

COURT OF APPEAL

ON APPEAL FROM THE PROVINCIAL COURT OF BRITISH COLUMBIA, FROM
JUDGMENT OF THE HONOURABLE JUDGE N. PHILLIPS PRONOUNCED ON THE
19TH DAY OF AUGUST 2020.

REGINA

RESPONDENT

v.

PATRICK HENRY FOX

APPELLANT

RESPONDENT'S FACTUM

The Appellant:

PATRICK HENRY FOX
c/o North Fraser Pretrial Centre
1451 Kingsway Ave
Port Coquitlam, BC
V3C 1S2

IN-PERSON

Counsel for the Respondent:

DAVID LAYTON, Q.C.
BC Prosecution Service
Criminal Appeals and Special Prosecutions
6th Floor, 865 Hornby Street
Vancouver, BC V6Z 2G3
Tel: (604) 660-0717
Email: david.layton@gov.bc.ca

COUNSEL

COURT OF APPEAL

ON APPEAL FROM THE PROVINCIAL COURT OF BRITISH COLUMBIA, FROM
JUDGMENT OF THE HONOURABLE JUDGE N. PHILLIPS PRONOUNCED ON THE
19TH DAY OF AUGUST 2020.

REGINA

RESPONDENT

v.

PATRICK HENRY FOX

APPELLANT

RESPONDENT'S FACTUM

The Appellant:

PATRICK HENRY FOX
c/o North Fraser Pretrial Centre
1451 Kingsway Ave
Port Coquitlam, BC
V3C 1S2

IN-PERSON

Counsel for the Respondent:

DAVID LAYTON, Q.C.
BC Prosecution Service
Criminal Appeals and Special Prosecutions
6th Floor, 865 Hornby Street
Vancouver, BC V6Z 2G3
Tel: (604) 660-0717
Email: david.layton@gov.bc.ca

COUNSEL

TABLE OF CONTENTS

	<u>PAGE</u>
PART I – OVERVIEW AND STATEMENT OF FACTS	1
Overview of events leading up to probation order and trial evidence.....	1
Overview of the respondent’s position on this appeal.....	2
A. Criminal Harassment Conviction and Probation Order.....	2
B. Evidence of Sole Crown Witness DC Fontana	4
C. Crown Closing Submissions.....	7
D. Defence Closing Submissions.....	7
E. Judge Phillips’ Reasons for Conviction.....	8
F. Appellant’s Factum Refers to Inadmissible Information.....	9
PART II – ISSUES ON APPEAL	10
PART III – ARGUMENT	10
A. Verdict Supported by the Evidence and Not Unreasonable.....	10
<i>i. Legal principles</i>	11
<i>ii. Applying the legal principles</i>	13
B. Judge Phillips Did Not Err in Law in Interpreting Condition 12 of the Probation Order.....	17
C. Respondent Does Not Rely on Condition 13 as Alternative Basis for Conviction.....	17
D. No Misapprehension of Evidence.....	17
<i>i. Relevant legal principles</i>	18
<i>ii. Applying the legal principles</i>	18
E. Judge Phillips Provided Adequate Reasons.....	19
<i>i. Relevant legal principles</i>	20
<i>ii. Applying the legal principles</i>	20
PART IV – NATURE OF ORDER SOUGHT	21
PART V – LIST OF AUTHORITIES	22

PART I – OVERVIEW AND STATEMENT OF FACTS

1. On August 19, 2019, Judge Phillips convicted the appellant of one count of breaching his probation order, between March 7 and 21, 2019, “by making publicly available the website www.desicapuano.com” (Information, AB p. 1, Count 1). The appellant now appeals that conviction, but the grounds are unconvincing, and his appeal should therefore be dismissed.

Overview of events leading up to probation order and trial evidence

2. The probation order was made by Justice Holmes, as she then was, following the appellant’s conviction for criminally harassing his ex-wife, Desiree Capuano. A centrepiece of this offence was the website www.desireecapuano.com, which the appellant had created to humiliate, degrade and intimidate Ms. Capuano. The website had the desired effect, and was still publicly accessible at the time of sentencing. The probation order sought to end the harm the appellant was causing Ms. Capuano by, among other things, prohibiting him from disseminating, distributing, publishing or making “publicly available in any manner whatsoever, directly or indirectly,” information referring to Ms. Capuano. This prohibition was contained in Condition 12.

3. The probation order took effect after the appellant finished serving his associated jail sentence, on December 30, 2018. On March 12 or 13, 2019, someone notified the media and Crown counsel about a new website, www.desicapuano.com (“the Website”). On March 18, VPD officer DC Jennifer Fontana confirmed that the Website was publicly accessible. Its contents replicated those of the earlier website, but in addition alleged corruption regarding the appellant’s criminal harassment trial. In June 2019, the appellant wrote a letter to DC Fontana admitting to publishing the Website, and asking to be charged with criminal harassment and breach of probation. In an interview with DC Fontana later that same month, he admitted to running or maintaining the Website.

4. DC Fontana was the sole witness at the appellant’s trial before Judge Phillips for breaching Condition 12 of the probation order. The appellant’s defence was that the Crown had failed to establish that the Website was published after his release from custody, and was thus unable to prove that he had made the Website “publicly available”

while the probation order was in effect. Judge Phillips disagreed, and convicted the appellant on the basis that, even assuming the Website was published before the probation order took effect, the appellant had made it “publicly available in any manner whatsoever, directly or indirectly.”

Overview of the respondent’s position on this appeal

5. The appellant’s main argument on appeal is that his conviction is unreasonable because the evidence did not establish that the Website was put online while he was on probation, let alone between March 7 and 21, 2019, as alleged in the Information.

6. This argument is unpersuasive because the wording in Condition 12 is broad enough to encompass running or maintaining the Website knowing that it is accessible to the public and contains information about Ms. Capuano. This interpretation of Condition 12 is supported by the ordinary meaning of the words used. It is also consistent with Justice Holmes’ purpose in imposing the probation order. And it is bolstered by case law that addresses the meaning of the phrase “make available” in other penal contexts, as well as by the criminal law concept of a “continuing offence”.

7. Accordingly, on a correct interpretation of Condition 12, Judge Phillips properly held that the appellant was guilty of breaching his probation by making “publicly available in any manner whatsoever, directly or indirectly,” information referring to Ms. Capuano. Not only was Judge Phillips’ conclusion reasonable; it was the only one reasonably possible, given the overwhelming nature of the trial evidence.

8. The appellant advances several arguments that implicitly raise discrete grounds of appeal, such as an error of law in interpreting Condition 12, a misapprehension of the evidence regarding what he said in his letter to DC Fontana, and the adequacy of Judge Phillips’ reasons. However, none of these arguments is persuasive, and so his appeal should be dismissed.

A. Criminal Harassment Conviction and Probation Order

9. On June 28, 2017, a jury convicted the appellant of criminally harassing Ms. Capuano, as well as possessing firearms at a place other than where he was authorized

to possess them. He was sentenced for these offences by Justice Homes on November 10, 2017 (*R. v. Fox*, 2017 BCSC 2361, ¶1).

10. The appellant's criminal harassment conviction arose from his campaign to, "as he put it, make Ms. Capuano's life as miserable as possible, hoping to drive her to suicide [...]" (*Fox*, ¶5). He did so, among other things, by means of a website he created in her name: www.desireecapuano.com. This website contained a very large amount of private information about Ms. Capuano, as well as other content designed to humiliate, degrade and intimidate her; to undermine her relationships with family, friends, employers and work colleagues; and to ruin her financially by preventing her from keeping or gaining employment (*Fox*, ¶5, 12-18, 35).

11. The applicant was explicit about his intentions, which were to "destroy [Ms. Capuano] – slowly and incrementally ... [e]very moment of [the appellant's] life [was] focused on that single goal" and "[h]e delighted publicly in the harm he was causing her" (*Fox*, ¶21, 89).

12. Ms. Capuano's attempts to take the website down were unsuccessful. At one point, the appellant moved it to a different server to stop this from happening (*Fox*, ¶34).

13. The harassment had a life-altering effect on Ms. Capuano (*Fox*, ¶70). She lost friends and had trouble keeping or maintaining employment. She was concerned about her own and her family's safety, and her relationship with her spouse suffered after he and his mother were, "brought within the circle of abuse and his career was threatened". She felt isolated, beaten down, frustrated, and powerless. She struggled every day, became depressed, and questioned whether she had the strength to keep going. She was also scared, always looking over her shoulder. Upon learning that the appellant's firearms offences involved arranging to transport firearms into the U.S., where she lived, Ms. Capuano was yet more unsettled about his future intentions (*Fox*, ¶44-48, 89-90).

14. It is in this context that the Crown sought a less lengthy sentence than might otherwise have been justified, to ensure that the appellant was subject to a three-year probation order to prevent him from continuing the harassment (*Fox*, ¶63). Justice

Holmes agreed with this approach (*Fox*, ¶¶95), which was understandable given that: (i) the website remained publicly accessible; (ii) the criminal harassment was carried out on a vast scale and maliciously, with significant planning and sustained intent; and (iii) the appellant downplayed or attempted to justify his conduct, and had no insight into his offending (*Fox*, ¶¶34-36, 66, 71-72, 81-90).

15. Justice Holmes therefore sentenced the appellant to three years in prison for the criminal harassment offence, plus a consecutive 10-month jail term for the firearms offences, which after credit for pre-sentence custody left him with 20.5 months to serve in jail. Justice Holmes also imposed a three-year probation order for the criminal harassment offence (*Fox*, ¶¶96-102; Probation Order, AB p. 10; RFC, AB p. 19, ¶¶2).

16. Condition 12 of Justice Holmes' probation order stated (emphasis added):

You must not disseminate, distribute, publish or make publicly available in any manner whatsoever, directly or indirectly, information, statements, comments, videos, or photographs which refer to or depict, by name or description, Desiree Capuano, James Pendleton, Sage Capuano, or any of their friends, relatives, employers, or co-workers. [Probation Order, AB p. 13]

17. The appellant finished serving his jail sentence on December 30, 2018 (T 33/22-34,¹ 41/37-38), at which point the probation order came into effect (T 32/5-25).

B. Evidence of Sole Crown Witness DC Fontana

18. In March 2019, DC Fontana was tasked with investigating whether the appellant had breached his probation order by making the Website public (T 16/26-17/44; Reasons for Conviction ("RFC"), AB p. 19, ¶¶4). She determined that the Website was made public, by accessing it on March 18, 2019, and thereafter checked frequently to confirm that it remained available for the public to view (T 17/45-18/21, 20/19-30; RFC, AB p. 20, ¶¶5).

19. The Website had a different name from the website that was the subject of the appellant's 2017 trial – the former was www.desicapuano.com, while the latter was www.desireecapuano.com (T 29/28-45, 41/25-27; RFC, AB p. 21, ¶¶9).

¹ DC Fontana mistakenly stated the year as 2019, but clearly meant to say 2018.

20. The Website contained quite a bit of information about Ms. Capuano, and depicted her in a very negative light. This information was the same as that on the website that was the subject of the 2017 criminal harassment trial. But the Website also included documents related to that trial itself, such as disclosure materials (e.g., audio recordings of police interviews, and police reports and notes), and audio recordings of the trial itself (T 18/36-19/13, 41/25-35; RFC, AB p. 20, ¶¶6 & p. 23, ¶14).

21. DC Fontana was able to have the Website shut down for 90 days, but the hosting provider refused to do so for any longer absent a U.S. judicial authorization, which she had not yet been able to obtain (T 19/15-25, 37/36-38/29; RFC, AB p. 20, ¶7).

22. In June 2019, DC Fontana received a letter dated June 6 from the appellant, who was by that time in jail in Port Coquitlam. The letter was addressed to her, and had a subject heading “Investigation into Patrick Fox, desicapuano.com website” (T 18/22-35, 19/26-20/18; Letter, AB pp. 6-9; RFC, AB p. 20, ¶8).

23. The appellant’s letter to DC Fontana stated as follows (original emphasis):

I have been informed by Kirsty Brown of the Burnaby RCMP that you are in charge of the investigation into the website hosted at www.desicapuano.com.

I assume by now you’ve reviewed the website and, in particular, the “R. v. Fox” section of it. And, I further assume you have reviewed the affidavit in support of my claims of ineffective assistance of counsel; as well as the HTML versions of the transcripts wherein I’ve highlighted many of Capuano’s perjurious statements and explained where the proof is (typically right on the very website) that her sworn statements were false (and that Tony Lagemaat and Mark Myhre know she was lying).

And, having reviewed all of that, I am guessing you have come to the only reasonable conclusion – that there is absolutely no way we’ll be able to have another criminal harassment trial which will depend on Capuano’s testimony. Obviously, I’m going to make sure she’s cross-examined on every one of those instances of perjury.

Obviously, with the proof of Capuano’s excessive perjury and blatant manipulation of the jury at the first trial, she will have absolutely no credibility at another trial. In other words, I think we all know there is absolutely no way of getting a conviction on another criminal harassment charge (this is, of course, why the Burnaby RCMP dumped the case on you).

On the other hand, how do you and the Crown explain NOT pursuing another criminal harassment charge to the many angry feminists and Canadian news media who adamantly refuse to accept that Capuano is simply an evil person? Particularly since by publishing the new website I have engaged in exactly the same conduct which Justice Heather Holmes declared formed much of the basis of the guilty verdict in 2017 (at the first criminal harassment trial). I mean, if the website constituted criminal harassment at that point then it must certainly still constitute criminal harassment now! Right?

I suppose the VPD and the Crown could simply admit that Capuano lied extensively; that Lagemaat and Myhre colluded extensively to suppress critical evidence, and to offer perjurious testimony; and that Justice Holmes repeatedly and blatantly refused to acknowledge or consider any evidence in my favour. I mean, the proof of all of that is on the website anyway; it's all publicly accessible; there's no point in denying it anymore.

So anyway, in closing, I respectfully request you charge me with criminal harassment and with violating probation by publishing the new website. Alternatively, I would like to request you declare publicly that such charges will not be forthcoming. Either way, I would certainly appreciate the return of my property (phone, tablet, et cetera), at your convenience.

I thank you for your time and assistance in these matters and I look forward to hearing from you soon.

Sincerely

[signed]

Patrick Fox

P.S. I apologize if this letter comes across as sarcastic or antagonizing. That is not my intention. I am merely attempting to communicate regarding the status of the investigation.

[Exhibit 1, appellant's letter to DC Fontana, dated June 6, 2019, AB pp. 6-9]

24. On June 24, 2019, DC Fontana interviewed the appellant at the North Fraser Pretrial Centre ("NFPTC"), where he was awaiting trial on another matter (T 16/41-43, 18/29-35, 20/31-39, 22/40-22; RFC, AB p. 21, ¶8). When she arrived, he asked if she had received his letter, which she allowed him to review. While reading the letter he commented, 'Oh yes', then handed it back to her (T 25/13-25 ; RFC, AB p. 21, ¶8).

25. During this interview, the appellant told DC Fontana that he had created and was running or maintaining the Website (T 25/26-31, 38/37-43; RFC, AB p. 21, ¶¶8). But he did not say when he had published it (T 29/28-30/5; RFC, AB p. 21, ¶¶9).

26. DC Fontana testified that, for two reasons, she believed the Website was published after the appellant was released from custody on December 30, 2018. First, it contained material from the 2017 trial, which DC Fontana believed would have been added after the appellant left jail (T 41/9-42; Reasons, AB p. 23, ¶¶14). Second, information about the Website was sent to multiple news outlets and Crown counsel on March 12 or 13, 2019 (T 30/6-31/30; RFC, AB p. 21, ¶¶10 & p. 23, ¶¶14).

27. However, DC Fontana admitted that she could not say whether the Website was published before or after December 30, 2018 (T 30/6-31/30, 38/30-36; RFC, AB p. 21, ¶¶10 & p. 22, ¶¶12). She also agreed that it was possible that material was put on the internet on the appellant's behalf by other people prior to his release from custody on that date (T 37/24-31; RFC, AB p. 22, ¶¶12).

C. Crown Closing Submissions

28. The Crown accepted that it had not established when the Website was created, but argued that doing so was not needed to prove a breach of Condition 12 (T 46/31-35; RFC, AB p. 23, ¶¶17). It was enough that the appellant was involved in, contributed to or operated the Website in some way while on probation (T 46/36-39). And in this respect, the offence was proven by his admissions to DC Fontana in the letter and interview, combined with the fact that the Website was online (T 47/44-48/3; RFC, AB p. 24, ¶¶18).

D. Defence Closing Submissions

29. The appellant conceded that he had published the Website, but argued that the Crown had failed to prove whether he did so before or after the probation order came into effect. He contended that if he did so before the probation order came into effect, then the fact that the Website was publicly accessible while he was on probation did not violate Condition 12 (T 48/43-49/22; RFC, AB pp. 24-25, ¶¶22-23).

30. The appellant also noted that, while DC Fontana testified that the Website included content that only came into existence after the 2017 trial ended, all of the content referred to in the trial evidence came into existence before he was released from custody on December 30, 2018. It could thus have been published either before or after the probation order came into effect (T 49/23-37; RFC, AB p. 25, ¶24).

31. The appellant further contended that, even if the Website contained content that only came into existence after he was on probation, the Crown had not shown that he personally uploaded it or if, instead, it was uploaded by someone acting on his behalf (T 49/38-50/4; RFC, AB p. 25, ¶25).

E. Judge Phillips' Reasons for Conviction

32. Judge Phillips accurately reviewed the evidence and parties' closing submissions (RFC, AB pp. 19-26, ¶3-26). In doing so, she emphasized the allegation made in the count in question, namely, that the appellant had breached the probation order "by making publicly available" the Website between March 7 and 21, 2019 (RFC, AB p. 24, ¶20).

33. Judge Phillips found DC Fontana to be a credible and reliable witness (RFC, AB p. 26, ¶27), which necessarily meant that she accepted DC Fontana's evidence regarding the admissions made by the appellant during the interview at NFPTC on June 24, 2019.

34. Judge Phillips next held that the appellant was subject to the probation order during the period referenced in the Information, March 7 to 21, 2019, and noted that Condition 12 provided that he "must not disseminate, distribute, publish or make publicly available in any manner whatsoever, direct [sic] or indirectly, information referring to or depicting by name or description Desiree Capuano" (RFC, AB p. 26, ¶28-29).

35. Judge Phillips then observed that, in his closing submissions, the appellant accepted that he had published the Website (RFC, AB p. 25, ¶22). He made the same admission in his letter to DC Fontana, as well as during the interview at NFPTC, which amounted to an acknowledgment that he engaged in the production of the Website. The question became whether this conduct violated the probation order by "making publicly available" the Website (RFC, AB pp. 26-27, ¶30-31).

36. In this regard, Judge Phillips accepted, for the purposes of argument, the appellant's assertion that all of the content on the Website was in his possession prior to his release from jail, and thus the nature of the content did not establish that the Website was published after that time (RFC, AB p. 25, ¶24). She also accepted that it was possible that the appellant had someone else publish the Website on his behalf (RFC, AB p. 28, ¶35). This latter finding implicitly accepted that the Website may have been published while the appellant was still in jail and thus not yet subject to the probation order.

37. Judge Phillips nonetheless concluded that the appellant's admissions to DC Fontana, to the effect that he engaged in the production of the Website, fell within the expansive definition of the phrase, "by making publicly available" in Condition 12, in particular because Condition 12 prohibited him from making the Website publicly available "directly or indirectly ... in any manner whatsoever". The appellant had thus breached the probation order as alleged (RFC, AB p. 27, ¶31-32).

F. Appellant's Factum Refers to Inadmissible Information

38. The appellant's factum refers to information that is not properly before this Court on appeal because it was not part of the trial record. In particular, he says that the website that was the focus of his 2017 trial, www.desireecapuano.com, went offline when the hosting plan expired in 2018, and that shortly thereafter his associate put it back online using the domain name www.desicapuano.com (*i.e.*, the Website), but did so without his involvement or knowledge (AF ¶4). The appellant further says that the Website was put online before he was released from custody on December 30, 2018 (AF ¶58).

39. As the appellant has not filed an application to adduce this information as fresh evidence, it is inadmissible on appeal. Also, the information is inconsistent with evidence filed on this and other of the appellant's appeals, including but not limited to:

- (a) appellant's statement at his sentencing before Judge Phillips that, regardless of any probation term requiring him to take down the Website, on his release from custody it was "not going to come down. It's not going to go away. If I need to transfer ownership of the website to another party so that I technically don't own it at the time, so be it" (emphasis added, T. 53/31-47);

- (b) the appellant's May 8, 2019 letter to Ms. Capuano's lawyer, David Georgetti, in which he states that: "a new version of the Desiree Capuano website is online (and has been since mid March)" (emphasis added, Affidavit #2 of Susanne Elliott, ¶2, filed May 23, 2019 on respondent's successful application to dismiss the appellant's appeal from his criminal harassment conviction (CA44915)).

PART II – ISSUES ON APPEAL

40. Contrary to the appellant's argument in his factum, his conviction for breaching Justice Holmes' probation order by making the Website publicly available between March 7 and 21, 2019 is supported by the evidence, and is not unreasonable within the meaning of s. 686(1)(a)(i) of the *Criminal Code*.

41. In the course of arguing that the verdict is unreasonable, the appellant makes other assertions that amount to allegations of: (i) error of law in interpreting the probation order; (ii) misapprehension of the evidence; and (iii) insufficient reasons. None of these arguments is persuasive either. His appeal should therefore be dismissed.

PART III – ARGUMENT

A. Verdict Supported by the Evidence and Not Unreasonable

42. The appellant claims that his conviction is unreasonable because it is unsupported by the evidence, and should thus be overturned and an acquittal entered instead (AF ¶33). This argument rests on three propositions. The respondent takes no issue with the first and second of these, but disagrees with the third.

43. The appellant's first proposition is that the probation order only came into effect on his release from custody on December 30, 2018 (AF ¶34-36). The respondent concurs. Under s. 732.2(1)(b) of the *Criminal Code*, where a judge orders a period of probation in addition to a term of imprisonment, the probation order comes into force as soon as the offender is released from prison. Because the probation order does not take effect until that point, an offender cannot be convicted of breach of probation for violating a probation condition while in custody (*R. v. Fazekas* (2003), 171 O.A.C. 114, ¶6).

44. The appellant's second proposition is that the Crown was unable to prove that any part of the Website was posted after December 30, 2018, and thus while the probation

order was in effect (AF ¶¶44, 19, 21, 23, 57-58). The respondent agrees with this proposition as well. Based on the evidence led at trial, the Crown could not establish that the Website was first put online after December 19, 2018, or more particularly during the period covered by the Information (March 7 to 21, 2019).

45. The appellant's third proposition is that the prohibition in Condition 12 – that he not “make publicly available in any manner whatsoever directly or indirectly” information regarding Ms. Capuano – only applied to the discrete act of posting such information on the internet, and did not require him to remove content that was already publicly accessible when the probation order came into effect (AF ¶¶38-48, 61).

46. The respondent disagrees with this proposition, and contends that, properly interpreted, Condition 12 prohibited the appellant from running or maintaining the Website while on probation, even if the Website was first published before the probation order took effect. If Condition 12 is interpreted in this way, the evidence at trial overwhelmingly supported Judge Phillips' conclusion that the appellant was guilty of the charged offence.

i. Legal principles

47. The relevant legal principles can be divided into three categories: first, the test that must be met before an appeal court will overturn a conviction as unreasonable because it is not supported by the evidence; second, the essential elements of the offence of breach of probation; and third, the guiding principles that apply where a court is asked to interpret a term in a probation order.

Test for overturning a conviction as unreasonable based on insufficient evidence

48. A conviction will be overturned as unreasonable, in the sense that it is not supported by the evidence, if it is one that no properly instructed trier of fact could reasonably have rendered (s. 686(1)(a)(i), *Criminal Code*; *R. v. C.P.*, 2021 SCC 19, ¶28).

49. In the context of this appeal, the issue becomes whether the evidence is sufficient to reasonably justify Judge Phillips' conclusion that the appellant breached his probation

order. It is thus helpful to identify the elements of the offence of breach of probation under s. 733.1 of the *Criminal Code*.

Elements of the offence of breach of probation under s. 733.1, *Criminal Code*

50. To prove the offence of breach of probation, the Crown must establish that the accused: (a) committed the act or omission prohibited by the probation order (the *actus reus*, or conduct element of the offence); and (b) at that time had the state of mind necessary to justify a conviction (the *mens rea*, or mental element of the offence).

51. The *mens rea* for the offence of breach of probation is subjective, and thus requires that the Crown prove the following:

- (a) the accused knew of the conditions in the probation order, or was wilfully blind to them; and
- (b) the accused either:
 - i. knowingly failed to act according to those conditions, meaning he knew of the circumstances requiring him to comply with the conditions, or was wilfully blind to those circumstances, and failed to comply with the conditions despite that knowledge; or
 - ii. recklessly failed to act according to those conditions, meaning he perceived a substantial and unjustified risk that his conduct would likely fail to comply with the conditions and persisted in that conduct despite that perception.

R. v. Blaney, 2022 BCCA 98, ¶¶43-44; *R. v. Zora*, 2020 SCC 14, ¶¶50-51, 109-120.

52. However, a mistake of law does not provide a *mens rea* defence to breach of probation, and thus a mistake about the legal scope or effect of a probation condition does not afford a defence (*Zora*, ¶114; *R. v. Allaby*, 2017 SKCA 25, ¶¶40-44).

Guiding principles for interpreting a term in a probation order

53. The meaning of a word or phrase in a probation order must be interpreted in its entire context, and in its grammatical and ordinary sense, harmoniously with the purpose of probation orders both generally and in the circumstances of the particular case (*Allaby*, ¶¶21-28, 35-36).

54. Dictionary definitions may aid the interpretive exercise, but the proper legal interpretation of a term in a probation order must be context and fact specific. To the extent reasonably possible, dictionaries should not override the interpretative role played by the purpose and intent of the *Criminal Code* provisions that underpin the particular probation order (*Allaby*, ¶¶30-35).

55. The primary purpose of a probation order, including a residual condition imposed under 732.1(3)(h), is to protect society and/or facilitate the offender's rehabilitation. A residual condition must reflect a nexus between the offender and one or both of these goals. There will generally be a link between the condition and the index offence, although this is not absolutely necessary. See 732.1 (3)(h); *R. v. Duguay*, 2019 BCCA 53, ¶¶60-66; *R. v. Goddard*, 2019 BCCA 164, ¶¶20-23; *R. v. Manca*, 2019 BCCA 164, ¶¶39-41; *R. v. Burgoyne*, 2021 BCCA 51, ¶¶19-21).

56. In the appellant's case, the probation order was made as part of a sentence for criminal harassment, which is a serious offence even where not accompanied by actual violence (*R. v. J.S.M.*, 2006 BCCA 377, ¶¶21; *Fox*, ¶¶59).

ii. Applying the legal principles in this case

57. The key question in determining whether the appellant's conviction is supported by the evidence is whether, assuming that all of the Website's contents were posted before the probation order came into effect, the appellant's subsequent conduct in relation to the Website, in particular during the period specified in the Information (March 7 to 21, 2019), is reasonably capable of being found to breach the requirement in Condition 12 that he not "make publicly available, in any manner whatsoever, directly or indirectly", any information regarding Ms. Capuano.

58. This question should be answered affirmatively, because properly interpreted the wording in Condition 12 is broad enough to encompass the running or maintenance of the Website, given that the appellant knew it included information about Ms. Capuano.

59. The respondent's interpretation of Condition 12 is supported by a number of considerations, starting with its wording. To repeat, Condition 12 states (emphasis added):

You must not disseminate, distribute, publish or make publicly available in any manner whatsoever, directly or indirectly, information, statements, comments, videos, or photographs which refer to or depict, by name or description, Desiree Capuano, James Pendleton, Sage Capuano, or any of their friends, relatives, employers, or co-workers. [Probation Order, AB p. 13]

60. For information to be "publicly available", it must be accessible to the public, in the sense that the public is able to obtain the information (*Concise Oxford English Dictionary*, 11th ed., 2008, p. 90, "available", definition #1). If a person does something to cause the information to be publicly available, they can be said to have acted to "make [it] publicly available" (*ibid*, p. 861, "make", definition #2)).

61. Crucially, Condition 12 prohibits making information referring to Ms. Capuano publicly available "in any manner whatsoever, directly or indirectly". This expansive language is broad enough to cover the appellant's conduct in running or maintaining the Website knowing that it contained information about Ms. Capuano. It matters not that the information may have been posted to the Website before the probation order took effect.

62. Interpreting the phrase, "make publicly available in any manner whatsoever, directly or indirectly", to include running or maintaining a website, knowing that it contains the prohibited information, accords with the primary purpose of Justice Holmes' probation order, including Condition 12, namely, to protect Ms. Capuano from continued victimization at the appellant's hands in the form of content publicly accessible on the internet. This is especially so given: (i) the central role that the information on the Website played in the appellant's criminal harassment of Ms. Capuano; (ii) the significant harm that information caused her as a result of it being available to the public; and (iii) the appellant's lack of insight into his offending at the time of sentencing.

63. This interpretation also accords with the courts' reading of similar language found in the *Criminal Code*. For instance, s. 163.1(3) states that every person who "transmits, makes available, distributes, sells, advertises, imports, [or] exports ... child pornography

is guilty of an indictable offence” (emphasis added). *R. v. G.F.*, 2018 BCCA 81, ¶¶56, 63, holds that the phrase, “makes available”, is the broadest of the terms in s. 163.1(3), and that it includes the passive dissemination of child pornography, and does not require any positive act by the accused to facilitate the material’s availability. See also *R. v. Spencer*, 2014 SCC 43, ¶¶83, and *R. v. Capancioni*, 2018 ONCA 173, ¶¶48-49.

64. Compare s. 486.4(2.1) of the *Criminal Code*, which permits a judge to prohibit any information that could identify a victim from being “published in any document or broadcast or transmitted in any way.” In *R. v. Canadian Broadcasting Corp.*, 2018 ABCA 391, the CBC failed to remove previously posted information identifying a victim from its website after a s. 486.4(2.1) ban came into effect. The Alberta Court of Appeal held that, by maintaining the website containing this previously posted information, the CBC had likely “made it available”. But the CBC had not thereby breached the ban because s. 486.4(2.1) did not list “making available” as prohibited conduct (¶¶34-35, 43).

65. The respondent’s interpretation of Condition 12 is also consistent with the notion that the criminal law can prohibit a “continuing offence”; that is, one where the *actus reus* and *mens rea*, once complete, nonetheless persist, and the perpetrator commits a crime for as long as this state of affairs persists. For instance, the illegal cultivation of marihuana starts with seeding, but continues until the plants are harvested or die, and so an accused is committing that offence even during periods where nothing active is being done to the plants (*R. v. Arnold* (1990), 74 C.R. (3d) 394 at 398-400 (B.C.C.A.)).² Plus, a person who is initially uninvolved in a continuing offence can become a principal or party by subsequently doing or omitting to do something that assists in its continuation (*R. v. Vu*, 2012 SCC 40, ¶¶5, 58-63).³

66. In sum, by prohibiting the appellant from making information referring to Ms. Capuano “publicly available in any manner whatsoever, directly or indirectly”, Condition

² In *Arnold*, the accused was thus found guilty of cultivating marihuana even though there was no evidence that he or anyone else had done anything to the plants on the date specified in the indictment.

³ In *Vu*, the accused was guilty of the continuing offence of kidnapping based on his involvement as a party after the initial taking of the victim.

12 of the probation order barred him from operating the Website, because by doing so he was knowingly making information about her accessible to the public. The language of Condition 12 is expansive enough to capture such conduct even if the appellant did not post any material referencing Ms. Capuano to the Website during the period set out in the Information.

67. It inexorably follows that the evidence at the appellant's trial was reasonably capable of supporting a guilty verdict, regardless of whether the Website was put online prior to the probation order coming into effect. In particular:

- (a) The Website contained all of the content that was on the website the appellant had used to criminally harass Ms. Capuano prior to his 2017 conviction. The appellant admitted to publishing the Website (AB p. 8, lines 1-4 & p. 8, 2nd full paragraph; T. 49/2-3, 49/42-46), and thus must have known that it contained this content.
- (b) At the interview at NFPTC on June 24, 2019, the appellant told DC Fontana that he was running or maintaining the Website.
- (c) In his letter to DC Fontana earlier that month, the appellant made comments that strongly supported the inference that he was involved in running or maintaining the Website while subject to the probation order. For instance, he admitted to having published the Website, and asked to be charged with criminal harassment and breach of probation as a result.⁴ He also showed familiarity with the specific contents of the Website and declared his role as creator of at least some of those contents.⁵
- (d) Given the Website's contents, and the appellant's statements to DC Fontana in his letter and during the interview at NFPTC, it was reasonable to conclude that he was running or maintaining the Website during the period set out in the Information. In fact, the evidence overwhelmingly established that he was doing so, which in turn guaranteed that any reasonable trier of fact who was properly

⁴ He stated: "since by publishing the new website I have engaged in exactly the same conduct which Justice Heather Holmes declared formed much of the basis of the guilty verdict in 2017" (AB p. 8, lines 1-4). He also said: "I respectfully request you charge me with criminal harassment and with violating probation by publishing the new website" (AB p. 8, 2nd full paragraph).

⁵ See, e.g., his reference to the "*R. v. Fox*" section of the website, the HTML versions of the transcripts from his 2017 trial, and his comment that, "I've highlighted many of Capuano's perjurious statements and explained where the proof is (typically right on the very website) that her sworn statements were false" (AB pp. 6-7).

instructed on the meaning of Condition 12 would find him guilty of breaching Justice Holmes' probation order.

B. Judge Phillips Did Not Err in Law in Interpreting Condition 12 of the Probation Order

68. The appellant's argument that his conviction is unreasonable is largely, if not entirely, based on the assertion that Judge Phillips misinterpreted Condition 12 of the probation order. A misinterpretation of a probation order constitutes an error of law (*Allaby*, ¶¶20-22). It is thus appropriate for this Court to consider whether Judge Phillips erred in law in interpreting Condition 12. However, for the reasons provided at paragraphs 53-66 above, Judge Phillips did not so err.

C. Respondent Does Not Rely on Condition 13 as Alternative Basis for Conviction

69. The appellant's factum addresses Condition 13 of the probation order, "in anticipation of the Crown seeking to rely on it in their response" (AF ¶47). However, the respondent does not seek to rely on Condition 13 in upholding the appellant's conviction for breaching Condition 12. It is thus unnecessary for the respondent to comment on Condition 13 in this factum.

D. No Misapprehension of Evidence

70. The appellant in effect argues that Judge Phillips misapprehended the evidence by misreading his letter to DC Fontana. Contrary to what Judge Phillips said in her reasons for conviction, the letter did not state, "Particularly, since my publishing the new website, I have engaged in exactly the same conduct [that was the basis for my 2017 conviction]" (emphasis added). Rather, the letter stated, "Particularly, since by publishing the new website, I have engaged in exactly the same conduct [that was the basis for my 2017 conviction]" (emphasis added). The appellant says this error led Judge Phillips to wrongly conclude that he admitted to engaging in conduct prohibited by Condition 12 during the period in which the probation order was in force (AF ¶¶53-54).

71. The respondent disagrees. While Judge Phillips does appear to have misread the letter, this error did not play an essential role in her reasoning process in convicting

the appellant. He has thus failed to establish a misapprehension of evidence as that ground of appeal is understood at law.

i. Relevant legal principles

72. The stringent test for establishing a misapprehension of evidence was recently described as follows in *R. v. Osinde*, 2021 BCCA 124:

[17] A misapprehension of evidence will warrant appellate intervention where the trial judge makes mistakes “as to the substance of material parts of the evidence and those errors play an essential part in the reasoning process resulting in a conviction”: *R. v. Morrissey* (1995), 1995 CanLII 3498 (ON CA), 97 C.C.C. (3d) 193 at 221 (Ont. C.A.); *R. v. Lohrer*, 2004 SCC 80 at para. 1, [2004] 3 S.C.R. 732. A misapprehension of the evidence “may refer to a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to the evidence”: *Morrissey* at 218.

[18] Where there is a material misapprehension of evidence that played an essential role in the reasoning process underlying a conviction, the appellant will not have received a fair trial and a miscarriage of justice will have occurred: *Morrissey* at 221; *Lohrer* at para. 1. One way to assess whether there has been a miscarriage of justice is to ask whether striking the error would leave the trial judge’s reasoning that led to conviction on unsteady ground: *R. v. Sinclair*, 2011 SCC 40 at para. 56, [2011] 3 S.C.R. 3.

[...]

[20] Demonstrating a misapprehension is a high standard for an appellant. They must point to a plainly identifiable error, not merely suggest that the judge may have erred: “[t]he plain language or the thrust of the reasons must disclose an actual mistake”: *Sinclair* at para. 53. Additionally, as noted, the error must be material. And, in deciding whether a material misapprehension resulted in a miscarriage of justice, an appellate court may ask itself whether the misapprehension, once removed, could plausibly have left the judge with a reasonable doubt: *Sinclair* at paras. 56–57, 59, 61–62. If so, then the reasoning that led to a conviction is based on “unsteady ground”: *Sinclair* at para. 56. If not, then the misapprehension was likely not central to the judge’s reasoning process.

ii. Applying the legal principles in this case

73. The respondent agrees that, in her reasons for conviction, Judge Phillips misread the appellant’s letter to DC Fontana as alleged (RFC, ¶15, 30-31). However, this misreading was not essential to the reasoning process underlying the conviction. Put

differently, Judge Phillips' error does not leave the appellant's conviction on unsteady ground, because its removal could not plausibly have left Judge Phillips with a reasonable doubt. This is so for two reasons.

74. First, for the purposes of her decision, Judge Phillips accepted the appellant's submission that the evidence did not establish that any of the material on the Website was published after he was released from custody on December 30, 2018 (RFC, ¶¶22-24). Her misstatement of the passage in question from the appellant's letter could not, therefore, have led her to conclude that the appellant had posted material to the Website after his release, and more particularly during the March 7 to 21, 2019 period referenced in the Information. Furthermore, Judge Phillips says nothing in her reasons to suggest that she concluded otherwise. Rather, the nub of her reasoning is that by maintaining the Website after the probation order came into force, the appellant made it publicly available and thus breached Condition 12 (RFC, ¶¶31-32).

75. Second, the evidence overwhelmingly proved that the appellant breached Condition 12 by maintaining the Website while on probation. There is no real possibility that Judge Phillips, or any other trier of fact employing the correct interpretation of Condition 12, could have entertained a reasonable doubt to the contrary. Accordingly, Judge Phillips' misreading of the letter, if corrected, could not have plausibly left her with a reasonable doubt, meaning that her error did not leave the conviction on unsteady ground.

E. Judge Phillips Provided Adequate Reasons

76. The appellant complains that Judge Phillips failed to make a finding that he engaged in the prohibited conduct while he was on probation and, more specifically, that he did so within the period of time set out in the Information. While the appellant does not frame this point as a discrete ground of appeal, if valid it might arguably amount to an error of law arising from a failure to provide adequate reasons (AF ¶¶54).

77. Yet Judge Phillips' reasons, when viewed in the context of the trial evidence and the parties' closing submissions, indicate why the appellant was convicted and, in any

event, do not foreclose meaningful appellant review. Consequently, his conviction should not be overturned based on the doctrine of inadequate reasons.

i. Relevant legal principles

78. A trial judge's reasons for conviction will be sufficient if, read together with the evidence and the parties' arguments, they show why the judge found the accused to be guilty, and thus allow for meaningful appellate review of the decision's correctness. The reasons need not, however, demonstrate how the judge arrived at that decision. Nor is the judge required to mention every piece of evidence, answer every argument advanced, or set out every finding made in the process of arriving at the verdict. Moreover, because "bad reasons" are not an independent ground of appeal, even if the judge's reasons do not explain why the decision was reached, if the answer to this question is clear on the record, there will be no error. See *R. v. G.F.*, 2021 SCC 20, ¶¶68-70; *R. v. Batstone*, 2021 BCCA 398, ¶¶74-76; *R. v. Greif*, 2021 BCCA 187, ¶¶83-84.

ii. Applying the legal principles in this case

79. Judge Phillips delivered her reasons immediately after closing submissions. In them, she recognized that the issue to be decided was whether the appellant had breached the probation order during the period specified in the Information (March 7 to 21, 2019) (RFC, ¶¶1, 20, 28). She also noted that: (i) DC Fontana was able to access the Website on March 18, 2019; (ii) the Website referred to Ms. Capuano; and (iii) in his interview with DC Fontana, the appellant admitted to creating and running the Website (RFC, ¶¶5-6, 8). Based on this uncontested evidence, Judge Phillips concluded that the appellant had engaged in the conduct prohibited by the probation order and set out in the Information by directly or indirectly making the Website publicly available in any manner whatsoever (RFC, ¶¶32).

80. Read in the context of the evidence and the parties' arguments, Judge Phillips' reasons indicate "why" the appellant was convicted, namely, regardless of whether he published the Website before his release from custody, he was running it while on probation, and therefore made it publicly available between March 7 and 21, 2019. Judge Phillips' reasons are thus sufficient within the meaning of the jurisprudence.

81. Regardless, the answer to the question of “why” the appellant was convicted is clear on the record. In fact, provided Condition 12 was properly interpreted, a conviction was the inevitable given the overwhelming nature of the evidence. It follows that any gaps in Judge Phillips’ reasons do not constitute a legal error so as to require a new trial.

PART IV – NATURE OF ORDER SOUGHT

82. This conviction appeal should be dismissed.

A handwritten signature in dark ink, appearing to read "David Layton", is positioned above a horizontal line.

May 20, 2022
Vancouver, B.C.

David Layton, Q.C.

PART V – LIST OF AUTHORITIES

Paragraph

Cases

<i>R. v. Allaby</i> , 2017 SKCA 25.....	52 – 54, 68
<i>R. v. Arnold</i> (1990), 74 C.R. (3d) 394.....	65
<i>R. v. Batstone</i> , 2021 BCCA 398.....	78
<i>R. v. Blaney</i> , 2022 BCCA 98.....	51
<i>R. v. Burgoyne</i> , 2021 BCCA 51.....	55
<i>R. v. C.P.</i> , 2021 SCC 19.....	48
<i>R. v. Canadian Broadcasting Corp.</i> , 2018 ABCA 391.....	64
<i>R. v. Capancioni</i> , 2018 ONCA 173.....	63
<i>R. v. Duguay</i> , 2019 BCCA 53.....	55
<i>R. v. Fox</i> , 2017 BCSC 2361.....	9 – 15, 56
<i>R. v. Fazekas</i> (2003), 171 O.A.C. 114.....	43
<i>R. v. G.F.</i> , 2018 BCCA 81.....	63
<i>R. v. G.F.</i> , 2021 SCC 20.....	78
<i>R. v. Goddard</i> , 2019 BCCA 164.....	55
<i>R. v. Greif</i> , 2021 BCCA 187.....	78
<i>R. v. J.S.M.</i> , 2006 BCCA 377.....	56
<i>R. v. Manca</i> , 2019 BCCA 164.....	55
<i>R. v. Osinde</i> , 2021 BCCA 124.....	72
<i>R. v. Spencer</i> , 2014 SCC 43.....	63
<i>R. v. Vu</i> , 2012 SCC 40.....	65
<i>R. v. Zora</i> , 2020 SCC 14.....	51, 52

Legislation

<i>Criminal Code</i> , R.S.C. 1985, c. C-46, s. 163.1.....	63
<i>Criminal Code</i> , R.S.C. 1985, c. C-46, s. 486.4.....	64
<i>Criminal Code</i> , R.S.C. 1985, c. C-46, s. 686.....	40, 48
<i>Criminal Code</i> , R.S.C. 1985, c. C-46, s. 732.1.....	55
<i>Criminal Code</i> , R.S.C. 1985, c. C-46, s. 732.2.....	43

<i>Criminal Code</i> , R.S.C. 1985, c. C-46, s. 733.1.....	49, 50
--	--------

Secondary Sources

<i>Concise Oxford English Dictionary</i> , 11 th ed., 2008, p. 90, “available”.....	60
<i>Concise Oxford English Dictionary</i> , 11 th ed., 2008, p. 861, “make”.....	60

R. v. Fox CA46979: Corrections to Crown Respondent's Factum

1. Page 3, paragraph 12, 2nd line: the citation at the end of this paragraph should be "Fox, ¶32, 34" (addition underlined).
2. Page 4, paragraph 14, last line: the citation at the end of this paragraph should include an additional reference to the Fox decision, namely, "¶52".
3. Page 11, paragraph 44, 5th line: the wording should be "first put online after December 30, 2018" (correction underlined).
4. Page 15, paragraph 63, last line: the citation at the end of this paragraph should be "¶44, 48-49" (addition underlined).
5. Page 15, paragraph 64, 2nd line: the wording should be "identify a victim under the age of 18 from being" (addition underlined).
6. Page 18, paragraph 73, 1st sentence, 2nd line: the citation at the end of this sentence should be "RFC, ¶15, 30, 32" (correction underlined).