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Vancouver Registry

COURT OF APPEAL

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

REGINA

RESPONDENT

v.

PATRICK HENRY FOX

APPELLANT

APPELLANT'S REPLY FACTUM

For the Appellant:

Patrick Fox **IN-PERSON**
c/o North Fraser Pretrial Centre
1451 Kingway Ave
Port Coquitlam, BC
V3C 1S2

For the Respondent:

David Layton, Q.C. **COUNSEL**
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

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Scope and Interpretation of Condition 12

1. Regarding paragraphs 6, 46, 58, 61, and 66 of the Crown's factum, I disagree that "the wording in Condition 12 is broad enough to encompass running or maintaining the website."

    1.1. Condition 12 explicitly lists the specific artifacts which I was prohibited from "disseminating, distributing, publishing or making available", and "websites" was not included in that list. The list is complete. It is not prefaced with "such as" or "including, but not limited to". The condition clearly and explicitly applied to specific types of content which could, potentially, be contained within a website, but not the website itself. A website is independent of the content on it. In other words, the particular offending content could be removed from the website without requiring the entire website to be removed. Condition 12 did not prohibit the publishing, running or maintaining of a website - it only prohibited the publishing of "statements, comments, videos, [and] pictures".

    1.2. A website is a medium which may be used to disseminate, distribute, publish, or make available, particular content but a website is not the content itself. Just as a magazine, or a billboard, or a flier might be the medium used for that same purpose. Condition 12 applied to the content, not to the medium.

    1.3. But even if one is to accept the Crown's argument that Condition 12 prohibited me from running or maintaining the website, there was no evidence at the trial that I *was* running or maintaining the website during the time I was on probation. Det. Fontana testified that when she interviewed me I had told her I "had" created and run the website - not that I was currently running the website. Beyond that there was no indication given of when, in the past, I had been involved in running the website.

    1.4. The term "in any manner whatsoever", as used in Condition 12, refers to the method of "disseminating, distributing, publishing or making available". In other words, whether it's done by uploading it to a website, or by putting it on a

billboard, or by running an advertisement in a magazine, or by including it in a mass email.

1.5. The term "directly or indirectly", as used in Condition 12, refers to whether the acts of "disseminating, distributing, publishing or making available" are executed by me, personally, or by another person on my behalf, under my direction. It means that I may not do it, and I may not have someone else do it for me.

2. What Crown is proposing is not an interpretation of Condition 12, but rather an expansion of the scope of Condition 12. The condition explicitly states the artifacts I was prohibited from disseminating, distributing, publishing or making available while I was on probation, and "websites" is not included in that list. The list only refers to particular types of content which may be found on a website, but not to the website itself.

3. Regarding paragraphs 6 and 62 of the Crown's factum, I disagree that the Crown's interpretation of Condition 12 is consistent with Justice Holmes' purpose in imposing the probation order. Given the Crown's interpretation, Condition 13 of the order would be redundant because Condition 12 would already have required me to remove any material previously published or made available. The fact that Justice Holmes imposed the two separate and distinct conditions, makes it clear that she intended for one to prohibit me from publishing, et cetera, certain material once the probation order came into effect (Condition 12); and the other to require me to remove any material published prior to the probation order coming into effect (Condition 13). I believe, for this reason, the Crown's interpretation of Condition 12 being broad enough to encompass running or maintaining the website must be rejected.

4. Regarding paragraph 63 of the Crown's factum, the cases relied upon by the Crown to support it's interpretation of "makes available" are not analogous to the current case because:

   a. in the Crown's cases, the material being "made available" was, itself, prohibited (i.e. child pornography), whereas in the current case the material which was made

available was not, itself, prohibited;

b. in the Crown's cases, the accused parties were prohibited from making the material available at the time that they actually engaged in the conduct necessary to cause the material to *become* available, whereas in the current case I was not prohibited from making the material available at the time the conduct which was necessary to cause the material to become available was actually engaged in;

c. in the Crown's cases, the accused parties made the material available to others by granting them access to their own personal computers, through their own personal internet connections, which they had direct and complete access to, and control and authority over, whereas in the current case the material had been transferred to a third party's computers (a hosting provider), which I did not have direct and complete access to, and control and authority over at the time the probation order came into effect.

Continuing Offense

5. Regarding paragraph 65 of the Crown's factum, the Crown relies on *R. v. Arnold* (1990), 74 C.R. (3d) 394, to support it's argument regarding the doctrine of a "continuing offense", however in Arnold, the Court held:

> Once a person normally takes on the task of raising a plant or crop of marijuana to maturity, he is "cultivating" that crop <u>until such time as he abandons the task</u> or the crop is harvested. (at 5th para of page 398) (emphasis added)

The Court said "abandons the task", not "abandons the crop", therefore, once the person makes the decision to have no further involvement in the <u>*task*</u> then they have abandoned it and the "continuing offense" has ended with respect to that person, even though the result (the crop) of his prior efforts may still remain. In the current matter, any involvement I may have had with the website ended, that is, I abandoned the task (of "making available"), before the probation order came into effect, so the continuing offense (if we accept my conduct even amounted to that) ended before the period of probation began.

6. Also, in the context of a "continuing offense", the offense in this case, is not "making the website available", it is "breaching a probation order". And the offense of breaching the order could not have occurred until the order came into effect. Therefore, since it was not an offense at the time I engaged in the conduct, it could not be considered a *continuing* offense.

Inadmissible Evidence

7. Regarding paragraph 38 of the Crown's factum, I agree that the referenced information is inadmissible because it was not part of the record and I have not applied to adduce it as fresh evidence. It was, however, raised in the trial in another of my matters (BCPC no. 244069-8-b) which is now before the Court of Appeal as CA48145 and will be put before this court in the course of that appeal.

8. Regarding paragraph 39(b) of the Crown's factum, the Crown is referencing a letter he claims I sent to David Georgetti, however that letter was not part of the record and Crown has not sought to adduce it as fresh evidence. For that reason, it is inadmissible.

Miscellaneous

9. Regarding paragraphs 2 through 13 of the Crown's factum, I strongly dispute most of the assertions and supposed "facts" stated therein (Fox Affidavit, ¶2-23). However, since none of it seems relevant to the issues in this appeal I abstain from responding to them here.

10. Regarding paragraph 3 of the Crown's factum, I did not admit in my letter to Det. Fontana that I had published the website (Fox Affidavit, ¶8).

11. Regarding paragraph 67(c) of the Crown's factum, there is nothing in the letter which provides any suggestion of, or supports any inferrence regarding the timing of anything related to the website. Nor is there anything in the letter that suggests I had any involvement, directly or indirectly, in posting any of the content to the R. v. Fox section of the website.

12. Regarding paragraph 67(d) of the Crown's factum, there is nothing about the website's contents as of the times stated on the indictment, nor about my statements to Det. Fontana, that would give any indication that I was running or maintaining the website during the two week period stated on the indictment, or even at any point while I was on probation.

13. Regarding paragraph 26 of the Crown's factum, that is merely Det. Fontana's belief, based on nothing more than her assumptions. Her belief was not based on any evidence. The material in question, from the 2017 trial, came into existence in 2017 so it could have been put onto the website at any point after that.

14. Regarding paragraph 27 of the Crown's factum, Det. Fontana actually agreed that it was possible material was put on the internet by other people, either on my behalf *or otherwise*. Meaning, on my behalf or completely indepent of me.

15. My affidavit #1 contains my factual responses to the assertions made by the Crown in it's factum. Those responses are not duplicated herein, due to space limitations.

16. Although there are further points in the Crown's factum which I would like to respond to, the five page limit on this reply precludes me from doing so herein.

Date: _____ _____

Patrick Fox