

**244069-10-BC
Vancouver Registry**

**In the Provincial Court of British Columbia
(BEFORE THE HONOURABLE JUDGE OULTON)**

**Vancouver, B.C.
March 28, 2023**

REX

v.

PATRICK HENRY FOX

PROCEEDINGS AT TRIAL

BAN ON PUBLICATION 486.5(1) CCC

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Crown Counsel:

**T. Laker
R. Elias**

Appearing on his own behalf:

P. Fox

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CNSL R. ELIAS: Your Honour, if we could call the first matter on your list, the Patrick Fox continuation.

For the record, it's Elias, E-l-i-a-s, first initial R. I use he and him pronouns please. And I'm here with my colleague, Ms. Laker, with the Provincial Crown.

Mr. Fox is here in the courtroom and as I think you heard, I believe he wants to stand down for a little bit. We just provided him some -- some information that he wants to --

THE COURT: Yes --

CNSL R. ELIAS: -- digest.

THE COURT: -- that's what I wanted to confirm, since I stood down to allow some other things to happen in the last half hour and then I wanted to make sure.

So, Mr. Fox, what -- it's that you just received this disclosure?

THE ACCUSED: Yes, this is related to some of the requests I submitted from the previous appearance and I just literally received this upon arriving in the courtroom this morning.

THE COURT: I see, okay.

THE ACCUSED: But this request to stand down is separate from the previous one. The previous one was because --

THE COURT: No, I understood.

THE ACCUSED: Oh.

THE COURT: And I -- it was communicated to me --

THE ACCUSED: Right.

THE COURT: -- and I said that's fine. I'm just saying I didn't come into the courtroom to canvass, but at this point, I just wanted to make sure that we're -- that I'm using the court time appropriately.

So, you just received this disclosure; you want half an hour to look at it. Crown agrees with that. Yes, okay. I'll stand down. We'll come back at 10:30.

THE ACCUSED: Thank you.

A SHERIFF: Order in court, all rise.

(PROCEEDINGS ADJOURNED)

(PROCEEDINGS RECONVENED)

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1 THE COURT: Please be seated.
2 CNSL R. ELIAS: And I see Mr. Fox at the door there.
3 THE COURT: All right. So, counsel had previously
4 introduced themselves and Mr. Fox is here.
5 We're -- we're ready to proceed now with the
6 continuation of the trial?
7 CNSL R. ELIAS: Yes, it sounds like we're ready with --
8 for Mr. Lamb --
9 THE COURT: Thank you.
10 CNSL R. ELIAS: -- he's outside.
11 THE COURT: All right. Mr. Lamb, if you could take the
12 witness stand again. And it's a different day,
13 you're still being cross-examined, but I'll ask
14 you to be affirmed again.
15 A Sure.
16 THE COURT: Or under oath, I --
17 A Under -- under oath.
18 THE COURT: Okay. If you would step forward and allow
19 Madam Clerk.

JOHNNY LAM

22 a witness called for the
23 Crown, sworn.

25 THE CLERK: Please state and spell your first and last
26 name for the record.
27 A Johnny Lam, J-o-h-n-n-y, last name is Lam, L-a-m.
28 THE COURT: Thank you, Mr. Lam. You can have a seat if
29 that's what you'd like to do.
30 THE ACCUSED: Good morning, Mr. Lamb.

CROSS-EXAMINATION BY THE ACCUSED, CONTINUING:

34 Q Are you familiar at all with the Hunchly software?
35 A I am not.
36 Q Oh. Are you aware of whether the Hunchly software
37 is a desktop application or client/server?
38 A I am not.
39 Q Are you aware of when a user runs the Hunchly
40 software, whether it's running on their local
41 machine or remotely?
42 A It's running on the server -- remotely on the
43 server.
44 Q Are you guessing that? Or is that something that
45 you know for certain?
46 A I'm not sure.
47 THE ACCUSED: Hmm. Sorry, I need a moment. These

Johnny Lam (for Crown)
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1 questions were -- or the responses were not what I
2 was anticipating.
3 THE COURT: No, take a bit of -- take some time.
4 THE ACCUSED: And if the witness has no knowledge of
5 the Hunchly software and how it works, then that
6 has a significant impact on what I would ask him.
7 THE COURT: Take a minute or so to look at the
8 questions you wanted to ask Mr. Lam and . . .
9 THE ACCUSED:
10 Q When you had testified previously, you had made
11 reference to a server with the name Haida
12 [phonetic]?
13 A Mm-hmm.
14 Q Do you know, is that server configured as a file
15 server or some other type of server?
16 A I don't know that because I don't configure that
17 server.
18 THE COURT: I'm sorry, your voice went down. I didn't
19 hear that, Mr. Lam.
20 A I'm sorry. I said, I don't know because I
21 don't -- I didn't configure that server, so . . .
22 THE COURT: You don't know --
23 THE ACCUSED: Right, right.
24 THE COURT: -- because you didn't configure that server.
25 A That's right.
26 THE COURT: Okay. Thank you.
27 THE ACCUSED:
28 Q Okay. Do you have any knowledge of whether that
29 server provides any packet forwarding?
30 A I don't know that. Sorry, I don't know that. Do
31 you -- I don't know if you want to turn the mike
32 down.
33 THE COURT: That will not amplify your voice.
34 A Oh.
35 THE COURT: So --
36 THE CLERK: Helps to record it.
37 THE COURT: -- it does record it --
38 A Okay.
39 THE COURT: -- however.
40 A Sure.
41 THE COURT: It's more just that I --
42 A Okay.
43 THE COURT: -- your voice has a tendency to go down.
44 So, just remember to keep it up.
45 A Okay.
46 THE ACCUSED:
47 Q So, then do you have any knowledge of when a user,

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1 such as Catherine Meiklejohn runs the Hunchly
2 software, in order to perform her duties, if the
3 instance of the Hunchly software is running on her
4 local desktop?
5 I know I asked a more general version of that
6 question earlier, but now I'm asking you --
7 A Right.
8 Q -- specifically about Catherine Meiklejohn.
9 A Right. No, I don't know that.
10 Q Do you have any knowledge of the flow of the
11 packets from where the Hunchly software is being
12 run until they get to the internet? For example,
13 which routers or devices those packets would be
14 going through from the local Hunchly installation
15 until they get out to the internet.
16 A I don't know the exact path.
17 Q Well, right. And of course, I'm assuming it's
18 fair to say that if you don't know where the
19 packets are originating from, whether they're on
20 Ms. Meiklejohn's machine or some other machine,
21 you can't possibly know the path that they would
22 be taking to get to the internet.
23 A That's correct, yeah.
24 Q Did -- did anyone advise you or tell you to say,
25 when you testified today, that you have no
26 knowledge of these matters?
27 A No.
28 THE ACCUSED: Do you have any -- wait, sorry.
29 Given the witness' responses so far, that he
30 has no knowledge of those initial matters, I don't
31 see how I can really proceed with any of the other
32 questions --
33 THE COURT: Okay. Well --
34 THE ACCUSED: -- because they were all kind of
35 dependent on him having knowledge of that.
36 THE COURT: -- okay, but you want -- if you -- again,
37 if you want to take a minute and look at your
38 notes and see if there's any other areas of
39 questioning, go ahead.
40 THE ACCUSED: Okay.
41 Q Do you have any knowledge of why there would be no
42 records in proxy server access logs on Chancellor
43 2 [phonetic], that we had looked at previously
44 that were entered as an exhibit here? Do you have
45 any knowledge of why there would be no records of
46 anybody accessing, or attempting to access the
47 desicapuano.com website on these days?

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1 A I do not.
2 Q Okay. When -- do you recall that when you were
3 here on March 7th and you had testified primarily
4 on direct? You were answering questions for the
5 Crown. Do you recall the testimony that you had
6 provided at that time?
7 A Yes.
8 Q Okay. And do you recall testifying that the
9 Hunchly users go through -- initially, you had
10 testified that the Hunchly users go through the
11 Chancellor 2 proxy server to access the internet?
12 A Yes.
13 Q Okay. And then shortly after providing that
14 testimony, do you recall that the Crown had asked
15 the court if we could stand down and then we took
16 the morning break?
17 A Yes.
18 Q And do you recall that when the court had stood
19 down, the judge had left the courtroom first? Do
20 you recall what happened immediately after that?
21 A Yes, I went outside to the waiting area.
22 Q Okay. And --
23 A Mm-hmm.
24 Q -- did Mr. Elias and Ms. Laker go with you
25 outside?
26 A Yes.
27 Q And without getting into any details of what might
28 have been discussed, do you recall any -- any
29 discussion about the testimony that you had just
30 provided about stating that Hunchly users go
31 through the Chancellor 2 proxy server?
32 A I was to verify with -- with the [indiscernible]
33 Q Okay. And was the Crown that requested that you
34 verify that?
35 A I wasn't sure, so I had to -- I had told the Crown
36 that I had to verify with my technicians at work.
37 Q And then while you were out there, while we were
38 stood down, did you make any phone calls or
39 contact -- contact anybody?
40 A Yes, I used -- I used my phone to call one of my
41 senior technicians --
42 Q Okay.
43 A -- to confirm --
44 Q So --
45 A -- yeah.
46 Q Okay. So, that would be somebody at the VPD,
47 someone that you work with at the VPD?

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1 A That's correct, yeah.
2 Q And you had asked them about the network topology
3 in that respect, about how it's configured?
4 A The only question I asked was with -- whether or
5 not the traffic from the Hunchly software --
6 Q Mm-hmm.
7 A -- exited through the proxy or through that --
8 over internet connection.
9 Q Okay. But would that be based on the user account
10 of the person that's using the Hunchly software,
11 or would it be based on the IP address of the host
12 that the Hunchly software is running on? Or would
13 that be based on the Hunchly software itself
14 somehow?
15 A I didn't ask those questions.
16 Q Right. Before you came and testified on March
17 7th, do you recall how many times you had
18 communicated with the Crown, specifically, either
19 Mr. Elias or Ms. Laker regarding this matter?
20 A Just one time.
21 Q And do you remember when that was, approximately?
22 A I believe it was the day before --
23 Q Right.
24 A -- just to prep me for being interviewed.
25 Q Right. Now, when you say to prep you for being
26 interviewed, what do you mean by prep you?
27 A Because I'm not a sworn member, we're not trained
28 to be providing witness statements. So, it was
29 just to go over the -- show me the room, like, the
30 courtroom and the scenario.
31 Q And did they ask you any questions at that time
32 about some of these issues that would be
33 discussed? For example, the Hunchly software and
34 whether or not they Hunchly users go through any
35 particular gateways or routers?
36 A Yes and talking about the logs as well.
37 Q Right, right. And did you tell them, at that
38 time, that the Hunchly users don't go through the
39 proxy server?
40 A Yes.
41 Q Okay. So, you had told them at that time, the day
42 before you testified, that the Hunchly users do go
43 through the proxy server, but then, when you came
44 and testified, you stated that they don't go
45 through the proxy server. But then you called the
46 office to verify?
47 THE COURT: I think -- isn't it the reverse?

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1 THE ACCUSED: Well, we're -- we're speaking first about
2 the discussions that he had with the Crown before
3 he came to testify.
4 THE COURT: Okay. So, if you could just rephrase your
5 question, because I remember Mr. Lam's testimony
6 and how --
7 THE ACCUSED: Yes.
8 THE COURT: -- in chief, he changed something.
9 THE ACCUSED: Yes.
10 THE COURT: And now you're asking him about the
11 interview with the Crown. If you could just
12 rephrase that last question. It wasn't --
13 THE ACCUSED: Sure.
14 THE COURT: -- clear to me.
15 THE ACCUSED:
16 Q So, to make sure that I have this chronology
17 correct, my understanding is that what you're
18 saying is that the day before you came to testify,
19 when you spoke with the Crown, you had told them
20 that the Hunchly users don't go through the
21 Chancellor 2 proxy server; is that correct?
22 A I said, yeah, [indiscernible], yeah.
23 Q Right. And then on the next day, you came and
24 testified and before we stood down, you testified
25 that the Hunchly users do go through the proxy
26 server; is that also correct?
27 A Yes, I said that. But that was a mistake, yeah.
28 Q Right.
29 A Yeah.
30 Q And then we stood down --
31 A Mm-hmm.
32 Q -- and then you made a phone call to the office
33 and spoke with someone else about it there. Then
34 you came and testified that you were mistaken and
35 that the Hunchly users don't go through the proxy
36 server.
37 A Yes.
38 Q Okay. And if I understand this correctly, you're
39 now saying that you actually have no knowledge
40 about how that's configured, or how that's set up,
41 or how that works.
42 A No, that's why I called to confirm, yeah.
43 Q Right. But what we're talking about then would be
44 hearsay; right? I mean, it's not your own
45 firsthand knowledge of how it works, but rather,
46 what somebody else at the office had told you.
47 A Yes.

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1 Q Okay. So, it seems to me -- and correct me if I'm
2 wrong, but it seems to me that someone else in the
3 VPD, in the IT department, actually has the
4 knowledge of these matters, not yourself.
5 A That would be correct, yeah. I was called for the
6 logs.
7 Q Right, right.
8 A Yeah.
9 Q And the reason I had requested your testimony was
10 because you were the one, specifically, that had
11 provided the logs -- or that had ran the query on
12 the logs and provided the logs to Detective
13 Meiklejohn. That's why I requested you.
14 But, given that the position is now that you
15 have no knowledge of these matters whatsoever, I
16 don't believe that there would be any further
17 questions that I could ask. Really, these
18 questions should be directed to the person in the
19 VPD's IT department who actually has this
20 knowledge.
21 THE COURT: Okay. So, you're -- you're not asking a
22 question there, Mr. Fox. And it's not accurate to
23 say Mr. Lam has knowledge whatsoever. There's
24 certain areas that you want to question him about
25 that he's answering in ways that perhaps you --
26 THE ACCUSED: Okay. My --
27 THE COURT: -- weren't expecting.
28 THE ACCUSED: -- my apologies. Let me rephrase that
29 then.
30 Q Given the information that I've been provided
31 through your testimony this morning, just now,
32 regarding your level of knowledge, or lack there
33 of, of the Hunchly software and the Hunchly users,
34 it is my understanding that -- that's not really a
35 question, sorry.
36 THE COURT: No, you can suggest something to a
37 witness --
38 THE ACCUSED: Mm-hmm.
39 THE COURT: -- in the form of a question. Like, you --
40 you say to him, it's my understanding that this.
41 Do you agree with that or not?
42 THE ACCUSED: Right.
43 THE COURT: So, if you want to take a minute, if that's
44 the way that you'd like to ask Mr. Lam a question,
45 that's acceptable.
46 THE ACCUSED: Honestly, at this point, Your Honour, I'm
47 of the opinion that the person who should be

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1 testifying would be whoever it is in the IT
2 department that has this information. And I'd
3 assumed that Mr. Lam had the information and that
4 that's why he was the one who ran the query and
5 provided the information to Detective McElroy and
6 it certainly seemed, when he testified three weeks
7 ago that he had the information, but it's becoming
8 apparent now that he doesn't have the information
9 that I would be seeking, the information that
10 would be relevant here. And so, I don't -- I
11 don't see the point in pursuing further questions
12 with Mr. Lam.

13 THE COURT: Okay. Well, again, if you need to
14 recalibrate and look at your notes and see if
15 there's any other areas of questioning, otherwise,
16 we can move on, see if Crown has any re-
17 examination questions and let Mr. Lam go. But it
18 involves sort of on the spot looking at your notes
19 and so, I want to give you a minute or two of you
20 need that, to think about whether you have any
21 other questions for Mr. Lam.

22 THE ACCUSED: I don't believe I would require
23 additional time. I've had sufficient time to
24 contemplate while I was downstairs.

25 THE COURT: Okay.

26 THE ACCUSED: What I would like though, at some point,
27 would be to have a few moments to speak with the
28 Crown about this, but after Mr. Lam would be
29 excused and --

30 THE COURT: No, but that's -- okay, that's a separate
31 issue. So, you're -- you're -- you don't have
32 anymore questions for Mr. Lam --

33 THE ACCUSED: That is correct.

34 THE COURT: -- that's correct? Okay.

35 Any questions in re-examination for Mr. Lam?

36 CNSL R. ELIAS: No, Your Honour, thank you.

37 THE COURT: All right. Thank you very much, Mr. Lam --

38 A All right.

39 THE COURT: -- you're excused.

40 A Thank you.

41

42 (WITNESS EXCUSED)

43

44 CNSL R. ELIAS: Your Honour, I've just -- I've just
45 asked Ms. Laker to pass along to Mr. Lam that he
46 should wait around for a few minutes, just in case
47 anything arises from the conversation where I

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1 might want his --
2 THE COURT: Oh, I see.
3 CNSL R. ELIAS: -- his further input.
4 THE COURT: Okay. So, Mr. Fox had asked to speak to
5 Crown. That would be an off-the-record
6 conversation he wants to have with him before
7 continuing.
8 THE ACCUSED: I mean, I don't -- I don't see that it
9 necessarily needs to be off the record. I just
10 don't want to waste the court's time with it.
11 THE COURT: Well, it just seems to me perhaps -- I
12 won't go far. Why don't you discuss and then
13 if --
14 THE ACCUSED: Sure.
15 THE COURT: -- I'm needed, I'll come back in and we can
16 continue with the case.
17 THE ACCUSED: Okay. Thank you.
18 THE COURT: Okay? So, I'll just stand down briefly,
19 I'm -- I'm going to remain close by, as I said.
20 A SHERIFF: Order in court, all rise.
21
22 (PROCEEDINGS ADJOURNED)
23 (PROCEEDINGS RECONVENED)
24
25 THE COURT: All right. So, I came back in because even
26 though we had a period of standing down this
27 morning, I know that Madam Clerk, Mr. Sheriff
28 didn't have their break and I understand that
29 you're still talking.
30 CNSL T. LAKER: Yes.
31 THE COURT: So, I thought we'll take the morning break;
32 we'll allow you to continue talking. Is there
33 likely to be an application, or you -- you need to
34 talk a bit more and see?
35 You need to talk a bit more, Mr. Fox?
36 THE ACCUSED: It's -- it's my understanding there is
37 likely going to be an application, yes.
38 THE COURT: By you.
39 THE ACCUSED: Yes.
40 THE COURT: Okay. All right. We'll take the break
41 now, returning at --
42 THE ACCUSED: Possibly two applications.
43 THE COURT: Okay. All right. Returning at 11:30.
44 A SHERIFF: Order in court, all rise.
45
46 (PROCEEDINGS ADJOURNED FOR MORNING RECESS)
47 (PROCEEDINGS RECONVENED)

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1
2 THE COURT: Please be seated.
3 CNSL R. ELIAS: Your Honour, sorry for -- sorry for
4 keeping you waiting.
5 THE COURT: No, no, that's fine.
6 CNSL R. ELIAS: Recalling the Fox matter, of course.
7 I believe Mr. Fox likely has two different
8 issues he wants to canvass. One involving
9 disclosure, as I think you probably anticipated.
10 The witness -- possibly the production of the
11 witness, the senior technician Mr. Lam referred to
12 in his evidence. I think Mr. Fox will have an
13 application about that. And there's also an issue
14 with the search warrant that he raised with Ms.
15 Laker that I think he may want the -- to bring --
16 to bring up as well.
17 So, I'll let him say his piece about those
18 two.
19 THE COURT: An issue about the search warrant?
20 CNSL R. ELIAS: Yes.
21 THE COURT: Okay.
22 CNSL R. ELIAS: I may be wrong, but I think that's -- I
23 think that's what Mr. Fox wants to -- wants to
24 discuss.
25 THE COURT: Okay. Thank you.
26 Mr. Fox?

SUBMISSIONS FOR ACCUSED BY THE ACCUSED:

27
28
29
30 THE ACCUSED: The first matter, about the witness -- I
31 was thinking about this while I was downstairs and
32 I'm a little torn on this because from my
33 perspective, the sooner I get this over with and
34 get out of custody, the sooner I can leave the
35 country and get on with my life.
36 But at the same time, it is my belief that
37 these proxy logs constitute physical, tangible
38 evidence that the testimony provided by Ms.
39 Meiklejohn and Detective McElroy is either false,
40 or they were just mistaken about what they were
41 accessing. And it seems to me that it's -- it's
42 critical to my defence to be able to show whether
43 or not somebody actually accessed the website from
44 VPD's network on that day and the proxy logs would
45 seem to show that nobody accessed the website.
46 And I'm very, very, very troubled with Mr. --
47 or about Mr. Lam's testimony today and his claims

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1 that he had no knowledge of certain technical
2 aspects of how the software works, or how their
3 network is configured, in light of the testimony
4 he had provided three weeks ago where he was
5 testifying that he did have knowledge of some of
6 these matters.

7 So, on the one hand, I don't want to delay
8 this by requesting further adjournments to get a
9 witness who does actually have knowledge of these
10 matters. On the other hand, I don't want to risk
11 being found guilty of something based on what I'm
12 confident is false testimony that was provided by
13 some of the Crown's witnesses.

14 I know I can't ask the court for -- well, I
15 certainly wouldn't ask the Crown for guidance on
16 the matter. But my initial thought would be not
17 to delay this with an adjournment, to request --
18 like, I'm also troubled by this idea that the
19 Crown knew where I was going with these proxy logs
20 and they spoke with Mr. Lam a couple of -- or
21 sorry, they spoke with him at least that one time.
22 If they knew he didn't have the knowledge that I
23 was seeking, like, why wasn't this brought up
24 sooner, so that I could have requested somebody
25 else from VPD to come and testify?

26 I guess really the first thing -- to an
27 extent, I think that what I would want to request
28 would be a mistrial because it seems that things
29 are just snowballing way out of hand with this
30 trial and it seems to me that some of these are
31 very simple, easy matters. Like, the evidence is
32 very clear on them about whether or not somebody
33 from VPD's network accessed the website on that
34 day.

35 Sorry, I'm trying to think, as I stand here,
36 about what it is that I should be asking for or
37 how I should be proceeding on this.

38 Part of me is thinking -- well, we could just
39 proceed and -- with the arguments, the closing
40 submissions and I could say in the closing
41 submissions that, based on the proxy log, it shows
42 that nobody accessed the website. But then there
43 is some suggestion that maybe it's because the
44 network is configured a certain way and I could
45 argue that we should discount Mr. Lam's testimony.
46 Because on the one day, he testified that he had
47 knowledge that it's configured this way and that's

Submissions for Accused by The Accused**BAN ON PUBLICATION 486.5(1) CCC**

1 why nothing shows up in the proxy logs. But then
2 he comes today and claims he has no knowledge of
3 how it's configured and that he wasn't involved in
4 configuring those servers and he really doesn't
5 know.

6 Sorry.

7 THE COURT: No. Well, first of all, I would -- I would
8 say -- I don't know if you're formally bringing an
9 application for a mistrial but there's a very high
10 burden for a mistrial and it's a fatal wounding of
11 the trial process and it would -- if it were
12 granted, it would result in the trial being reset
13 again and bearing in my mind my trial management
14 powers, first of all, I don't think there's been a
15 fatal wounding of the trial process, which is the
16 most important part. But also, the implications
17 of that, I think, are -- wouldn't be fair to the
18 process, to the Crown, to you, to anybody.

19 If I thought there'd been a fatal wounding,
20 that would have to be dealt, but really, the test
21 hasn't been met.

22 What -- what is happening is there was
23 certain disclosure that you sought back in the
24 pretrial conference portion of this matter and it
25 was provided and it was provided because I thought
26 that there was something I wanted to allow you to
27 explore.

28 Now, as the evidence has come out, it seems
29 that that -- that evidence doesn't -- it isn't
30 what you expected. So, then the question becomes
31 what to do about it.

32 THE ACCUSED: Well, on the matter though of the
33 evidence not being what I had expected, I would
34 like to point out that when Sergeant Shook
35 testified, he -- he testified that all users on
36 the VPD network do go through the proxy server and
37 when Mr. Lam testified, first he testified that
38 the Hunchly users do go through the proxy server,
39 but the Crown immediately, realizing that
40 completely destroyed their allegations against me
41 on those matters, requested a recess, stepped
42 outside and spoke with him in private. Then he
43 came back in and changed his testimony.

44 THE COURT: Okay. So, this is -- sounds like a matter
45 for argument, but I -- but I have to correct you
46 because -- a few things.

47 When a witness is in chief, it's different

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1 than being in cross-examination. You -- you'll
2 recall, in this trial, there was what I believe
3 was an innocent mistake, but a witness who was in
4 cross-examination spoke to the Crown. That should
5 not have happened because judges remind witnesses
6 not to discuss the case or their evidence when
7 they're under cross-examination.

8 Mr. Lam was an examination in chief and you
9 asked him about that. First of all, Crown was
10 under no rule or prohibition to talk to their
11 witness when the witness is in chief, but you did
12 ask him that and he said no, I told them that I
13 wasn't sure, that I needed to check.

14 So, just to -- I think it's important because
15 to understand, first, they're allowed to talk to
16 their witness at that stage of proceedings. And
17 second, the evidence I heard was that Mr. Lam was
18 the one who brought it up to them and then went
19 and checked something. And there's nothing
20 untoward about that. Okay.

21 THE ACCUSED: Okay. Then -- then I guess I would have
22 to say, as much -- as much as it pains me to do
23 so, I would have to say that I believe the only
24 way that I could get a fair and reasonable defence
25 would be for somebody who has knowledge of these
26 network issues to be able to clarify or provide
27 definitive testimony about whether or not these
28 proxy logs mean that somebody from the VPD's
29 network actually attempted to access the website
30 on that day.

31 So, yes, I would say then I would ask for an
32 adjournment for somebody from the VPD who does
33 have knowledge of this matter to be able to
34 testify about this.

35 And it's my expectation the Crown is going to
36 say that this is really just a fishing expedition
37 but I would disagree with that because the proxy
38 logs show that there is some evidence supporting
39 what I'm saying. I'm not just fishing for
40 evidence. What I'm asking for is somebody to
41 confirm definitively, one way or the other,
42 whether or not these logs actually prove what I'm
43 saying, or what I believe they prove.

44 THE COURT: Well, what -- what do you say the proxy
45 access logs prove?

46 THE ACCUSED: I say that they show -- they prove that
47 nobody on the VPD's network made any attempt to

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1 access the website -- or access anything at
2 desicapuano.com on the dates in question, May 16th
3 and 17th.

4 THE COURT: I mean, that's not my understanding of Mr.
5 Lam's evidence. He -- he -- again, I haven't
6 looked back to review it, but from memory, he was
7 explaining that the proxy access logs were
8 speaking about running security checks on websites
9 that were, as I understood it, being accessed, to
10 make sure there was no malware, that there was --
11 there was nothing that would harm. Basically --
12 I'm trying to think of the technical words, which
13 I don't know. But basically, that they
14 represented a scanning, for security purposes, of
15 websites that were being accessed.

16 THE ACCUSED: Yes.

17 THE COURT: Right. So . . .

18 THE ACCUSED: But that would -- that would mean that
19 every website that would be accessed, through the
20 proxy server, there would be a log entry to
21 reflect -- sorry, to reflect that in the report
22 that was provided by him.

23 THE COURT: So, okay, when you requested Mr. Lam,
24 you'll recall that Crown said we're actually
25 finished, we want to close our case and I said,
26 well, you know, perhaps Crown could consider
27 whether they would present Mr. Lam and they did
28 that. And you were able to cross-examine Mr. Lam.

29 THE ACCUSED: If --

30 THE COURT: You know, at a certain point, you know, if
31 you have a defence you want to put forward, it
32 would be up to you to put forward that defence. I
33 think, in my asking the Crown if they would
34 consider doing that so you could ask your
35 questions, that was to give you some latitude.
36 But at a certain point, Crown is -- Crown could
37 say, we want to close our case and then it's over
38 to you, Mr. Fox, what do you want to do? Are --
39 are you going to testify? Are you going to call
40 any witnesses?

41 THE ACCUSED: Okay. And if I make speak completely
42 frankly for a moment, I will say that I don't
43 believe for one moment that Mr. Lam's testimony
44 today that he had no knowledge of these certain
45 matters, I don't believe that that was truthful at
46 all. I believe that he does have the knowledge of
47 these and I believe that he was instructed to just

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1 say that he didn't have the knowledge. But I
2 can't prove any of that, so, I'll let that go.
3 If the Crown were to close its case, would I
4 have the opportunity to attempt to subpoena or get
5 somebody from the VPD's IT department who would
6 have knowledge about these matters to come and
7 testify about this?

8 THE COURT: Well, I think that's something that you
9 should get legal advice about, which I shouldn't
10 be giving you.

11 THE ACCUSED: Right.

12 THE COURT: There may be --

13 THE ACCUSED: Well --

14 THE COURT: -- duty counsel in the building, but it --
15 but -- but perhaps you wouldn't necessarily
16 know -- I can say this just as information, not
17 advice, it seems to me what you're wanting
18 involves an application for disclosure, as well as
19 potentially a subpoena. And so, that would come
20 to the trial judge to access -- to access the
21 matter from all angles and decide whether that's
22 an application for further disclosure that I would
23 grant.

24 So, we're not -- I don't know for sure
25 whether Crown is closing its case. I don't know,
26 perhaps that is something that -- that I should
27 know now and Mr. Fox should know.

28 CNSL R. ELIAS: Yes, Your Honour, we are inclined to
29 close our case at this stage. We're -- we're
30 certainly content with the Crown evidence.

31 THE COURT: Okay. So, you said inclined to close your
32 case. Is that -- are you -- is Crown leaving it
33 open? Is Crown -- I haven't heard your reply yet
34 to what --

35 CNSL R. ELIAS: Yes.

36 THE COURT: -- Mr. Fox is requesting.
37 If I can summarize, if I've understood.
38 correctly, Mr. Fox, are you seeking -- are you
39 seeking to adjourn this matter? Are you seeking
40 further disclosure? Or are you going to argue
41 based on the evidence that's already been
42 presented? That's the choice.

43 And if you want to speak to duty counsel
44 before deciding that, you can do that.

45 I think for -- I want to be very clear what's
46 being requested, so I can answer as clearly as
47 possible.

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1 THE ACCUSED: Yes, I am requesting an adjournment for
2 the purpose of seeking the testimony of somebody
3 from VPD's IT department who would have knowledge
4 of these specific matters.

5 THE COURT: Okay. But there's -- as I said, you -- you
6 would -- you don't know -- first of all, you --
7 you're making a disclosure request; right?

8 THE ACCUSED: Would --

9 THE COURT: You don't know that person would be.

10 THE ACCUSED: That is correct. I don't know the
11 identity of that person. Would that be a
12 disclosure request, to first identify who the
13 person is, or?

14 THE COURT: Well, this is what I wanted you to talk to
15 duty counsel about, but it sounds to me as though
16 it would be.

17 You're in custody. You've been in custody 10
18 months -- more than 10 months, if you want to make
19 that application and further delay the trial, it
20 has to be for something -- first of all, it has to
21 have merit and then it has to be for something
22 tangible. And it seems to me, at this point, you
23 don't have that. You don't know who this person
24 would be. You don't know if they could give you
25 the evidence that you're hoping to obtain from a
26 witness.

27 So, that's why I'm saying --

28 THE ACCUSED: Okay.

29 THE COURT: -- seems to me that disclosure comes before
30 adjournment. And the disclosure is something that
31 the trial judge has to decide, based on
32 everything.

33 THE ACCUSED: Right.

34 THE COURT: Is there -- is it fair, at this point, to
35 adjourn the trial for this disclosure? So, I have
36 to be satisfied that it's likely relevant to your
37 defence.

38 THE ACCUSED: Okay. Then I would say, yes, I agree
39 that I would be submitting a disclosure request
40 and then, from that, a subpoena, probably.

41 THE COURT: Okay. And do you want to talk to duty
42 counsel though, before you do that?

43 THE ACCUSED: No, I don't.

44 THE COURT: You sure?

45 THE ACCUSED: I've spoke with duty counsel before --

46 THE COURT: Okay.

47 THE ACCUSED: -- and I don't believe that it would

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1 really benefit me or help me.

2 THE COURT: Okay. All right. So, I think then Mr. Fox
3 is seeking disclosure of a witness who can -- from
4 the IT department who can testify as to how
5 proxies --

6 THE ACCUSED: Well, ultimately, to testify about
7 whether or not the packets from the Hunchly users,
8 when they use the Hunchly software, whether those
9 packets go through a proxy. Actually, not even
10 about that. Whether or -- okay, whether or not
11 the Hunchly users go through any proxy server
12 which would have been included in this report that
13 was generated. It wouldn't necessarily have to be
14 the same proxy server, but . . .

15 THE COURT: So, whether or not Hunchly users go through
16 any proxy server?

17 THE ACCUSED: Well, any proxy server that would have
18 been included in this report that was provided to
19 me previously. Because remember, Mr. Lam had
20 testified that the Splunk software consolidates
21 information from multiple machines and so, it
22 wouldn't have to be specifically the same -- like,
23 it wouldn't have to be Chancellor 2, but as long
24 as it was any one of the machines that would be
25 included in the Splunk configuration.

26 THE COURT: All right. Well, I think though -- so,
27 that's your question, whether or not Hunchly users
28 go through any proxy servers to access the
29 internet?

30 THE ACCUSED: Yes, but also it is my -- it is my very
31 confident belief that the Hunchly -- the activity
32 of the Hunchly servers is logged. Maybe not
33 necessarily in the same proxy server, but it is
34 logged somewhere and I would think that it would
35 have to be because this is evidence in criminal
36 trials. And so, I would be seeking testimony
37 regarding that as well.

38 But I would assume it would be -- the same
39 person would have this knowledge or this
40 information and so, I would hope that that person,
41 when they would come to testify, would be able to
42 testify about those two matters.

43 THE COURT: Okay. And to be clear, the two matters,
44 whether Hunchly users go through any proxy servers
45 and whether there are logs of the activity of
46 Hunchly users?

47 THE ACCUSED: Yes, correct.

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1 THE COURT: Okay. And so, that -- that's -- that's it,
2 that summarizes what you're looking for?
3 THE ACCUSED: With respect to that matter, yeah.
4 That's independent from the search warrant issue
5 which we'll get to after.
6 THE COURT: All right. And Crown, first of all, with
7 respect to your case?
8 CNSL R. ELIAS: Yeah, we're -- we're ready to close,
9 Your Honour.
10 THE COURT: Okay. So, Crown has closed its case.
11 And Crown's position on this application for
12 further disclosure?
13

SUBMISSIONS FOR CROWN BY CNSL R. ELIAS:

14
15
16 CNSL R. ELIAS: Your Honour, I appreciate what Mr. Fox
17 is asking for and this is sort of a path we
18 have -- we have started down in the evidence. But
19 the Crown's position, at this point, is that what
20 he seeks is it simply isn't -- isn't relevant.
21 We have evidence from -- from Mr. Shook and
22 Mr. Lam about first, the question of what's
23 maintained on these logs and how -- how
24 information rolls over, over time, and so there's
25 no -- no way to be certain what should or
26 shouldn't be reflected in the proxy log that was
27 captured in October.
28 So, if Mr. Fox is seeking dispositive
29 evidence that a user did or did not access the
30 website on May 16th, the evidence, as we -- as I
31 understand it, just isn't going to be there to
32 show us either way.
33 THE COURT: Now, is that based on your review of the
34 evidence that's already been presented in this
35 trial? And if so, could you indicate to me where?
36 CNSL R. ELIAS: Yes, I think it was Mr. Lam's evidence.
37 I'd have to -- I'd have to go back through my
38 notes, that -- that what's reflected on the log
39 that he provided is only security entries scanning
40 -- scanning a handful of files and that there
41 likely were, at some point, logs that would have
42 shown up on this, logging attempted access by the
43 VPD or that resulted in those security scans, but
44 that those logs have likely been written over, or
45 -- or lapsed either way. But they're not --
46 they're not maintained forever. So, he simply
47 couldn't comment on what might have been -- what

Submissions for Crown by Cnsl R. Elias**BAN ON PUBLICATION 486.5(1) CCC**

1 might have been logged five months earlier.
2 Because this isn't something I inferred, that --
3 that they normally track as closely as we're
4 now -- as we're now tracking it in this case.
5 And I believe -- I believe that's Mr. Lam.
6 THE COURT: I'm looking at his -- my notes of his
7 evidence: We only keep a month or two of access
8 logs before it's rolled over.
9 CNSL R. ELIAS: Yes, precisely.
10 THE COURT: Okay.
11 CNSL R. ELIAS: So, we have some -- I'm not sure if he
12 used this term, but some breadcrumbs in the logs
13 for security scans that were performed, but not
14 the logs of the actual access attempts and there's
15 no reason to believe that those -- those exist
16 anymore. They're -- they're gone.
17 The second question is the issue of whether
18 Catherine Mickeljon's access would have been
19 reflected in this -- in this log in the first
20 place, whether it potentially goes through a
21 server that -- that is collect -- that -- that
22 the logs of which would have been collected from
23 the search or whether it -- whether it has another
24 route to the internet that wouldn't have been
25 reflected in this log.
26 I think it would be fair to say that his
27 evidence on that was -- was equivocal, as Mr. Fox
28 explored with him in cross-examination, he said
29 one thing, consulted with a coworker, said another
30 thing, but ultimately, it seems pretty clear that
31 Mr. Lam just wasn't sure either way.
32 THE COURT: Well -- well, I think, in fairness, though,
33 his own evidence, the weight of which falls to be
34 determined but he said one thing, then he
35 corrected himself and he said he'd been mistaken.
36 CNSL R. ELIAS: Yes.
37 THE COURT: His own evidence was that Hunchly users
38 would not go through --
39 CNSL R. ELIAS: Yes. Yeah. I agree.
40 So, I just want to ask Mr. Fox something
41 before I continue, but I'm -- oh.
42 THE ACCUSED: I'm -- I'm sorry. I just wanted to say,
43 wasn't it other way around? His own evidence was
44 that the Hunchly users did go through the proxy,
45 but then he spoke with somebody else and was
46 advised by them that they didn't. Because his
47 first testimony was --

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1 THE COURT: Right.
2 THE ACCUSED: Okay.
3 CNSL R. ELIAS: Yes.
4 THE COURT: But he said -- okay, what I heard, if I
5 could summarize it, is in his interview he told
6 the Crown the Hunchly users don't go through the
7 proxy. Then he came to court and he said they do.
8 Then he thought about it and he called someone and
9 he said, actually, I was mistaken and he went back
10 to what he first said; right? That they -- they
11 don't go through the proxy logs.
12 THE ACCUSED: Yes, yes. But I was basing it only on
13 his testimony, not on his interview with the Crown
14 before that because we really have no proof that
15 that interview even really occurred and that he
16 said that in the interview, like, there's no
17 recording of the interview.
18 THE COURT: Well, what we have in evidence is that that
19 was his testimony under oath.
20 THE ACCUSED: Right.
21 THE COURT: That that was what his discussion was with
22 -- with Crown.
23 CNSL R. ELIAS: So, Your Honour, what I was just
24 discussing with Mr. Fox is --
25 THE COURT: Mm-hmm.
26 CNSL R. ELIAS: -- the disclosure we provided this
27 morning included a summary of some conversations
28 that Ms. Laker and I had with the VPD that I think
29 encapsulate what a VPD witness would ultimately be
30 able to testify to.
31 THE COURT: Oh, I see.
32 CNSL R. ELIAS: Which Mr. Fox -- Mr. Fox is leery about
33 me giving it to you because it's -- it's unsourced
34 information. I spoke to a couple different VPD
35 officers about it and I haven't told him -- I
36 didn't provide their names. So, I'm --
37 THE COURT: But it -- it seems to me that it's relevant
38 to my deciding a disclosure application if
39 there -- to the extent that it's -- you know, I
40 recognize you're not sourcing it, it's your
41 understanding --
42 CNSL R. ELIAS: Yeah.
43 THE COURT: -- but --
44 CNSL R. ELIAS: With -- with those caveats, in my -- in
45 my view, it's appropriate for you to look at and
46 sort of -- to understand what -- what we expect
47 may come of such a witness if they were called.

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1 THE COURT: Right. I don't necessarily need to look at
2 it, but in terms of thinking of likely relevance
3 or whether -- what Mr. Fox is seeking is even
4 available, it seems to me important that I -- that
5 I know this.

6 CNSL R. ELIAS: Yeah.

7 THE COURT: You're objecting to that, Mr. Fox?

8 THE ACCUSED: No, no. I was just going to ask if the
9 Crown could at least say whether the parties he
10 spoke to were technical people that worked in the
11 IT department or nontechnical people because that
12 would make a big difference in these matters.

13 Like, from the wording that's used in this, I
14 get the impression that they weren't IT people.

15 CNSL R. ELIAS: But they were, Your Honour. This is --
16 these are my summaries, so, I'm not an IT person,
17 so, I apologize to Mr. Fox if I -- if I phrased
18 things in way that he wouldn't expect from someone
19 who knew more deeply than I do what they were
20 talking about.

21 I spoke to two different members from the
22 cyber crimes unit and my understanding is that
23 they went away and made inquiries elsewhere in the
24 VPD and came back to me to give information. So,
25 I don't know exactly where all this comes from.

26 But my overall understanding of -- this
27 was -- to try to figure out how the Hunchly server
28 works and how it's -- or Hunchly access to the
29 internet works, is that -- is that there are no
30 access logs the way it's set up.

31 The reports that Hunchly generates are the
32 evidence of what Hunchly users saw. That's the
33 purpose of the software, is to generate these
34 screen captures that say what was accessed
35 [indiscernible].

36 It appears that it's a -- it's a VPD server,
37 but -- and it's run on -- runs on VPD
38 infrastructure, but it's not -- because it's used
39 for -- for these public opensource searches and I
40 think some covert searches, it's a different -- a
41 different server entirely. It doesn't, I'm told,
42 go through the ordinary VPD proxy server such that
43 it would be reflected in the log -- in the proxy
44 server log that we -- we produced and that the VPD
45 is reluctant to provide a lot of information about
46 because, in their view, it's a security issue
47 because I think -- I infer that it's used as a --

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1 as a covert investigative tool, to some extent,
2 this -- this server. So, that's -- that's the
3 information I have.

4 The thing I want to focus on is that I'm told
5 that these logs simply don't exist. The logs of
6 May 16th access to a certain website through --
7 through whatever -- whatever firewall or proxy
8 server the Hunchly users use isn't logged in the
9 way that Mr. Fox is hoping they are. So, there
10 won't be -- there won't be evidence either to
11 corroborate or contradict Catherine Meiklejohn's
12 evidence that she accessed the website at that
13 date, at that time.

14 That, combined with the uncertainty about
15 whether anything is even retained, because the
16 access -- access logs roll over quite quickly
17 because this isn't -- this isn't information
18 that's archived, in my submission, it's -- it's
19 exceedingly unlikely that anything -- anything of
20 relevance could -- could come of calling
21 additional VPD witnesses to testify about this.
22 So . . .

23 Nor do I have at my fingertips the name of a
24 particular person who would be -- who would be an
25 appropriate witness. That's something that we
26 would need to look into further if -- if you
27 were inclined to direct that we make that
28 disclosure.

29 Just one moment. I want to . . .

30 And Ms. Laker -- Ms. Laker just pointed
31 made a good point to me, which is that Crown is
32 also perfectly content to admit there are no logs
33 of this sort, if that's helpful to Mr. Fox. So,
34 there -- admit that the absence of this
35 corroborating -- this corroborative evidence that
36 he thought might -- might exist. So, I know he's
37 looking for evidence that contradicts what -- what
38 the Crown witnesses have said, but if there's
39 admission we could make along those lines that
40 would assist, we'd be happy to make it.

41 THE COURT: Okay. All right.

42 THE ACCUSED: May I reply to just two points very
43 quickly?

44 THE COURT: Yes, go ahead.

45

46 **REPLY FOR ACCUSED BY THE ACCUSED:**

47 THE ACCUSED: With respect to the issue of the rollover

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1 of the logs, I would point out that if it was a
2 matter of the logs rolling over and that's why
3 there's no record of them, then these references
4 to Desi Capuano [indiscernible].com also would
5 not have been found. Like, the fact that those
6 log entries still existed means that every other
7 log entry from that date should have also still
8 been in the -- in the logs for the respective
9 devices: It -- it wouldn't have been rolled over
10 already.

11 And so, rollover might be an issue now
12 because more time has passed, but as of the time
13 that this report was made, the data would have
14 rolled over.

15 The other point that I wanted to bring up was
16 that it seems very troubling or very suspicious to
17 me that in the process of investigating things
18 related to the internet, the VPD does not bother
19 to record the IP address of the server that they
20 were connecting to. And you'll recall, when I was
21 cross-examining Ms. Meiklejohn and Detective
22 McElroy, I asked them about that because the
23 hostname could change at any time. You see, an IP
24 address is associated with the computer, the
25 hostname is associated with an IP address. But
26 it's easy to mask a hostname on a person's local
27 computer or with DNS on a network or something.

28 And so, for the police to say that they
29 accessed the website but based only on the URL of
30 the website that they were accessing doesn't
31 actually prove that they were accessing the
32 website that I was required to ensure was no
33 longer available, which is another reason that I
34 think that these logs are very important because
35 the logs provide a more technical view and more
36 reliable view because they're made by a machine,
37 not by a person who could tamper with the
38 information or such.

39 That's all. Thank you.

40 THE COURT: What about the Crown being willing to make
41 an admission that there are no logs?

42 THE ACCUSED: I would ask them to clarify a bit what
43 they mean by that because to say that there are no
44 logs today doesn't mean much because the logs may
45 have been rolled over by now. I mean, it's been
46 almost a year since this has happened. What we do
47 know is that as of the time that this report was

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1 generated in -- on October 12th, there were some
2 entries that contained the string desicapuano.com
3 but not referring to the actual website
4 desicapuano.com.

5 THE COURT: Right. But in terms of the application
6 before me, the logs would have to be presently
7 available. That's a relevant point. So, if the
8 Crown is willing to admit they're not . . .

9 THE ACCUSED: I would wonder, how does the Crown know
10 that?

11 THE COURT: Well, I mean, for the purposes of the case
12 in front of me, the Crown's willing to make an
13 admission of fact and you accept it, that's a
14 fact.

15 THE ACCUSED: I would not be prepared to accept that
16 without knowing what that admission is based on.

17 THE COURT: Okay. So, what about the second
18 application?

19 What I'm going to do with respect to the
20 first one, I'm going to ask Madam Clerk if she can
21 give me the record of proceedings with respect to
22 this matter and give my ruling at 2:00 p.m.

23 But let me hear about the application with
24 respect to the search warrant.
25

26 **SUBMISSIONS FOR ACCUSED BY THE ACCUSED:**
27

28 THE ACCUSED: The issue with the search warrant was --
29 and it came to my attention after Sergeant Shook
30 had testified and we had gone through that whole
31 process. It actually just came to my attention
32 after the March 7th appearance.

33 In the report provided by the digital
34 forensics unit, it made no reference to when the
35 data was extracted from the phone. I stumbled
36 across the information in a report written -- or a
37 narrative written by Sergeant -- Detective McElroy
38 which was generated or disclosed to me December
39 15th, I believe it was, that the data was
40 extracted on August 18th and that corresponds with
41 the modification date timestamp that I'd seen in
42 some of the information that was extracted from
43 the phone. The issue though is that the warrant
44 was only valid for a two-week period in July. I
45 think it was July 15th to 28th.

46 And so, what I'm requesting at this point,
47 with respect to the search is that all of the

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1 information extracted from the phone and Sergeant
2 Shook's testimony related to that be excluded
3 because the search was executed far outside the
4 time authorized by the warrant.

5 THE COURT: Is Crown able to respond to that
6 application?

7 CNSL T. LAKER: Yes, and it's a very brief response,
8 Your Honour.
9

10 **SUBMISSIONS FOR CROWN BY CNSL T. LAKER:**

11
12 CNSL T. LAKER: With regards to and the reason for why
13 I'm responding is because I spoke with Mr. Fox
14 about this.

15 THE COURT: Yes.

16 CNSL T. LAKER: And he's accurately explained to the
17 court what his concern is.

18 When I look at the search warrant, it says
19 that Sergeant McElory was authorized to have the
20 search conducted between -- or to have it
21 conducted between July 15th to July 28th. And
22 what she said in her evidence was that at that
23 point, once the search warrant was granted, is
24 that she took the cellular phone, or the mobile
25 phone of Mr. Fox's from the exhibit locker and
26 then turned it over to the DFU, the digital
27 forensic unit, on July 15th. So, it was done on
28 that date, which then, ultimately, satisfies, in
29 my submission, that requirement.

30 And from that point onwards, that is when the
31 search has started and any resulting evidence that
32 was obtained from that search, in my submission,
33 is valid.

34 THE COURT: So, your -- your position is the search
35 began within the parameters of the search and even
36 if it ended beyond, that's not a problem?

37 CNSL T. LAKER: Yes. Yes, and if you look at the
38 wording in page 3 of the search warrant, it says
39 here, which is the timing that Mr. Fox has
40 expressed concern about, he says -- it says here
41 that [as read in]:
42

43 This is therefore to authorize and require
44 Detective Constable Amber McElroy or her
45 designate to enter the said premise between
46 July 15th, 2022 up to and including July
47 18th, 2022.

Submissions for Crown by Cnsl T. Laker**BAN ON PUBLICATION 486.5(1) CCC**

1
2 And then it says [as read in]:
3
4 And to search the cellular phone, the
5 things/data and to bring them before me or
6 some other justice or submit a report in
7 writing in respect of anything seized.
8
9 THE COURT: Okay. May I see a copy of that?
10 CNSL T. LAKER: Yes. It's an -- it's an exhibit
11 actually. I think --
12 CNSL R. ELIAS:
13 CNSL T. LAKER: -- it's 10. Yes.
14 THE COURT: Exhibit 10.
15 CNSL T. LAKER: Exhibit --
16 THE COURT: Okay.
17 THE ACCUSED: Which .pdf is it in? Which disclosure
18 package? I can't remember.
19 CNSL T. LAKER: I can give you a copy too, Mr. Fox, for
20 reference.
21 THE ACCUSED: No, that's okay, I have it here.
22 THE COURT: Okay. If it's Exhibit 10, I have the
23 exhibits.
24 All right. Anything -- anything further from
25 either Crown or Mr. Fox?
26 THE ACCUSED: I did have something that I wanted to
27 respond to that, but sorry, I'm just looking for
28 my copy of the exhibit. I -- well, okay. I'm
29 going to use that.
30

REPLY FOR ACCUSED BY THE ACCUSED:

31
32
33 THE ACCUSED: I would point out that the part that the
34 Crown had just referred to, the wording, where it
35 says [as read in]:
36
37 This is therefore to authorize and require
38 Detective Constable Amber McElroy or her
39 designate to enter the said premise
40 between . . .
41
42 The dates, et cetera.
43 It seems to me that there's a bit of a --
44 probably a copy and paste error that occurred
45 here. I think that was happened was this wording
46 was just copied from some other warrant because
47 that really doesn't seem to apply in this

Reply for Accused by The Accused**BAN ON PUBLICATION 486.5(1) CCC**

1 instance. There as no entrance to any premises or
2 anything. They -- they seized the devices at the
3 time of the arrest and so, it is my understanding
4 that what's being authorized here, or what was
5 intended to be authorized was for the search of
6 those devices to occur between those dates. That
7 would also be consistent with what Detective Dent
8 had testified in one of my previous trials, his
9 testimony. And I realize this is not evidence,
10 but I had questions about a search that they had
11 performed before and his response was that it's
12 their understanding that as long as the data is
13 extracted within the time specified in the
14 warrant, then that complies with the warrant.

15 So, based on that, it's my understanding that
16 what's important is the date that the data was
17 extracted from the device and then copied onto
18 their server, not the date that Detective McElory
19 would have provided the device to DFU.

20 I mean, if we accept that argument, then that
21 would mean that the police could, theoretically,
22 seize any device, give it to DFU and they can sit
23 on for five years before searching it and that the
24 search would still be valid. I think that that
25 would just be unreasonable expectation.

26 THE COURT: All right. Well, I think what it turns on
27 is an interpretation of what the warrant
28 authorized. So, I'll -- I'll look at that over
29 the lunch hour as well the other argument before
30 me.

31 THE ACCUSED: I should say also, I was expecting the
32 Crown wasn't going to oppose this because it
33 seemed very clear to me.

34 But I had also spoken with Ms. Laker, at the
35 time when I brought this to her attention, that
36 there was the issue that I brought up when I was
37 cross-examining Sergeant Shook about how some of
38 the files that were on the phone, that were
39 extracted from the phone, some of the database
40 files had date modification timestamps that were
41 after the date of my arrest. And I had some
42 concerns that the VPD may have possibly modified
43 some of the data in that it seemed to me that the
44 account that Sergeant Shook was referring to, that
45 were related to or associated with desicapuano.com
46 had been added to the phone by the VPD after I was
47 arrested. And so, I had mentioned to Ms. Laker

Reply for Accused by The Accused**BAN ON PUBLICATION 486.5(1) CCC**

1 that if the information from the phone is not
2 going to be excluded, it seems important that
3 somebody should be able to explain from V -- or
4 somebody from VPD should be able to explain why it
5 is that those databases were modified,
6 coincidentally on the same -- with the same date and
7 time as when the data was extracted from the
8 phone.

9 So, if the data from the phone is not going
10 to be excluded, then there is, I would say, likely
11 going to be a request for an additional subpoena.
12 I'm -- I think I know who it was that did the
13 extraction. It's not explicitly stated in the DFU
14 report, but I'm pretty sure it was Detective
15 Yingling. So, in that case, I do have the
16 identity of the -- of the person.

17 THE COURT: Okay. So, we're on day five of a trial.
18 If -- if there's challenges to search warrants,
19 that's the reason that there are pretrial
20 conferences and you canvass this and you set it up
21 ahead of time and you give the Crown notice.
22 There -- there has to be a reasonable limit and as
23 the trial judge, I'm going to be setting it, as
24 the trial is now on day five, to entertain new
25 applications when there's been all this time
26 leading put to this trial to consider whether or
27 not there was anything to be challenged in the
28 search warrant, for example.

29 THE ACCUSED: And I apologize and I completely agree
30 with you and I believe that these matters should
31 be addressed with -- long before the trial, but in
32 this particular instance, you may recall that Mr.
33 Poll, when he had conduct of the case, said that
34 they weren't going to be using any information
35 from the phone. And then it was on the first day
36 of trial that Ms. Laker then said that they were
37 going to be seeking to admit evidence from the
38 phone and that they were going to be calling an
39 expert witness, Detective -- or Sergeant Shook, to
40 testify about that. So, that's why this was not
41 addressed long before because I was led to believe
42 that they weren't going to be using that
43 information.

44 THE COURT: Yes, okay. I remember both those things.
45 Okay.

46 THE ACCUSED: Oh, also though, it didn't -- I didn't
47 become aware of the fact that the phone was

Reply for Accused by The Accused**BAN ON PUBLICATION 486.5(1) CCC**

1 searched outside of the time of the search warrant
2 until just a few weeks ago because, like I said,
3 it wasn't stated in the DFU when the phone was
4 searched. It was -- I stumbled across it in
5 another, like, other parts of the disclosure where
6 it was mentioned by Sergeant -- or Detective
7 McElroy.

8 THE COURT: All right. Okay. Thank you.

9 Does Crown have any case law about the
10 parameters of the search warrant, that issue? Or
11 are -- are you content with what you've already
12 told me?

13 CNSL T. LAKER: Your Honour, I'm content with what
14 we've provided you.

15 THE COURT: Okay.

16 CNSL T. LAKER: I think we can just leave it at that.

17 THE COURT: All right.

18 CNSL T. LAKER: Thank you.

19 THE COURT: So, I'm going to take the record of
20 proceedings with me.

21 THE CLERK: It's all the way.

22 THE COURT: Hmm?

23 THE CLERK: It's all the way out, Your Honour.

24 THE COURT: Thank you.

25 All right. Adjourning until 2:00 p.m.

26 A SHERIFF: Order in court, all rise.

27

28 (PROCEEDINGS ADJOURNED FOR NOON RECESS)

29 (PROCEEDINGS RECONVENED)

30

31 [RULING #1]

32

33 THE COURT: With respect to the second issue, and this
34 is the search warrant issue, I have some questions
35 for Crown just before ruling on that and that is,
36 I think it would be Ms. Laker?

37 CNSL T. LAKER: Yes.

38 THE COURT: All right. So, what do you say is the
39 significance of the August 18th date? And here,
40 again, I looked at Sergeant McElroy's evidence.
41 Her evidence was that she took the phone out of
42 the evidence locker the day that she got granted
43 the search warrant. She doesn't mention August
44 18th specifically. She talks about having a
45 discussion with the forensic identification unit
46 and so, can you tell me, the report -- the 5.2 has
47 August 18th as the date too. And then Sergeant

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1 Shook looked at the phone starting January 12th.
2 CNSL T. LAKER: Yes.
3 THE COURT: So --
4 CNSL T. LAKER: My understanding, I believe this was
5 under cross-examination of Sergeant Shook, Mr. Fox
6 asked Sergeant Shook about this August 18th date.
7 THE COURT: Okay. So, this is why -- where I need help
8 from counsel because I -- again, on the lunch
9 hour, I was looking at certain testimony and --
10 CNSL T. LAKER: Yes.
11 THE COURT: -- and not -- so, you're saying -- and what
12 was the evidence on that point?
13 CNSL T. LAKER: I think it -- I -- my colleague is -- I
14 believe, is looking through his notes but my
15 recollection of Sergeant Shook's evidence, when he
16 was being asked questions by Mr. Fox, is that
17 there was a date of August 18th referenced in the
18 raw data that was provided to Mr. Fox. And Mr.
19 Fox asked Sergeant Shook about that date of August
20 18th and why it says something along the lines of
21 modified data, or something.
22 I believe that that is the date that the data
23 was extracted from the phone and then provided to
24 Sergeant McElroy, who then searched that data and
25 came -- and highlighted certain further areas that
26 she wanted the expert to subsequently analyze.
27 THE COURT: From my review of Sergeant McElroy's notes,
28 absent the mentioning of the date of August 18th,
29 she did describe a process like that where she had
30 had a discussion and narrowed down -- okay, I
31 wanted to make sure I understood what Crown said
32 the August 18th date represents. And again, it's
33 not that there's evidence, basically, there's
34 evidence from which you're asking there be an
35 inference that that was the first day somebody
36 extracted the data from the phone at DFU and it
37 wasn't Sergeant McElroy who did that.
38 CNSL T. LAKER: No.
39 THE COURT: Okay. I wanted to understand what your
40 position on that.
41 And any reply to that, Mr. Fox, as to --
42 THE ACCUSED: Yes, I just want to clarify, in the
43 disclosure that was provided to me December
44 15th --
45 THE COURT: Mm-hmm.
46 THE ACCUSED: -- there's a police statement 11 which
47 is -- it's one of the narratives. It's

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1 entitled --
2 THE COURT: Mm-hmm.
3 THE ACCUSED: -- Analysis of 2266177-1, Fox's cellular
4 phone and it's in there where Detective McElroy
5 writes [as read in]:
6
7 Detective McElroy was advised on August 18th,
8 2022 at 1523 hours that the digital forensics
9 unit had extracted the data from . . .
10
11 Et cetera.
12 THE COURT: Okay. Thank you. That helps even more
13 because -- okay, thank you.
14 THE ACCUSED: Okay.
15 THE COURT: So, it's in the disclosure, it's not
16 something that I've seen and it wasn't something
17 that I made note of. And it may be that Sergeant
18 McElroy did mention that date but it wasn't in my
19 notes. And so, I was left looking at the report
20 to a justice and wanting to make sure I
21 understood. Okay.
22 THE ACCUSED: I could also say that there was some
23 discussion of the date of August 18th when I was
24 cross-examining Sergeant Shook because there was
25 the issue of the files having the timestamp of
26 August 18th and I was asking him about that and he
27 said he didn't have any knowledge of that.
28 THE COURT: Right. Yes. Okay.
29 THE ACCUSED: I was saying that some of the files had
30 been modified on that date.
31 THE COURT: I remember -- I remember that line of
32 questioning too. Okay. All right. Thank you.
33 Some -- something further, Mr. Elias?
34 CNSL R. ELIAS: Just the one thing I'll add is there
35 actually is evidence of August 18th directly on
36 Exhibit 11, which is the data 5.2 form.
37 THE COURT: No, exactly.
38 CNSL R. ELIAS: Yes.
39 THE COURT: I looked at the 5.2 form, which is Exhibit
40 11 on the trial. I looked at Exhibit 10 and then
41 I had the question of where does the August 18th
42 date come from, which -- which you've both helped
43 me to answer. Okay.
44 Let me just -- okay, I think I need to take
45 just 15 minutes, just to incorporate that
46 knowledge and then I'll come back in 15 minutes to
47 give you my ruling on the search warrant issue;

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1 okay?
2 THE ACCUSED: Before -- before you go --
3 THE COURT: Mm-hmm.
4 THE ACCUSED: -- I just want to mention very quickly,
5 it's not relevant to the search warrant issue, but
6 the other issue. I just want to point out that
7 Mr. Lam had said that the logs generally roll over
8 every one to two months --
9 THE COURT: Right.
10 THE ACCUSED: -- but in this report, it was generated
11 in October but is referring to data from May,
12 which is actually five months. So, that actually
13 shows that the data is kept in the logs much
14 longer than just a month or two.
15 THE COURT: Well, okay --
16 THE ACCUSED: Like, it's -- it's -- I'm not asking you
17 to --
18 THE COURT: -- so --
19 THE ACCUSED: -- change any decisions, I'm just
20 pointing --
21 THE COURT: No, no, I know. But -- but I think what I
22 would say to you and again, we're not -- we're not
23 arguing, but I just want to say how I look at
24 that. I understood Mr. Lam to come and say that
25 what we were looking at were the -- what did he
26 call them? The security module logs.
27 THE ACCUSED: Mm-hmm.
28 THE COURT: And again, this is an inference, but it may
29 be that they get kept for longer. Because when he
30 was being asked about the access logs --
31 specifically about the access logs --
32 THE ACCUSED: Okay.
33 THE COURT: -- that's when he said, oh, one to two
34 months, I think they roll over.
35 So, I appreciate, yes, it's inference, but
36 that's -- that was my thinking when I -- when I
37 saw that.
38 THE ACCUSED: Okay.
39 THE COURT: Okay.
40 THE ACCUSED: Thank you.
41 THE COURT: So, 15 minutes.
42 A SHERIFF: Order in court, all rise.
43
44 (PROCEEDINGS ADJOURNED)
45 (PROCEEDINGS RECONVENED)
46
47 THE COURT: Please be seated.

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[RULING #2]

THE COURT: Okay. So, Crown has closed its case. Mr. Fox, are you presenting a defence case?

THE ACCUSED: Yes. Since the information from the phone is not going to be excluded, that raises the issue then of the appearance or evidence that the data on the phone seems that it was tampered with or modified after it was seized from me and this wasn't an issue that I'd brought up sooner because well, first, again, I had no idea that the Crown was going to be proceeding with this until the start of the trial and then it wasn't until Sergeant Shook was testifying that I began to realize that the files appeared to have been modified. And when I asked him about it, though, he said that he had no knowledge of that.

THE COURT: Okay.

THE ACCUSED: Now, some of the -- based on his testimony about what he found on the phone, it creates the appearance that I may have had some involvement with the website because he claimed that there were two accounts -- or information about two accounts in a particular database on the phone and that was one of the files that had a late -- sorry.

THE COURT: So, though, can I just make sure -- like, important that you understand --

THE ACCUSED: Mm-hmm.

THE COURT: -- you need to be giving evidence if you want this to be something I rely on in deciding the case.

THE ACCUSED: Right. Where I'm going with this is --

THE COURT: Yes?

THE ACCUSED: -- I believe it is critical to my defence, at this point, to have the person who performed the extraction of the files from the phone to testify why it is that some of the files were modified after the phone was seized from me. Specifically modified on the date that she extracted the data. Because it appears to me that the information that Sergeant Shook says that he found in that database, I know that it couldn't have been there. And so, what I'm -- my argument is that somebody else put that information into the phone before they gave it to him and he

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1 searched it. And that would be consistent with
2 the date modified timestamp of that particular
3 database file being August 18th, 2022. The phone
4 wasn't in my possession at that point. There's no
5 way I could have done it. And so, it certainly
6 appears that when they extracted the data from the
7 phone, somebody modified the data before it was --
8 before it -- oh, also, I should mention, even a
9 copy of the entire extraction was provided to me,
10 that particular file, I've never been able to
11 open. I have it right here on the laptop and I
12 brought this up to the Crown before as well. So,
13 it's troubling to me that the one file that is the
14 most incriminating here, that contains these two
15 pieces of information, one, I can't open it, and
16 two, it has a date modified timestamp of August
17 18, 2022.

18 THE COURT: So, Sergeant Shook was here and he's an
19 expert in analyzing data from devices. So, you
20 had an opportunity to cross-examine him about what
21 I think you're putting forward now, that somebody
22 modified your data when they extracted it.

23 THE ACCUSED: Well, at the time that they extracted it
24 or after. Most likely, what would happen is
25 before they extracted the data, the probably, on
26 the phone itself, put the information in. But I
27 should say that I did actually ask Sergeant Shook
28 about this when I cross-examined him.

29 Sorry, my throat's dry. I think I'm --

30 THE COURT: No, that's fine.

31 THE ACCUSED: -- dehydrated or something.

32 And he had said, at the time, that because he
33 wasn't involved in the extraction, he would have
34 no knowledge of that.

35 And certainly, this is something that I could
36 have thought out or pursued much sooner, had this
37 information about, for example, Sergeant Shook and
38 the Crown's intention to use the data from the
39 phone, had that been made known to me earlier,
40 then I could have brought this out earlier. But
41 because all of this didn't happen until the trial
42 actually started and so . . .

43 THE COURT: Sure, but -- so, right now, are you saying
44 you want to present defence evidence? Are you
45 going to testify? Have you decided that?

46 THE ACCUSED: I don't intend to testify.

47 THE COURT: You still don't?

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1 THE ACCUSED: What I'm hoping at this point --

2
3 SUBMISSIONS FOR ACCUSED BY THE ACCUSED:
4

5 THE ACCUSED: Oh, I should mention also, I also brought
6 this up to Ms. Laker when I spoke to her on March
7 8th about the issue of the search warrant, I also
8 told her at that time that in the event the Crown
9 is going to be opposing the exclusion of that
10 data, then I would want somebody from VPD to be
11 able to testify about why these files were
12 modified. And so, my point is I'm not just
13 bringing this up now at the very last --

14 THE COURT: Mm-hmm. No.

15 THE ACCUSED: -- very late point.

16 Since that time, I haven't been able to reach
17 Ms. Laker by telephone because apparently there's
18 some issue, I can no longer call her telephone
19 number from the jail, so I had to communicate by
20 mail again.

21 THE COURT: Hmm.

22 THE ACCUSED: Oh, and in this case, I'm pretty sure we
23 do know who it was that performed the extraction.
24 It doesn't explicitly state in the DFU report it
25 Detective Nancy Yingling, however, she is
26 referenced indirectly. Something to do with some
27 photographs of the evidence. So, I'm pretty sure
28 it was probably her because she was involved in
29 the extractions in a previous case of mine.

30 THE COURT: So, you don't intend to testify but even
31 though Sergeant Shook was here and could be cross-
32 examined, you say you asked him this question,
33 which is about your suggestion that somebody
34 modified data in extracting it and he said he
35 didn't know. I haven't looked back at Sergeant
36 Shook's evidence on this point.

37 THE ACCUSED: Mm-hmm.

38 THE COURT: I don't know if Crown has any -- this is --
39 I would expect -- this sounds like yet another
40 application for disclosure of a witness and
41 production and then you would be seeking a
42 subpoena, strictly speaking; right?

43 THE ACCUSED: I guess that would -- yeah, I guess that
44 would be the process.

45 THE COURT: and I have a similar task, to assess
46 whether -- what the likelihood this is that it's
47 likely relevant to your defence.

Submissions for Accused by The Accused**BAN ON PUBLICATION 486.5(1) CCC**

1 THE ACCUSED: See, I didn't consider it very important
2 at the time that Sergeant Shook was testifying
3 because I was relying on the proxy logs proving
4 that nobody had access to the website and my
5 opinion, at that time, was that since it couldn't
6 be proven that the website was actually online, it
7 wouldn't matter, even if the Crown had clear
8 evidence that I was involved in the website. If
9 it wasn't online, there was no breach. And so,
10 that's why it wasn't a very huge issue to me
11 before. But now, since the Crown is resisting --
12 or, I shouldn't raise it that way -- since the
13 Crown is opposing the exclusion of the data from
14 the phone, plus the -- they're fighting the issue
15 of the proxy logs in the meaning of the proxy
16 logs, so now it seems to me that I'm in a position
17 where I really have to kind of pursue every
18 avenue. I can't just assume that something's not
19 going to be relevant because this other evidence
20 proves that what they're saying can't be true.

21 THE COURT: Well, I don't know if Crown wants to take
22 the afternoon break now and consider their reply,
23 or?
24

SUBMISSIONS FOR CROWN BY CNSL T. LAKER:

25
26
27 CNSL T. LAKER: Well, Your Honour, what I can say is
28 that we are fairly certain that it was Constable
29 Yingling who did the data extraction. We can't
30 say for certain if it was.

31 My response with regards to Mr. Fox's
32 concerns about the data having been modified when
33 it was extracted is that Sergeant Shook did speak
34 to that to a certain degree, in that he was asked
35 by Mr. Fox about whether or not some of the data
36 could have been modified post-extraction. And my
37 -- my recall is that he replied that the method of
38 extraction will sometimes vary case-to-case, but
39 that extraction programs strive for not modifying
40 data at all, or as little as possible.

41 So, my submission is that -- that is a fairly
42 complete and thorough answer to the query that Mr.
43 Fox currently has and as to whether or not
44 requires further disclosure, I just do not see
45 that there is any possibility that it was -- that
46 it will answer the questions that Mr. Fox has
47 currently and I know Mr. Fox has mentioned

Submissions for Crown by Cnsl T. Laker**BAN ON PUBLICATION 486.5(1) CCC**

1 previously that the Crown will say that this is a
2 fishing expedition, but I will echo those
3 comments, this is -- this is taking us further and
4 further away from the real issues at trial, in my
5 submission and we already have a fairly concrete
6 answer already from Sergeant Shook.

7 THE COURT: All right. Thank you. Well, then that was
8 why I asked. Sergeant Shook is an expert in that
9 area and if he was asked that question and gave an
10 answer -- all right.

11 We'll take the afternoon break now. I'm
12 going to look at my notes of what Sergeant Shook
13 said to make a ruling on this and come back,
14 please, at 3:30.

15 A SHERIFF: Order in court, all rise.

16
17 (PROCEEDINGS ADJOURNED FOR AFTERNOON RECESS)
18 (PROCEEDINGS RECONVENED)
19

20 THE COURT: All right. Everybody ready?

21
22 [RULING #3]
23

24 THE COURT: So, that is my ruling and we're still in
25 defence case and what I wanted to make sure you
26 understood, Mr. Fox, is I don't have evidence
27 against you with -- I just wanted to make sure you
28 understood the statements are not evidence against
29 you that the Crown has presented as part of their
30 case. So, there are two statements that I heard.
31 We played them. They took up court time. But
32 they are not in evidence before me unless or until
33 you decide to testify. So, if there's anything in
34 those statements that you want to rely on, I want
35 to make sure you understand I'm not considering
36 them at all, unless you are testifying.

37 Similarly, if there's anything that you want
38 me to consider in deciding the case, I have to
39 rely on the evidence before me and the evidence
40 I've heard and cross-examination questions aren't
41 evidence. The answers are evidence. Depending
42 sometimes on the question and answer, they could
43 go together, making the question and answer
44 together confirming something. But the important
45 point is, if there's anything that you want me to
46 consider, then you would have to choose to
47 testify.

Proceedings**BAN ON PUBLICATION 486.5(1) CCC**

1 And it's your right not to testify and you
2 can maintain that. And you have indicated a few
3 times that's what you wanted to do, but I thought
4 the point about the statements was a little bit
5 subtle, so I wanted to make sure that you
6 understood that.

7 THE ACCUSED: Okay. Thank you.

8 THE COURT: Any -- any other -- what are you going to
9 do now?

10 THE ACCUSED: I don't -- I don't intend to testify and
11 I would guess, at this point, that we could
12 proceed with the closing arguments.

13 THE COURT: Okay. Are you ready to proceed to closing
14 arguments then?

15 THE ACCUSED: I couldn't fully write them ahead of time
16 because I needed to wait until I heard from Mr.
17 Lam today and to see how those things went. Also,
18 the issue about the search and all. I could wing
19 it though. But looking at the time, I'm not sure,
20 by the time the Crown finishes their closing
21 arguments, I don't know that there'll be time for
22 me today anyways.

23 THE COURT: Well, okay. Crown would begin anyway, in a
24 case like this, where, in effect, I just have the
25 Crown evidence to consider. We'll see where we
26 get to. If you want time to prepare, we'll come
27 back for you to complete submissions. You can
28 listen and know that I'll give you more time to
29 prepared and reply to what they've said; okay?

30 THE ACCUSED: All right. Thank you.

31

32 **SUBMISSIONS FOR CROWN BY CNSL T. LAKER:**

33

34 CNSL T. LAKER: And Your Honour, for everyone's benefit
35 what we've done is actually drafted our
36 submissions, so that if Mr. Fox feels that he
37 needs time to -- to consider his -- his closing,
38 then he has the benefit of those written
39 submissions.

40 THE COURT: Thank you, that's helpful.

41 CNSL T. LAKER: There are also some cases. Mr. Fox has
42 been previously provided these cases and I can
43 hand them up to Your Honour. I'll also give Mr.
44 Fox a hard copy of those cases as well, but I
45 believe he has them for -- already on his hard
46 drive.

47 So if I could just have a moment, I'll just

Submissions for Crown by Cnsl T. Laker**BAN ON PUBLICATION 486.5(1) CCC**

1 quickly -- or actually I'll ask my -- so Mr. Fox
2 -- have we given copies to everyone?
3 THE ACCUSED: I do not, maybe that right here?
4 CNSL T. LAKER: Yeah, this is it. And has a copy been
5 provided to Your Honour?
6 THE COURT: I have a closing submission.
7 CNSL T. LAKER: Yes. Thank you.
8 THE COURT: I don't have the case law yet.
9 CNSL T. LAKER: Yes, so I'm just referring to the
10 closing submissions and Mr. Elias is just bringing
11 up some of the cases, I apologize they're not in a
12 book of authorities.
13 THE COURT: That's fine.
14 CNSL T. LAKER: Now what I propose to do is just for --
15 just -- because I'm trying to be as cautious and
16 cognizant of time in light of the fact that we
17 have moved fairly slowly through this trial, and
18 so what I've done is we've set out our closing in
19 writing. We've summarized the evidence that is
20 relevant, in my submission, with regards to each
21 counts.
22 I'm happy to move through it fairly quickly
23 so that it -- because everyone will have the
24 benefit of having these -- these written
25 submissions --
26 THE COURT: You know what, take your -- take the time
27 you need --
28 CNSL T. LAKER: Okay.
29 THE COURT: -- and don't feel rushed. This is an
30 important part of the trial too and it's the
31 reason why I've said Mr. Fox can have more time if
32 he needs it and we'll go over to another day so --
33 CNSL T. LAKER: Yes.
34 THE COURT: -- if we need to.
35 CNSL T. LAKER: Okay, and it seems like we will, at a
36 minimum for Mr. Fox so --
37 CNSL T. LAKER: Yes. Yes, so Mr. Fox is before the
38 court on three allegations of breaching his
39 probation order imposed by Judge Denhoff on
40 February 25th of 2022. That probation order has
41 been entered as Exhibit 1 on the case.
42 In summary, he is charged with failing to
43 report on April 21st, 2022, failing to remove the
44 prohibited website desicapuano.com on May 16th and
45 disseminating information about Desiree Capuano on
46 May 16th. It is important to note that the
47 underlying offences that led to the imposition of

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1 this probation order. In -- there's something
2 that we actually did forget to grab -- in 2017 Mr.
3 Fox was convicted of criminally harassing his ex-
4 wife by using a website that contained information
5 that humiliated, degraded and intimidated her
6 causing substantial harm. Since that time he's
7 been placed on successive probation orders to try
8 to constrain this type of conduct that amounted to
9 the criminal harassment in his 2017 conviction.
10 This includes constraining him from disseminating,
11 distributing or making publically available in any
12 manner whatsoever, directly or indirectly,
13 information about his ex-wife or people associated
14 with her, including, but not limited to putting
15 such material on the website.

16 We have a book of judicial history that we
17 will provide to Your Honour and to Mr. Fox as
18 well, and those can be entered as an exhibit, in
19 my submission, on the proceedings. And I submit
20 that the court can refer to those prior
21 proceedings.

22 Now with regards to the elements of the
23 offence, in the context of a breach of probation
24 contrary --

25 THE COURT: Can I just stop you on that prior point --

26 CNSL T. LAKER: Yes.

27 THE COURT: -- you know, courts can look at their own
28 records but this -- the basis for saying I should
29 look at the entire history or it should be made an
30 exhibit now on your submissions, not on the trial.

31 CNSL T. LAKER: Yes, Your Honour, I just -- I see your
32 point and because -- yes, I agree. I -- that was
33 my mistake, it shouldn't be entered as an exhibit,
34 but it is something that I -- that I do submit
35 that the court can certainly refer to because it
36 does form part of the court record.

37 THE COURT: Are all the proceedings in this court? Or
38 are you speaking more -- more broadly.

39 CNSL T. LAKER: The -- there have been proceedings both
40 in the Provincial Court, Supreme Court and Court
41 of Appeal.

42 THE COURT: And do you say that I can know about all of
43 those proceedings?

44 CNSL T. LAKER: Yes.

45 THE COURT: Not just the ones that directly touch on
46 this prosecution? Are you saying they're all
47 relevant or --

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1 CNSL T. LAKER: Well, Your Honour, what I can --
2 THE COURT: And I'll just say, I don't have specific
3 knowledge of --
4 CNSL T. LAKER: Yes. The only -- the only prior
5 proceeding that the Crown will be directly
6 referring Your Honour to will be the decision of
7 Judge Denhoff.
8 THE COURT: Well exactly, that seems evident to me.
9 CNSL T. LAKER: Yes.
10 THE COURT: I would know about that one.
11 CNSL T. LAKER: And perhaps what we can do is we can
12 just parse that out and place that before Your
13 Honour rather than the entire proceedings.
14 THE COURT: Well right, if we're going over to another
15 day --
16 CNSL T. LAKER: Mm hmm.
17 THE COURT: -- if I could -- if I could consider that
18 and Crown as well as to whether that's -- that's
19 something that should properly be in front of me
20 in deciding this matter. I don't want to -- some
21 context is important, some context may even be
22 admissible, but I'm -- I'm focused on this
23 decision in this case.
24 CNSL T. LAKER: Yes. I should also note that there is
25 a recent Court of Appeal decision that directly
26 addresses the particular issue that's before Your
27 Honour today, that the -- that we will be asking
28 Your Honour to take into account. And that --
29 that will all become more clear as I go through my
30 submissions.
31 THE COURT: Okay.
32 CNSL T. LAKER: Okay --
33 THE COURT: Well certainly any published decision --
34 CNSL T. LAKER: Which it is.
35 THE COURT: -- right, I have to have regard to what the
36 Court of Appeal has to say in general or perhaps
37 you're saying in this case in specific? I don't
38 know. I'll wait to hear what it is that you point
39 out.
40 CNSL T. LAKER: Thank you. Now to the elements of the
41 offence, in the context of a breach of probation
42 contrary to s. 733.1 of the *Criminal Code*, the
43 Crown must establish beyond a reasonable doubt
44 that the accused (a) committed the act or omission
45 prohibited by the probation order, which is the
46 actus reus of the offence. And (b) knew of the
47 conditions in the probation order and either

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1 knowingly or recklessly failed to act according to
2 those conditions. That's the mens rea.

3 The cases that I've provided to Your Honour
4 that address that, and I'm not going to go into
5 them at length, are *R. v. Blaney* from our Court of
6 Appeal. The *Zora* decision from the Supreme Court
7 of Canada, and as well the *Sugg* [phonetic] which
8 is from the Nova Scotia Court of Appeal and last
9 an article that is called *The Vagueness and*
10 *Impossibility in Probation Conditions* authored by
11 David Burke. Those, in particular *Blaney* and *Zora*
12 specifically set out what I've just spoken of,
13 which is what the Crown has to establish or what
14 the court has to find in order to convict Mr. Fox.

15 And with regards to *Sugg* and the article I've
16 referenced, that addresses the issue of when you
17 have situations where if it's impossible for the
18 accused to comply with a probation order, that the
19 actus reus and the mens rea are negated.
20 Obviously, the Crown here is arguing that that's
21 not the case and -- but for the benefit of the
22 court and for the benefit of Mr. Fox, we felt that
23 it was important to include those authorities.

24 THE COURT: So it doesn't relate to what the Crown has
25 to prove, but did Crown consider the *Valesky*
26 [phonetic] decision from the BC Court of Appeal of
27 the burden on an accused person who wants to raise
28 a reasonable excuse on the burden of proof?

29 CNSL T. LAKER: No, we did not consider that simply
30 because it did not appear from our view of the
31 evidence that a reasonable excuse was a possible
32 defence here.

33 THE COURT: Okay, so you're aware of the case but you
34 didn't see it applying to these facts.

35 CNSL T. LAKER: Yes.

36 THE COURT: Okay.

37 CNSL T. LAKER: Further, courts have determined that a
38 probation order must be interpreted in its entire
39 context and in its grammatical and ordinary sense,
40 harmoniously with the purpose of probation orders,
41 both generally and in the circumstances of the
42 particular case. And that's the *Alleby* [phonetic]
43 decision, which is from the Court of Appeal for
44 Saskatchewan from 2017.

45 In my submission this is the most helpful
46 case for Your Honour to consider. It contemplates
47 a breach of probation where an accused had gone to

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1 essentially a library and the argument was that
2 whether or not the library fell under the context
3 of a community centre. And this accused person
4 had been convicted of various sexual offences with
5 respect to children, and the court ultimately said
6 that you can't just parse out that one word and
7 interpret it. You have to consider both the sort
8 of reason why the probation order has been imposed
9 and the totality of the probation order. And that
10 is certainly helpful in this case, and that is why
11 I drew Your Honour's attention both to the
12 background that has led to these probation orders
13 being imposed on Mr. Fox.

14 Mr. Fox is putting up his hand so I'm just --
15 THE COURT: Oh, sorry Mr. Fox, I didn't see you. Stand
16 up, please.

17 THE ACCUSED: I think I'm familiar with the case of
18 *Alleby* but I think it's a little bit misleading
19 though because they're talking about -- they're
20 not talking about the wording used in a probation
21 order, they're talking about the wording used in a
22 statute, they're talking about when Parliament
23 writes the statute, not when a court writes a
24 probation order condition. Anyway --

25 THE COURT: So Mr. Fox that's --

26 THE ACCUSED: -- that's argument I should bring up when
27 [indiscernible].

28 THE COURT: -- here's -- final submissions usually work
29 like this. If you have -- do you have a pen and
30 paper.

31 THE ACCUSED: Yeah.

32 THE COURT: So make a note of things that you want to
33 say to respond to what you hear the Crown saying.

34 THE ACCUSED: Right.

35 THE COURT: And then you get your full opportunity when
36 you stand up to make your submissions to point out
37 anything like that.

38 THE ACCUSED: Thank you.

39 CNSL T. LAKER: And Your Honour, with regards to the
40 actual conditions that we are concerned with here,
41 they are Counts 4 and 6 of the probation order and
42 they state as follows: that Mr. Fox is to report
43 to a probation officer within 72 hours of your
44 release from custody, only for the purpose of
45 informing your probation officer at that time of
46 the exact steps you have taken to comply with the
47 conditions of this probation order, with the

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1 following conditions of this probation order that
2 within 48 hours of your release from custody, you
3 shall take all necessary steps to ensure that any
4 website, social media page, or other publication
5 which you have authored, created, maintained or
6 contributed to, which contains any information,
7 statements, comments, videos, pictures which refer
8 to or depict by name or description Desiree
9 Capuano, or any of her friends, relatives,
10 employers, co-workers including the websites
11 published under the domain www.desireecapuano.com
12 or www.desicapuano.com are no longer available via
13 the internet or any other means.

14 Once you have reported these exact steps you
15 have taken to comply with that condition, you will
16 no longer be required to report to a probation
17 officer.

18 And then condition 6 states you shall not
19 disseminate, distribute, publish or make
20 publically available in any manner whatsoever,
21 directly or indirectly, information, statements,
22 comments, videos or photographs which refer to or
23 depict by name or description Desiree Capuano or
24 any of her friends, relatives, employers, co-
25 workers.

26 So in this case condition 4 had two
27 obligations; first, Mr. Fox was required to
28 report; and second, he was required to take all
29 necessary steps to ensure the subject website was
30 no longer available via the internet or any other
31 means. For the reporting aspect of the condition
32 he was required to report only for the purpose of
33 informing his probation officer at that time of
34 the exact steps he had taken to comply with the
35 conditions of the probation order. And that once
36 he had reported these exact steps, he was no
37 longer required to report.

38 And then for the requirement that Mr. Fox
39 take all necessary steps to ensure that
40 desicapuano.com is no longer available via the
41 internet, this has already been subject to
42 judicial commentary. And this is what I
43 referenced before, is that recently the Court of
44 Appeal in Mr. Fox' latest appeal found at
45 Paragraph 28 that the plain meaning of the phrase
46 "no longer available" clearly indicates that Mr.
47 Fox was required to ensure that the website was

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1 not available during the entire probation period.
2 THE COURT: So was that an appeal in relation to this
3 exact same probation order or is that --
4 CNSL T. LAKER: It's the exact same wording.
5 THE COURT: Exact same wording of a different probation
6 order term?
7 CNSL T. LAKER: Yes.
8 THE COURT: Same -- same wording entirely or same, you
9 know, two, three wordings. Three words.
10 CNSL T. LAKER: Same wording entirely.
11 THE COURT: Okay.
12 CNSL T. LAKER: The only -- the only difference is the
13 reporting condition that -- I'll hand up the Court
14 of Appeal decision for Your Honour -- Mr. Fox, do
15 you need this? Actually no --
16 THE ACCUSED: [indiscernible].
17 CNSL T. LAKER: Yeah. The only difference is that
18 Judge Denhoff added the reporting aspect of
19 condition 4 -- into condition 4 of her order.
20 Other than that where you go from "within 48 hours
21 of your release from custody" all the way down to
22 "or any other means", that is the exact same
23 wording I -- I believe. I'm quite certain but
24 perhaps -- well here, we've got it here. Page 6
25 of the Court of Appeal decision references the
26 condition that he was --
27 THE COURT: Okay, thank you.
28 CNSL T. LAKER: Thank you. What I'll also say with
29 regards to that condition is that it's not vague
30 or ambiguous. There's the *Traverse* [phonetic]
31 decision, which I've provided to Your Honour, and
32 at Paragraphs 34 to 36 the court found that the
33 probation conditions must be drafted with
34 sufficient clarity and specificity to give an
35 accused fair notice of the conduct required or
36 prohibited by the conditions. A probation
37 condition is considered vague where an accused
38 cannot determine when he is at risk of breaching
39 that condition.
40 And in that case they also referenced the
41 David Burke article that we've provided to Your
42 Honour at Paragraph 38 and that's simply a helpful
43 decision with regards to dealing with that
44 particular issue as to whether or not a condition
45 is possibly vague.
46 But the Crown submits here that condition 4
47 gave Mr. Fox fair notice of the conduct required.

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1 It explicitly expressed what was required, that he
2 ensure that the website was no longer available
3 via the internet or any other means, and when he
4 was required to fulfil that obligation, within 48
5 hours from his -- from custody -- of his release
6 from custody. While condition 4 did not detail
7 precisely how Mr. Fox should take the website
8 offline, the condition must be interpreted in its
9 entire context, per Alleby, and that context
10 includes that Mr. Fox originally created,
11 published and maintained control over the website,
12 is proficient in the maintenance of websites, and
13 has been bound by this condition over multiple
14 probation orders.

15 In these circumstances he could reasonably be
16 expected to know what steps were required to
17 ensure that the website was no longer available.

18 Now with regards to Count 1, which I will
19 characterize as the failing to report allegation,
20 the court has heard that Mr. Fox was released on
21 April 17th of 2022. At that time he was bound by
22 the conditions of the probation order and he was
23 well aware of the conditions, which included a
24 requirement to report. Mr. Fox reported for the
25 first time at 275 East Cordova Street on April
26 19th of 2022, and on that date he met with Julie
27 Seif [phonetic] who was one of the duty officers
28 on that date, and she testified the following.

29 That part of her job as the duty officer is
30 to ensure that people are referred to the correct
31 officer or office. She met with Mr. Fox because
32 his assigned probation officer, Mr. Trimmus
33 [phonetic], was not available. She had no prior
34 familiarity with Mr. Fox. She said the
35 administrative staff had the probation order
36 printed up for her, she quickly reviewed the
37 order, and called Mr. Fox into one of the rooms to
38 review. After she reviewed the probation order
39 with him, she gave him the next reporting date and
40 that reporting slip was entered as Exhibit 3. She
41 said that when she reviews the order, she goes
42 through the conditions, tells them about non-
43 compliance and asked them if they have questions
44 about the order.

45 She was candid in saying that there was a lot
46 she did not remember since it was back in April,
47 but she remembers going through the order,

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1 stamping it and knowing that he was Coulis'
2 [phonetic] client, giving him a reporting date to
3 come back. She does recall that Mr. Fox felt
4 strongly that he had satisfied his requirements,
5 but she felt that he had not done -- that he had
6 not, so she told him to come back to report.

7 In cross-examination she said that she does
8 not recall whether Mr. Fox told her he had taken
9 no steps to cause the website to be taken down
10 because it was already offline, but she did agree
11 it was a possibility.

12 Mr. Trimmus testified that he was assigned to
13 Mr. Fox' file following his sentencing on February
14 25th. On April 21st, 2022 he confirmed that Mr.
15 Fox did not report to him or any other Community
16 Corrections office. This was confirmed via a
17 review of CORNET, after Mr. Fox failed to report,
18 he submitted a breach report. Mr. Trimmus did
19 provide evidence about co l lateral contacts he had
20 regarding the probation order. He spoke with the
21 police on April 19th and he also spoke with ad hoc
22 Crown Counsel, Chris Johnson. Mr. Trimmus also
23 looked up the subject website and he saw that one
24 of the sites was on the internet but it was
25 password protected.

26 Mr. Trimmus was asked questions about his
27 interpretation of condition 4. He was asked in
28 direct what is your role in monitoring this
29 condition, and he replied that he would first see
30 if sites are still on the internet, and have a
31 discussion with Fox about what steps he had taken
32 to remove them. He said that it was his job to
33 know more about what Mr. Fox had done to remove
34 the sites and this was what he expected to do on
35 April 21st.

36 The Crown submits that Mr. Trimmus is a
37 careful conscientious probation officer. He
38 apprised himself of what he perceived was the
39 obligations with regards to the probation order
40 and he was fully expecting Mr. Fox to attend on
41 April 21st and that potentially Mr. Fox was going
42 to have to report following that date as well.

43 In cross-examination Mr. Trimmus indicated
44 that it was up to the probation officer to
45 determine if Mr. Fox had satisfied his reporting
46 condition. That it was implicit in the last
47 sentence of condition 4. He said once you have

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1 complied with telling me what steps you've taken,
2 my sense is that until that's done, you would be
3 required to report. He disagreed with Mr. Fox'
4 proposition that condition 4 was satisfied by Mr.
5 Fox possibly informing Ms. Seif that he had taken
6 no steps. He said his interpretation was that
7 some steps had to be taken -- had to be taken
8 regarding taking down the website, and that he
9 would have wanted a careful -- or he would have
10 wanted to have a meaningful detailed description
11 about what steps Mr. Fox had taken. Mr. Trimmus
12 told the court that he was not looking for Mr. Fox
13 to report over and over.

14 So in conclusion with regards to Count 1, Mr.
15 Fox was required to report to a probation officer
16 about what steps he had taken to take down the
17 subject websites. There was no question that Mr.
18 Fox was aware of the requirement. In fact, Mr.
19 Fox had the benefit of Judge Denhoff's reasons for
20 judgment dated February 25th, 2022, I've got extra
21 copies of that. I didn't staple it because I
22 didn't believe a staple would work.

23 THE COURT: Thank you. These look like the transcript
24 rather than the reasons.

25 CNSL T. LAKER: Yes, this is the transcript.

26 THE COURT: So in other words it was an oral decision?

27 CNSL T. LAKER: Yes.

28 THE COURT: Okay, thank you.

29 CNSL T. LAKER: At --

30 THE COURT: Hold on, I'm just looking at it, it looks
31 like the transcript, it doesn't look like the
32 decision. It looks like -- I just want to make
33 sure --

34 CNSL T. LAKER: Oh, Your Honour, I apologize --

35 THE COURT: I'll give it back to you. It looks like
36 Mr. Fox' evidence, submissions, submissions.

37 CNSL T. LAKER: Yes, thank you. I apologize.

38 THE COURT: No, that's fine.

39 CNSL T. LAKER: What I'll do is I will just take it out
40 of here, perhaps Madam Clerk can staple it. Thank
41 you. Mr. Fox has that.

42 THE COURT: Thank you. Yes, oral reasons for judgment.

43 CNSL T. LAKER: Yes, I apologize --

44 THE COURT: No, no, that's all right, this is what you
45 meant to give me and I have it now. Okay.

46 CNSL T. LAKER: Yes. So if we go to Paragraph 23 to
47 28, Judge Denhoff states here:

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1
2 [23] Mr. Fox rhetorically asked the
3 prosecutor what further steps, other than
4 sending a supposed email to the editor of the
5 website, he could have taken to ensure that
6 the website was no longer available. To
7 begin, I do not believe that Mr. Fox sent an
8 email to the editor of the website. Mr. Fox
9 refused to produce the email to the police
10 when asked and also failed to offer to
11 produce the email when his laptop was
12 available in court during the trial.

13
14 [24] In terms of steps he could have taken,
15 he could not have launched the website as he
16 has admitted to doing.

17
18 [25] Even if I were to believe that Mr. Fox
19 only told the police he launched...

20
21 Yes -- yes, I'm just going through, I just want to
22 hit the actual or discuss the -- there we are. If
23 we could just turn to Paragraph 26 -- just one
24 moment. What I'll do rather than just read this
25 all out for Your Honour --

26 THE COURT: Mm hmm.

27 CNSL T. LAKER: -- is I'll just characterize that here
28 the Honourable Judge Denhoff is discussing the
29 various methods in which Mr. Fox was arguing that
30 he was not able to remove the website and she was
31 discussing in her decision that her conclusion was
32 that he did have care and control and could have
33 removed the website. And she says that -- and she
34 finally concludes at Paragraph 29 that:

35
36 [29] Mr. Fox had control of the website
37 www.desicapuano.com within 48 hours of his
38 release and continuing past that time, as he
39 repeatedly boasted to the police. As such,
40 he was obligated to ensure that the website
41 did not continue to be available via the
42 internet. He failed to do so and he is
43 guilty of breach of condition 6 of the 12-
44 month probation order issued by Judge Rideout
45 at that time.

46
47 Now -- so that was his -- that was her reasons for

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1 decision or reasons for judgment, and as I state
2 in the Crown's closing submissions at Paragraph
3 23, Judge Denhoff here was outlining the scope of
4 the conditions and the steps that Mr. Fox could
5 and should have taken to comply with identically
6 worded probation condition.

7 So turning back to the Crown's closing
8 submissions at Paragraph 24 Mr. Fox reported in on
9 April 19th and his order was reviewed with him by
10 Ms. Seif. He was told to come back and meet Mr.
11 Trimmus since he was his assigned probation
12 officer. At this time on April 19th, there was no
13 information before Community Corrections about
14 what steps Mr. Fox has taken with regards to the
15 subject website. This was information that he was
16 told he had to provide to Mr. Trimmus on April
17 21st. He failed to report on April 21st and he
18 failed to provide any information about what steps
19 he had taken with regards to the website.

20 In keeping with the court's language in
21 *Alleby*, Mr. Fox was required to continue reporting
22 to Mr. Trimmus until Mr. Trimmus was satisfied
23 that he had a proper description of the steps Mr.
24 Fox had undergone to take down the website. This
25 is an interpretation of the probation order that
26 considers the order's entire context in the
27 circumstances of this particular case.

28 Mr. Fox chose his own self-serving
29 interpretation and he subsequently, in keeping
30 with his erroneous interpretation, chose not to
31 report. An accused's erroneous legal
32 interpretation of an order does not negate mens
33 rea for a breach of that order. And that's in the
34 *Alleby* decision at Paragraph 41 to 43.

35 Mr. Fox' conscious decision to not report on
36 April 21st is therefore a clear breach of
37 condition 4 of the probation order.

38 So we can then turn to Counts 2 and 3, which
39 are -- relate to the steps that Mr. Fox was
40 required to take to remove the website and also
41 making information about Mr. Capuano publicly
42 available.

43 So the Crown submits that the second breach
44 of condition 4 and breach of condition 6 are
45 related. Mr. Fox failed to take any steps to
46 remove the website, *desicapuano.com*, ensuring that
47 information about her continued to be publicly

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1 available, contrary to condition 4. He also
2 disseminated new information about her contrary to
3 condition 6.

4 The evidence to support these convictions are
5 that of Catherine Meiklejohn, Sergeant McElroy,
6 Sergeant Shuck [phonetic] and Johnny Lamb. The
7 court has heard via Ms. Meiklejohn and Sergeant
8 McElroy that on May 16th the website was available
9 on the internet. Hunchley [phonetic] printouts
10 entered as Exhibit 5, document her access to the
11 website.

12 Further, Sergeant Shuck's report shows that
13 from a forensic analysis of Mr. Fox' phone, there
14 was data shown that Mr. Fox had some control and
15 access to the website.

16 So the first aspect of -- or the first
17 portion of the evidence that's relevant here is
18 the evidence that the website was available on the
19 internet, and that occurred on May 16th. And Ms.
20 Meiklejohn was the primary witness with regards to
21 that, and she testified that she is a data analyst
22 with the VPD and that on file 22-66177, on that
23 date, she was asked by either McElroy or Kim to
24 check a site because they had heard it was up and
25 running without a password. She located the
26 website by entering www.desicapuano.com which she
27 recognized from previous years. She noted that on
28 the left-hand of the screen there were some recent
29 blog posts. In conclusion, she observed that the
30 desicapuano.com website was available on the
31 internet on May 16th.

32 Further, using the Hunchley software that is
33 a screen capture tool, which she uses in a very
34 simple capacity, she captured screenshots of the
35 website. The Hunchley program then provides a
36 list of all the captures as well as creating a
37 record of her access to the website on that day.
38 She then printed the specific pages from the
39 website in PDF format, which prints with a cover
40 page.

41 And Your Honour has had the benefit of seeing
42 those and they were entered as Exhibit 5 and they
43 are the package of Hunchley captures of the blog
44 posts from desicapuano.com and Ms. Meiklejohn
45 confirmed that the printouts in Exhibit 5 are what
46 she saw on May 16th. The front page of the
47 screenshot captures or a screenshot capture shows

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1 the website at the top, along with the name of the
2 blog post. It also shows the date and time that
3 the screen was obtained, and provides a hash tag
4 identifier, which is a unique identifying number.

5 Mr. Fox suggested to her that there was no
6 way of knowing on May 16th that she actually
7 viewed the desicapuano.com website, rather than
8 being routed to some other website, and she
9 replied correct. However, this does not diminish
10 her evidence that what she saw, documented by her
11 Hunchley screen captures, was accessed by the
12 method of entering the website's URL. In other
13 words, while Ms. Meiklejohn cannot speak to where
14 every element of the material she viewed was
15 stored on the internet, her evidence is clear that
16 she viewed it by way of direct access to
17 desicapuano.com.

18 She also confirmed under cross that when she
19 attempted to access the website on May 3rd, it was
20 not publicly available because credentials were
21 needed to enter it, and she said that when she
22 looked at the website's previous address,
23 desireecapuano.com, she observed what she
24 described as a placeholder, suggesting that that
25 domain had expired on -- I believe that would be
26 -- I think it's April 12th, 2022, pending renewal
27 or deletion.

28 Sergeant Amber McElroy also provided evidence
29 about her observations of the website being
30 available on May 16th. She advised the court that
31 when she was working at the VPD detachment at 3585
32 Graveley Street, Vancouver, she was looking over
33 Ms. Meiklejohn's shoulder when the website was
34 searched and she observed the website on Ms.
35 Meiklejohn's computer with that URL, along with a
36 header and a picture. She confirmed that Exhibit
37 5 was the package created by Ms. Meiklejohn. She
38 was specifically asked about page 22, and I'm not
39 going to take Your Honour to the Hunchley
40 printouts, obviously that's something Your Honour
41 can do when we finish with court, and I'll -- what
42 I can --

43 THE COURT: Might this be a good time to just pause --

44 CNSL T. LAKER: It might be a good time.

45 THE COURT: -- in your submissions. I know you're only
46 on page 10 of 18 --

47 CNSL T. LAKER: Yes.

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1 THE COURT: -- so I think to finish would take us --
2 CNSL T. LAKER: Too long.
3 THE COURT: So just pause at the top of page 10.
4 I think you should get a full day
5 continuation here, so that I can hear the end of
6 the Crown's submissions, I can hear Mr. Fox's
7 submissions and then my hope would be that I could
8 take some time to think about it and give you a
9 decision that day.
10 CNSL T. LAKER: Yes.
11 THE COURT: That's why I'm saying get a day. So,
12 adjourn to the judicial case manager to fix that
13 one day. So, Mr. Fox -- I'll bring Mr. Fox back
14 on a day after that, to confirm the day that's
15 been set. So, which -- which date are Crown
16 suggesting? Could it be tomorrow?
17 CNSL T. LAKER: Yes, I think -- I think the earlier,
18 the better, Your Honour.
19 THE COURT: Mm-hmm.
20 CNSL T. LAKER: We will email the JCMs, because that's
21 what we've been doing for this case and then we
22 will have a date to confirm with Mr. Fox tomorrow.
23 And before Mr. Fox leaves, I'd just need to
24 review what dates he's [indiscernible]. I think I
25 still actually have a record of the dates that Mr.
26 Fox isn't available coming up.
27 THE COURT: Do you?
28 CNSL T. LAKER: Yes.
29 THE COURT: Okay.
30 CNSL T. LAKER: I'm quite certain.
31 THE COURT: So, you're suggesting that you could both go
32 to the JCM, get the day and also that I should
33 remand Mr. Fox to tomorrow afternoon --
34 CNSL T. LAKER: Yes.
35 THE COURT: -- by video, to confirm the date set?
36 CNSL T. LAKER: Yes.
37 THE COURT: Okay.
38 CNSL T. LAKER: Thank you.
39 THE COURT: So, I'll adjourn the matter to the JCM fix
40 date court at 9:00 a.m., for the purpose of
41 setting a further day and adjourn Mr. Fox to
42 courtroom 101 by video, or 102.
43 Does Crown have a preference of which court?
44 Just to confirm that date, by video, at 2:00 p.m.
45 in the afternoon.
46 CNSL T. LAKER: I think 102.
47 THE COURT: One-o-two then, 102, tomorrow afternoon at

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1 2:00, Mr. Fox, by video, to confirm the
2 continuation date that Crown are going to set in
3 the morning.
4 A SHERIFF: Order in court, all rise.
5 THE COURT: Thank you.
6
7 (PROCEEDINGS ADJOURNED TO MARCH 29, 2023, AT
8 2:00 P.M.)
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11 Transcribers:
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13 P. Moore
14 R. Richardson
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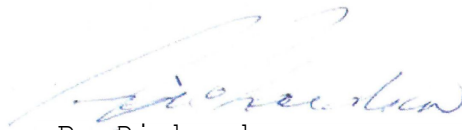
I hereby certify the foregoing to
be a true and accurate transcript
of the evidence recorded on a sound
recording apparatus, transcribed to
the best of my skill and ability.

A handwritten signature in blue ink, appearing to read 'P. Moore'. The signature is fluid and cursive, with a large initial 'P' and a trailing flourish.

P. Moore
Court Transcriber

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I hereby certify the foregoing to
be a true and accurate transcript
of the evidence recorded on a sound
recording apparatus, transcribed to
the best of my skill and ability.

A handwritten signature in blue ink, appearing to read "R. Richardson", is written over the printed name.

R. Richardson
Court Transcriber