

VANCOUVER
AUG 11 2022
COURT OF APPEAL
REGISTRY

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COURT OF APPEAL

REGINA

RESPONDENT

v.

PATRICK HENRY FOX

APPELLANT

AFFIDAVIT #4 OF PATRICK FOX

RE: CROWN'S FACTUM

I, Patrick Henry Fox, presently incarcerated at North Fraser Pretrial Centre (NFPC) in the City of Port Coquitlam in the Province of British Columbia, solemnly affirm and say as follows:

1. I am the appellant and personally know about the matters referred to in this Affidavit, except where they are based on information and belief, in which case I believe them to be true.
2. Regarding paragraph 3 of the Crown's factum:
 - 2.1. I reject the premise of an "implied undertaking" being a requirement for me to receive access to the material the Crown is legally required to disclose to me in order for me to defend myself against the Crown's allegations.
 - 2.2. I have never agreed to accept any conditions imposed by any so-called "implied undertaking" relating to disclosure material.
 - 2.3. There is no law which I am aware of which prohibits a defendant from publishing, disseminating, or distributing any material disclosed by the Crown in the

prosecutions against him.

2.4. In all of the five prosecutions against me by the BCPS since 2016, they have never produced a single piece of evidence establishing I have had any direct involvement in the publishing of any material which I received from them as disclosure and have not also received from another source.

2.5. At footnote 3, neither the Crown, the BCPC, the BCSC, nor the BCCA have ever informed me of the basis for the Crown's concern with the publishing of disclosure materials in the prosecutions against me even though I have repeatedly requested to be informed of such.

3. Regarding paragraph 7 of the Crown's factum:

3.1. The website which was accessible at desireecapuano.com did not contain "much private information about Ms. Capuano". There has never been any "private information" about Ms. Capuano on the website. All of the information and content on the website which pertains to Ms. Capuano was obtained from public and/or third-party sources, so it cannot be considered "private information".

3.2. The website did not contain content designed to intimidate Ms. Capuano.

4. Contrary to the Crown's claim at paragraph 7 of it's factum, the website has not caused Ms. Capuano substantial harm. The website has now been online and publicly accessible for more than eight years, since 2014.

4.1. In the entire time the website has been online, Ms. Capuano has taken no action to get the website shut down. She has not filed any requests or complaints, regarding the website, with the hosting provider. She has not applied for or attempted to obtain an injunction from an Arizona court, against the hosting provider to require the hosting provider to shut down the website, even though both she and the hosting provider are based in Arizona.

4.2. Since 2015 Ms. Capuano has repeatedly pursued criminal charges/prosecutions, and a civil suit against me in BC, related to the website, even

though the BC justice system has no authority or power to cause the website to be shut down. The BC justice system does have the authority and power to imprison me and to impose punishments and restrictions on me, as they have done so for past six years. She has participated in countless Canadian news media interviews related to me and to the website, wherein she has made extensive false claims against me, even though such media coverage would have no effect on the existence of the website. Such defamatory Canadian news media coverage would obviously cause me substantial harm.

4.3. None of the courses of action which Ms. Capuano has participated in, related to the website, have been initiated by her. They have all been initiated by third-parties such as the RCMP, VPD, BC Victim Services, and Ms. Capuano's boyfriend.

4.4. Ms. Capuano's participation in those courses of action has consistently been begrudging, requiring repeated coaxing on the part of those third parties. Ms. Capuano's actions have consistently been focused on what will adversely affect me and cause me harm, not on what will result in the website being shut down.

5. Regarding paragraph 22 of the Crown's factum, I did not request, at the 2020-10-20 appearance, that the bail hearing be rescheduled because I had not yet received the artifacts I was waiting for to disprove Mr. Johnson's false claims. I did, however, request in my 2020-10-31 letter and in the message I left with Mr. Johnson's office, that he schedule a bail hearing at the earliest opportunity.

6. Regarding paragraphs 24 and 85 of the Crown's factum, Mr. Johnson and I did not engage in any off-the-record courtroom discussions.

7. Regarding paragraph 26 of the Crown's factum:

7.1. In my 2020-10-31 letter to Mr. Johnson, when I said I was ready for trial right away I meant I may not need time to investigate the Crown's witnesses and/or seek out rebuttal evidence. I was not saying I was ready, or willing, to proceed with the trial without having reviewed disclosure material that had not yet been provided.

7.2. The Crown did not "rely on statements [I] had made at the interview with DC Dent". The Crown relied on Det. Dent's testimony regarding statements he claimed I made in the interview. If Crown had played the video recording of the interview that would have been relying on the statements I had made.

8. Regarding paragraph 27 of the Crown's factum, I was not aware at that time that I could have contacted the court registry myself to schedule a bail hearing and a pretrial conference. Up to that point I had always gone through the Crown to schedule appearances.

8.1. I do not have access to the Crown's and/or Mr. Johnson's schedules, so I believe I would first have to schedule a brief appearance for the purpose of scheduling the actual hearing and PTC at times which were conducive with the court's and the Crown's schedules. Also, I would have to communicate with the court registry by mail because I do not have access to email from NFPC, which would cause unnecessary, excessive delays and take far longer than if the Crown did it.

9. Regarding paragraph 30 of the Crown's factum:

9.1. Regarding paragraph 30 of the Crown's factum, there was no discussion. Mr. Johnson talked and I listened. I reserved my statements and/or responses for when they would be recorded so there would be a record of it and there could be no dispute about what was said.

9.2. Regarding paragraph 30 of the Crown's factum, by the time of my brief meeting with Mr. Johnson immediately before the trial, I had not had sufficient time to adequately review the video of the interview so my recollection of the detail of it was very deficient and I was not prepared to cross-examine Det. Dent on it.

10. Regarding paragraph 30, 75, 87 of the Crown's factum, I did not agree to permit Mr. Johnson to lead the evidence of my statements at the interview through Det. Dent, instead of playing the video of the interview in court.

11. Regarding paragraph 31 of the Crown's factum, I did not complain about the timing of

the disclosure at that point, in part because as I stated I did have "disclosure" but could not say whether it was complete, the judge immediately proceeded to state that Mr. Johnson would ensure that the trial proceeds in a fair and just manner, and that he will remain objective in that regard. Based on that advisement by the judge, I did not believe he would be receptive to any complaints of prosecutorial misconduct or impropriety.

12. Regarding paragraph 34 of the Crown's factum:

12.1. Mr. Johnson did not say I "agreed that it was not necessary for the Crown to play the recording of the interview", Mr. Johnson stated I said the Crown doesn't need to play the entire recording. There are significant segments of the recording where there is no discussion either because I was alone in the room or the room was empty. I agreed those parts would not need to be played.

12.2. The judge only asked me if I had received disclosure of the interview. He did not ask me when I received disclosure or if the disclosure was adequate. I was responding to the specific question the judge had asked me.

13. Regarding paragraph 35 of the Crown's factum, the witness lists included in the disclosure material provided to me less than 72 hours prior to the trial where witness lists in the context of the police investigations, not in the context of the Crown's case at trial.

14. Regarding paragraph 38 of the Crown's factum, I did not say anything to suggest the timing of the disclosure had caused me prejudice because:

(a) the judge already addressed the issue of the late disclosure by advising me that "on the day of trial it's not usually 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" (TR p4137-41); and

(b) the judge already addressed any potential allegations of prosecutorial misconduct against Mr. Johnson when he advised me that "Mr. Johnson, as an officer of the court,

has an obligation to ensure the trial proceeds in a fair and just manner. The prosecution takes no interest in the result. They remain objective in that regard" (TR p1137-41).

It seemed clear to me the judge had already made up his mind on those matters.

15. Regarding paragraph 38 of the Crown's factum, it was my understanding, since the judge had already rejected any claims regarding late or inadequate disclosure, it would have been inappropriate to continue bringing them up to the trial judge. It was my understanding, at that point, that all I could do was to raise them on appeal.
16. Regarding paragraph 40 of the Crown's factum, I raised no concern about the time of the disclosure because it was my understanding that the judge had already addressed and rejected any objections regarding the timing of the disclosure.
17. Regarding paragraph 44 of the Crown's factum, I had not reviewed the Task Action Report (TAR) which Det. Dent and Mr. Johnson relied on. However, it was my understanding the judge had already rejected any potential objections regarding the disclosure, and the TAR was part of that disclosure.
18. Regarding paragraph 45(a) of the Crown's factum, there are multiple websites which I have created and which I continue to contribute to. One such website is about the corruption and misconduct in the Vancouver justice system and, in particular, in the prosecutions against me. I did not specify to Det. Dent which website I was referring to.
19. Regarding paragraphs 45(b) and 100(e) of the Crown's factum, I was familiar with the details of what was on the website because they were publicly accessible. Everybody who is able to access the internet had access to the content.
20. Regarding paragraph 45(c) of the Crown's factum, I did not say I believe the website is not illegal. I said the website is not illegal. In the interview, Det. Dent also admitted the website is not illegal.
21. Regarding paragraph 51 of the Crown's factum, by saying that Ms. Capuano herself

could have written the article my point was that any person could have written it then put any name they wanted at the bottom. Just because they put my name at the bottom of the article doesn't mean I wrote it.

22. Regarding paragraph 55 of the Crown's factum, I 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 rely on Det. Dent's testimony rather than the video recording of the interview, because the judge had already rejected any potential disclosure issues at the start of the trial. It was my understanding at that point that the only option left for me in that respect was to raise those issues in the appeal.

23. Regarding paragraph 67 of the Crown's factum:

23.1. Crown claims I "had always known the Crown would be leading [my] statements from the interview at trial, and so was not taken by surprise". That is false. There was no indication provided by Mr. Johnson that he intended to use any of my statements from the interview. Mr. Johnson's refusal to provide me with any disclosure (until three days before the trial), including the recordings of the interview, lead me to believe he did not intend to rely on the interview.

23.2. I did not write to Mr. Johnson saying I did not need disclosure or a witness list.

24. Regarding paragraphs 73 and 84 of the Crown's factum

24.1. I did not know the interview would be led as evidence and, in fact, the interview was not led as evidence - Det. Dent's testimony regarding the interview was led as evidence. At the time of the interview I believed the video recording of the interview would be used as evidence, but because of Mr. Johnson's refusal to provide me disclosure, to notify me of any witnesses he intended to call, his refusal to schedule a pretrial conference and a bail hearing, and his refusal to communicate with me at all, prior to the trial, I subsequently believed he intended to not call any witnesses or to use the video of the interview.

24.2. I did not state or even suggest, in my 2020-10-31 letter, that I did not need or want the disclosure.

25. Regarding paragraph 73 of the Crown's factum:

25.1. In my 2020-10-31 letter to Mr. Johnson, I deliberately put the word "admissions" in quotation marks because I knew there were no incriminating statements made by me in the interview with Det. Dent. And, my reference to the testimony of one or two VPD officers related to the two officers who had provided the narratives regarding my arrest on 2020-09-17. As of 2020-10-31 those two narratives were the only police statements which had been disclosed to me so I believed it was clear I was referring to those statements.

25.2. I did not express that I had no concerns about the timing of the disclosure. In fact, in the letter I stated "...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." I believe that clearly expresses my concern about the timing of the disclosure.

26. Regarding paragraph 74(c) of the Crown's factum:

26.1. I repeatedly requested Mr. Johnson schedule a pretrial conference for the purpose of addressing the outstanding issues, namely that I still hadn't received disclosure. At the 2020-10-20 appearance I directly and explicitly requested Mr. Johnson schedule a PTC prior to the trial so that we can address the outstanding issues, and Mr. Johnson stated he was not aware of any issues but if any arose I could contact him and he would schedule a PTC if necessary. Then, in early November 2020, I left a message with his office, by telephone, again requesting he schedule a PTC. Mr. Johnson did not respond and did not schedule a PTC.

26.2. I believed if I were to schedule the PTC myself, rather than going through the Crown, I would have had to do it by mail, and I would first have to schedule a brief "fix date" appearance at which we would *then* schedule the actual PTC because I do not have access to the Crown's and the court's schedules. I believed that process would, literally, have taken at least two weeks.

27. Regarding paragraph 75(b) of the Crown's factum, I was present at the interview but it was over an hour long, many things were said, and more than two months had elapsed. I did not, by the time of the trial, remember everything that was stated and, most importantly in this case, the context and demeanor of the specific statements.

28. Regarding paragraph 75(d) of the Crown's factum:

28.1. A "brief break to review the contents of the interview" would not have been anywhere near sufficient. I would need to go through the entire video recording, making notes about specific statements I would want to cross Det. Dent on, and about the context and demeanor of those statements. I would need to document the exact starting and ending points of the statements, within the video file so that if Det. Dent disagreed with my representation of the statements or if he said he did not recall, I could play the specific segment during the cross-examination. All of that preparation takes a lot of time and would have required at least a number of days. Moreover, I do not have access to any electronic disclosure material, the disclosure laptop or hard drives, nor pens/pencils in the courthouse holding cells so it is, literally, impossible to do any prep work in the holding cells. In addition, I could not reasonably have anticipated the extent to which Det. Dent and Mr. Johnson would misrepresent my statements.

28.2. The Crown submits that if I wanted to play some or all of the interview for the court, I could have asked to do that. However, at the time of the trial, I had not had sufficient time to review the video to be certain I would want it to be played in its entirety, or which segments I would want to play. Now that I have reviewed the entire video I know that playing it in its entirety is what I would have wanted to do at the trial.

29. Regarding paragraph 76 of the Crown's factum:

29.1. Part of the reason I did not request to have the video played was because, as of the time of the trial, I may have forgotten details of interview, and I was not certain at that point if there may have been one or more statements or occurrences in the video which may have been prejudicial to me. The bottom line is I simply didn't

know because I hadn't had time to adequately review the entire video.

29.2. It is my understanding that the police and/or the Crown are not actually required to transcribe the interview. It is, further, my understanding that the Crown would only be required to disclose the transcript if it was actually generated, which as of the time of the trial it had not been. And for those reasons, I believed I would have no standing for a complaint about not receiving the transcript of the interview.

30. Regarding paragraph 79 of the Crown's factum, the Crown did not provide a witness list or any notice of any witnesses it intended to call, prior to the day of the trial.

31. Regarding paragraph 82 of the Crown's factum, the witness lists included in the police disclosure were police witnesses, not Crown witnesses. That is, they were people the *police* believed may have had information relevant to their investigation, not witnesses that the Crown believed may have had information relevant to the trial.

32. Regarding paragraph 83 of the Crown's factum:

32.1. I didn't know and I couldn't have known what issues would be disputed at trial until the trial actually occurred. Mr. Johnson did not provide any indication, before the day of the trial, of how he intended to proceed or of what issues he considered to be in dispute. In fact, Mr. Johnson ignored all of my attempts to communicate before the trial.

32.2. The electronic disclosure package to which Crown refers was not provided to me until less than 72 hours before the trial. Even assuming his claims in paragraph 83 are correct, I did not have enough time to go through all of the material that thoroughly.

32.3. The Crown submits that none of the other witnesses named in the disclosure had relevant information. However, from my perspective leading up to the trial, neither did Det. Dent. I knew I had not said anything incriminating during the interview, so therefore Det. Dent could not have had any relevant testimony either. And, in that respect, Det. Dent's name in the police witness list was no more significant to me than

any of the other names.

33. Regarding paragraph 86 of the Crown's factum

33.1. While I did receive disclosure of the Det. Dent interview, I received it less than 72 hours before the trial.

33.2. My cross-examination of Det. Dent was not "competent" or "well-organized". I was completely unprepared, had no plan, no notes, my recollection of the details of the interview were nil, and I did not even have a copy of the disclosure material with me at the trial to refer to during Det. Dent's testimony. The cross-examination was conducted completely off-the-cuff, from my vague memory of the interview which occurred more than two months prior.

33.3. I had no plans or notes regarding my closing submissions. I could not have prepared that ahead of time because I had no way of anticipating how Mr. Johnson was going to proceed with the trial. My cross-examination of Det. Dent was not based on the arguments I intended to make in my closing submissions; my closing submissions were based on the information presented during my cross-examination of Det. Dent. There was absolutely no plan or preparation on my part. I could not have done any preparation because I did not have the disclosure material. My entire defense at the trial was completely made up on the spur of the moment.

34. Regarding paragraph 87 of the Crown's factum

34.1. I *could* have asked that the video of the interview be played, and had I had sufficient time to review the video before the trial, I *would* have asked that. Although I knew, overall, the content of the video, I could not recall all of the details of what occurred during the interview and so I believed it would have been very unwise to request the entire video be played without knowing exactly what the video contained.

34.2. The judge had already stated that, regarding the disclosure and the Crown's witness list, I should have raised those issues prior to the trial, not on the day of the trial. For that reason, I believed requesting an adjournment at that point was not an

option.

34.3. I did request Mr. Johnson schedule a PTC so that the disclosure issues could be addressed. Although he stated, in court, that he would do so if I requested it, when I actually did request it he failed to do so.

35. Regarding paragraph 92 of the Crown's factum:

35.1. Based on the email correspondence between Mr. Johnson and Ms. Goodwillie of the BCPS, attached as Ex. 'D' of Mr. Johnson's affidavit, Mr. Johnson received the disclosure material from Ms. Goodwillie on 2020-10-15, 42 days before the trial. He took no action. On 2020-11-03, 23 days before the trial, Ms. Goodwillie followed up with him regarding the disclosure. Mr. Johnson again took no action. On 2020-11-18, eight days before trial, Ms. Goodwillie followed up with Mr. Johnson again. Mr. Johnson finally responded, stating he is "in the process of reviewing the...disclosure." On 2020-11-20, Ms. Goodwillie followed up again. In her email, Ms. Goodwillie pointed out that the trial is less than a week away and asked if it will be sufficient time for me to review the disclosure. Mr. Johnson responded that he had finished reviewing the material and it could now be disclosed to me. That email thread shows that Mr. Johnson neglected the material for more than a month, ignoring multiple follow-up messages from the Ms. Goodwillie.

35.2. And based on the email correspondence between Mr. Johnson and Ms. Goodwillie, attached as Ex. 'I' of Mr. Johnson's affidavit, on 2020-12-10 there was an exchange between them regarding my request to be provided the disclosure material so I could prepare for sentencing, then nothing further until 2021-01-12, more than a month later, when Ms. Goodwillie emailed Mr. Johnson asking whether it would be acceptable to provide me the material on an external hard drive. Mr. Johnson did not reply to that until 2021-04-09 - more than three months later. And while this exchange was happening, Mr. Johnson and Judge Rideout were repeatedly stating in court, on the record, that the disclosure material would be provided to me so I could prepare for sentencing. The disclosure material was not provided to me at any point in the five months between the trial and the sentencing.

35.3. I believe those two email threads, combined with Mr. Johnson's statements in court, prove that Mr. Johnson was either acting deliberately to withhold the disclosure material for an improper reason, or in the least he was grossly negligent in his handling of the disclosure material.

36. Regarding paragraph 95 of the Crown's factum, on 2022-06-15, in open court, at my bail hearing in the matter of 244069-10-bc, Crown Counsel Adam Flanders admitted that the BCPS thinks I am "engaging the BC government in a game of chicken and given the media attention [my] cases have received over the past few years it is important the government not blink because that would bring the justice system into disrepute". At the next appearance for the bail hearing, on 2022-06-24, when I brought this up Judge Gordon forcefully insisted Mr. Flanders did not say that.

37. Regarding paragraph 100(e) of the Crown's factum, the access logs of the website had been posted to the website and were publicly accessible.

38. Regarding paragraph 105 of the Crown's factum, I failed to confront Det. Dent on his contradictions at the time of the trial because I was completely unprepared to perform the cross-examination and I was scrambling to do it on the spur of the moment, due to having not had sufficient time with the disclosure material and notice of the Crown's intention to call Det. Dent as a witness.

39. Regarding paragraph 106 of the Crown's factum, I did not challenge Det. Dent's credibility in my closing submissions because I was so completely unprepared to proceed with the trial at that time, due to having received almost all of the disclosure material less than three days prior and having not received any notice of the Crown's intention to call Det. Dent as a witness, that I missed a large number of events that occurred during the trial. It was not until I was able to review the transcripts that I noticed Det. Dent's contradictions.

40. Regarding paragraph 113 of the Crown's factum:

40.1. Regarding paragraph 113 of the Crown's factum, there is absolutely no evidence that the current website was made publicly accessible by me, or that I had

any involvement with the website subsequent to the Judge Phillips probation order coming into effect on 2020-08-20.

40.2. Regarding paragraph 113 of the Crown's factum, I told Judge Phillips that there is absolutely no way the website will come down on my release from custody because I had nothing to do with the website at that time. It was not my website and I had no authority or control over it.

40.3. Regarding paragraph 113 of the Crown's factum, there was absolutely no evidence that I had any involvement in writing or posting the "Dear David Eby" article.

41. Regarding paragraph 116 of the Crown's factum, I did not state, at any point, that I put the website back online after taking it down. I had said that *if somebody else* put it back online.

42. Regarding paragraph 118 of the Crown's factum:

42.1. Crown is misrepresenting what I said to Det. Dent. It was two separate statements: "I was ordered to take down the website" and "the website is not illegal". When Det. Dent testified, he falsely combined the two statements creating the false impression I said the reason I didn't take down the website is because I believe it's not illegal, but that was not the case. Had I had sufficient time to review the recording of the interview and to prepare the cross-examination I believe I would have caught that at the trial.

42.2. Mr. Johnson and Det. Dent falsely represented my statement: I did not say "I believe the website is not illegal", I said "the website is not illegal". During the interview Det. Dent also acknowledged the website is not illegal.

43. Regarding paragraph 120 of the Crown's factum:

43.1. Regardless of the subject matter of the website, the Crown did not provide any evidence to establish that I personally had any involvement in the website while the Judge Phillips probation order was in effect (2020-08-20 through 2021-02-19).

43.2. Regardless of the contents of the "Dear David Eby" article, the Crown did not provide any evidence that I actually had any involvement in the writing or posting of that article.

43.3. I, personally, was not required to take down the website. I was only required to engage in some unspecified conduct which would result in *someone* taking down the website. The Crown did not provide any evidence about whether or not I engaged in such conduct, or whether or not the website had actually been taken down within 48 hours of my release.

Affirmed before me at the City of
Port Coquitlam in the Province
of British Columbia, this 29
day of July, 2022.



Commissioner for Taking Affidavits



Patrick Fox