

COURT OF APPEAL

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

REGINA

RESPONDENT

v.

PATRICK HENRY FOX

APPELLANT

APPELLANT'S REPLY FACTUM

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TABLE OF CONTENTS

	<u>PAGE</u>
Off-the-record communication with Mr. Johnson.....	3
2020-10-31 letter to Mr. Johnson.....	4
Miscellaneous.....	5

Scope and Interpretation of Condition 4

1. Regarding paragraphs 59, 63, 106, 108, 114 of the Crown's factum, the Crown argues that Condition 4 of the probation order required me, essentially, to take down the website for the entire duration of the probation order. However:
 - (a) Condition 4 of the Judge Phillips order is effectively identical to Condition 13 of the Justice Holmes order. Which means that however the Crown is interpreting Condition 4 of the Judge Phillips order, it must interpret Condition 13 of the Justice Holmes order in the same way.
 - (b) If Condition 4 of the Judge Phillips order required me to take down the website for the entire duration of the Judge Phillips order then Condition 13 of the Justice Holmes order must also have required me to take down the website for the entire duration of the Justice Holmes order.
 - (c) Therefore, under the Crown's interpretation, the Judge Phillips order required me to take down the website from 2020-08-20 through 2021-02-19. Whereas, the Justice Holmes order required me to take down the website from 2018-12-30 through 2021-12-29. So, the Judge Phillips order was made while the Justice Holmes order was still in effect, and the entire duration of the Judge Phillips order would run and expire while the Justice Holmes order was still in effect. And, the Judge Phillips order was imposed by Mr. Johnson and Judge Phillips with both of them having full knowledge of and familiarity with Conditions 12 and 13 of the Justice Holmes order. In other words, the entire Judge Phillips order was irrelevant, unnecessary, and served absolutely no purpose because it merely imposed a single condition which was already being imposed by the Justice Holmes order. And, in fact, Condition 4 of the Judge Phillips order was slightly less restrictive than Condition 13 of the Justice Holmes order, which makes it's imposition even more pointless. That is, of course, *if* you accept the Crown's interpretation.
 - (d) And, if Condition 4 required me to remove the website for the entire duration of the

probation order, then why would Mr. Johnson explicitly request, and Judge Phillips explicitly order, "a short term of probation for six months" (emphasis added)? Are we to believe that the Crown and the judge only intended for the website to be down for a short period of time?

- (e) Imposing Condition 4 of the Judge Phillips order would only serve a purpose given my interpretation of the condition. Because, that would mean Condition 13 of Justice Holmes' order only required me to engage in the specified conduct within the first 24 hours following my release from custody on 2018-12-30, and that by the time the Judge Phillips order was imposed Condition 13 of the Justice Holmes order no longer required me to engage in the specified conduct.
- (f) My interpretation of Condition 4 is also supported by Mr. Johnson's submissions and Judge Phillips' statements at the time of sentencing, where Mr. Johnson said "...I'm also going to ask Your Honour to consider a short term of probation for six months...it seems that Mr. Fox did not get the message that he needs to remove this website, and so I'm going to ask Your Honour to consider a condition very similar to the one that was imposed on his previous order which I believe is...number 13" (TR p52l13-24, BCPC 244069-6-b / BCCA CA46979). That shows that Mr. Johnson was familiar with Condition 13 of the Justice Holmes order, and that at the time of sentencing in the matter of 244069-6-b he did not believe Condition 13 still required me to engage in the specified conduct - otherwise there would be no point in imposing the same condition on a new order which is going to expire long before the first order would expire.

Based on the foregoing, I believe the Crown's claim that it interprets Condition 4 as requiring me to take the website down for the entire duration of the probation order is false and must be rejected.

2. Regarding paragraphs 59, 63, 106, 108, 114 of the Crown's factum, a probation condition can only either prohibit the accused from engaging in specified conduct, or it can require the accused to engage in specified conduct. In the event of prohibited conduct it is reasonable to assume that, unless otherwise stated, the person is

prohibited from engaging in that conduct 24 hours a day, 7 days a week, for the entire duration of the order. However, in the event of required conduct it is unreasonable and unrealistic to assume that the person must engage in the specified conduct continuously, 24 hours a day, 7 days a week, for the entire duration of the order. Therefore, if it is not stated when, for how long, how frequently, and/or how promptly the person is required to engage in the specified conduct then it is reasonable to assume he is only required to do it one time. If the only guidance stated in the condition is the achievement of a particular objective, then it is reasonable to assume the person is required to engage in the conduct until the objective is achieved. In the current matter, the only guidance provided was the stated objective of the website being "no longer available", and for that objective to be achieved within 48 hours of my release from custody. Based on that it was reasonable for me to conclude that I was required to engage in the specified conduct until the objective was achieved, and that the objective was required to be achieved within 48 hours of my release from custody. And both the Crown and the judge acknowledged that there was no evidence as to whether or not that occurred.

3. Regarding paragraph 114 of the Crown's factum, the Crown submits "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" (emphasis added). But that is false! It would not result in an absurdity, because Condition 12 of the Justice Holmes order addresses exactly that scenario. Condition 12 of the Justice Holmes order expressly prohibited me from immediately putting the website back up - because doing so would constitute "disseminating, distributing, publishing or making publicly available".

Off-the-record communication with Mr. Johnson

4. Regarding paragraphs 24, 29, 73, 79, 85 of the Crown's factum, contrary to Mr. Johnson's sworn statement at paragraph 18 of his affidavit, no such discussions between he and I occurred. And the proof of that is irrefutable, as explained in my affidavit (Fox Affid3 ¶¶4, 5). And, given that those discussions never actually occurred,

any subsequent reliance on them by Mr. Johnson and by the Crown in its factum, must also fail.

5. Given Mr. Johnson's blatant and brazenly false statements in his affidavit, and his history of brazenly lying to the court in my proceedings, I submit that any and all statements from Mr. Johnson must be received with skepticism.

2020-10-31 letter to Mr. Johnson

6. Regarding paragraphs 25, 26, 67, 73, 74, 84 of the Crown's factum, in my letter to Mr. Johnson, dated 2020-10-31:

- 6.1. My statement regarding "admissions" was a reference to the fact that during my interview by Det. Dent I did not make any statements which I believed were incriminating or which could provide the Crown any evidence they could use against me at trial (Fox Affid3 ¶6 ; Fox Affid4 ¶25.1).

- 6.2. My statement regarding the testimony of one or two VPD officers was a reference to the fact that I had, as of that point, only received through disclosure, the statements of two VPD officers regarding their involvement in my arrest (Fox Affid3 ¶7.3; Fox Affid4 ¶25.1).

- 6.3. My statement about being ready to proceed with the trial right now meant that if the Crown was not intending to provide any further disclosure beyond the initial package it had already provided, then I was ready for trial. Obviously, if further disclosure was provided then I could not say how long I would need to prepare until I've reviewed the additional disclosure (Fox Affid3 ¶7.1; Fox Affid4 ¶7).

Given Mr. Johnson's familiarity with the case, and that he was the sole Crown Counsel on the case, I would think that he would have realized the foregoing.

7. The specific content of my 2020-10-31 to Mr. Johnson must be considered in the context of the events and circumstances leading up to that point. Namely, that Mr. Johnson was being very evasive about disclosure, ignoring my attempts to

communicate, and misrepresenting facts to the court.

8. Regarding paragraph 26 of the Crown's factum, the Crown claims Mr. Johnson saw no need to respond to my 2020-10-31 letter to him because he believed I was saying I was ready for trial immediately and did not require or want any further disclosure material. I submit that is completely implausible. There is absolutely no circumstance in which a sane, unrepresented defendant would voluntarily proceed with trial having not received or reviewed any of the Crown's disclosure material. Particularly, material the Crown would be relying on at the trial.
9. Given that I was unrepresented, if Mr. Johnson really understood my letter to mean I did not want or require the disclosure material he should have explicitly confirmed that with me, preferably in court, on the record, but at least in writing. In part because it would be so outrageously out of the norm for the defense to agree to proceed with trial without reviewing ANY of the disclosure.
10. Regarding paragraph 28 of the Crown's factum, the Crown and Mr. Johnson's suggestion that the Crown was not obligated to provide me the disclosure, and to provide it timely, because they understood my 2020-10-31 letter to mean I said I did not want or require the disclosure, is contradicted by Mr. Johnson's email communication with Ms. Goodwillie (Ex. 'D' of Johnson Affidavit), where he stated on 2020-11-20 at 2:01pm "...and it can now be disclosed to Mr. Fox, hopefully as soon as possible" (emphasis added) and at 3:51pm "Yes I'm ok with that as long as we can have it sent on Monday." That email thread shows that Mr. Johnson withheld and neglected the disclosure material for over a month, then a few days before the trial he repeatedly expressed concern about the late release of it. If he really believed I had waived my right to it, then he would not be concerned about the late delivery of it.

Miscellaneous

11. Regardless of Mr. Johnson's "heavy schedule and personal obligations", the simple fact is he had the disclosure material in his possession for over a month; he repeatedly ignored both my and Ms. Goodwillie's attempts to communicate with him about it; and

he made no attempt to inform me or the court that he may not be able to provide it to me in time to be prepared for the scheduled trial date. Even if that does not rise to the level of bad faith and misconduct, it at least shows gross negligence on the part of Mr. Johnson.

12. My affidavits #3 and #4, contain my factual responses to the assertions made by Mr. Johnson in his affidavit, and by the Crown in its factum. Those responses are not duplicated herein, due to space limitations.

13. 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