

File No: 244069-3-B, 244069-4-BC  
Registry: Vancouver

**In the Provincial Court of British Columbia**

**REGINA**

**v.**

**PATRICK HENRY FOX**

**REASONS FOR JUDGMENT AT  
JUDICIAL INTERIM RELEASE HEARING  
OF  
THE HONOURABLE JUDGE SUTHERLAND**

**COPY**

**BAN ON PUBLICATION 517(1) CCC**

**Crown Counsel:**

**P. Tomasson**

**Appearing on his own behalf:**

**Patrick Fox**

**Place of Hearing:**

**Vancouver, B.C.**

**Date of Judgment:**

**April 10, 2019**

[1] THE COURT: Mr. Fox is in custody charged with three counts of breaching his probation order.

[2] Crown counsel seeks his detention on the primary, secondary and tertiary grounds; Mr. Fox argues that his detention is not justified on any ground.

[3] These are my reasons on whether Mr. Fox's detention is justified.

[4] By way of background, on November 10th, 2017, Mr. Fox was sentenced on one count of criminal harassment to the equivalent of three years' jail. Presentence time in custody calculated at 17 months was credited, ultimately leaving a sentence of 25 and a half months.

[5] Also at that time, a conviction was entered for possession of a firearm, contrary to his authorization to possess one. He received a 10-month sentence consecutive to the criminal harassment sentence. A probation order was imposed as part of the sentence. The allegations for which he is currently before the court relate to that probation order.

[6] The alleged breaches are that on March 19th, 2019, he failed to report to his probation officer; on March 14th, 2019, he left British Columbia without the permission of the probation officer; and the third charge is that on March 14th, 2019, he, without reasonable excuse, failed to comply with the order by being within 100 metres of the United States border.

[7] I will get into the circumstances underlying the charges later in my reasons. But context to that probation order can be found in the reasons of Madam Justice Holmes for the sentence that she handed to Mr. Fox on November 10th, 2017.

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[8] By way of some background, before getting to a description of the substantive offences, Mr. Fox was formally married to the complainant in the criminal harassment charge. They have one child together. They are separated and they had a -- or divorced?

[9] THE ACCUSED: Annulment.

[10] THE COURT: They are estranged and a difficult custody battle has ensued.

[11] There is some question about Mr. Fox's citizenship, which I will get to later. Crown counsel asserts that he is a Canadian citizen, and that Richard Reiss is his birth name, and that Mr. Fox -- Patrick Fox, the name he currently uses, is a name that he has switched over to since he returned to Canada from the United States. I will discuss later in these reasons the significance of the issue of his citizenship.

[12] At this juncture, in the narrative, I will note that Mr. Fox was found guilty on November 5th, 2008, by a jury in the United States of perjury and alleging a false claim of U.S. citizenship. He was ultimately sentenced to two years' jail on each count to run concurrent, and three years of supervised release.

[13] I will now turn to passages in the Reasons for Sentence of Madam Justice Holmes from which one can gain context into the substantive offences that led ultimately to the three year and 10 month jail sentence, less time served. From there, again, context as to the seriousness of the current allegations of breach of probation can be inferred. These circumstances behind the substantive offence I find are particularly relevant to the secondary ground for detention.

[14] The Reasons for Sentence are contained in *R. v. Fox*, 2017 BCJ 2619, and I

will quote extensively the words of Madam Justice Holmes. At paragraph 5 she said this:

In brief overview, Mr. Fox conducted a campaign to, as he put it, make Ms. Capuano's life as miserable as possible, hoping to drive her to suicide if that could be done within the confines of the law. It was a campaign conducted by means of hundreds – probably thousands – of emails he sent her, and sometimes to people she knew, as well as by means of a website he created in her name. These communications were designed to embarrass and humiliate Ms. Capuano by disseminating personal information about her, to undermine her relationships with her family members, friends, and employers and work colleagues, to ruin her financially by preventing her from keeping or gaining employment, and generally to intimidate her.

[15] More specific details of Mr. Fox's conduct are contained in subsequent paragraphs. It is worth going into detail, as mentioned, because it relates to the matters that are currently before the court and again, in particular, the secondary ground for detention.

[16] At paragraph 13 Madam Justice Holmes states:

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

[17] Continuing on paragraph 14:

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

[18] Paragraph 15:

Another section of the website focuses, individual by individual, on the

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

[19] Paragraph 16:

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

[20] This is a partial quote from paragraph 17:

Finally, a series of dozens of blogs or posts, most of them purportedly written by Ms. Capuano, contains content designed to humiliate and degrade her.

[21] At paragraph 21 of Justice Holmes' reasons she quotes from email sent from Mr. Fox to Ms. Capuano the date of this email is July 23rd, 2014:

"I will destroy you - slowly and incrementally ... [e]very moment of my life is focused on the single goal".

[22] In an email dated December 2014 he wrote to Ms. Capuano [as read in]:

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

[23] At paragraph 25 -- I'll pause here to say this is their son:

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

[24] Paragraph 27:

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Mr. Fox delighted in Ms. Capuano's loss of her employment. In an email in November 2015, he said: "You will soon be homeless; you have no money; nobody believes anything you say anymore; nobody is coming to your aid or defense; you will not be able to secure another job as long as that website exists – and it's not going anywhere as long as you're alive".

[25] Paragraph 29:

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

[26] Continuing on later in that paragraph:

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

[27] I will just quote from the first sentence of that email.

I was pretty direct when I told Detective Tuchfarber that my intention was to do everything in my power and capabilities to make your life as miserable as possible, and, if possible, to the point that you ultimately commit suicide.

[28] At paragraph 31:

In various of his emails, Mr. Fox reminded Ms. Capuano that he had firearms, and the ability to cross the border (into the USA) surreptitiously. In one email, he detailed the logistics of bringing his firearms into the USA and using them to kill Ms. Capuano, while also adding that he would never do so – despite his wish to – because to kill would be illegal and immoral.

[29] And then later in that paragraph:

There can be no doubt that these communications were meant to

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intimidate Ms. Capuano, despite the caveat Mr. Fox always included about remaining within the confines of the law.

[30] These passages are important to note because they document the persistence, the intensity, and the cruelty behind the criminally harassing conduct of Mr. Fox that he was ultimately convicted of.

[31] Turning to Count 2 of the substantive Information, the charge of possession of firearms in a place other than authorized, I will quote from three paragraphs from Madam Justice Holmes' reasons. Those are paragraphs 41 to 43, and together they read as follows:

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

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

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

[32] With that context in mind, I will now turn to the circumstances behind the breach of probation offences for which Mr. Fox is before the court.

[33] On December 30th, 2018, a little over three months ago, Mr. Fox was released from custody. A few days later, on January 4th, 2019, he filed an application to vary his probation order to allow him to leave British Columbia. His application started February 6th, 2019, and an amendment was made to his

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probation order, but not to that condition.

[34] On March 14th, 2019, the condition to leave British Columbia was addressed. Ultimately his application was denied. Mr. Fox argued that he was not a Canadian citizen and therefore had no status in Canada, and consequently remaining in Canada would put him in perpetual violation of Immigration laws.

[35] Madam Justice Holmes, after hearing the arguments -- which I might add were similar arguments to what I have heard today -- again denied the application. According to Crown counsel, Justice Holmes found that he, in fact, is a Canadian citizen, and that it was required that he remain in British Columbia as, at the very least, a protective condition to protect Ms. Capuano, who resided in the United States.

[36] As a condition of the probation order, and it is unclear whether this was discussed on March 14th, 2019, nevertheless, it was not amended -- there is a condition, Condition 12, that prohibits Mr. Fox from disseminating, distributing, publishing or making publicly available in any manner, directly or indirectly, information, statements, comments, videos or photographs which refer to or depict by name or description, Ms. Capuano, among others.

[37] Condition 13 required him, within 24 hours of his release from custody, to take all necessary steps to ensure that any website, social media page or other publication, which he had offered, created, maintained or contributed to, which contained any information, statements, comments, videos, pictures, which refer to or depict by name or description, Ms. Capuano, among others, be no longer accessible via the internet or by any other means.

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[38] These conditions are significant because the website that had been created and that was referred to by Madam Justice Holmes in her Reasons for Sentence apparently still remains active. Crown counsel suggests that it was inactive while Mr. Fox was in custody, but since he has been out, it is now active.

[39] However, Mr. Fox, whose background is in information technology, has clarified that a copy of the contents of the website were archived and a cached copy remains on line but is controlled by a third party. Mr. Fox implies that he has nothing to do with that website. The bottom line though is it still remains active.

[40] A second website has cropped up since Mr. Fox has been released from custody. Simultaneous to this website, this second website which I am going to discuss in a little bit of detail -- perhaps I will back up a bit.

[41] On October 7th, 2016, in preparation for the trial on the criminal harassment and firearms charge, Madam Justice Burgess ordered that Mr. Fox may receive disclosure material provided to him by the Crown, solely to make full answer and defence. He was not to reproduce or disclose any of the disclosure to anyone, other than his counsel, if he had counsel. And furthermore, that no information provided as part of the disclosure shall be published, broadcast or transmitted in any way unless it was taken as evidence in court at the trial.

[42] This second website that has been created is acknowledged by Mr. Fox. He claims that he has done nothing wrong in his association to this second website because material that is on that website, which he describes as being a "huge amount of incriminating evidence that shows that Ms. Capuano has committed perjury and is a liar, and that there was collusion between the Crown and his own

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lawyer at the trial," is contained on that website, but that it was not disclosure received by Crown counsel.

[43] Crown counsel has submitted, and it is not denied, that indeed the website does contain disclosure material, and when I say it is not denied, Mr. Fox admits that contained on website 2 are, for example, Reports to Crown Counsel, and as well, apparently, there are audio clips from the digital audio recording system from the courtroom.

[44] It is not clear which proceedings the audio clips relate to, but obviously they relate to Mr. Fox's matters. This is obviously a concern.

[45] Continuing with the narrative behind the charges currently, Madam Justice Holmes denied Mr. Fox's application on March 14th, 2019.

[46] On March 15th, it appears to be agreed that Mr. Fox attended at his probation officer. There was discussion with respect to the websites, and the term of his probation regarding the websites as I have just described. Mr. Fox said he had no control.

[47] Then Mr. Fox, according to Mr. Fox, told his probation officer that he was then going to do what followed, which was him leaving the probation office, taking a bus to the U.S. border, and attempting to cross the border.

[48] Ultimately, he was detained by American authorities, who eventually returned him to Canada on April 4th, 2019, returned him to the RCMP.

[49] The charge of failing to report is because his probation order required him to report every four days. March 19th, 2019 was his next reporting period. He did not

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report.

[50] Mr. Fox points out that he was in custody at the time with the Department of Homeland Security, and therefore could not report.

[51] The other allegations, as mentioned, relate to his attending at the U.S. border on March 15th.

[52] Crown counsel says it is obvious that Mr. Fox has no intention to comply with the probation terms as indicated by the website, and his attending at the U.S. border.

[53] Crown counsel goes on to say that the secondary ground has been met, or I should say justification for his detention has been achieved simply by the narrative of the proceedings when one factors in the context of the substantive offences and the nature of the alleged breaches of probation. Crown counsel also points to the importance in maintaining public confidence in the administration of justice and treating breaches of court orders seriously, and thus suggests in the context of the entire case that his detention ought to be on the tertiary ground as well.

[54] I have already referred to what Mr. Fox has said about his failure to report and his attendance at the Canadian Border Services Office, which he said he turned himself into on March 15th. That office was about 300 metres away from the border, and he was hoping that the Canada Border Services Agency officers would remove him from Canada, based on what he has asserted as American citizenship status, or at least a lack of Canadian citizenship. He then said he approached the U.S. authorities and was ultimately taken into custody.

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[55] Mr. Fox argues that the critical question is: what is his citizenship? He acknowledges that if he is a Canadian citizen, then clearly he has acted contrary to the spirit of the probation order that he was on. However, if he has no status in Canada, so he is not a Canadian citizen, then he has no right to be within Canada, and so the probation order preventing him from essentially leaving Canada is problematic because it places him in violation of Immigration laws.

[56] Some documents were presented to the court by Mr. Fox, and accessed information and privacy requests to the Immigration Refugee and Citizenship Canada Department of the Federal Government, relating to records pertaining to the name Richard Reiss, which is one that Mr. Fox has used and had a Canadian passport for, and Patrick Henry Fox, the name that he currently has, as well as government documents relating to the Ministry of Social Development and Poverty Reduction, Employment and Assistance requests that also comments with respect to his Immigration status.

[57] I cannot come to a conclusion, based on those documents, exactly what Mr. Fox's status is, as I find that the information is far from fulsome from which a conclusion can be drawn. I can say that Madam Justice Holmes heard similar arguments and did not find them compelling enough to change his probation order.

[58] Mr. Fox argues that he is not eligible for Social Assistance because he is not a Canadian citizen. He cannot get Medical Services Plan benefits, and he cannot get Immigration status, and so his attempts to leave Canada were really because he was caught between a rock and a hard place. He either violates his probation order, or he stays in compliance with it and lives as a homeless, hungry, Immigration law

violator, and that this is an impossible position to be in.

[59] I will now turn to the primary, and secondary, and tertiary grounds. I will state at the outset, I will not analyze the tertiary ground for detention, as it is not necessary for me to do so, given my conclusions with respect to the other two grounds. Furthermore, I am going to analyze the grounds in a different sequence than they are listed in the *Criminal Code* -- I am going to address the secondary ground first.

[60] The test for the secondary ground was stated by Mr. Justice Lamer in *R. v. Morales* at paragraph 39 where he stated:

Bail is not denied for all individuals who pose a risk of committing an offence or interfering with the administration of justice while on bail. Bail is denied only for those who pose a "substantial likelihood" of committing an offence or interfering with the administration of justice, and only where this "substantial likelihood" endangers "the protection or safety of the public".

Moreover, detention is justified only when it is "necessary" for public safety. It is not justified where detention would merely be convenient or advantageous.

[61] Broken down through subsequent court decisions, the test for the secondary ground comes out in really four questions that the court must ask itself. Firstly, there must be a risk that, to personalize it, Mr. Fox will commit an offence or interfere with the administration of justice if released. Second, the risk must be to the extent that it is a "substantial likelihood" that he will commit an offence or interfere with the administration of justice. Third, that the risk, if realized, would endanger the public safety generally, or a specific member of the public. And fourthly, that detention is necessary because the danger to public safety or the individual cannot be reduced

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to an acceptable level through bail conditions.

[62] It is here, with that test in mind, that I come back to what I characterized as the intensity, the depth, the persistence, and cruelty of the steps taken by Mr. Fox that underlied the criminal harassment conviction.

[63] In the course of submissions by Mr. Fox, when asked about website number 2 and why the need for website number 2, admitted that all of the content on that website was created by him and maintained by him, that he did not and does not admit that he published it or distributed it in any way, or that it came from the Crown disclosure. So he is behind this website to a degree and its contents by his admission.

[64] When asked why, his response was telling as it relates to the secondary ground of whether there is a substantial likelihood that he would commit an offence, and that it would endanger a member of the public going forward, and whether conditions could be placed on him. He said, "She took my child away and took steps to deport me, I lost custody of my child, and then she did everything she could to make it impossible for me to maintain contact with him," and that he had had no contact with his child since May 26, 2016.

[65] For that reason - and I wish to underscore this part - he said, "I will never forgive her, I will never stop. When the probation order is finished in three years and I return to the United States or wherever I go, everything will continue."

[66] This I find to be a telling comment. It demonstrates Mr. Fox's commitment to continuing this campaign of torment toward Ms. Capuano. He did qualify his

comments by saying, "When the probation order is finished," but I note his admission that the website that contains information that can only be characterized as, at the very least, intimidating content, as he has described it, is in existence, and he has contributed to it while he is on probation with the conditions that I have mentioned.

[67] In my view, those comments, combined with his actions of March 15th, 2019, which I will describe in a moment under the analysis of the primary ground, show a degree of determination that satisfies me, Mr. Fox, that there is a substantial likelihood that you would offend if you were to be released from custody, that the person who is in your sights, Ms. Capuano, is obviously a member of the public, and I am not satisfied that conditions could be placed on your bail that would reduce the risk to an acceptable level, given what I have described.

[68] Also considering, and this relates to the primary ground now -- and for your benefit, the primary ground of detention, is a ground for detention where it is necessary to ensure someone's attendance at court. You have been charged, and I am directing these comments directly to you now, you have been charged with three offences of breach of probation. You need to attend court on those. But I have referred to this overwhelming desire of yours to go to the United States. This desire is to the point where when the application before Madam Justice Holmes, based on similar arguments to what have been placed before me, was denied, you went anyway. Not letting, one could say bluntly, the law get in the way of your desire.

[69] You have argued that you have no support here, you really have no standard of living here, which is a strong motivation to leave here.

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[70] Then the comments, however, about your desire to continue this campaign toward Ms. Capuano, coupled with your lack of support here, give a strong motivation to leave this jurisdiction if you were to be released from custody. Indeed, being ordered to stay here by Madam Justice Holmes was not enough to have you stay.

[71] Consequently, I am satisfied that on the primary ground as well, your detention is necessary to ensure your attendance at court.

[72] Given those conclusions, I do not find it necessary to address the tertiary ground of whether your detention is necessary to maintain the public's confidence in the administration of justice, and consequently you are detained.

(REASONS FOR JUDGMENT CONCLUDED)