CA47391

COURT OF APPEAL

ON APPEAL FROM THE PROVINCIAL COURT OF BRITISH COLUMBIA, FROM JUDGMENT OF THE HONOURABLE JUDGE RIDEOUT, PRONOUNCED ON THE 26TH DAY OF NOVEMBER 2020.

REGINA

RESPONDENT

v.

PATRICK HENRY FOX

APPELLANT

RESPONDENT'S FACTUM

The Appellant:

PATRICK HENRY FOX **IN-PERSON**
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PART I – OVERVIEW AND STATEMENT OF FACTS

1. The appellant appeals his conviction by Judge Rideout, on November 26, 2020, for failing without reasonable excuse to comply with a condition of a probation order that directed him to remove the website www.desicapuano.com from the internet (Information, AB p. 1). As explained in the respondent's factum in the companion appeal CA46979, to be heard together with this one, that website is part of the appellant's campaign to destroy the life of his former spouse, Desiree Capuano.

2. The appellant challenges this conviction on the basis that his ability to make full answer and defence was prejudiced because the *ad hoc* trial Crown, Chris Johnson, failed to make timely disclosure and withheld the identity of the sole Crown witness, VPD officer DC Kyle Dent, until the morning of the trial. The appellant also alleges various abuses of process by Mr. Johnson, DC Dent, and Judge Rideout. In support of these grounds, the appellant has sworn and filed two affidavits as fresh evidence, and has applied to have that fresh evidence admitted on the appeal.

3. In response to this fresh evidence, the respondent has filed an affidavit from Mr. Johnson. At the appellant's request, the respondent has also filed the disclosure materials in a Supplemental Appeal Book. The respondent has not, however, provided the Supplemental Appeal Book to the appellant,[1] because despite his awareness of the implied undertaking attaching to disclosure and court orders forbidding him from doing so,[2] he has in the past posted disclosure materials to the above-mentioned website.[3]

4. The respondent's position is that the record on this appeal shows that the appellant's ability to make full answer and defence was not impaired as he claims, and

---

[1] As indicated at paragraph 5 of the respondent's letter to the appellant dated April 8, 2022, copied to Case Management Scheduler Ms. Torri Enderton, the appellant is content that he does not receive a copy of the Supplementary Appeal Book.

[2] While at least three such orders have been made in the past, the order that expressly covers the disclosure contained in the Supplementary Appeal Book was made by Justice Fitch on December 15, 2021.

[3] The basis for the respondent's concern is evident in this Court's decision granting the respondent's application to dismiss the appellant's appeal in CA44915 (*R. v. Fox*, 2019 BCCA 211) and the affidavits filed by the respondent in support of that application.

that none of the alleged abuses occurred. His application to adduce fresh evidence should therefore be dismissed, and these grounds rejected.

5. The appellant raises other grounds of appeal as well, including that the verdict was unreasonable, and that Judge Rideout erred: (i) by admitting into evidence a hardcopy of a letter that had been posted on the website; (ii) by finding DC Dent to be credible and reliable; and (iii) in interpretating the probation order. As none of these grounds can succeed either, the appellant's appeal should be dismissed.

A. Criminal Harassment Conviction and Probation Orders of Justice Holmes and Judge Phillips

6. Much of the relevant information about the appellant's criminal harassment conviction, and the ensuing probation orders by Justice Holmes and Judge Phillips, is in the respondent's factum in CA46979, and can be restated briefly here, without citations.

7. On June 28, 2017, the appellant was convicted by a jury of criminally harassing Ms. Capuano, in part by creating a website called www.desireecapuano.com. This website contained much private information about Ms. Capuano, as well as other content designed to humiliate, degrade and intimidate her. The appellant's use of the website caused Ms. Capuano substantial harm.

8. On November 10, 2017, Justice Holmes, as she then was, sentenced the appellant to three years in prison for this offence. She also sentenced the appellant to a consecutive 10-month jail term for firearms offences. After accounting for presentence custody, he had about 20.5 months of jail left to serve, a result that was designed, at least in part, to allow Holmes J. to impose a three-year probation order for the criminal harassment offence. Condition 12 of this order prohibited the appellant from making publicly available, in any manner whatsoever, directly or indirectly, information that referred to Ms. Capuano.

9. The appellant finished serving these jail sentences on December 30, 2018, at which point Justice Holmes' probation order took effect.

10. In March 2019, someone sent the media and Crown counsel information about a new website, www.desicapuano.com (the "Website"). A VPD officer reviewed the Website that same month. The Website contained the same information as had www.desireecapuano.com. But it also contained information about the appellant's jury trial before Justice Holmes, including transcripts and audio recordings from the trial, and disclosure materials that had been provided to the appellant. The Website argued that Ms. Capuano had committed perjury at the trial and that the appellant had been wrongfully convicted by a corrupt justice system.

11. The appellant was subsequently charged with breaching Condition 12 of Justice Holmes' probation order by making the Website publicly available, and he was convicted of this offence by Judge Phillips on August 19, 2020. That same day, Judge Phillips sentenced the appellant to a 12-month prison term, and after accounting for time served, he was released from custody on August 20.[4] Judge Phillips also imposed a 12-month probation order, which took effect when the appellant left jail on August 20.

12. Condition 4 of Judge Phillips' probation order stated (emphasis added):

> Within 48 hours of your release from custody you will take all necessary steps to ensure that any website, social media page, or other publication, which you have authored, created, maintained or contributed to, which contains any information, statements, comments, videos, pictures which refer to or depict, by name or description, Desiree Capuano or any of her friends, relatives employers or co-workers, including the websites published under the domain www.desireecapuano.com and www.desicapuano.com are no longer available via the internet or by any other means. [AB. for CA46979, p. 40]

13. On September 16, 2020, VPD officer DC Kyle Dent determined that the Website was available via the internet. Its home page contained a letter to Attorney General David Eby, which described particulars of the trial before Judge Phillips, and in doing so mentioned Ms. Capuano's name.

---

[4] Although the appellant finished serving his sentence on August 19, he remained in custody on another charge, which the respondent has confirmed was stayed on August 20, thus leading to his release from custody on that day (Information 103555-B-1, Port Coquitlam). See also CA46979, T. 54/46-55/31.

14. On September 17, 2020, the appellant was charged with breaching Judge Phillips' probation order by, without reasonable excuse, failing to comply with the condition "which directed him to remove the website www.desicapuano.com" (Information, AB p. 1). This condition was Condition 4, referenced at paragraph 12 above.

B. Relevant Pretrial Events and Evidence/Submissions/Rulings from Trial

15. The issues raised on appeal require a review of: (i) certain pretrial events, including court appearances; (ii) various trial colloquies; (iii) the evidence of DC Dent; (iv) the parties' closing submissions; and (v) Judge Rideout's reasons for convicting the appellant of breaching Condition 4 of the probation order. This review incorporates the fresh evidence filed by the respondent in response to the appellant's fresh evidence. Pretrial events including court appearances

16. The appellant was arrested on the same day he was charged, September 17, 2020, and appeared in court for a bail hearing later that day. Mr. Johnson acted for the Crown at this appearance and all others in this matter (Supp. T., pp. 1-6). The appellant said he did not want a lawyer and would represent himself, and at his request the matter was adjourned to September 24 (Supp. T., p. 5/28-44).

17. On September 24, the appellant again said he would be representing himself and would not be getting a lawyer (Supp. T., p. 9/23-26). The judge adjourned the matter to October 5, because the appellant wanted to obtain documents that he said would disprove submissions made by Mr. Johnson on September 17 (Supp. T., pp. 9-10).

18. On October 5, the judge put the matter over to October 20 because the appellant indicated that the above-mentioned documents had been mailed to, but rejected by, the jail, and so he would need to have them resent (Supp. T. pp. 12-17). The appellant said that he would be representing himself at trial (Supp. T. p. 17/2-11).

19. Also at the October 5 court appearance, the appellant asked for disclosure, and Mr. Johnson agreed to provide it to him. Later that day, Mr. Johnson contacted the Crown office at 222 Main Street in Vancouver ("Crown Office") to begin the process of providing

the appellant with disclosure, which was made more complicated because of concerns that he might post any disclosure received on the Website (Johnson Affidavit, ¶9-11).

20. On October 14, an initial disclosure package was sent to the appellant at North Fraser Pretrial Centre ("NFPTC"). It contained basic material, such as a copies of the Information and the probation orders made to that point, a three-page narrative, and will says from two officers who had served a production order on a worker at Belkin House on September 16, and the next day had arrested the appellant at that same location (Johnson Affidavit, ¶12-13, Exh. "C"; RTCC, Supp. AB pp. 25, 27, 40-41, 50 (officer will says)). The package contained neither a recording or transcript of the appellant's September 17 interview with DC Dent, nor any notes, will says or reports by DC Dent.

21. On October 15, the Crown Office provided an electronic package of materials to Mr. Johnson for vetting prior to its being disclosed to the appellant. This package included civilian and police witness lists, audio and video recordings of the appellant's interview with DC Dent, as well as a three-page Task Action Report, written by DC Dent, which set out certain statements the appellant made at the interview. DC Dent was the first officer named on the police witness list. A transcript of the interview had not been prepared by police, and so was not included in the disclosure package (Johnson Affidavit, ¶14-15, 27-31; RTCC, Witness Lists, Supp. AB, pp. 11-12; Audio & Video Recordings, Supp. AB, Tabs B & C; RTCC, Task Action Report, Supp. AB, pp. 34-36).

22. On October 20, the appellant asked to be arraigned before he had his bail hearing. He was arraigned and pleaded not guilty, and the trial was set for 1.5 days on November 26 and 27, 2020. The appellant did not request a date for a bail hearing, and the matter was adjourned to November 26 (Johnson Affidavit, ¶16; Supp. T. pp. 19-24).

23. At this same court appearance, the appellant confirmed that he had received the initial Crown disclosure package. Mr. Johnson said that he was arranging for the electronic disclosure package to be provided to the appellant (Supp. T. p. 22/43-23/8).

24. Prior to the trial dates being set on October 20, the appellant and Mr. Johnson had engaged in courtroom discussions, in the absence of the presiding judge, on at least

two court appearances, regarding which witnesses might be called at trial. The appellant told Mr. Johnson that he wanted DC Dent to be called as a witness. Mr. Johnson agreed, although DC Dent was a witness he would have called in any event, given that statements the appellant had made when interviewed by DC Dent supported the prosecution case (Johnson Affidavit, ¶18).

25. By letter dated October 31, 2020, the appellant wrote to Mr. Johnson as follows regarding the Crown witness list and outstanding disclosure:

> Also, as you know, we're less than four weeks away from the scheduled trial date and I've still not received your witness list or the disclosure. Obviously, I would like to investigate your witnesses before I cross-examine them, and I may need time to obtain evidence to rebut any evidence you intend to offer, so if it gets too close to trial before the disclosure is provided then I may need to request a continuance.
>
> However, I believe your case is going to be based solely on my "admissions" and the testimony of one or two VPD officers - in which case, I'm ready to proceed with the trial right now. [Johnson Affidavit, ¶20]

26. Mr. Johnson viewed the second of the two paragraphs set out above as reflecting his earlier discussions with the appellant as to which witnesses would be called at trial, as well as the fact that the Crown would be relying on statements that the appellant had made at the interview with DC Dent. For this reason, and because in the letter Mr. Fox said that he was ready to go to trial right away if the Crown was simply relying on his "admissions" and the evidence of one or two VPD officers, Mr. Johnson saw no need to respond (Johnson Affidavit, ¶21).

27. Apart from this October 31 letter, neither Mr. Johnson's firm nor, to his knowledge, the Crown Office, received any letters from Mr. Fox between the time of his arrest on September 17 and his conviction on November 26, 2020. From previous discussions, Mr. Johnson knew the appellant was aware that he could request a pretrial conference by contacting the registry (Johnson Affidavit, ¶22-23).

28. Because of his heavy schedule and personal obligations during this period, Mr. Johnson did not vet the electronic disclosure package until November 20, 2021. The

Crown Office couriered a hard drive containing this package to the appellant at NFPTC on November 23, 2020, which was three days before trial (Johnson Affidavit, ¶24-32).

November 26, 2020 trial; events and colloquies before evidence is called

29. Before the trial started, Mr. Johnson spoke to Mr. Fox about admissions. He confirmed with the appellant that the Crown was calling DC Dent as a witness, as per their previous discussions. The appellant expressed no surprise at this information. The appellant also agreed that, since DC Dent would be testifying, the Crown did not need to play the video of the interview as part of its case. The appellant expressed no concern that he had not received the electronic disclosure until November 23, or that he did not have a transcript of his interview with DC Dent (Johnson Affidavit, ¶33).

30. During this same discussion, the appellant agreed to permit Mr. Johnson to lead the evidence of his statements at the interview through DC Dent, instead of by calling DC Dent and also playing the entire interview in court. Mr. Johnson made this request because the interview was over an hour long and, for the purposes of the Crown case, he was content to rely on the statements that DC Dent had mentioned in his Task Action Report. But Mr. Johnson would have played the video of the entire interview at the trial, had the appellant asked him to do so (Johnson Affidavit, ¶34).

31. The matter was called, with Judge Rideout presiding, at which point the appellant confirmed he was waiving his right to counsel and would thus be acting on his own behalf. Judge Rideout asked the appellant whether he had full disclosure from the Crown. The appellant responded: "I don't know if it's full but I do have disclosure". He did not complain about the timing of the disclosure (T. 1/9-31).

32. Judge Rideout told the appellant that, while he could not advocate for him, he had to protect the appellant's interests, and if the appellant had any concerns to raise them as the trial proceeded. The appellant indicated that he understood. He asked for a pen and water, and Judge Rideout took steps to provide these things to him (T. 1/32-2/26)

33. Mr. Johnson then told Judge Rideout that he had met with the appellant that morning, at which time the appellant had indicated that he was prepared to admit that he

was the subject Judge Phillips' probation order made on August 19, 2020, which took effect on his release from custody on August 20, 2020 (T. 2/42-3/6).

34. Mr. Johnson also told Judge Rideout that the appellant had agreed that it was not necessary for the Crown to play the recording of the interview conducted by DC Dent, and that the Crown intended to call DC Dent to give evidence regarding the substance of that interview. Judge Rideout questioned the appellant to confirm that he took no issue with the admissibility of this interview on *Charter* grounds. He also asked the appellant whether he had received disclosure of this interview, to which the appellant replied, "That is correct". The appellant said nothing to indicate he had suffered prejudice arising from the timing of that disclosure (T. 3/19-47).

35. Mr. Johnson then called DC Dent as a witness, at which point the appellant objected to DC Dent being a witness on the basis that he had received no notice of this despite "multiple requests" for a witness list. Mr. Johnson indicated that he had provided the appellant with full disclosure, including the evidence of DC Dent, and submitted that he had thus fulfilled the Crown's obligations in this regard (T. 4/5-25). As noted at paragraph 21 above, DC Dent was the first officer on the police witness list included in the disclosure, although this point was not made by Mr. Johnson in his brief submission.

36. Judge Rideout asked when the disclosure was provided to the appellant. Mr. Johnson said that it was made in two components, an initial disclosure and then a subsequent disclosure on "Monday" (*i.e.*, November 23, which was three days before the trial) (T. 4/26-32). Judge Rideout then stated:

> THE COURT: Normally, Mr. Fox, this is what's called an ambush and it's certainly frowned upon; that if you had disclosure which included the package with the name of Detective-Constable Dent so you knew what was coming. On the day of trial it's usually not well received by a trial judge as the sort of thing that's -- unfortunately it should have been brought in advance of the trial date as an objection. What would happened if the -- the most that would have happened is a judge would have adjourned it to another date to make sure you understand what's going on. It wouldn't defeat the case. It would just simply cause an adjournment, that's all. [T. 4/33-46)

37. The appellant replied, "okay", at which point Judge Rideout invited DC Dent to take the stand and be affirmed (T. 4/4 7-5/6)

38. While the appellant objected to DC Dent testifying on the basis that he had not received a witness list, he did not say anything to suggest that the timing of the disclosure had caused him prejudice, not even when that timing was mentioned by the Crown in response to questioning from Judge Rideout.

DC Dent's evidence in chief, including printout of Website's home page

39. DC Dent testified that on September 15, 2020, he reviewed the appellant's probation order, a condition of which required the appellant to remove the Website. The next day he reviewed the Website and printed its home page, which included a letter to the Attorney General David Eby (T. 6/4-7/12, 7/36-43).

40. Judge Rideout interjected to confirm yet again that the appellant had received disclosure, including of the printout of the Website's homepage. During this brief exchange, the appellant raised no concern about the timing of disclosure (T. 7/13-19).

41. DC Dent resumed testifying, indicating that the Website stated that the letter to David Eby was posted August 19, 2020, at 1:53 p.m. He added that he was not a technical expert and did not know how to update websites, and said, "I just see a date on the top of the document there." He could not say if the date was accurate (T. 7/36-8/17).

42. The letter to David Eby was written in the first person and ended with the salutation "Sincerely, Patrick Fox". It stated in part (emphasis added):

> Anyway, on August 19, 2020 I had a trial for a probation violation for putting this website back online (publishing, disseminating information about Capuano). And even though the Crown's (Chris Johnson) only witness (VPD Detective Jennifer Fontana) and Crown himself both admitted they had no knowledge or evidence of WHEN I published the material; and even though the material was published BEFORE the probation order took effect (2018-12-30) and therefore it could not, possibly, violate the probation order because the period of probation had not yet begun; nevertheless, I was convicted. I was sentenced to six months in jail (although I had already been in jail for 17 months anyway) and a new probation order with one condition that I take down the website within 48 hours of my release. I told the judge "that's just not going to happen."

> I told Mr. Johnson all this is doing is showing the world how ineffectual and impotent the Canadian justice system is. They can't even make a little pissant nobody like myself take down a website. They can lock me up for te [sic] rest of my life, but I will never take down the website.
>
> Well, 48 hours has passed and the website is still online. The R. v. Fox section, with all the proof of the corruption and collusion that Crown Counsel Mark Myhre, defence counsel Tony Lagematt, and Justice Heather Holmes engaged in is still there. By the time you read this I will probably be back in custody, but in case you haven't figured it out, I just don't give a fuck. [Exhibit 1, AB p. 5; T. 8/20-9/17]

43. Next, DC Dent testified that he had interviewed the appellant on September 17, 2020, after the appellant had been taken into custody (T. 9/39-1 O; RFC, AB p. 9, ¶6). The following exchange then took place:

> THE COURT: Mr. Fox, from Mr. Johnson's opening you're not taking issue with the interview, but if you are concerned about that conversation I can declare a *voir dire* which is a trial within a trial, and Mr. Johnson can continue with it. Then at the conclusion of the *voir dire* I'll determine whether or not the conversation is admissible. Would you prefer to go that route?
>
> THE ACCUSED: No, I have no concerns with it.
>
> THE COURT: You're sure of that?
>
> THE ACCUSED: Yes.
>
> THE COURT: All right. Thank you.
>
> CNSL C. JOHNSON: And with respect to the interview, Your Honour, I've already indicated there is an audio version. There is not a transcript version and so Mr. Fox has indicated that I can simply highlight the statement, and then of course, he's entitled to ask any questions he wants about it.
>
> THE COURT: Sure. Thanks. So you're admitting that you freely and voluntarily gave that statement to the detective-constable?
>
> THE ACCUSED: Yes. [T. 10/15-37]

44. DC Dent testified that he had prepared a Task Action Report that acted as a "recording" for his own purposes of what took place at the interview. Mr. Johnson indicated that this Task Action Report had been disclosed, and verified this with the

appellant. The appellant did not suggest that he had not reviewed this disclosure or had suffered prejudice arising from its timing (T. 10/39-11/14).

45. Having refreshed his memory from the Task Action Report (T. 11/26-31), DC Dent testified that the appellant made the following comments during the interview:

a. At the beginning of the interview, DC Dent advised that it was being recorded. The appellant said that it was important to have good quality audio and video for him to put on the Website later (T. 11/15-22; RFC, AB. p. 10, ¶9).

b. On the topic of what was on the Website and whether he had posted anything on it, the appellant referenced a number of details on the Website. He did not admit to posting anything, although he indicated that it had been updated by someone (T. 11/23-35; RFC, AB. p. 10, ¶9).

c. He said that he had been ordered to take the Website down but believed that it was not illegal. He also said that the reason the Website had not been taken down is because it exposes misconduct and corruption, including that committed by jackasses like Mark Myhre and Tony Lagemaat and his evil, horrible cunt of an ex-wife (T. 11/42-12/29 RFC, AB. p. 10, ¶9).[5]

d. The appellant said he had been waiting to be arrested by the police, and was surprised it had taken this long (T. 12/31-37 RFC, AB. p. 10, ¶9).

e. The appellant said he had viewed the access logs for the Website, and had seen IP addresses indicating visits by persons working for the City of Vancouver, the RCMP and the Province of British Columbia. DC Dent testified that he believed that a person cannot view a website's access logs simply by clicking on the website itself (T. 12/38-13/31).

f. When DC Dent asked what it would take for him to take the Website down, the appellant said he wants the government to admit that everything on his Website is true and to overturn all of his convictions, and for his ex-wife to get throat cancer and to die a slow, miserable death. He added that no one was going to take anything down from the Website unless the provincial government admits publicly that he did not commit criminal harassment and overturns his conviction (T. 13/32-14/25; RFC, AB. p. 10, ¶10).

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[5] As noted in the "Dear David Eby" letter, Mr. Myhre was Crown counsel at the criminal harassment trial. Mr. Lagemaat was initially appointed under 486.4 of the *Criminal Code* to cross-examine Ms. Capuano, but the appellant later retained him as defence counsel to make closing submissions (*R. v. Fox*, 2018 BCCA 431, ¶2).

g. The appellant also said that he would never in his life take the Website down (T. 14/36-40 RFC, A.B. p. 10, ¶10), and locking him up in jail was not going to stop or change anything (T. 15/22-25).

h. The appellant provided great detail regarding how to remove a website from online. He appeared to be informed in this respect, stating that he was a software engineer. DC Dent got the impression that he was incredibly intelligent about computer related things (T. 14/41-15/6; RFC, A.B. p. 11, ¶11).

i. The appellant said there was a lot more content that needed to be added to the Website, and it was going to go up, but it was time-consuming and he had not been the most productive (T. 15/8-19; RFC, A.B. p. 11, ¶11).

46. DC Dent did not have a note as to how long the interview lasted, but recalled it being about an hour and a half (T. 15/36-43; RFC, A.B. p. 9, ¶8 & p. 11, ¶11).[6]

DC Dent's evidence in cross-examination

47. DC Dent first saw the Website on September 16, 2020, and did not visit it from August 20 to 22. He had no information as to whether it was taken offline during this latter period; his involvement was limited to preparing to interview the appellant, which included looking at the Website the day before (T. 16/16-26, 16/42-44, 21/20-22/10).

48. DC Dent did not recall if he asked whether the appellant had taken the Website down between August 20 and 22, and his notes did not indicate that he had done so. DC Dent's notes did, however, reflect that the appellant had said that if he had taken the Website down in that 48-hour period, then put it back up, he would have complied with the probation order (T. 20/4-21/77).

49. Asked if the appellant had said whether he took the Website down at any time, DC Dent testified that the Website was still up on the day of the interview, so he did not ask the appellant this question because he knew the Website was still up (T. 21/8-19).

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[6] In fact, it lasted about 65 minutes (Audio Recording, Supp. A.B. Tab C). While the appellant says the audio/video recordings are over two hours long (AF ¶23, 67, 82), they relate to the same 65-minute event.

50. DC Dent did not know the identity of the Website's registered owner, including from August 20 to 22, nor did he know who had administrative access to the Website, and he had not contacted its hosting provider (T. 16/27-41; RFC, A. B. p. 11, ¶12).

51. Asked who wrote the post, "Dear David Eby", DC Dent noted that the signature block contained the name Patrick Fox. Asked whether someone else could have written this name, DC Dent recalled that during the interview the appellant had indicated that Ms. Capuano could have written his name there (T. 16/45-17/21).

52. DC Dent did not know whether the "Dear David Eby" post was written and put on the Website before the appellant's release from custody on August 20. Asked what relevance this post had regarding whether the Website was taken down in the 48 hours after August 20, DC Dent said the only relevance he saw was that the letter said it would never be taken down (T. 17/22-32).

53. Asked if the appellant had said that he still owned or controlled the Website after August 20, DC Dent testified that the appellant would make statements to the effect that he had more information to put on the Website, then would correct himself and say that, in stating "I", he meant "somebody". DC Dent did not recall if the appellant said that he had transferred ownership or control to another party at some point, but he did recall the appellant saying that if somebody was assisting with the Website that person would be outside of Canada (T. 17/39-18/2, 18/32-19/2; RFC, A.B. p. 11, ¶12).

54. DC Dent did not know if the access logs for this Website specifically, as opposed to websites generally, were publicly accessible so anyone could see them (T. 19/41-20/3).

Appellant does not ask Crown to call further evidence, calls no defence evidence

55. Before closing the Crown case, Mr. Johnson obtained an adjournment to find out from the appellant if he wanted the Crown to call further evidence (T. 23/29-24/43). In their ensuing discussion, the appellant did not raise any concerns about the timing of the disclosure, the absence of a transcript of the interview, or Mr. Johnson's decision to lead the evidence of his statements solely through DC Dent, instead of playing the interview in

court. Had he raised these or any other concerns, Mr. Johnson would have conveyed them to Judge Rideout or encouraged him to do so himself (Johnson Affidavit, ¶36)

56. Following the adjournment, Mr. Johnson told Judge Rideout that the appellant was not asking the Crown to call any further evidence, and that there was nothing further that the appellant wanted to explore (T. 23/29-24/43).

57. The appellant called no evidence in response to the Crown case (T. 25/29-47).

Crown closing submissions

58. Mr. Johnson conceded that there was no evidence as to who owned the Website, but argued that the appellant's statements at the interview showed he was able to comply with Condition 4 of the probation order but had refused to do so (T. 26/9-22, 26/28-27/41).

59. Mr. Johnson also submitted that Condition 4 did not allow the appellant to remove the Website at some point within 48 hours of his release, then put it back online after the 48-hour period was over. Rather, he was required to remove the Website once and for all, yet as DC Dent testified it was still online on September 16 (T. 26/23-27). Alternatively, given the appellant's admissions at the interview, and the nature of the content on the Website's front page, it was speculative to suggest the Website was taken down during this 48-hour period, then put back online after the period ended (T. 30/5-15).

Defence closing submissions

60. The appellant argued that the Crown had not proved who owned and controlled the Website, and that absent ownership or control he would not have been able to take it down (T. 28/3-14). He further noted that in the interview he never said he was the person maintaining or publishing the Website (T. 29/15-20).

61. The appellant also submitted that there was no evidence to show the Website was not taken offline within 48 hours of his release, then put back online. He said that if this had happened, he would have complied with Condition 4, which only required that the Website be removed during that 48-hour period, and did not prohibit him or anyone else from later putting it back online (T. 28/15-37, 29/42-47).

62. Regarding the Website's access logs, the appellant claimed they were publicly available on the internet (T. 28/38-42).[7] As for his comments to DC Dent about having more material to add to the Website, he submitted that he would be allowed to do so after the probation order expired, and so this statement was not incriminating (T. 28/42-29/14).

Reasons for conviction

63. After reviewing DC Dent's testimony, Judge Rideout found him to be credible and reliable. But Judge Rideout noted that it was still necessary to determine whether the Crown had proved the offence, and set out the parties' positions on this point. He concluded that, despite its reference to 48 hours, Condition 4 required the appellant to take all necessary steps to ensure the Website was no longer available on the internet. Yet DC Dent accessed it on or about September 15 [sic],[8] 2020 (RFC, AB pp. 9-13, ¶6-18). Judge Rideout thus convicted the appellant, concluding :

> There were statements made by Mr. Fox that clearly implicated him beyond a reasonable doubt in relation to access to the website, social media, or other publication which was prohibited by Judge Phillips. What happened within forty-eight hours remains uncertain and perhaps only speculation as to what took place, and I am not going to speculate what happened. The point is that the information contained in the website was available via the internet between the dates as set out by the Crown, being the 19th of August 2020, and the 16th day of September 2020. It is more than clear that it was the accused who was involved in that website. Ownership aside, he was inputting the information and from his own mouth himself, essentially convicted himself. [RFC, AB p. 13, ¶9-20).

PART II – ISSUES ON APPEAL

64. The appellant argues that Mr. Johnson failed to make timely disclosure or provide a witness list, and alleges abuses of process by Mr. Johnson, DC Dent and Judge Rideout. He also contends that Judge Rideout erred by admitting the "Dear David Eby" letter into evidence, by finding DC Dent to be credible and reliable, and in interpreting Judge Phillips' probation order. Finally, the appellant says the verdict is unreasonable.

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[7] There was no trial evidence to support this submission, although as noted at paragraph 54 above, the appellant had cross-examined DC Dent on this point.

[8] As noted at paragraph 39 above, DC Dent accessed the Website on September 16, but Judge Rideout's misstatement is immaterial to the result reached.

65. The respondent's position is that none of these grounds has been established so as to require a new trial, and that this appeal should therefore be dismissed.

PART III – ARGUMENT

A. No Miscarriage of Justice Regarding Late Disclosure

66. The appellant says his defence was prejudiced because he only received disclosure of his interview three days before trial, and then only in audio/video form, and so lacked the time needed to prepare to cross-examine DC Dent, including because the lateness of the disclosure caused him to believe that the Crown was not going to call any witnesses but rather was going to stay or withdraw the charge (AF,I65-76).

67. This argument is unpersuasive. The timing of the disclosure caused the appellant no prejudice, and thus did not result in a miscarriage of justice. He had always known the Crown would be leading his statements from the interview at trial, and so was not taken by surprise. Indeed, prior to trial he wrote to Mr. Johnson saying that he did not need disclosure or a witness list if the Crown was relying solely on what he had said at the interview and the evidence of one or two police officers. In these circumstances, the appellant's failure to complain to Judge Rideout about the timing of the disclosure reflects the absence of any negative impact on his defence. In any event, given the issues in dispute, there is no reasonable possibility that receiving the disclosure any earlier would have allowed the appellant to advance his defence more effectively.

i. Relevant legal principles

68. The Crown must make timely disclosure, so that the accused has sufficient opportunity to respond to the prosecution case. But to obtain a remedy for late disclosure, the accused must show prejudice to the ability to make full answer and defence. The trial judge is best positioned to determine if this standard is met and, if so, what remedy is appropriate. Where the trial has not started, an adjournment will usually cure the prejudice, but if not, or if the integrity of the justice system has been compromised, it may be necessary to exclude the evidence (*R. v. Bjelland*, 2009 sec 38, ¶20-27; *R. v. Vallee*, 2022 BCCA 11, ¶49-50, 57-58; *R. v. Dixon*, [1998] 1 S.C.R. 244, ¶23-24, 31-33).

69. It follows that the defence must be diligent in raising disclosure concerns at trial. The defence cannot, for instance, stay passive if aware that the Crown has failed to disclose relevant material, but must diligently pursue disclosure with the judge. Otherwise, an appeal court is unlikely to find that the failure to disclose affected trial fairness, and may also infer that the decision not to pursue disclosure was strategic (*Dixon*, ¶37-38, 55-56). The same approach should apply to late disclosure. That is, the defence must be diligent in seeking a remedy at trial. Indeed, raising the issue for the first time on appeal arguably requires leave of the court (*R. v. Lilgert*, 2014 BCCA 493, ¶14-20, leave refd, [2015] SCCA No. 52; *R. v. Trieu*, 2010 BCCA 540, ¶56).

70. The assessment of due diligence may need refinement for a self-represented accused (*R. v. Cathcart*, 2019 SKCA 90, ¶76). For example, it may be difficult for a self-represented accused to proactively seek disclosure while in custody (*R. v. Tossounian*, 2017 ONCA 618, ¶19). The trial judge's duty to assist a self-represented accused may also come into play (*Cathcart*, ¶76-82; *Tossounian*, ¶32-39).

71. Nonetheless, a self-represented accused's failure to raise a disclosure issue, or their agreement to handle it in a certain way, may indicate an absence of prejudice, or undermine the reliability or credibility of their fresh evidence on appeal (*Cathcart*, ¶42-50; *R. v. Leno*, 2021 BCCA 200, ¶59-60, 71). Furthermore, an accused who decides to proceed without counsel cannot overturn a conviction simply because they did not conduct the defence to their best possible advantage (*R. v. Walkins*, 2005 NSCA 2, ¶69-70, 78; *R. v. Romanowiz*, 1999 CanLII 1315, ¶27-33).

ii. Applying the legal principles in this case

72. Contrary to the appellant's submission, the timing of the disclosure did not undermine his ability to make full answer and defence. This is so for numerous reasons.

73. For starters, and contrary to the claim in his factum (AF ¶69), the appellant knew the interview would be led as evidence. He said so himself at the interview, in explaining why he was refusing to confirm or deny certain things (Supp. AB, pp. 113/11-22, 135/7-32, 149/23-150/3), and at times seemed to directly address the court by looking at the camera while speaking (Supp. AB, pp. 147/8-23 (Video, Tab B, 8:32:20 a.m. fwd.),

148/16-20 (Video, Tab B, 8:32:50 a.m. fwd.)). Mr. Johnson also told him this before the trial date was set, and said that DC Dent would be a witness. The appellant's October 31 letter to Mr. Johnson confirms that he believed the Crown case would be based solely on his comments at the interview and the testimony of one or two officers. Indeed, in this letter the appellant said he did not need disclosure, or at least had no concerns about its timing, if his belief about the nature of the Crown case was correct, which it was.

74. That the appellant had no concern that the timing of disclosure might harm his ability to make full answer and defence is underlined by his failure to raise such a concern at trial, despite the sufficiency/timing of the disclosure, including regarding the interview, being mentioned on several occasions (T. 1/28-31, 3/19-38, T. 4/5-5/6, 7/11-26, 10/39-11/3). The failure to raise this concern takes on added weight given that:

(a) the appellant is an intelligent and capable litigant, as shown by the materials he has filed on this appeal and the trial record, and as noted by Judge Rideout (RFC, AB p. 9, ¶5) and Mr. Johnson (Johnson Affidavit, ¶5-6);

(b) the appellant did object to other matters at trial, including to DC Dent being called as a witness (T. 4/5-5/6) and the admissibility of the "Dear David Eby" letter (T. 23/17-37);

(c) as revealed in his October 31 letter, the appellant knew he could seek an adjournment if the lateness of the disclosure caused problems regarding his ability to prepare his defence.

75. The appellant's claim that prejudice to his ability to cross-examine DC Dent was heightened because there was no transcript of the interview, and the video was not played in court (AF ¶70-71, 76, 90-98), is belied by his failure to complain about the lack of a transcript and his agreement to have the evidence about the interview led through DC Dent's testimony (T. 3/19-47, 10/15-37). Importantly, there were sound tactical reasons for the appellant to agree to this approach, including:

(a) The contested issues at trial were very narrow, namely: (i) whether the appellant had a reasonable excuse for not removing the Website; and (ii) whether the probation order allowed him to remove the Website within 48 hours of his release, then put it back online before the probation order expired, and if so whether there was a reasonable doubt as to whether this might have occurred.

(b) The appellant had been present at the interview, and so he was familiar with what he had said to DC Dent.

(c) The appellant is a capable cross-examiner, as shown by his focussed and efficient questioning of DC Dent.

(d) If the appellant decided at any point that he needed to review the contents of the interview to prepare for cross-examination, he could still ask for a brief break to for this. If he decided that he wanted to play some or all of interview for the court, he could ask to do that too. There was time to take either or both steps, if he desired, as 1.5 days had been set aside for the trial. (At his previous trial, he had raised analogous issues with Judge Phillips (CA46979, T. 5/31-6/22).)

(e) The interview contains statements, not mentioned in DC Dent's Task Action Report, which further show a degree of familiarity or involvement with the Website that strongly supports the inference that he had the ability to take it offline (Supp. AB, pp. 109/13-111/5, 115/22-116/12, 117/21-118/1, 119/16-27, 125/27-126/5, 126/9-17, 129/26-31, 131/16-20, 139/13-22, 140/13-141/1,143/24-144/15, 144/20-145/8). Agreeing to have the evidence led only through DC Dent's testimony was thus to the appellant's advantage.

76. As it turned out, the appellant conducted a capable cross-examination of DC Dent that focussed on the narrow issues in dispute. He did not ask to review the video of the interview to assist in this cross-examination. He did not complain about the lack of a transcript. And he did not seek to have the video played, not even when Mr. Johnson asked whether he wished the Crown to call further evidence prior to closing its case.

77. Finally, there is no reasonable possibility the appellant could have advanced his defence more effectively had he had further time to review the audio/video of the interview. Condition 4 required him to take the Website offline within 48 hours of his release from custody. He thus had only two defences: first, that he was unable to take the Website offline; or second, that Condition 4 allowed him to take the Website down, then put it back up, and it was reasonably possible that this is what occurred. Neither of these defences could meaningfully be advanced by cross-examining DC Dent on matters additional to those raised by the appellant in the cross-examination that took place. In particular, a review of the video makes plain that, contrary to the appellant's claim on appeal (AF ¶76), there is no reasonable possibility he could have cross-examined DC Dent to show that the statements relied on by the Crown from the interview were made jokingly and thus had no probative value regarding the issues in dispute.

B. No Miscarriage of Justice Regarding Witness List

78. The appellant claims that Mr. Johnson "withheld" the identities of the Crown witnesses, especially DC Dent, until the morning of the trial. He says the failure to provide a witness list prior to this point left him unable to anticipate that DC Dent would be called by the Crown, and thus to prepare for cross-examination. In essence, he argues that his right to make full answer and defence was thereby breached (AF ¶23, 56, 77-83).

79. This argument cannot succeed, because the Crown did provide a witness list to the appellant, and in any event he already knew that DC Dent would be testifying and that his statements at the interview would be evidence at trial.

i. Relevant legal principles

80. Provided the Crown's Stinchcombe obligations are met, the accused's right to make full answer and defence is not breached simply because the Crown has not disclosed its intention to call a witness. It is nonetheless good practice for the Crown to provide a witness list, certainly in more complex cases with multiple prospective witnesses, so as to reduce the risk that the accused will require an adjournment to properly prepare to defend the case. See *R. v. Pinkus*, [1999] O.J. No. 5464 (S.C.J.), ¶8-11; *R. v. Michaels*, 2000 BCSC 1785, ¶8, 23; *R. v. Fiddler*, 2012 ONSC 1785, ¶28, 31, 47; *R. c. Gagnon*, 2005 CanLII 18415 (Q.C. C.Q.), ¶9-21, 38-44; *R. v. Browne*, 2017 ONSC 5047, ¶6; *R. v. Banks*, 2022 NSSC 77.

ii. Applying the legal principles in this case

81. Mr. Johnson did not impair the appellant's ability to make full answer and defence by "withholding" that he intended to call DC Dent as a witness, for some or all of the following reasons.

82. First, civilian and police witness lists were included in the electronic disclosure provided to the appellant on November 23, and the first name on the "police witness list" was DC Dent (Supp. AB., pp. 11-12).

83. Second, even a cursory review of the (frequently repetitive) electronic disclosure package reveals that none of the seven other people named on these witness lists had

relevant evidence to give on the issues disputed at trial. Those other people were: (a) five police officers who obtained or executed a production order and/or a search warrant, neither of which yielded any relevant evidence, or who arrested the appellant (Supp. A.B., pp. 16-22, 24-28, 38-79); (b) a Belkin House worker upon whom the production order was served (Supp. A.B., p. 15); and (c) Ms. Capuano, who as a "will say" written by a VPD officer indicates had no involvement in the breach of probation (Supp. A.B., p. 14).

84. Third, DC Dent's inclusion on the police witness list confirmed what the appellant already knew: that the Crown case would include statements he made in his post-arrest interview. His belief in this regard is evident both in comments he made at the interview, and in his October 31 letter to Mr. Johnson. In fact, in this letter the appellant indicated that he only needed a witness list (and disclosure) if the Crown intended to rely on evidence other than his "admissions" and the testimony of one or two police witnesses.

85. Fourth, prior to the trial date being set on October 20, Mr. Johnson orally confirmed with the appellant that DC Dent would be a witness and that the Crown would be leading evidence of statements he had made during the interview. Indeed, the appellant told Mr. Johnson that he wanted DC Dent to be called as a Crown witness.

86. Fifth, the appellant received full disclosure of DC Dent's evidence as part of the electronic disclosure package, and conducted a competent and well-organized cross-examination of DC Dent, which focused on eliciting the points that the appellant believed supported the arguments he would be making in closing submissions.

87. Finally, if the appellant was at truly concerned about DC Dent testifying, he could have asked that the video of the interview be played, instead of agreeing to the Crown's proposal that his statements be elicited through DC Dent's testimony. Or, he could have asked for an adjournment, which his October 31 letter shows he knew was an option if taken by surprise by a Crown witness. But, in any event, for the reasons described at paragraph 77 above, the prosecution case was overwhelming, and there was no reasonable possibility that playing the video instead of relying solely on DC Dent's evidence, or having more time to prepare, would have led to a different result.

C. No Abuse of Process by Crown Counsel Arising from Late Disclosure

88. The appellant claims Mr. Johnson acted in bad faith, so as to create an abuse of abuse, by deliberately withholding almost all the disclosure until three days before trial, and by withholding the identities of the Crown witnesses until the morning of trial, for the improper purpose of coercing the appellant into either pleading guilty, adjourning the trial, or proceeding with the trial unprepared (AF ¶57, 84-89).

89. This argument lacks merit because the appellant has failed to establish the alleged improper purpose on the part of Mr. Johnson.

i. Relevant legal principles

90. The doctrine of abuse of process permits the courts to dissociate themselves from the unacceptable conduct of investigatory and prosecutorial agencies where that conduct egregiously and seriously compromises trial fairness and/or the integrity of the justice system (*R. v. Anderson*, 2014 SCC41, ¶50).

91. The test for determining whether an abuse of process warrants a stay of proceedings involves assessing the following criteria:[9]

(a) there must be prejudice to the accused's right to a fair trial or the integrity of the justice system that will be manifested, perpetuated, or aggravated through the conduct of the trial or its outcome;

(b) there must be no alternative remedy capable of redressing the prejudice; and

(c) where the first two criteria are not determinative, the court must balance the interests in favour of granting a stay (including denouncing misconduct and preserving the integrity of the justice system) against the societal interest in having a final decision on the merits.

R. v. Moazami, 2021 BCCA 328, ¶45

ii. Applying the legal principles in this case

92. The appellant has not shown an abuse of process, because there is no evidence to support his speculative contention that Mr. Johnson's impugned conduct was the result

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9 While a remedy less drastic than a stay of proceedings may be possible for an abuse of process (*R. v. Basi*, 2009 BCSC 1685, ¶33-38), the stringent test for establishing an abuse of process remains the same (*R. v. Nixon*, 2011 SCC34, ¶38).

of a deliberate attempt to coerce him into either pleading guilty, seeking an adjournment, or proceeding to trial unprepared. Plus, Mr. Johnson's evidence is that he did not act for any of these purposes, or otherwise conduct himself in bad faith, in respect of the disclosure or the identities of the prosecution witnesses (Johnson Affidavit, ¶51).

D. Mr. Johnson and DC Dent Did Not Deliberately Mislead the Court

93. The appellant argues that Mr. Johnson and DC Dent deliberately misled the court regarding the statements he made during the interview. He says the video of the interview makes "very obvious" that the "overwhelming majority" of his statements were sarcastic, joking or satirical, and yet Mr. Johnson and DC Dent deliberately misrepresented them as being serious and sincere (AF ¶90-100).

94. The appellant has not, however, shwon an abuse of process, because he has not proven conduct by Mr. Johnson or DC Dent that egregiously and seriously compromised trial fairness and/or the integrity of the justice system. In particular, a review of the video of the interview does not support the claim that his statements were made jokingly, and that by suggesting otherwise Mr. Johnson and DC Dent must have been deliberately trying to mislead the court. Rather, a review of the video irrefutably supports Mr. Johnson's evidence that he did not knowingly and deliberately mislead the court regarding the appellant's statements to DC Dent (Johnson Affidavit, ¶51).

E. Mr. Johnson and Judge Rideout Did Not Use the Prosecution to Punish the Appellant for Having Publicly Exposed Corruption in the Justice System

95. The appellant appears to argue that an abuse of process arises because Mr. Johnson and Judge Rideout stated that he was being prosecuted because he had repeatedly published proof of corruption and misconduct in his case (AF ¶108-109). This argument fails because neither Mr. Johnson nor Judge Rideout made such a statement.

F. Judge Rideout Did Not Err in Admitting "Dear David Eby" Letter as Exhibit

96. The appellant says Judge Rideout wrongly admitted the Website's "Dear David Eby" letter into evidence (T. 23/17-37), because the posting stated that it was added on August 19, 2020, yet he was not released from jail until the next day. He says that, as a

result, he could not have had any involvement in writing or posting this item, and so it could have no bearing on whether he complied with the probation order by taking all necessary steps to remove the Website within 48 hours of his release (AF ¶101-107).

97. This argument cannot succeed because the letter was relevant to two disputed issues: (i) whether the appellant had a reasonable excuse for not taking the Website down; and (ii) whether he did so within 48 hours of his release from custody.

i. Relevant legal principles

98. Barring the application of an exclusionary rule, evidence is admissible if it is relevant to a fact that is material and in dispute. Relevance is established if, as a matter of logic and human experience, the evidence tends to make more or less probable the existence of that material and disputed fact (*R. v. Wiens*, 2016 BCCA 34, ¶35-36).

ii. Applying the legal principles in this case

99. The "Dear David Eby" letter was relevant, and thus admissible, for two reasons. First, there was a reasonable basis for concluding the appellant wrote it, and the letter expressed a firm intention never to take the Website down. This intention, in turn, made it more likely that the appellant failed to remove the Website because he refused to do so, not because he was unable to do so. The letter thus helped to disprove any suggestion that the appellant had a reasonable excuse for not removing the Website.

100. The appellant's suggestion that the letter was irrelevant because he was still in custody when it went up on the Website, and thus could not have been its author, is unconvincing for the following reasons:

(a) As DC Dent indicated in his testimony, the fact that posting on its face purports to be made on August 19, 2020 does not mean that the letter was added to the Website that day (T. 17/22-25).

(b) The posting purports to have been made at "1:53 p.m. PDT" (AB p. 5), and states that the appellant was convicted and accurately describes the details of his sentence. Yet the trial transcript shows that the appellant was neither convicted

nor sentenced until after 2:00 p.m. (T. 48/14-29). It follows that the purported time for the posting is false.[10]

(c) This conclusion is further supported by the following statement in the letter: "Well, 48 hours has passed and the website is still online. "This statement strongly suggests that the letter was written and posted more than 48 hours after the appellant was released from custody.

(d) The letter is written in the first person, and is signed with the appellant's name. It addresses a topic in which no one else would have such a strong interest. And it reflects the appellant's view, as adamantly expressed to DC Dent, that the justice system had operated corruptly against him and that he would never take the Website down, not even if it meant remaining in jail for the rest of his life.

(e) In his interview with DC Dent, the appellant displayed knowledge of details found on the Website, and stated that he had viewed its access logs and described what he had learned as a result. He spoke stridently about what it would take for the Website to come down, and mentioned adding content in the future. These comments indicate a deep connection with the Website, consistent with his being intimately involved in its operation and thus able to post to it or to have someone else do so while he was himself in jail.

101. The "Dear David Eby" letter was also relevant, and so admissible, because its contents made more likely the conclusion that the Website was not taken offline during the 48 hours after the appellant's release from jail. In the letter, he says that: (i) although Judge Phillips ordered him to take the Website down within 48 hours of his release, he told Judge Phillips that this was not going to happen; (ii) 48 hours has passed and yet "the website is still online". (Of course, the Crown's main argument, and Judge Rideout's basis for convicting, was that the probation order required that the Website be taken down for the duration of the order, and not merely for a brief period.)

G. Judge Rideout Did Not Err in Finding DC Dent to be Credible and Reliable

102. The appellant says Judge Rideout erred in finding DC Dent to be a credible and reliable witness, and in support of this submission lists a number of aspects of DC Dent's

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[10] Even had the trial ended before the lunch break, or the posting purported to have been made in the early evening, it is unlikely to the point of impossibility that a third party would have had the interest and information needed to write and post the letter that same day. In this respect, the respondent accepts the appellant's evidence, in his Affidavit #2, ¶4, that there is no way he could have told anyone on August 19 about the details of his conviction and sentence.

evidence that he says should have led Judge Rideout to conclude otherwise (AF,I110-114). However, this argument is unpersuasive, as it was open to Judge Rideout to find as he did regarding DC Dent reliability and credibility.

i. Relevant legal principles

103. Trial judges are accorded substantial deference regarding findings of fact, in particular regarding a witness's credibility, and such findings will not be overturned on appeal absent palpable and overriding error (*R. v. Ceal*, 2012 BCCA 19, ¶24-27; *R. v. Dhaliwal*, 2021 BCCA 327, ¶35-36; *R. v. Clark*, 2005 SCC 2, ¶9).

ii. Applying the legal principles in this case

104. Judge Rideout's reasons for judgment reveal no palpable and overriding error in his finding that DC Dent was a reliable and credible witness. The absence of such an error is, by itself, enough to justify rejecting this ground of appeal.[11]

105. Moreover, and in any event, some of the transcript excerpts the appellant relies on to attack Judge Rideout's finding do not, in fact, reveal any inconsistency in DC Dent's testimony (e.g., AF ¶113, lines 3-8 & 12-20). Plus, testimony that he claims was evasive does not appear as such in the transcripts (AF ¶111, lines 6-9; AF ¶112). And to the extent any inconsistencies might be apparent, they were minor and had no bearing on the disputed trial issues (e.g., AF ¶11 O; AF ¶111, lines 1-6; AF ¶113, lines 8-12),[12] as reflected in the appellant's failure to put them to DC Dent in cross-examination, or, more importantly, to rely on them in his closing argument (T. 28/1-29/47).

106. Indeed, the appellant did not challenge DC Dent's reliability or credibility at all in his closing submissions, which is hardly surprising given that the accuracy of his

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[11] Judge Rideout arguably failed to consider all of the evidence by noting that DC Dent mentioned asking the appellant whether he had taken down the Website, without also noting that in cross-examination DC Dent clarified that he did not believe he ever asked this question because the Website was on line at the time of the interview. However, this failure was not "overriding", in the sense that consideration of DC Dent's evidence in cross-examination could not have led to a different result at trial.

[12] One inconsistency is only apparent in light of fresh evidence regarding DC Dent's testimony at a subsequent trial, as described at AF ¶110. But this inconsistency is of no consequence, and had it been elicited at trial could not have affected the result.

testimony was not in material dispute. Rather, the key issue at trial was whether the Crown had established a breach of Condition 4 of the probation order given: the public availability of the Website on September 16, 2020; the appellant's comments at the interview; and the contents of the "Dear David Eby" posting.

H. Judge Rideout Did Not Err in Interpreting Condition 4 of Probation Order

107. The appellant says Judge Rideout erred in interpretating Condition 4 of the probation order, which he claims required him only to take the Website down within 48 hours of his release, and did not prevent him from immediately thereafter putting it back online (AF ¶115-120, 123).

108. This ground of appeal cannot succeed, because, properly interpreted, Condition 4 required the appellant to ensure that the Website was no longer available via the internet for the entire currency of the probation order. Alternatively, the proviso applies because, as Judge Rideout intimated in his reasons for conviction, it would be speculation to infer that the appellant may have taken the Website down within 48 hours of his release from custody, and then put the Website back online prior to DC Dent accessing it.

i. Relevant legal principles

109. A misinterpretation of a probation order constitutes an error of law. See Respondent's factum filed in *R. v. Fox*, CA46979, ¶68.

110. A court must interpret a probation order 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. See Respondent's factum filed in *R. v. Fox*, CA46979, ¶53-56.

111. 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. See Respondent's factum filed in *R. v. Fox*, CA46979, ¶52.

ii. Applying the legal principles in this case

112. To repeat, Condition 4 of Judge Phillips' probation order stated (emphasis added):

> Within 48 hours of your release from custody you will take all necessary steps to ensure that any website, social media page, or other publication, which you have authored, created, maintained or contributed to, which contains any information, statements, comments, videos, pictures which refer to or depict, by name or description, Desiree Capuano or any of her friends, relatives employers or co-workers, including the websites published under the domain www.desireecapuano.com and www.desicapuano.com are no longer available via the internet or by any other means. [A.B. for CA46979, p. 40]

113. Condition 4 must be interpreted in light of the offences that led to its imposition. The appellant criminally harassed Ms. Capuano using a website that contained information that humiliated, degraded and intimidated her. He thereby caused her substantial harm. He had no insight into this offence at the time of sentencing, and Justice Holmes imposed a jail sentence low enough to permit a three-year probation order that could afford Ms. Capuano protection. However, the appellant breached that probation order by creating and publishing a new website (i.e., the Website) that contained the same information (and more). Then, when sentenced by Judge Phillips, he stated that, regardless of whether she imposed a probation order requiring him to do so, there was "absolutely no way" the website was "going to come down" or "go away" on his release from custody (CA46979, T. 53/31-47). He then wrote and posted (or had posted) the "Dear David Eby" letter, which stated that he would never take the Website down, and he subsequently repeated this sentiment in his interview with DC Dent.

114. In these circumstances, and given the plain meaning of the words used, the only reasonable interpretation of Condition 4 is that it required the appellant to take all necessary steps to ensure the Website was no longer available during the entire currency of the probation order, and that he do this within 48 hours of his release. This interpretation is consistent with the nature of the appellant's offences and his continued defiance of court orders seeking to protect Ms. Capuano from continued harm. By contrast, the interpretation of Condition 4 advanced by the appellant at trial and before this Court, which would permit him to take the Website offline for as little as one second, and then immediately put it back up, would result in an absurdity.

115. Alternatively, even if Judge Rideout erred in rejecting the appellant's interpretation of Condition 4, the error caused no substantial wrong or miscarriage of

justice, and the proviso in s. 686(1)(b)(iii) of the Criminal Code applies, because a conviction was inevitable in any event.

116. This is so because, as Judge Rideout rightly intimated (RFC, AB p. 13, ¶19, 2nd sentence), given the evidence at trial it would be speculative, and thus improper, to base a reasonable doubt on the possibility that the appellant took the Website down during the 48-hour period after his release from custody on August 20, 2020, and then put it back up at some point before it was seen by DC Dent on September 16, 2020.

117. In this respect, it is notable that the "Dear David Eby" letter, which the appellant surely wrote, but at the very least fully endorsed, stated that:

(a) Judge Phillips had ordered him to take the Website down within 48 hours of his release but he told her "that's not going to happen";

(b) the Canadian justice system could not "even make a little pissant like myself take down a website", and "they can lock me up for te [sic] rest of my life, but I will never take down the website;

(c) "48 hours has passed and the website is still on line".

118. Furthermore, in his interview the appellant told DC Dent that: (i) he was ordered to take the Website down but believed it was not illegal; (ii) the reason the Website had not been taken down was because it exposes misconduct and corruption; (iii) no one was going to take anything down from the Website unless the government admitted he did not commit criminal harassment and overturned his conviction; and (iv) he would never in his life take the Website down, and locking him up in jail would not change anything (see paragraph 45 above). And while he opined to DC Dent that no breach of the probation order would have occurred if the Website were taken down within 48 hours but later put back online, he did not tell DC Dent that this had occurred (see paragraph 48 above)).

I. Verdict was Reasonably Supported by the Evidence

119. The appellant argues that there was no evidence to suggest he had ownership or control over the Website, or could obtain the consent of its current owner do so, and thus no basis to find that he was able to comply with Condition 4 by taking the Website offline within 48 hours of his release (AF ¶121-122, 124-125).

120. This argument should be rejected. Given the subject matter of the Website, including the contents of the "Dear David Eby" posting, and the appellant's comments at the interview with DC Dent, a trier of fact properly instructed could reasonably conclude that the appellant did not take the Website offline as required by Condition 4, and that he had no reasonable excuse for not doing so. The appellant's conviction is thus supported by the evidence (*R. v. Choi*, 2021 BCCA 410, ¶58, 107; *R. v. Mills*, 2020 BCCA 228, ¶48).

PART IV – NATURE OF ORDER SOUGHT

121. The appellant seeks an order dismissing this appeal.

May 20, 2022
Vancouver, B.C.

David Layton, Q.C.

PART V – LIST OF AUTHORITIES

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