case --

Submissions on his own behalf by the Appellant

1 THE COURT: I'm -- I'm unclear as to what -- what it is
2 you're suggesting. You're saying that anybody who
3 enters the building is seeking entry into Canada?
4 THE APPELLANT: Oh, no, no, no, they may not actually
5 be seeking entry to Canada and they may not
6 actually be a foreign national, but they're
7 supposed to be presumed to be a foreign national
8 seeking entry to Canada.
9 THE COURT: Well, why -- what -- what is the basis for
10 that presumption?
11 THE APPELLANT: That's where the case law comes in.
12 Now, I know that there is case law to support
13 this, because I researched this before I presented
14 myself at the border and before I even came up
15 with this plan of -- of doing any of that.
16 Unfortunately, though, I don't have access to the
17 case law to --
18 THE COURT: All right. Was this case law --
19 THE APPELLANT: -- support that.
20 THE COURT: -- put to -- would -- did you -- did you
21 present this case law to Judge St. Pierre?
22 THE APPELLANT: I couldn't have, because I was in
23 custody the whole time.
24 THE COURT: All right. So --
25 THE APPELLANT: Also -- also I should say I certainly
26 didn't expect that the CBSA officer was going to
27 say the kinds of things that she had said. I
28 expected that she was going to say some things
29 that weren't going to be entirely true, but I
30 didn't think that she was going to say that the
31 burden on CBSA to prove that somebody is a
32 Canadian -- or is not a Canadian citizen at the
33 border.
34 THE COURT: All right. And so basically what -- what
35 you're saying is that the officer is wrong about
36 that and --
37 THE APPELLANT: I'm saying --
38 THE COURT: -- that Judge St. Pierre was wrong to
39 believe her testimony because she was wrong about
40 that?
41 THE APPELLANT: Well, I'm saying that she was wrong
42 about it and that she knew that she was wrong
43 about it, and I -- I agree or -- I would say that
44 Judge St. Pierre should not have accepted her
45 testimony on that -- at that point.
46 I mean I would have expected that it would
47 have been fairly clear that -- that she was wrong,

Submissions on his own behalf by the Appellant

1 but --

2 THE COURT: All right, but because I -- I can -- I can
3 say that I've -- I've attended as counsel at the
4 port of entry many times from the Canadian side.
5 I -- you're saying every time that I attended
6 there there was a presumption that I was a foreign
7 national?

8 THE APPELLANT: Um...

9 THE COURT: Like I'm trying to understand what --
10 what -- what it is that you're -- you're -- you're
11 suggesting as a legal principle --

12 THE APPELLANT: Right, right.

13 THE COURT: -- but every officer who goes into there is
14 presumed to be a foreign national when they show
15 up for work that day?

16 THE APPELLANT: Well, for the purposes of the
17 Immigration laws, yes.

18 Now, that doesn't mean that CBSA has to
19 investigate or interrogate every person who enters
20 the area designated as a port of entry, but
21 certainly in a case where somebody enters the
22 area -- the area designated as a port of entry and
23 their identity and their citizenship is unclear,
24 and that person is stating unequivocally that they
25 are not a Canadian citizen and they have been
26 convicted of a criminal offence, in that case
27 there should be.

28 And I'm certain that there would be a clear
29 burden or duty on CBSA's part to not simply allow
30 the person back into Canada, which is what
31 happened in this case. I showed up at the border,
32 I told him them I'm not a Canadian citizen, I was
33 convicted of an -- an indictable offence. They
34 agreed that I would not be admissible based on
35 that, and I mean for them to say, well, we don't
36 know who you are, but welcome back to Canada
37 anyway, would seem a little outrageous to me.

38 THE COURT: All right.

39 THE APPELLANT: And then there was some further
40 discussion or cross-examination of Officer Polisak
41 regarding additional records that she had checked,
42 specifically my CPIC record, and the reason that I
43 questioned her on that is at one point, I think it
44 was on direct, she had stated that all of the
45 records that -- or all of the information that she
46 had seen indicated that I was a Canadian citizen.

47 However, we had already established that the

Submissions on his own behalf by the Appellant

1 FOSS record and the GCMS both stated that I was
2 born in the U.S.
3 THE COURT: Sorry, how is that relevant to you being a
4 Canadian citizen?
5 THE APPELLANT: Well, because if the Immigration
6 authorities records state that I wasn't born in
7 Canada and I have never applied for Canadian
8 citizen then I'm not --
9 THE COURT: There are -- there are millions of Canadian
10 citizens who weren't born in Canada --
11 THE APPELLANT: Right, right, but until they --
12 THE COURT: -- or at least hundreds of thousands, I
13 I imagine millions, but --
14 THE APPELLANT: Until they establish their right to
15 citizenship, the presumption is that they would
16 not be a Canadian citizen, would it not? I mean
17 if a person is born in a foreign country, until
18 they can show that they have some historical
19 connection to Canada cer -- certainly the Canadian
20 government is not simply going to say, okay,
21 you're a Canadian citizen until we prove
22 otherwise.
23 THE COURT: Well, no, but you're -- you're -- sorry,
24 be -- because you've jumped -- there's two -- one
25 is GCMS or FOSS identified you as a Canadian
26 citizen according to the officer --
27 THE APPELLANT: According to the officer.
28 THE COURT: Well, that -- I mean that's -- that's the
29 testimony that was before Judge St. Pierre, that
30 accord -- the officer's reading of whatever was in
31 GCMS and FOSS was that you were a Canadian
32 citizen, at least two officers had interpreted
33 whatever was in GCMS or FOSS in the same way in
34 the years -- in the years prior to and after that,
35 and so that -- that's what the testimony was
36 was that this officer understood the records to
37 say that you were a Canadian citizen.
38 THE APPELLANT: But I believe we covered earlier where
39 I cross-examined her on the GCMS and the FOSS
40 entries, where it stated that I was born in the
41 United States.
42 THE COURT: Yes --
43 THE APPELLANT: Okay.
44 THE COURT: -- as are many Canadian citizens.
45 THE APPELLANT: Right. And then -- well, I'd like to
46 turn to page 91, if we could.
47 THE COURT: Yes.

Submissions on his own behalf by the Appellant

1 THE APPELLANT: Let's see, lines 37 to 40, I'm reading
2 from Officer Polisak's declaration, this is what
3 went into the GCMS record.
4 THE COURT: Sorry, 90 -- sorry, page?
5 THE APPELLANT: Oh, page 91.
6 THE COURT: Yes.
7 THE APPELLANT: Lines 37 to 40.
8 THE COURT: 30 -- yes.
9 THE APPELLANT: And there in her declaration, which was
10 her -- which were her notes in the GCMS record,
11 she states that:
12
13 At this point it cannot be confirmed the
14 subject is not a Canadian and his explanation
15 of stealing Reese's identity cannot be
16 confirmed.
17
18 That was the only statement that she made in the
19 GCMS record or in her declaration regarding my
20 citizenship --
21 THE COURT: Yes.
22 THE APPELLANT: -- simply that she couldn't confirm
23 that I'm not a Canadian citizen, but she never
24 stated that she believed or confirmed that I was a
25 Canadian citizen, like --
26 THE COURT: Yes.
27 THE APPELLANT: -- it -- it seems to me that at the
28 time that I presented myself at the border, there
29 were so many questionable things that came up, it
30 seems surprising to me that they would not at
31 least detain me for -- until they could
32 investigate further and determine who I am and
33 whether or not I really am a Canadian citizen.
34 So my point with all of this is I think all
35 of this contributes to a lack of credibility on
36 the part of Officer Polisak.
37 THE COURT: And coming back to the suggestion that she
38 told you that based on the information before her
39 you were inadmissible?
40 THE APPELLANT: Yes.
41 THE COURT: All right. And then from there your
42 interpretation that inadmissibility meant you
43 ought to go to the United -- that you had to go to
44 the -- you were obligated to go to the United
45 States?
46 THE APPELLANT: But to be fair, more specifically I
47 I would say that it wouldn't mean that I was

Submissions on his own behalf by the Appellant

1 required to go to the United States, just that I
2 was prohibited from going to Canada.
3 THE COURT: All right. And -- but you -- you didn't
4 tell -- your testimony didn't -- the officer
5 didn't prohibit you from going into Canada?
6 THE APPELLANT: Well, by stating that I'm inadmissible.
7 THE COURT: Well, there are plenty of people in Canada
8 who are inadmissible.
9 THE APPELLANT: But if you're inadmissible aren't you
10 not permitted or authorized to be present in
11 Canada?
12 THE COURT: Well, there are plenty of ways to -- to
13 address inadmissibilities that do not require
14 departing Canada, so -- and -- and one can be
15 many -- many people are inadmissible to Canada and
16 various exceptions are made on a daily basis for
17 various types of inadmissibilities.
18 THE APPELLANT: I understand that that would be the
19 case if the person is encountered inside of
20 Canada, but if they're encountered at a port of
21 entry it's -- it's my understanding that if
22 they're encountered at a port of entry, since they
23 are not considered to already be admitted, they're
24 not present in Canada, then they cannot be removed
25 at that point, because they are not actually in
26 Canada. They can simply be denied admission.
27 That's my understanding.
28 THE COURT: All right. Well, you're -- you're --
29 what -- what you're -- what you're saying -- I
30 just want to be clear, the officer said based on
31 the information you're giving me it would appear
32 that you're inadmissible.
33 THE APPELLANT: Yes.
34 THE COURT: And then the officer says I don't know if
35 he's Canadian or not.
36 THE APPELLANT: Of course I didn't receive this --
37 these GCMS notes until much, much, much later.
38 THE COURT: No, but the off -- what the officer -- what
39 the officer says that she wrote in the GCMS --
40 THE APPELLANT: Right.
41 THE COURT: -- is I don't know if this guy is Canadian
42 or not, he says he's not.
43 THE APPELLANT: Right.
44 THE COURT: The system says he is -- is -- is
45 essentially what -- that's -- that's her
46 testimony. The system says he's Canadian, he says
47 he's not; I don't know what's going on here.

Submissions on his own behalf by the Appellant

1 THE APPELLANT: Okay.

2 THE COURT: It -- it is essentially what -- it can't be
3 confirmed one way or the other.

4 THE APPELLANT: Right.

5 THE COURT: So the note is put on -- on GCMS and -- and
6 then you're saying that by saying that, based on
7 what you've told me you are inadmissible, you
8 understood that you should continue on to the
9 United States from there?

10 THE APPELLANT: Yes. I understood that to mean that my
11 only legal option at that point was to proceed to
12 the United States.

13 THE COURT: All right. And so if that understanding
14 so you're -- you're saying -- I just want to
15 understand the argument before me.

16 You were saying that your understanding is
17 correct as a matter of law and that Judge St.
18 Pierre got it wrong, when he said that -- when
19 by not finding that the only -- that you were
20 effectively being removed and ordered to leave
21 Canada at that point is that Judge St. Pierre got
22 it wrong or are you arguing that you misunderstood
23 the law?

24 THE APPELLANT: My argument is that Judge St. Pierre
25 got it wrong, but I do accept that I could be
26 wrong. I mean I'm not so arrogant that I'm going
27 to insist that I'm right and the judge is wrong.

28 THE COURT: All right.

29 THE APPELLANT: Other than that, there were just a few
30 other inconsistencies or statements that I found
31 that were proven to be false by Officer Polisak,
32 but I don't think that it would add anything to my
33 arguments, so they're not critical at this point.

34 The one thing I did want to mention, though,
35 is with respect to Issue 1, I believe that once
36 Issues 3 and then 2 are accepted or determined to
37 be correct then Issue 1 would become relevant.
38 That's the Crown's agreement not to prosecute me
39 if I were removed or asked to leave.

40 THE COURT: But you say, sorry, the -- the agreement
41 not to prosecute you would go to --

42 THE APPELLANT: My argument there was that my position
43 is that what happened was that I was effectively
44 removed. I presented myself at the border and
45 then I was denied readmission and so --

46 THE COURT: All right.

47 THE APPELLANT: -- I was essentially removed and since

Submissions on his own behalf by the Appellant

1 during the sentencing submissions on the index
2 offence Mr. Meyer [phonetic], the Crown, had
3 stated on the record that in such a circumstance
4 the Crown would not prosecute me for a breach,
5 because he wouldn't consider that a voluntary
6 or he would consider that an involuntary
7 removal --

8 THE COURT: Did you -- did you apply for a stay of
9 proceedings based on abuse of process?

10 THE APPELLANT: A stay of proceedings in this matter?

11 THE COURT: Yes.

12 THE APPELLANT: No.

13 THE COURT: All right, because in -- in terms of the --
14 a decision to prosecute or not to prosecute is
15 not -- it doesn't go to the ultimate guilt or non-
16 guilt of an individual.

17 So, for example, if the Crown makes a promise
18 to someone not to prosecute them the -- the remedy
19 for the Crown reneging on that promise is an abuse
20 of process application. It doesn't go to the
21 ultimate question of guilt. In other words, when
22 somebody makes a -- a -- the Crown makes a deal
23 with somebody which we see in some -- in some
24 cases and then renegs on that agreement, there may
25 be an abuse of process, but it doesn't change the
26 guilt or non-guilt of the person.

27 And so I just want to be clear on what it is
28 that you're arguing with respect to
29 representations that were made by Mr. Meyer, but
30 ultimately I'm not sure that much turns on this,
31 because if -- if you were ordered to leave then --
32 and I -- I'll -- I'll hear from Ms. Horneland, but
33 if -- if -- if you were ordered to leave and you
34 did not have the required *mens rea* to commit the
35 offence, in the sense that you had no choice, in
36 other words you were -- you were ordered -- you
37 were forced to commit the offence, if you were not
38 ordered to leave then Mr. Meyer's representations
39 are somewhere irrelevant. Did you see -- like
40 this really comes down to whether you were ordered
41 to leave Canada or not.

42 THE APPELLANT: Right, I -- I understand that and
43 hearing you phrase it in that way makes me think I
44 believe that was one of the issues that Ms. Brown
45 had brought up in the amended notice of appeal --

46 THE COURT: Yes.

47 THE APPELLANT: -- but the reason I chuckled a moment

Submissions on his own behalf by the Appellant

1 ago was what you're saying would be absolutely
2 current, but if the Crown gets a warrant for a
3 person's arrest, based on something that they
4 really shouldn't be prosecuting anyway, and then
5 U.S. authorities send me back here to be
6 prosecuted for that, I mean it's a little -- it's
7 a very small reassurance to know that, well, they
8 can't prosecute me for something and I should
9 apply for an abuse of process after U.S.
10 authorities have come and arrested me and brought
11 me back to Canada to prosecute me for something
12 that I shouldn't have been arrested for in the
13 first -- that was the only reason I chuckled.
14 THE COURT: All right. Well, anyway, that -- that's a
15 separate -- that's a separate question as to --
16 THE APPELLANT: Yeah.
17 THE COURT: -- as to whether -- what the remedies might
18 be for that are -- but ultimately the -- the
19 question before me is was Judge St. Pierre correct
20 or -- or what should --
21 THE APPELLANT: Right.
22 THE COURT: -- Judge St. Pierre's decision be upheld as
23 far as your intention to violate this order.
24 THE APPELLANT: Right, okay.
25 THE COURT: Is that --
26 THE APPELLANT: Yes.
27 THE COURT: All right. So the -- that the --
28 THE APPELLANT: I -- I --
29 THE COURT: -- the issue with Mr. Meyer is a bit of a
30 side issue, in the sense that if you -- if you had
31 the necessary intent --
32 THE APPELLANT: Right.
33 THE COURT: -- then there was no agree -- the agreement
34 with Mr. Meyer was not relevant --
35 THE APPELLANT: Right.
36 THE COURT: -- and if you didn't have the necessary
37 intent then you should have been acquitted and the
38 agreement with Mr. Meyer is irrelevant, is that
39 fair?
40 THE APPELLANT: Okay, yes. Yes, right, correct.
41 THE COURT: All right. Okay. I just want to make sure
42 we're on the same page that --
43 THE APPELLANT: Thank you.
44 THE COURT: Okay. Thank you.
45 THE APPELLANT: And I'm -- I guess I'm done. I think
46 that's all that I can say.
47 THE COURT: All right. Thank you. Ms. Horneland?

Submissions on his own behalf by the Appellant

1 CNSL J. HORNELAND: Yes, thank you, Justice.
2 THE COURT: I -- I don't know if I have -- do I have a
3 book of authorities from you or should I have a
4 book of authorities from you?
5 CNSL J. HORNELAND: Yes. There should have been a book
6 of authorities. It's a blue Cerlox book filed
7 August 24, so -- and it's -- it's entitled
8 Respondent Book of Authorities Updated and
9 Corrected. It's the companion to the Book of
10 Argument and Materials, also filed August 24th.
11 THE CLERK: I have the original [indiscernible].
12 THE COURT: All right. The original updated and
13 corrected and then -- oh, I see, I've got -- oh,
14 this is the Argument and Materials, so that --
15 that should stay on the file and --
16 THE CLERK: Right.
17 THE COURT: -- then this is the Authorities, Updated
18 and Corrected.
19 THE CLERK: So is that the one you were --
20 THE COURT: This is the one I'm looking for.
21 THE CLERK: Okay.
22 THE COURT: Thank you. All right. Thank you.
23 THE CLERK: Sorry, Justice, we've got -- we've got
24 another set. This one is one is September 5th.
25 THE COURT: I think it was originally scheduled for --
26 I think that the -- that the date -- it's the date
27 at the top that will be the -- oh --
28 THE CLERK: Yeah, I don't know why -- sorry,
29 [indiscernible] I have two sets, one set is --
30 CNSL J. HORNELAND: Yes, there -- there --
31 THE COURT: Oh, it will be the August 27th one?
32 CNSL J. HORNELAND: August 24th should be the stamp
33 that it was -- the date it was --
34 THE COURT: All right. I have the August 24th one.
35 CNSL J. HORNELAND: -- that it was filed.
36 THE COURT: All right. Thank you.
37 CNSL J. HORNELAND: So that's the -- those -- those are
38 the books the Crown will be referring to and I
39 if there's confusion -- there were earlier
40 arguments filed, but -- but the latest one is the
41 one I'll be relying on and the reference to
42 corrections, Justice, is simply that the
43 transcript references were corrected to correspond
44 with the new consolidated books, so that is why we
45 filed the new argument.
46 So if you are -- if you have the materials
47 before you now, Justice, I can commence my

Proceedings

1 submissions.

2 THE COURT: I -- I do and I -- I think that the -- the
3 part that would be of the -- what -- the part that
4 I think would be helpful for me, in terms of
5 focusing your submissions is on the implications
6 of *Zora* and the -- the *mens rea*, like the -- that
7 -- that aspect of what the test is that's -- that
8 ought to have been applied by Judge St. Pierre.

9 If -- you can just assist me, I'm just --
10 because I'm just trying to remember the timing of
11 *Zora*, but is --

12 CNSL J. HORNELAND: Yes.

13 THE COURT: This was pre -- this was a pre-*Zora* -- this
14 was a pre-*Zora* case, is that --

15 CNSL J. HORNELAND: Yes, yes, Justice.

16 THE COURT: And so if you could just assist me with
17 what test Judge St. Pierre was applying and
18 what -- what I am to make of that post-*Zora* would
19 be helpful for me.

20 CNSL J. HORNELAND: Okay.

21

22 **SUBMISSIONS FOR THE CROWN/RESPONDENT BY CNSL J.**
23 **HORNELAND:**

24

25 CNSL J. HORNELAND: Yes, I can do that, Justice, and so
26 that -- *Zora* I -- I do refer to in my -- in my
27 argument and it comes up under Issue 4, so let me
28 just take you to that point.

29 My friend's Issue 4 is -- it begins on -- my
30 written submissions begin on page 13 in my book of
31 argument.

32 THE COURT: Yes.

33 CNSL J. HORNELAND: And I'll just -- I'll take you
34 through it, Justice, but just as a brief overview
35 in -- in response to your question about *Zora*, I
36 do refer to *Zora*. It was a decision that was
37 rendered by the Supreme Court in 2020, so it did
38 follow this decision of Judge St. Pierre.

39 The *Zora* decision -- and I'll get to it in
40 more detail once I make my way through my
41 argument, but the *Zora* decision as, Justice,
42 you're likely aware, was one that was rendered in
43 respect of the custody applied for breach of
44 bail -- for a breach of recognizance. This is of
45 course a breach of probation, but nonetheless
46 *Zora* -- the court does mention a breach of
47 probation offence in obiter in *Zora*, and so I

Submissions for the Crown/Respondent by Cnsl J. Horneland

1 will -- I'll take you to those comments, Justice,
2 so you can put that in context in -- in
3 [indiscernible] case.

4 THE COURT: Thank you.

5 CNSL J. HORNELAND: So -- so the issue that I
6 articulated at Issue 4, on page 13 of my argument,
7 is whether the trial judge erred in respect of the
8 analysis of reasonable excuse for failing to
9 comply with the probation order.

10 So this is -- this is a ground that the
11 appellant has raised in his notice of appeal filed
12 November 17, and of course I appreciate Mr. Fox
13 has said today he's not necessarily advancing them
14 and he hasn't really advanced them in his oral
15 submissions, but because this was filed for him
16 and the Crown argument was prepared in response to
17 all of those grounds I think it appropriate for
18 the court to deal with it.

19 Your Honour, it -- it's more articulated
20 further articulated as the trial judge erring by
21 not considering whether the Crown had proven
22 beyond a reasonable doubt that the accused had the
23 subjective *mens rea* for the breach of probation
24 offence, before proceeding on to consider whether
25 the accused has a reasonable excuse for the
26 breaches otherwise proven.

27 So in order to pre -- pre -- for this court
28 to make a determination of whether the trial judge
29 correctly applied the law, of course, we need to
30 first turn to the -- the reasons for judgment and
31 the record.

32 I start first with the record and the -- the
33 reasons for judgment -- I'm at paragraph 51 of my
34 argument. Really, Your -- Justice, at the outset
35 of the reasons for judgment you will see at
36 paragraph 4 that the trial judge acknowledges
37 straight away that the key issue for him to
38 determine in this case is -- is whether or not Mr.
39 Fox, the appellant, had a reasonable excuse for
40 walking across the border and thereby allegedly
41 breaching his conditions.

42 He also cited in his reasons for judgment the
43 *Goleski* case, so I -- I describe this case at
44 paragraph 53 of my written case. Now, the case
45 that I reference in paragraph 53 is indexed in my
46 book of authorities at tab 2, Justice, and I'm
47 referring to an index there of the Court of Appeal

Submissions for the Crown/Respondent by Cnsl J. Horneland

1 decision. It's a decision of Justice Frankel and
2 I can advise that his decision was affirmed by the
3 Supreme Court of Canada and that is also indexed
4 in my book, but if I could just describe the
5 *Goleski* case for you, Justice, it was a case where
6 Mr. Goleski was charged with failing to provide a
7 sample of his breath in an impaired driving
8 investigation.

9 That offence, as it was then, entitled him to
10 rely on a -- on a reasonable excuse defence, and
11 he testified at trial that he refused to provide a
12 sample because he believed that the officer would
13 lie about the breath result.

14 Ultimately at trial, the trial judge wasn't
15 satisfied that the accused had established that
16 reasonable excuse and he found Mr. Goleski guilty.
17 Mr. Goleski appealed, and on the summary
18 conviction appeal his conviction was set aside and
19 the -- the summary conviction appeal judge relied
20 on a case called *Lewko* which is a Saskatchewan
21 Court of Appeal case, and that case essentially
22 held that the onus that the -- the defendant need
23 only raise the reasonable excuse defence, that the
24 burden remained on the Crown to prove a lack of
25 reasonable excuse beyond a reasonable doubt. So
26 essentially the summary conviction appeal judge
27 found that the trial judge had the onus wrong by
28 placing it on the accused, to prove on a balance
29 of probabilities.

30 So following that summary conviction appeal,
31 Justice, the Crown further appealed to our Court
32 of Appeal and I have -- I begin my summary of that
33 decision on page 14, paragraph 54 of my argument.

34 Mr. Justice Frankel for the court identified
35 the issue as being where the onus lies when an
36 accused asserts that he had a reasonable excuse
37 for failing or refusing to comply in *Goleski* with
38 a breathalyzer demand. So that's in the decision
39 indexed at tab 2.

40 So Mr. Justice Frankel went on to more
41 specifically ask whether the Crown must prove that
42 the accused did not have a reasonable excuse
43 beyond a reasonable doubt, or whether the accused
44 must prove on a balance of probabilities of
45 probabilities that the facts asserted give rise to
46 a reasonable excuse.

47 Now, at the time Mr. Goleski committed his

Submissions for the Crown/Respondent by Cnsl J. Horneland

1 offence s. 794 was as I've excepted at paragraph
2 55 of my argument. I won't read it aloud, but I
3 set it out there for you, Just i ce, because it --
4 it was in force for that period of time, but not
5 in force for the time when Mr. Fox was convicted
6 or sorry, when he committed the offences he was
7 convicted of.

8 So -- and I'll get to that -- the
9 implications of that in -- in a moment, but before
10 I do let me just conclude my summary of the
11 *Goleski* decision.

12 It's important in the Crown's submission that
13 in the *Goleski* case Justice Frankel took the time
14 to conduct a thorough review of the common law and
15 the legislative history concerning the defence of
16 reasonable excuse, and he ultimately found for the
17 court that the onus was on the accused person to
18 establish the reasonable excuse on a balance of
19 probabilities.

20 He -- he affirmed the correct approach in
21 [indiscernible] portion -- an excerpt there that I
22 have at paragraph 56 of my argument. Justice
23 Frankel was quoting from a decision called
24 *Sheehan*, which was from the Newfoundland
25 Provincial Court, and I won't read the entire
26 except aloud, Justice, but the important part for
27 the purposes of determining *mens rea* and how
28 the -- the burden of proof around that element of
29 the offence, this -- this is important in -- and
30 relevant, in the Crown's submission, that Justice
31 Frankel found that the correct approach is when an
32 accused person raises this defence of reasonable
33 excuse he or she is conceding that the Crown has
34 proven beyond a reasonable doubt the existence of
35 the *mens rea* and *actus reus* of the offence.

36 And so once they've raised that the onus
37 shifts to the accused to prove on a balance of
38 probabilities that they have established a
39 reasonable excuse. So that was what was found by
40 the -- our Court of Appeal.

41 As I said it was further appealed to the
42 Supreme Court by Mr. *Goleski*. That appeal was
43 dismissed and the Supreme Court affirmed that the
44 law had been correctly stated by Justice Frankel
45 of our Court of Appeal.

46 Now, an interesting twist for the purposes of
47 this appeal, Justice, is that the reasonable

Submissions for the Crown/Respondent by Cnsl J. Horneland

1 excuse that was imported into s. 794 was repealed.
2 Section 9 -- 794(2) was repealed in 2018, as I
3 have set out at paragraph 58 of my argument. So
4 that raises the question what does this mean,
5 because of course Mr. Fox committed his offences
6 on March 15th, 2019, after this provision was
7 repealed.

8 And so I spent some time considering and
9 and discussing in my written argument, Justice,
10 you know, the implications of the repeal of
11 that -- of that provision and I can tell Your --
12 you, Justice, that I was unable to find a case
13 addressing that issue in this jurisdiction, and so
14 I have had to refer to cases that are out of
15 province, but which have directly addressed this
16 very issue, that is the implications of the repeal
17 of the provision and I -- I note the time.

18 I know, Justice, you have to break soon, but
19 I will -- I can say that the line of authorities
20 or the authorities that I have included in this
21 portion of my argument essentially come to the
22 conclusion that the implication of the repeal is
23 that it did not disturb the common law, that
24 *Goleski* is still the authority with respect to
25 reasonable excuse, because the repeal of the
26 provision did not specifically speak to doing away
27 with that common law principle and that, in the
28 absence of that, there is a statutory presumption
29 that the common law will continue to apply.

30 And so there are quite a few decisions there
31 that I refer to and describe. Of course, yes,
32 they are from out of the province, but they, each
33 and every one of them, conclude that *Goleski*
34 appears to be the continuing authority in this
35 area.

36 Of course what this means for this case is
37 that we can go back to the issue as articulated in
38 the notice of appeal and ask did the trial judge
39 err in respect of his analysis of reasonable
40 excuse for failing to comply with his probation
41 order, and given that all of these authorities
42 that I have pointed to that have found that
43 *Goleski* appears to still be the correct authority,
44 we can answer in the negative, that the trial
45 judge did not err, and I can say that because as I
46 said at the outset of these submissions, Justice,
47 Mr. -- sorry, the Honourable Judge St. Pierre in

Submissions for the Crown/Respondent by Cnsl J. Horneland

1 his reasons for judgment specifically refers to
2 the *Goleski* decision.

3 And so, in the Crown's submission, he very
4 much correctly apprehended the correct law that
5 applies to a case where the reasonable defence
6 sorry, the reasonable excuse defence applies.

7 And if I can go to paragraph 66, Justice, if
8 you're satisfied that *Goleski* was the proper
9 authority to apply in this case as -- as I am
10 submitting the court ought to, then -- then the
11 submission of the Crown is that the -- the trial
12 judge didn't err in law by not considering whether
13 the Crown had -- had proved beyond a reasonable
14 doubt that the accused had the subjective *mens rea*
15 for the breach of probation, before going on to
16 consider whether he had a reasonable excuse,
17 because -- and I am coming back from my
18 paragraph 66 of my argument midway --

19 THE COURT: Yes.

20 CNSL J. HORNELAND: -- through the paragraph, where
21 Justice Frankel has stated in *Goleski*, when an
22 accused person brings this issue he or she is
23 conceding that the Crown has proved a reasonable
24 doubt the existence of the *mens rea* and *actus*
25 *reus*.

26 And so, in my submission, it would have been
27 necessary, if we accept that that's the correct
28 law, for the trial judge to specifically consider
29 whether the *mens rea* had been proven beyond a
30 reasonable doubt, because Mr. Fox raised this
31 reasonable excuse defence and so was conceding
32 that *mens rea* [indiscernible]. Now --

33 THE COURT: Well, I guess that's my -- that's my
34 question is -- is if someone is compelled to do
35 something by law you -- you're saying they -- they
36 have the *mens rea* and it goes to reasonable
37 excuse? In -- in other words if -- if
38 reasonable -- because in the -- in the case of
39 probation -- a probation offence, reasonable
40 excuse is built into the statute if I'm not
41 mistaken. Is that correct? It's -- it's -- it's
42 built into the offence itself?

43 CNSL J. HORNELAND: Yes.

44 THE COURT: But if -- if someone is compelled to do
45 something by law that would be a violation of a
46 statute that doesn't have a reasonable excuse
47 provision in it?

Submissions for the Crown/Respondent by Cnsl J. Horneland

1 CNSL J. HORNELAND: Then that -- then they're -- there
2 very well may constitute a reasonable excuse if
3 they're --
4 THE COURT: Well --
5 CNSL J. HORNELAND: -- not complying.
6 THE COURT: No, no, sorry, I'm -- I'm talking about a
7 statute that does not have a reasonable excuse
8 provision in it.
9 CNSL J. HORNELAND: Oh, okay.
10 THE COURT: So in other words if you -- if you're
11 looking at -- if -- let's say for -- for
12 argument's sake that this -- that this provision
13 did not have a reasonable excuse provision and
14 that Mr. -- Mr. Fox was, in fact, removed from
15 Canada -- ordered removed from Canada what -- what
16 would be the basis on which he would have a
17 defence?
18 CNSL J. HORNELAND: Well, yes, I think we'd be on -- in
19 a different -- in a different place, so the
20 court -- if there was no reasonable excuse
21 imported into the provision, then the Crown would
22 have to prove that the -- the accused intended and
23 had the requisite *mens rea* to commit the offence.
24 I think the --
25 THE COURT: But the -- in the --
26 CNSL J. HORNELAND: -- difference is --
27 THE COURT: But I'm -- I'm trying to understand how --
28 why in this case we get to reasonable excuse and
29 this isn't just a *mens rea* issue.
30 CNSL J. HORNELAND: I'm -- I believe because the --
31 really the -- a lot of the focus of the trial
32 proceedings were that Mr. Fox very clearly, with
33 intention in a common sense, went to the border,
34 presented himself -- voluntarily did so, but was
35 asserting that he felt that he had to leave Canada
36 and in -- and that was characterized by the court
37 correctly in my view, as a reasonable excuse by
38 Mr. Fox for leaving the country, such that he
39 should not be found guilty of the offence.
40 THE COURT: But -- but the --
41 CNSL J. HORNELAND: So he --
42 THE COURT: But the implication -- because in most
43 reasonable excuse cases the person is conceding
44 the *mens rea* for the underlying offence. In other
45 words I -- I -- I refuse to -- to blow or I did
46 drive over the speed limit, or whatever it is, but
47 I had a reasonable excuse for doing so; I left

Submissions for the Crown/Respondent by Cnsl J. Horneland

1 my -- I left my --
2 CNSL J. HORNELAND: Yes.
3 THE COURT: -- my -- my red zone or I went into my red
4 zone rather because I -- and I had a compelling
5 reason to do so, but I knew that I was going into
6 the red zone.
7 CNSL J. HORNELAND: Yes.
8 THE COURT: In -- in this case
9 CNSL J. HORNELAND: And --
10 THE COURT: -- if -- if he was ordered to do so -- and
11 I understand the argument that -- that the -- the
12 finding as to whether or not he -- he ought to --
13 whether or not he actually was ordered to do so
14 and whether that finding was reasonable, but
15 I'm -- I'm just -- I'm just trying to understand
16 why we're not looking at this at the *mens rea*
17 stage rather than at the reasonable excuse stage.
18 CNSL J. HORNELAND: I suppose as you said it -- it
19 seems very much to be on similar footing as the
20 hypothetical that you just posed. It -- Mr. Fox
21 went to the border and he -- he acknowledged that
22 he was -- he went within a hundred metres of the
23 border and he acknowledged that he walked across
24 the border and --
25 THE COURT: He did --
26 CNSL J. HORNELAND: -- he knew that he was doing so --
27 THE COURT: No, he -- he -- he --
28 CNSL J. HORNELAND: -- but --
29 THE COURT: Sorry, I -- I just want to be clear. He
30 attended at the border with the intention of
31 getting himself ordered across the border, but
32 when he attended at the border he says he was not
33 within a hundred metres, and there is not a
34 finding that he was, he was 200 metres or
35 something, the -- the -- the actual port of entry
36 building is 200 metres from the border or
37 something like that, so in -- when he's with the
38 officer at that stage he hasn't breached his bail,
39 correct?
40 CNSL J. HORNELAND: Mm- hmm.
41 THE COURT: Now, if she orders him into the United
42 States -- I mean if she -- if she -- let's just
43 say, for argument's sake, she put handcuffs on him
44 and dragged him across the border, this wouldn't
45 be a reasonable excuse case, correct?
46 CNSL J. HORNELAND: No, it wouldn't --
47 THE COURT: All right.

Submissions for the Crown/Respondent by Cnsl J. Horneland

1 CNSL J. HORNELAND: -- because -- yes.
2 THE COURT: So if she -- if she held a gun --
3 CNSL J. HORNELAND: And so --
4 THE COURT: -- to his head and said walk across the
5 border, this wouldn't be a reasonable excuse case.
6 CNSL J. HORNELAND: No.
7 THE COURT: So how is it different when she orders --
8 when the -- the -- an -- an armed border officer
9 orders him -- if -- if that's what he understood,
10 which he -- but if he understood that he was being
11 ordered across the border why -- why does it
12 become a reasonable excuse case at that point,
13 rather than a *mens rea* case?
14 CNSL J. HORNELAND: Well, I think that the trial judge
15 didn't accept that -- that he had been ordered --
16 THE COURT: Oh, I -- I understand he --
17 CNSL J. HORNELAND: -- across the border --
18 THE COURT: -- didn't accept that he -- I --
19 CNSL J. HORNELAND: Yes.
20 THE COURT: -- I understand that he didn't accept that,
21 the -- but the difference is -- is that you -- if
22 it's a reasonable excuse case, you say the law
23 says that the onus is on him. If it's a *mens rea*
24 case, then that's where -- that's where my
25 question is, is if it's a subjective -- if the
26 subjective *mens rea* is the issue do I have
27 analysis from the -- from the trial judge with
28 respect to subjective *mens rea* in the moment that
29 he's deciding that he -- the -- because the judge
30 seems to -- and says -- the point of dispute, he
31 says he felt compelled to leave the country as he
32 had in his mind no status to remain in the
33 country.
34 That's -- those are the words of the judge,
35 that -- that that's -- that's what the testimony
36 was from Mr. -- that he felt compelled, so if --
37 if he was compelled to go across the border,
38 how -- what -- what -- what -- at what point if
39 and we're analyzing that at the *mens rea* stage,
40 what -- what do I make of that?
41 CNSL J. HORNELAND: I think that what I would point
42 Your -- you to, Justice, would be the -- the
43 finding of the trial judge that -- and I'm at
44 paragraph 71 of my written argument. If the trial
45 judge -- I -- I refer to the reasons for
46 judgment --
47 THE COURT: Yes.

Submissions for the Crown/Respondent by Cnsl J. Horneland

1 CNSL J. HORNELAND: -- and specifically so he refers to
2 the -- the applicable *mens rea* in paragraph 4. He
3 finds that he needs to consider the --
4 THE COURT: In paragraph --
5 CNSL J. HORNELAND: -- [indiscernible] intent --
6 THE COURT: -- sorry, paragraph 4, yes.
7 CNSL J. HORNELAND: Paragraph -- mm-hmm. Yes, and --
8 THE COURT: Yes.
9 CNSL J. HORNELAND: And then over the page I -- I
10 excerpt some other paragraphs, 14, 19, 36, 39, 40.
11 These are all paragraphs, Justice, where in my
12 submission the trial judge is turning his mind to
13 the issue of *mens rea* and the -- and whether or
14 not he -- he was involuntarily removed or directed
15 to leave.
16 I think what the trial judge characterized
17 as -- as the *mens rea* is whether he intentionally
18 and voluntarily walked across the border and I --
19 I draw that conclusion because -- and I'm -- I'll
20 just -- let me get to the paragraph where the
21 trial judge says in the reasons he voluntarily
22 performed the action of walking himself across the
23 border and then so I -- I -- in my view -- in my
24 opinion on the reasons as a whole, and of course
25 with those specific paragraphs in mind as well, my
26 sense of it was that the trial judge characterized
27 that as the *mens rea*, did this person intend to
28 walk toward the border, come within a hundred
29 metres.
30 I believe that there was really no
31 disagreement as to that. That was his choice.
32 This is how the trial judge characterized it, but
33 he --
34 THE COURT: But I guess the -- the question --
35 CNSL J. HORNELAND: -- believes -- Mr. Fox believes he
36 has an excuse.
37 THE COURT: -- but the -- the question for me is that
38 if -- if it's an objective standard -- if he -- if
39 the -- the trial judge makes a finding that he was
40 not objectively compelled to walk across the
41 border --
42 CNSL J. HORNELAND: Mm-hmm.
43 THE COURT: -- but if he subjectively felt compelled to
44 walk across the border is --
45 CNSL J. HORNELAND: Yes.
46 THE COURT: -- is -- is the -- is the test after --
47 following *Zora* that subjective compulsion?

Submissions for the Crown/Respondent by Cnsl J. Horneland

1 That's -- I guess that's my question is -- is what
2 is the test, in terms of if he subjectively was --
3 felt that he was compelled, his understanding of
4 the situation was that he was compelled to go
5 across the border, I mean that's ultimately Mr.
6 Fox's defence -- Mr. Fox's argument as I
7 understand it, that he -- he understood that he
8 was compelled to walk across the border.
9 CNSL J. HORNELAND: Yes, and I -- I think that the
10 trial -- the -- the reasons to me read as the
11 trial judge not accepting that, that he found --
12 THE COURT: We ll, but the -- but the trial judge
13 doesn't --
14 CNSL J. HORNELAND: -- [indiscernible]
15 THE COURT: -- the trial judge doesn't -- and perhaps
16 you can just assist me with where the trial -- the
17 trial judge says he objectively was not compelled,
18 in other words objectively he had no obligation to
19 cross the border, but does the trial judge make a
20 finding that he subjectively was not compelled?
21 CNSL J. HORNELAND: I can take your -- you, Justice, to
22 paragraph 38 and --
23 THE COURT: Yes.
24 CNSL J. HORNELAND: -- and -- of the reasons and this
25 is an important paragraph, because in it midway
26 the trial judge says, you know, even if I accept
27 his evidence at the highest point, that somebody
28 told him that he was inadmissible to Canada, he
29 had a choice. He could leave or he could stay and
30 fight that designation and be arrested.
31 I think he just -- his -- you know, His
32 Honour doesn't say specifically that that
33 constitutes a subjective *mens rea*, but that's how
34 I read that paragraph. It very specifically
35 refers to Mr. Fox and -- you know, what -- what
36 the trial judge found was in his mind in respect
37 of *mens rea*.
38 THE COURT: All right.
39 CNSL J. HORNELAND: I suppose also -- I mean I could
40 into -- to that a little bit further, but I note
41 the time. I can take you -- take you back there,
42 Justice, if I have --
43 THE COURT: All right. Perhaps we could come back after
44 the --
45 CNSL J. HORNELAND: -- [indiscernible] after the
46 break --
47 THE COURT: -- I -- I do -- I do note the time and I do

Submissions for the Crown/Respondent by Cnsl J. Horneland

1 need to go and -- and give another decision, so
2 what I -- what I will suggest is that we'll take
3 the afternoon break. I'm hopeful to be back to
4 20 -- well, let's -- to be on the safe side let's
5 say at 3:30 we can resume and then I -- I expect
6 that I -- I'll be able to be back by 3:30 and we
7 can resume at that time. Thank you.

8
9 (VIDEOCONFERENCE PAUSED)

10
11 (PROCEEDINGS ADJOURNED FOR AFTERNOON RECESS)
12 (PROCEEDINGS RECONVENED)

13
14 (VIDEOCONFERENCE RECOMMENCES)

15
16 THE CLERK: We are back on the record, Justice.
17 THE COURT: Yes. Please go ahead, Ms. Horneland.
18 CNSL J. HORNELAND: Thank you, Justice.

19
20 SUBMISSIONS FOR THE CROWN/RESPONDENT BY CNSL J.
21 HORNELAND, CONTINUING:

22
23 CNSL J. HORNELAND: So I think it would be best if I
24 just return to the topic that we left on, which
25 was the *mens rea* of the offence and the trial
26 judge's treatment of it.

27 I -- I think it would be helpful to turn to
28 paragraph 67 of my written argument, which is on
29 page 19.

30 THE COURT: Yes.

31 CNSL J. HORNELAND: And of course this -- this issue is
32 framed as to whether the trial judge failed to
33 provide sufficient -- or provided insufficient
34 reasons for deciding that the *mens rea* of the
35 breaches have been proven, so of course importing
36 the question of whether the judge actually did
37 consider properly the *mens rea*.

38 So I have dealt with that issue in -- in the
39 paragraphs below and I have excerpted some
40 portions of the trial transcript and referred to
41 the reasons for judgment, which in my submission
42 demonstrate that the trial judge did properly
43 apprehend that he didn't need to consider whether
44 Mr. Fox had the requisite *mens rea*, before going
45 on to consider whether he had a reasonable excuse
46 for crossing the border.

47 There is a -- an exchange between the court

Submissions for the Crown/Respondent by Cnsl J. Horneland

1 and Mr. Wolf, who was the prosecutor at the trial
2 that I have excerpted in paragraph 70 of my
3 written argument, where the court articulates that
4 he is satisfied that there is really -- it is not
5 contentious that -- that on the evidence that he
6 has heard that there -- the physical act or the
7 *actus reus* has been established, and that Mr. Fox
8 crossed the border and was within 100 metres of
9 it, but he notes it -- he -- he needs to also
10 consider whether the accused -- and I -- it's
11 underlined there, knowingly or recklessly or
12 voluntarily performed or failed to perform, and
13 the prosecutor, Mr. Wolf, agrees and says, yes, it
14 comes down to intent, *mens rea*, whether Mr. Fox
15 knowingly intended to breach the order.

16 And so following that -- immediately
17 following that exchange the trial -- trial judge
18 gives oral reasons for judgment and -- and as I
19 have said in paragraph 71, which I took you to
20 earlier, Justice, where he specifically refers to
21 the *mens rea* and his -- his considerations in the
22 preceding paragraphs with respect to that, and
23 ultimately finding that Mr. Fox voluntarily
24 performed the action of walking himself across the
25 border.

26 And so that I think -- although it is -- is,
27 you know, not explicitly excerpted per se or -- or
28 with a -- a title in -- in the reasons is
29 certainly a consideration that the trial judge
30 engaged in, that is with respect to whether Mr.
31 Fox had the requisite *mens rea*.

32 I just pause to -- to note that what we're
33 dealing with here is -- is in -- in my reading of
34 the reasons is the judge -- judge's consideration
35 of whether Mr. Fox had the requisite *mens rea*, in
36 the sense that he intended to walk across the
37 border, not whether he had the subjective *mens rea*
38 to breach the probation order, because in my
39 respectful submission that would make completely
40 moot the reasonable excuse defence.

41 So the *mens rea* we're talking about is
42 whether he voluntarily and with intention
43 performed the act that he did. Whether he
44 breached the probation order is a matter of law
45 for the trial judge to decide and that, in my
46 respectful submission, is what the trial judge
47 did. He found that the *actus reus* and *mens rea*

Submissions for the Crown/Respondent by Cnsl J. Horneland

1 had been proven.

2 He then appropriately, although not in a
3 step - wise fashion, in the reasons for judgment
4 considered whether Mr. Fox satisfied him that he
5 did so, but had a reasonable excuse for doing so,
6 which Mr. Fox said was that he had been ordered or
7 he felt compelled to leave, and ultimately of
8 course the -- the judge wasn't satisfied that Mr.
9 Fox had met that burden.

10 So I just wanted to articulate that and --
11 and [indiscernible] Justice, to those excerpts and
12 those points in my written argument.

13 I also wanted to take -- take you back,
14 Justice, to -- to Zora. I know that you had
15 mentioned it earlier and I hadn't -- I felt like I
16 hadn't properly dealt with it, so paragraph 64, in
17 my written argument, I -- that's page 18 -- I -- I
18 mention that the *Goleski* decision was mentioned in
19 *Zora*. So *Zora* I have excerpted at tab 10 of my
20 book of authorities.

21 Now, as I mentioned earlier, the issue before
22 the court in *Zora* was whether an administrative
23 offence of breach of bail should be assessed on a
24 subjective or objective standard, and during its
25 analysis the court did refer to the offence of
26 breach of probation, but when the court cited --
27 and the court cited *Goleski* with approval, and
28 but -- but didn't engage of course in a
29 consideration of -- you know, what the -- the
30 correct *mens rea* was, with respect to the breach
31 of probation offence, because that wasn't before
32 the court.

33 So the court refers to *Goleski*, Justice, for
34 your reference -- paragraph 37 is where *Goleski* is
35 mentioned.

36 THE COURT: Yes.

37 CNSL J. HORNELAND: And the court mentions *Goleski* --
38 or cites *Goleski* when -- where the court is noting
39 and really distinguishing that where there is
40 available a defence of lawful excuse it doesn't
41 play a role in the interpretation of the *mens rea*
42 offence.

43 So, you know, it's -- it's a -- in -- in my
44 respectful submission it doesn't change and in
45 fact I -- I would argue that the -- the citing of
46 *Goleski* is -- is support for -- for the contention
47 that it remains to be the law with respect to the

Submissions for the Crown/Respondent by Cnsl J. Horneland

1 offence of breach of probation.

2 So that leads me to -- and sorry, nothing
3 more is said in the *Zora* decision that -- that in
4 my respectful submission would be directly
5 applicable to a case as here before Your -- Your
6 Justice on a breach of probation, because of
7 course they're quite different offences and there
8 are different considerations, of course, when the
9 leg -- the Parliament drafted the underlying
10 provisions, importantly those being that on a
11 breach of bail offence or allegation the accused
12 still has the benefit of the presumption of
13 innocence, and whereas the breach of probation the
14 offender has obviously been convicted before --

15 THE COURT: But in *Zora* --

16 CNSL J. HORNELAND: -- [indiscernible] --

17 THE COURT: -- sorry, just to be clear, *Zora* at
18 paragraph -- I mean the -- the -- *Zora*, at
19 paragraphs 50 and 51, specifically addresses the
20 subjective *mens rea* for -- for probation -- for
21 probation breaches.

22 CNSL J. HORNELAND: Yes. I suppose what I'm trying to
23 say, Justice, is that it wasn't -- the issue
24 before the court wasn't the -- it wasn't calling
25 into question or asking the court to reconsider
26 the *mens rea* required for breach of probation
27 offences, because it was a case about breach of
28 recognizance and I -- all I'm trying to say is
29 they are different -- they are different offences
30 and that the court cited *Goleski* with respect to
31 breach of probation offences, I would say with
32 approval, and so I'm just simply trying to say
33 that it is --

34 THE COURT: Well, it -- it's -- it -- it cites *Goleski*
35 for the -- for the proposition that there is a
36 distinction that -- that the availability of a
37 defence of reasonable excuse does not change the
38 burden on the Crown to prove all elements of the
39 offence, including *mens rea*. I mean that's what
40 says -- paragraph 37 says.

41 CNSL J. HORNELAND: Yes, and -- and I don't disagree.
42 I just think that *Zora* -- *Zora* isn't the leading
43 authority at this -- in my respectful submission
44 on the reasonable excuse defence in the context of
45 breach of probation. That's all I'm trying to
46 say --

47 THE COURT: Okay.

Submissions for the Crown/Respondent by Cnsl J. Horneland

1 CNSL J. HORNELAND: -- Justice, so --

2 THE COURT: I -- in terms of -- of when the reasonable
3 excuse -- like I'm -- I'm just trying to
4 understand because what the -- what the Supreme
5 Court -- what I understand the Supreme Court to be
6 saying in *Zora* is that the Crown has to prove mens
7 rea, regardless -- reasonable excuse is a separate
8 issue.

9 First, the Crown proves *mens rea* and -- and
10 *actus reus* and then reasonable ex -- excuse
11 becomes an issue, and at paragraph 50, the court
12 quite clearly says that the -- that it's a test of
13 subjective *mens rea*.

14 CNSL J. HORNELAND: Yes, and I'm not taking issue with
15 that, Justice. I -- I'm simply saying that in
16 this case before you --

17 THE COURT: Yes.

18 CNSL J. HORNELAND: -- that the judge did consider mens
19 rea just in -- in my previous submissions just
20 now, under Issue 5, I've excerpted some portions
21 that I say demonstrate that there was a
22 consideration of *mens rea*, and then properly went
23 on to consider the reasonable excuse defence. So
24 I don't concede that the ground in Issue 5 is made
25 out, so far as insufficient reasons were given for
26 *mens rea*.

27 My submission is that it was properly
28 considered, but it was very clear from the outset
29 that Mr. Fox wasn't disputing and it wasn't
30 contentious in the evidence that he very much
31 intended to attend at the office that day and that
32 after he had his interactions with Officer Polisak
33 he decided to go to the U.S. border and walk
34 across it.

35 Now, I don't believe that that was ever
36 contested by Mr. Fox. Of course his reasons for
37 doing so were really the focus of the trial, and
38 so I -- in my submission I -- I respectfully
39 submit that that is why the -- very much the focus
40 of the trial and the reasons were on the
41 reasonable excuse defence.

42 It really -- the -- the subjective *mens rea*,
43 as I've said earlier as -- and articulated as
44 by the judge as being did he voluntarily and
45 intentionally cross the border. I don't hear Mr.
46 Fox and I don't read him in transcript to be
47 saying that he didn't, but what he is saying is,

Submissions for the Crown/Respondent by Cnsl J. Horneland

1 yeah, I did so, but I'm -- I thought that there
2 was an order or I understood the words that you
3 are inadmissible to Canada to mean that I -- I --
4 I had -- I had to go to the U.S.

5 That -- that is how I understand this -- the
6 evidence to be -- to have been in -- in very brief
7 summary.

8 So that -- that is how I wish to leave it, I
9 think, subject to any questions that you may have,
10 Justice, with respect to the *mens rea*, because of
11 course Mr. Fox has made a number of submissions
12 about the other issues and I'm -- I'm trying to
13 address your specific questions, Justice, but
14 I'm -- I can continue on in other areas, or I
15 can -- I can provide --

16 THE COURT: Well, I -- I have reviewed and -- and will
17 review your written submissions on -- on the other
18 issues. I think that that's -- that was the main
19 issue that I was hoping to get your submissions
20 on.

21 CNSL J. HORNELAND: Okay, thanks.

22 Before actually -- sorry, sorry, Justice,
23 before I do leave that issue I -- there was one
24 other point that I -- I did wish to make and that
25 was I do urge Your Lordship or Your -- you,
26 Justice, to -- if you haven't already to -- to
27 review Mr. Justice Frankel's decision in *Goleski*
28 and -- and the reason for that is I noticed that
29 in the underlying summary conviction appeal on
30 *Goleski*, the very same -- the argument was made as
31 is being made here today, that the trial judge
32 erred for not considering or -- you know,
33 requiring Crown to prove subjective *mens rea*
34 beyond a reasonable doubt.

35 And so that issue was thoroughly considered
36 by the B.C. Court of Appeal and I just -- I don't
37 think I can do better than just Justice Frankel in
38 articulating the court's view where that is raised
39 and ultimately, of course, in that case what Mr.
40 Justice Frankel was -- was dealing with was where
41 the onus lie, where reasonable excuses is laid,
42 and I -- or raised and I think I've probably made
43 my submissions on that.

44 THE COURT: All right. Thank you.

45 CNSL J. HORNELAND: So I -- as I said, I mean I'm
46 mindful that Mr. Fox has -- has made the bulk of
47 his submissions of course are with respect to

Submissions for the Crown/Respondent by Cnsl J. Horneland

1 Issues 2 and 3, Your Honour. I heard your comments
2 with respect to Issue 1 and I -- I am certainly
3 prepared to make submissions of -- on Issues 2 and
4 3, but my -- my plan was to take you, Justice,
5 just through the summaries of Officer Polisak's
6 and Mr. Fox's testimony that I have prepared and
7 written in my book of argument, because I felt
8 that they provide a good overview of what was
9 quite a bit of testimony.

10 And I did wish to respond to a few of the
11 points that Mr. Fox made, but I actually think
12 that your -- you have already really touched upon,
13 Justice, the points that I wanted to make in your
14 exchanges with Mr. Fox, so I'm in the court's
15 hands. I -- I can certainly take you through some
16 brief submissions on Issues 1, 2 and 3, but if
17 Your Lordship -- or if you're -- if you don't need
18 me to make those submissions then I certainly
19 won't.

20 THE COURT: I -- I'm content to rely on your written
21 submissions for those -- for those issues, unless
22 there is any thing additional that you wanted to
23 highlight, I'm -- I'm content to rely on the
24 written submissions for those.

25 CNSL J. HORNELAND: Thank you.

26 THE COURT: All right. Thank you. Mr. Fox, did you
27 have any reply?

28 THE APPELLANT: No, I didn't. Thank you.

29 THE COURT: Thank you. All right, in which case thank
30 you both, I will endeavour to get a decision to
31 you as -- as expeditiously as possible.

32 All right. Thank you.

33

34 (VIDEOCONFERENCE CONCLUDES)

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36 (PROCEEDINGS ADJOURNED AWAITING DECISION)

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39 Transcriber: S. Curran

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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.



Sandy Curran
Court Transcriber