

File No: 244069-5-BC
Registry: Vancouver

In the Provincial Court of British Columbia

REGINA

v.

PATRICK HENRY FOX

**ORAL REASONS FOR JUDGMENT
OF
THE HONOURABLE JUDGE ST. PIERRE**

COPY

BAN ON PUBLICATION 517 CCC

Crown Counsel:

B. Wolfe

Appearing on his own behalf:

Patrick Fox

Place of Hearing:

Vancouver, B.C.

Date of Judgment:

March 6, 2020

[1] **THE COURT:** It is not going to be eloquent, but it will be done. I counted some 17 court appearances, not all of which we heard some evidence, but I think it is at least 17 court appearances on this matter, which include pretrial appearances and others. All of these appearances were for the three breach charges that Mr. Fox faces, which normally could be dealt with in a summary fashion, but the unique circumstances, I suppose, of this case and of the evidence that Mr. Fox was seeking led this matter down a very, well, long path towards conclusion and, hopefully, it is going to be concluded today. I think that I have my first appearance, at least, as July 2, 2019.

[2] In any event, the charges were sworn May 14, 2019, and these are charges on 244069 and it is a 5-BC information. Mr. Fox faces three allegations, one arising out of March 19, 2019, where it is alleged he failed to report as required by a probation order of Justice Holmes that she issued on November 10, 2017, and it was amended, that order; and Count 2 is March 15, 2019, the allegation is that contrary to Justice Holmes' order that Mr. Fox not leave British Columbia, that he failed to comply with that order. Count 3 is on the same date and in respect to the same probation order. The allegation is that Mr. Fox did without reasonable excuse fail to comply with Justice Holmes' order not to be within 100 metres of the United States border. These charges are all on under s. 733.1 of the *Criminal Code*.

[3] Proving these kind of charges, a breach of probation under 733.1, the Crown -- and we have had this discussion -- because Mr. Fox has given evidence in this proceeding and before submissions, we had a discussion on what the extant issues were with respect to the essential elements, and the essential elements of this

offence are identity, are date and time of the incident. The jurisdiction needs to be proved. It has to be proved that the accused was previously convicted of an offence for which there was a sentence that included a period of probation. It has to be proven the accused was bound by a probation order on the dates in question. It has to be proved that the accused committed an act which was prohibited by the probation order or that the accused failed to perform an act that was required by the probation order. All of those things are not in issue. The Crown has established proof beyond a reasonable doubt on those issues.

[4] The issue that still remains and that has become the crux of the matter in this whole case is whether Mr. Fox knowingly, recklessly, or with wilful blindness, involuntarily performed or failed to perform an act or omission which constitutes the *actus reus* of the offence. So, essentially, in this particular instance, whether there was a reasonable excuse for failing to comply. So 733.1(1) expressly provides that a failure to comply with a condition of a probation order will be an offence only if it was without reasonable excuse. What constitutes an acceptable excuse will vary, obviously, according to the circumstances.

[5] Once the Crown has established a *prima facie* case, then the accused is required to establish the factual foundation for his asserted reasonable excuse on a balance of probabilities and, even after establishing that factual foundation, the reasonableness of the accused's non-compliance has to be shown to exist on a balance of probabilities. So the function of s. 794 of the *Criminal Code*, essentially, imports a persuasive burden on the defence to establish the reasonable excuse and it is not the Crown's burden, and that may be a source of contention around the

country still, but it was resolved in this province as far as how to analyze that burden.

[6] It was resolved, essentially, by Justice Frankel in a case called *Goleski* [2014] B.C.J. No. 347, from our Court of Appeal and at least in British Columbia, the function of 794 is that the persuasive burden rests on the defence to establish reasonable excuse. In other words, in this case, in order to succeed as a defence, the excuse has to be a reasonable one and must mean that, viewed objectively, the explanation given provided some kind of reasonable basis for the violation of the court order.

[7] On November 10, 2017, Madam Justice Holmes sentenced Mr. Fox with respect to a criminal harassment conviction. In addition to a period of incarceration, there was also a probation order with certain conditions.

[8] That document -- what is the exhibit number, Madam Registrar? Can I have that?

[9] THE CLERK: [Indiscernible].

[10] THE COURT: Yes, I am just trying to remember what the -- I do not think I wrote it down. The exhibit number of Madam Justice's probation order.

[11] MR. WOLFE: I believe it is two.

[12] THE COURT: Exhibit 2, it was earlier on, that is right, earlier on in the proceeding. Yes, Exhibit 2, it was entered through Ms. Dhinjal from the registry. Thank you. Okay, thank you. Yes.

[13] Ms. Dhinjal was the justice of the peace at the registry. One of her duties was to review the conditions of the probation order that might be given to an inmate who

is about to be released on probation. Through her, Exhibit 2 was entered. It is a probation order; it relates to Mr. Fox, the accused in this case. She reviewed the order with Mr. Fox and, when it came time for him to sign the order, he refused to do so, but of course there is no issue here with respect to that refusal to sign such an order, it certainly does not release the individual from being legally obligated to comply with court-ordered conditions. So those conditions are set out in that document, Exhibit 2.

[14] On March 14, 2019, Mr. Fox appeared in front of Madam Justice Holmes again seeking a variation to the probation conditions relating to his prohibition from attending within 100 metres of the border and his prohibition from entering the U.S. and, after a full hearing on that matter, that application was dismissed. Mr. Fox testifies, and I accept, that he told the court at that time that whatever the outcome of that application was, his intention was to present himself in the Canada Border Services office with the hope that they would find him inadmissible to Canada and they would deport him from Canada. He has asserted all along that he has no status in this country and was attempting in front of Madam Justice Holmes to establish that fact so that she would vary those prohibitive conditions on his probation order and that would allow him to go back to the U.S.

[15] On March 15, 2019, the evidence shows, he presented himself from within Canada to the Canada Border Services office at the Douglas Border Crossing. After speaking to an initial officer, he was directed to deal with Officer Polisak, who also testified in these proceedings. He told the officer that he had no status in Canada and gave her some information that led her to conduct an inquiry on her computer.

[16] She checked several databases, searching both the names of Patrick Fox and the name of Richard Reiss, R-e-i-s-s, an alias, for lack of a better characterization. Officer Polisak testified that Mr. Fox had not appeared at her wicket seeking entry into Canada; in other words, he had not been directed by any pedestrian booth attendant or other entry border guard who deals with folks entering Canada from the U.S. He was already in Canada when he appeared in the office.

[17] She testified that she could not confirm, after her inquiries, that he was not a Canadian citizen. She was clear in her evidence that her recollection of the interaction was largely dependent on the notes that she made on that date, specifically, the notes that come in a paragraph under the heading, "Text," in these log entries that she made.

[18] She also testified that she told him that if his desire was to go to the United States that that was going to be problematic due to the fact that he had been removed several times by the American authorities, by U.S. Immigration, and he did not appear to have a U.S. passport on his person. She said that once she delivered this information to Mr. Fox he simply walked out of the office and she did not see where he went from there. At no time, she testified, did she direct or advise him or require him to leave the country of Canada. In fact, she said that she had no valid reason for doing something like that given her inquiries.

[19] Mr. Fox, on the other hand, says that he showed certain documentation to Officer Polisak and that, as a result, she told him that he was inadmissible to Canada. He agrees that she did not have him taken into custody or specifically ask or direct him to leave Canada, but that once he was told he was inadmissible, he felt

that he now had no lawful basis to remain in Canada and that he felt compelled to leave the country, and he did just that. He went out of the Canada Border Services office and he walked towards the United States Customs and Border Protection office.

[20] Officer Geoff Obrist from Customs and Border Protection on the U.S. side testified that Fox had come into their office at the border at Blaine, Washington and because he had a prior immigration record he was tasked with dealing with him. He was given identification from Fox. He made several inquiries. The name of Reiss and Fox came up. After those inquiries, they issued what was called an expedited removal order from the U.S. back to Canada.

[21] After that order was served on Mr. Fox, he was transferred to a Tacoma Detention Centre and he was held there for several weeks and then returned to Canadian authorities. In the meantime, Mr. Fox had missed a meeting that he had prescheduled with his probation officer for March 19, 2019, and that refers to Count 1 in the information. He was returned to Canadian police on April 4, 2019. So he was in U.S. custody from March 15 through April 4, 2019.

[22] Kirsty Brown is a constable with Surrey RCMP. She and Constable Hawkins went down to the border on April 4, 2019, essentially to retrieve Mr. Fox. They attended on that date to take him into custody. There had been an arrest warrant that was issued for Mr. Fox and they were executing that warrant.

[23] She testified that she requested CCTV footage of Mr. Fox's attendance at the Canada side of the border on March 15, 2019. The information as to what happened to that request was, quite frankly, less than satisfactory. She said she

followed up her initial request with a second request when there was no response to the first request. She was told the initial request was misplaced or not actioned upon. She also asked for information from Canada Border Services as to what kind of contact they had with Mr. Fox on March 15, 2019. She received no response to that request. In fact, she was never provided any records of any kind.

[24] She then requested video footage of their attendance -- of the police attendance on April 4, 2019, during the arrest of Mr. Fox and she was told that was also not available. She agreed in cross-examination that CCTV footage would support the notion that Mr. Fox had some kind of interaction with Canada Border Services prior to entering the U.S. She was never able to get a confirmation from Canada Border Services with respect to his attendance there on March 15.

[25] She was, in my mind, doing her due diligence as a police officer, as an investigator, and following up not only the information that Fox was providing to police about his dealings at the border, but also Constable Brown had testified that she herself had received some information from a border agent about a possible attendance by Mr. Fox on that date at the Canada Border Services office.

[26] Probation Officer Bhimji testified that he certainly did not give Mr. Fox any permission to be outside the province on that date in question. He also said that if someone is in custody on a day they are to report, he would advise the Crown that the client failed to show but was in custody at the time. He also said he would not submit a request for a breach charges if a client was in custody.

[27] Corporal Potts was called to support the voluntariness of a warned statement that was provided by Mr. Fox, and that statement has been admitted into evidence

for the purpose of cross-examining Mr. Fox when he testified.

[28] After the Crown closed their case, there was much back and forth and we had several court attendances, all sort of relating to Mr. Fox's attempts to get information, based on his assertions that he had dealings with Canada Border Services on March 15, 2019. He needed that information, he said, to support his contention that he had reported to that office prior to leaving Canada.

[29] I was worried about his liberty, quite frankly, given the matter had gone on for so long, and he asked me not to be so concerned and that he was concerned primarily with "justice" being done, and that he required certain evidence to be disclosed prior to the defence being called. So we had some adjournments for that reason. After several adjournments, I was told on December 11, 2019, that Constable Brown had now at that time confirmed there were no documented dealings between Fox and Canada Border Services on March 15, 2019.

[30] On February 11, 2020, we appeared in court and Mr. Fox indicated he now had the results of his *Freedom of Information* request (or ATIP) request and, in fact, there were documented dealings. Well, again, that goes back to my earlier comment, for what it is worth, that all of that, that whole scenario and how it played out, is really less than satisfactory, and all of it has to be laid at the feet of Canada Border Services. I cannot see anybody else who did not do their duly diligent job in this whole affair..

[31] Crown, in the best traditions of the bar, asked the court to reopen their case to call the Canada Border Services agent who had dealings with Mr. Fox on that date, Officer Polisak , and in fact, that is what happened. Polisak was called. She

testified that she did, in fact, have dealings with Mr. Fox on that day. The documents that she had to refer to to refresh her memory are the subject of Exhibit 13 and her memory is really largely, as I indicated before, constrained to that document.

[32] She said he came in and indicated that he wanted to go back to the U.S.A., indicated that there was an issue with his admissibility to Canada. So she conducted an inquiry, came up -- she looked at several databases and that eventually she could not confirm that the subject was not a Canadian citizen. So because he had presented himself from within Canada to that office, there was no basis for directing him to go anywhere; certainly, no basis for directing him to go back to the U.S.

[33] She informed Mr. Fox, she says, that again, as I indicated earlier, that since he does not have any proof of U.S. citizenship and since he has been removed several times before, he is unlikely to get entry to the U.S. So his initial desired request when he attended at the office to go back to the U.S. she thought was not likely to be realized.

[34] Part of her evidence is that, she was clear, they can refuse foreign nationals that are seeking entry. In other words, Canada Border Services can remove from that office, at the secondary inspection there, any foreign nationals who are seeking entry and send them back to their place of origin and, in the case of the Douglas Border Crossing, that would be the United States. If that occurs, this refusal of a foreign national entering the country, a paper trail is created, she said. There must be a report and that report is forwarded to Immigration who ultimately make the

determination. That makes sense, her evidence. I accept that evidence. I mean, all of that makes logical sense.

[35] In fact, the gist of Mr. Fox's submission at the end of the day is essentially the same. Mr. Fox testified. The point of dispute in his evidence as compared to the evidence of Polisak is he says that she clearly told him that he was inadmissible in Canada and that, as a result of that, he felt compelled to leave the country as he had, in his mind, no status to remain in the country. He testified that he explained to the officer he had no status in Canada and that he gave her a number of documents and pointed her to a number of informational sources that would establish that he was, in fact, a U.S. citizen, and he testified that she told him something to the effect of, "based on the information available to me, you appear to be inadmissible to Canada."

[36] He said he went outside at that point, talked to a border officer who asked him where he was going, and he says, "Well, I guess I have to leave because I do not have any -- I am inadmissible in Canada," and he walked to the Customs and Border Patrol on the U.S. side. All of that happened on March 15, 2019, around 4:30 to 5:30, he says.

[37] The issue is essentially, and you know, it is as simple and as complicated as --, does that scenario amount to a reasonable excuse for non-compliance with the order? Mr. Fox's submission is he was effectively removed by Canada Border Services and yet the evidence is that -- and Mr. Fox agrees that he was never directly directed to do anything. It is Immigration Canada who make the decision on whether a person who is already in the country is required to exit or not. That is a

decision of Immigration Canada. Only the Immigration and Refugee Canada authorities can say if someone is admissible, is going to be allowed to remain in Canada once they are inside Canada.

[38] Different concerns arise when somebody is seeking entry to Canada from the U.S. That is not the fact pattern that is before me. Before me is a fact pattern that leads to the inexorable conclusion that Mr. Fox had -- even if I accept his evidence at its highest point that somebody told him while he was inside this country that he was inadmissible to Canada, he had a choice at that time. He could leave the country or he could stay in the country and fight that designation or be arrested by Immigration.

[39] A number of different scenarios could arise out of what decision was made in that circumstance, but the point is, is that the decision that he did make was to walk across the Canada-U.S. border, and he did that without any objectively reasonable excuse, and that is the crux of the whole thing and when it comes down to it the question is, did he voluntarily breach this order or not? The answer is, he clearly did.

[40] There is no evidence that he was involuntarily removed from the country or asked to leave or directed to leave. He voluntarily performed the action of walking himself across the border and, by doing so, he committed the breaches contained in Counts 2 and 3 on the information. Count 2 was the one that said he should not leave British Columbia and he did. Count 3 is that he should not be within 100 metres of the U.S. border and the clear inference, from his own evidence and from all the other evidence, is that he was clearly within 100 metres of the border by

walking across that border to the U.S. side.

[41] The more difficult question to answer is Count 1; did he, without reasonable excuse, fail to comply with an order to report? As Mr. Fox stated in his submission, he said his arrest by, and detention by the U.S. Customs and Border Patrol in the U.S. is analogous to him committing an offence within the country and subsequently being detained at a facility like North Fraser Pretrial and being physically unable to report. In that case, it would hardly be a valid reason for finding that somebody voluntarily did without reasonable excuse, in any event, fail to report, and I have to say there is some merit to that argument and I have a reasonable doubt on Count 1. There is clear evidence that he did not report, but I have to say that I accept that he has met the persuasive burden that is on him to establish a reasonable excuse that he failed to comply for whatever reason even though he knew that he was going to be in custody when he got arrested down there.

[42] Lots of folks commit crimes and know they are going to jail when they are on probation orders and they are still imbued with the ability to argue that there was a reasonable excuse for them not physically showing up at the probation office on a certain date and, in that case, I am going to have a reasonable doubt on Count 1.

[43] I find him not guilty on Count 1, but he is guilty on Counts 2 and 3.

(REASONS CONCLUDED)