

File No: 244069-10-BC
Registry: Vancouver

In the Provincial Court of British Columbia

REX

v.

PATRICK HENRY FOX

**ORAL REASONS FOR JUDGMENT
OF
THE HONOURABLE JUDGE OULTON**

BAN ON PUBLICATION 486.5(1) CCC

Crown Counsel:

**T. Laker
R. Elias**

Appearing on his own behalf:

P. Fox

Place of Hearing:

Vancouver, B.C.

Date of Judgment:

May 15, 2023

[1] **THE COURT:** Mr. Fox is charged on Information 244069-BC-10 with three counts of breaching his probation order (the "Probation Order"). Mr. Fox is self-represented. Mr. Fox has been in custody on these charges since his arrest on May 16, 2022. He was detained in July 2022. There has been no review of that decision. The Probation Order was for a period of three years. It was imposed by Judge Denhoff, when Mr. Fox was convicted after a trial on February 25, 2022, for breaching a previous probation order.

[2] In Count 1, Mr. Fox is charged with failing to report as directed on April 21, 2022.

[3] Count 2 alleges that on May 16, 2022, Mr. Fox failed, within 48 hours of his release from custody, to take all necessary steps to ensure that any website which he had authored, maintained, or contributed to, which contained any information relation to, or depicting D.C., was no longer available on the internet. I am extracting relevant portions of a lengthy condition.

[4] Count 3 charges Mr. Fox, on May 16, 2022, with making publicly available information, comments, or photographs which refer to or depict D.C. There is a publication ban in effect in these proceedings, and so I will be referring to D.C. occasionally by name, and that would be redacted if any copy of these reasons were ordered.

[5] The Crown proceeded by indictment on the information. Crown made an application to change their election from proceeding summarily, to proceeding indictably, at the pretrial conference in October 2022, relying on the authority of paragraph 44 of *R. v. Dudley*, 2009 SCC 58. Mr. Fox consented to the Crown's

application. When proceeded with indictably, the maximum sentence for a breach of a condition of probation is four years in jail.

[6] The trial took place over seven days, with three days of pretrial conference. The Crown with conduct at the outset was not available for the trial. Mr. Fox made several applications for disclosure, some of which I granted, which I will discuss later in these reasons. After closing submissions on March 28, I reserved my decision to today, May 15, 2023.

[7] On May 4, 2023, the Criminal Registry forwarded me further written submissions from Mr. Fox, with a cover letter attached from Crown. Mr. Fox's letter raised the argument that Counts 2 and 3 were subject to the rule in *R. v. Kienapple* [1975] 1 S.C.R. 729.

[8] Crown disagreed, and provided me a written reply to this new submission on May 9. I will now file both Mr. Fox's letter, which is in a brown envelope, and the Crown's reply, which is separate, as the next marked Exhibits, to complete the record of the arguments before me. So the envelope, the next numbered exhibit and letter, the one after that, please.

[EXHIBITS NOTATED IN PROCEEDINGS TRANSCRIPT]

[9] THE CLERK: Okay.

[10] THE COURT: Crown called nine witnesses at the trial, probation officers Julia Seath and Koulis Trimis; police officers Sergeant McE[roy], Detective Dent, Constable Roberts, and Detective Kim; VPD civilian analyst Catherine Meiklejohn; VPD manager of IT, Johnny Lam; and expert witness Sergeant Shook from VPD's

Digital Forensic Unit.

[11] Crown sought rulings that two statements made by Mr. Fox were voluntary. The first was a statement made by Mr. Fox to Detective Dent in September 2020. Detective Dent and Constable Roberts were called in relation to this. The second was a statement made on May 16, 2022, after Mr. Fox's arrest for these charges. Sergeant McElroy and Detective Kim testified about that. Crown advised that it sought to hold these statements for cross—examination only. I ruled both statements voluntary. Mr. Fox did not testify. I will omit citations from these oral reasons, but I will insert them later if a transcript of these reasons is ordered.

Issues

[12] Count 1, has Crown proven Mr. Fox's subjective *mens rea* for failing to report? In the alternative, has Mr. Fox established a defence of reasonable excuse for failing to report?

[13] Has Crown proven Counts 2 and 3 beyond a reasonable doubt?

[14] Do the principles enunciated in *R. v. Kienapple* apply to Counts 2 and 3?

Legal Principles

[15] Breach of probation has a subjective fault requirement: *R. v. Zora*, 2020 SCC 14 at paras. 41-45, cited in *R. v. Blaney*, 2022 BCCA 98.

[16] As the B.C. Court of Appeal decision in *R. v. Blaney* sets out at paragraphs 43 and 44:

[43] In *Zora*, the court set out the requirements for the proof of subjective *mens rea* for a failure to comply offence: [The offence under consideration in the *Zora* case was breach of bail]

[109] Subjective *mens rea* generally must be proven with respect to all circumstances and consequences that form part of the *actus reus* of the offence. (*Sault. Ste. Marie*, at pp. 1309-10; *Pappajohn v. the Queen* [1980] 2 S.C.R. 120 at 139, per Dickson J., dissenting, but not on this point). Therefore, subjective *mens rea* under s. 145(3) can be satisfied where the following elements are proven by the Crown:

1. The accused had knowledge of the conditions of their bail order, or they were willfully blind to those conditions; and
2. The accused knowingly failed to act according to their bail conditions, meaning that they knew of the circumstances requiring them to comply with the conditions of their order, or they were willfully blind to those circumstances, and failed to comply with their conditions despite that knowledge; or

The accused recklessly failed to act according to their bail conditions. Meaning that the accused perceived a substantial and unjustified risk that their conduct would likely fail to comply with their bail conditions and persisted in this conduct.

[17] The *Blaney* case concerned a breach of a long-term supervision order under s. 753 of the *Criminal Code*, not a breach of probation under s. 733. The B.C. Court of Appeal in *Blaney* continued at paragraph 44:

[44] Although there is no appellate authority dealing with the *mens rea* requirement for s. 753.3(1), and *Zora* concerned s. 145(3) of the *Criminal Code* which has a slightly different statutory construction, I agree with the parties that the requirements set out in *Zora* are applicable to this failure to comply offence. In that regard, I note that in *R. v. Docherty* [1989] 2 S.C.R. 941, the Court held that proof of subjective *mens rea* was required for a breach of probation offence (now s. 733.1). The statutory construction for the two offences (s. 753.3(1) and s. 733.1) is similar; both state that an offender “who, without reasonable excuse, fails or refuses to comply” with an LTSO or probation order is guilty of the offence.

[18] What I take from this is the point that I began with: Section 733.1 of the *Criminal Code* creates a subjective *mens rea* offence.

[19] If Crown succeeds in proving Mr. Fox's subjective *mens rea* for Count 1, Mr.

Fox may advance a reasonable excuse for not following a condition of his probation order. That reasonable excuse must be established on a balance of probabilities: *R. v. Goleski*, 2014 BCCA 80.

[20] The onus does not shift to provide a lawful excuse unless the Crown has first proven each element of the offence: *R. v. Truong*, 2008 BCSC 1151 at para. 31.

Count 1

[21] The Probation Order is Exhibit 1 in the trial. I accept the Crown has proven beyond a reasonable doubt that Mr. Fox was bound by this Probation Order on April 21 and May 16, 2022. The Probation Order is presumptively valid, its conditions based upon facts proven in the underlying prosecution which gave rise to the probation order. Section 733.1(1) of the *Criminal Code* reads:

An offender who is bound by a probation order and who, without reasonable excuse, fails or refuses to comply with the order is guilty of (a) an indictable offence and is liable to imprisonment for a term not exceeding four years.

[22] To prove this count, the Crown called Julia Seath, a probation officer and the duty officer to whom Mr. Fox first reported on April 19, 2022, and Koulis Trimis, a probation officer and the probation officer assigned to Mr. Fox, to whom Mr. Fox failed to report on April 21, 2022. I also have the Probation Office's Client Log for April 19 to 21st, 2022, which is Exhibit 4 in this trial.

[23] The Client Log is kept in the usual "and ordinary course of business by

probation officers. It is a business record and admissible under the common law business records exception. It is a reliable document that has a circumstantial guarantee of trustworthiness.

[24] Condition 4 of the Probation Order is the basis of the charge in Counts 1 and 2 of the information. Condition 4 reads [as read in]:

Report to a probation officer within 72 hours of your release from custody only for the purpose of informing your probation officer at that time of the exact steps you have taken to comply with the conditions of this Probation Order, with the following condition of this Probation Order that: within 48 hours of your release from custody, you shall take all necessary steps to ensure that any website, social media page, or any other publication which you have authored, created, maintained, or contributed to, which contains any information, statements, comments, video, pictures which refer to or depict, by name or description, D.C. or any of her friends, relatives, employers, or coworkers, including the websites published under the domain [website], and [website] are no longer available via the internet or any other means. Once you have reported these exact steps you have taken to comply with that condition, you will no longer be required to report to a Probation Officer.

[25] in my view, Condition 4 has two parts: The reporting part, and the ensuring no criminal material is publicly available via the internet, or by any other means, part. The latter imports a continuing obligation on Mr. Fox for the length of his Probation Order. The former is temporally limited. In analyzing Count 1 of the information, my focus is on the reporting part of Condition 4.

[26] Mr. Fox was released from custody April 17, 2022.

[27] He reported to a probation officer in person on April 19, 2022.

[28] He was seen by duty officer and probation officer Julia Seath. Ms. Seath made the following entry entitled "initial Report" on the Client Log at 8:51 :56 a.m. on April 19, 2022. The entry describes the meeting she had with Mr. Fox at 8:15 a.m.,

approximately 45 minutes earlier. The relevant portion reads [as read in]:

Client only needs to report for the purposing (sic) of explaining "the exact steps you have taken to comply with the conditions (sic)... Client very argumentative that he does not have to report again as per condition number 3. Writer explained I am not his P.O. and only his P.O. can determine and take necessary steps to verify he has complied with the condition - Duty officer too busy to make this determination. Writer reviewed the order, explained the conditions in s. 733, 732 of the CCC. Client signed the order indicating his understanding and consequences of non-compliance.

[29] When she testified, Ms. Seath remembered going through the Probation Order with Mr. Fox, knowing Mr. Fox was Koulis Trimis' client. She remembered that Mr. Fox felt he had satisfied Condition 4. She felt, no, he had not. She felt he had to come back and let Koulis know what he had done to fully comply with Condition 4. She gave him a copy of a reporting slip directing him to return on April 21, 2022 and meet with Koulis Trimis. Mr. Fox did not return.

[30] In cross-examination, Ms. Seath did not remember Mr. Fox telling her on April 19, 2022, that the website was already down, therefore, he had taken no steps as there were no steps to take - the website was already offline.

[31] Ms. Seath said, "[i]t's a possibility you said that to me. I cannot say with certainty".

[32] Corroboration with Mr. Fox's suggestion that he did, in fact, say this to Ms. Seath is found in two places in the Client Log. The entry of April 20, 2022, at 11:21:38, is composed by probation officer Koulis Trimis. It is entitled "Collateral Summary" and it reads [as read in]:

Spoke with Chris Johnson Crown...Says Patrick called him yesterday to complain re: being directed to report again - his position is that he has not taken any steps because the websites are no longer active...

[33] The entry at 14:08:34, on April 20, 2022, also composed by Mr. Trimis, reads "Correspondence with Chris Johnson", is the bolded title, and the text below is [as read in]:

Hi Chris, I spoke to the duty officer, Julia Seath, and she tells me Fox simply told her he didn't have to take any steps as the site had already been shut down. He was apparently quite argumentative and didn't provide anything more specific.

[34] A little earlier that morning, Mr. Trimis had performed his own internet search. The Client Log entry at 10:15:09, entitled, "General" and written by Mr. Trimis reads: "Websites as per condition" is the bolded title and the text below is [as read in]:

This P.O. performed an internet search of websites noted in Condition, [website] - yielded no results aside from media references to the original offence.

[website] - no public access to such a site, popup noting "authorization is required by http://[website] and user name/password required".

[35] Mr. Fox argues, relying on Exhibit 4 and his cross-examination, that having reported to a Probation Officer once and having told that Probation Officer that he took no steps because the website was already down, he had complied with Condition 4.

[36] Mr. Fox further argues that there is no requirement on his Probation Order that he is to report to a probation officer once, and "thereafter as and when directed". That is true.

[37] Instead, the relevant part of Condition 4 stipulates that the reporting is only for the purpose of Mr. Fox explaining to a probation officer, or his probation officer,

the exact steps he has taken to ensure that the website is no longer available via the internet. The condition ends with [as read in]:

Once you have reported these exact steps you have taken to comply with that condition, you will no longer be required to report to a Probation Officer.

[38] The Condition is ambiguous, referring as it does to both “a probation officer” and “your probation officer”. The Crown takes the position that the requirement to report was not complied with, unless it was to Mr. Fox's own probation officer. The second reporting on April 21 was more than 72 hours after Mr. Fox's release from custody. The more significant problem Crown faces is that “ambiguity should be resolved in a manner most favourable to accused persons”: the *dicta* of Lamer C.J. in *R. v. McIntosh*, [1995] 1 SCR 686.

[39] At paragraph 38 of the *McIntosh* decision, former Chief Justice Lamer cites former Chief Justice Dickson in *Marcotte*, who noted:

When freedom is at stake, clarity and certainty are of fundamental importance.

[40] The following passages from the Manitoba Court of Appeal decision in *R. v. Traverse*, 2006 MBCA 7 are also helpful in analyzing the reporting part of Condition 4:

Vagueness exists where the accused who knows that he is bound by a condition of a probation order cannot determine when he is at risk of breaching that condition. Individuals should not be subjected to criminal sanction if they do not have fair notice of the prohibited conduct. As was stated by the Saskatchewan Court of Appeal in *Zarubin* (at para 3):

Because a breach of a condition in a probation order can give

rise to a charge under the *Code* against an accused, it is important that it be drafted with specificity and clarity sufficient to enable it to serve as the foundation for a criminal charge should one be warranted.

The accused must have knowledge both of the conditions of the order and of the consequence of his conduct in wilful breach of those conditions. If a condition is vague, a probationer cannot determine when his conduct is at risk of breaching that condition.

[41] My view is that the spirit, ulterior purpose, or overall intent of Condition 4 is to ensure the continuing obligation part of Condition 4, that criminal material is no longer available via the internet or by any other means. Its intent is protective, upholding the ban on criminal material being publicly available because of the underlying prosecution and conviction in 2017. The requirement to tell a probation officer the exact steps taken to ensure that this was so, is an intermediary mechanism to give comfort to the probation office that the ulterior purpose of Condition 4 has been achieved and that after that, no further reporting was necessary.

[42] Given that there is no requirement to report "thereafter as and when directed" on this Probation Order, that Condition 4 refers both to "a probation officer" and "your probation officer", which I have found to be ambiguous, that Mr. Fox did speak of the exact steps he had taken to a probation officer when he reported on April 19, 2022, and that Koulis Trimis's search on April 20, 2022, found that no criminal material was publicly available on that date, I do not find that Crown has proven Mr. Fox's subjective *mens rea* for failing to report on April 21, 2022.

[43] Either Mr. Fox complied by reporting to Ms. Seath that he took no steps because the website was already down, or the ambiguity in the wording of the

condition, which must be resolved in Mr. Fox's favour, combined with the lack of requirement to report "thereafter as and when directed", give me a reasonable doubt that he had the subjective *mens rea* to fail to report a second time.

[44] This case is similar to the *Blaney* case in that the same facts underlie either the Crown's proof of subjective *mens rea* of the offence and the accused's potential defence of reasonable excuse. Unlike the *Blaney* case, however, Mr. Fox did not testify.

[45] Given that I have found Crown did not establish Mr. Fox's subjective *mens rea* for this offence, I do not need to consider whether or not Mr. Fox can establish a defence of reasonable excuse through the Crown's case alone and I will not do so. I acquit Mr. Fox of Count1 of the information.

Count 3

[37] Condition 6 of the Probation Order reads [as read in]:

You shall not disseminate, distribute, publish, or make publicly available in any manner whatsoever, directly or indirectly, information, statements, comments videos, or photographs which refer to, or depict, by name or description, D.C. or any of her friends, relatives, employers, or coworkers.

[46] On May 3, 2022, VPD civilian analyst Catherine Meiklejohn was asked by police to search online for "[website]". She performed a Google search. The result was for a "site indice page". This is an analysis of a website: Who visits? How many visitors? It is not the website itself. Ms. Meiklejohn confirmed that she could not see the website, just an analytical breakdown of the website.

[47] Ms. Meiklejohn then entered “[website]” and she saw that the site was password—protected. In other words, it was not publicly available.

[48] Sergeant Shook testified that the cell phone seized from Mr. Fox on May 16, 2022 revealed that the user of the phone, “Patrick”, made searches of Google, webmaster tools, and the term “D.C.”, “D.C. websites”, “D.C.”, and “[website]”. Fourteen such searches were performed May 13 and 14, 2022. This is at page six of Exhibit 14. Also searched was Kyle Dent, detective. Sergeant Shook explained that Google webmaster tools allow users to host and administer websites.

[49] On May 16, 2022, Ms. Meiklejohn was again asked to search online for “[website]”. On this occasion, upon entering that search term into Google, Mr. Meiklejohn located the website online. On the left-hand side of the page was a list of recent blog posts. Mr. Meiklejohn performed both of these searches on May 3 and May 16, using Hunchly software. Hunchly is a screen capture tool. It allowed Ms. Meiklejohn to take a picture of each page she was looking at. The Hunchly software shows the date and time that Ms. Meiklejohn performed the search. This search was an open-source search, or an internet search. “I expect any user would see what I saw,” she said.

[50] Exhibit 5 is the 41-page document Ms. Meiklejohn produced. There are eight blog posts with a date range from March 29, 2022 to May 11, 2022. Seven out of the eight blog posts have dates after May 3, 2022. The Exhibit separates each blog post from the next with a cover page from Hunchly, which shows the date and time of the screen captures. The subject matter of these blog posts include three posts

purportedly from D.C., including the first page of the first blog post provided, which has three pictures of a woman identified by Sergeant McElroy to be D.C., and is entitled, "I defraud the public and still nothing happens to me", subtitled, "Perspective: D." This blog post is dated May 8, 2022.

[51] There are three blog posts about Mr. Fox's court cases, including cites from a transcript that was subject to a publication ban. Without a court order, this material was accessible only to the parties, which included Mr. Fox. There was no court order allowing publication. The subject matter of the blog post is personal and idiosyncratic to Mr. Fox.

[52] On May 16, 2022, Sergeant McElroy stood behind Catherine Meiklejohn, looked at her computer, and saw for herself that the website, [website], was live. Sergeant McElroy saw the URL and the header and saw D.C.'s name and picture. She recognized Exhibit 5 as the screen capture Catherine Meiklejohn provided to her to forward to Crown and request criminal charges.

[53] Mr. Fox's suggestion to Sergeant McElroy and Ms. Meiklejohn in cross-examination was that perhaps Ms. Meiklejohn was not actually accessing the internet at all. Perhaps what Ms. Meiklejohn viewed was a "dummy site" because VPD had an internal redirecting website.

[54] The suggestion was that someone at VPD had manufactured this evidence against Mr. Fox. Since Ms. Meiklejohn did not verify the IP address of the computer the web page had come from, it is possible that it was internal to VPD. In argument, Mr. Fox added that the Crown had either assisted with this plan or had known about it and done nothing about it, because of *animus* that both the VPD and Crown office

bear Mr. Fox. This suggestion remained speculative. No witness agreed with it and no evidence supported it.

[55] To support him in advancing this suggestion, pre-trial Mr. Fox had requested the proxy server access logs. At that time, my understanding was that this was available evidence and Crown confirmed that while they did not have them, they could and would ask VPD for them. These proxy server access logs would confirm the fact of the searches performed on May 16, 2022. I granted this disclosure request of Mr. Fox's because the information was readily available and Mr. Fox asserted it was relevant to his defence.

[56] Unfortunately, when Johnny Lam, VPD's IT manager, testified, it became apparent that what had been disclosed, Exhibit 12, were not proxy server access logs, but security module logs. Mr. Lam explained that the 14 "events" depicted in Exhibit 12 do not include the access logs, but are the security module scanning the site being accessed for malware and viruses. The security module logs are evidence that the listed sites are either attempting to be accessed, or being accessed.

[57] Those 14 events refer to [website].siteindices.com, [website].ico, and [website].com.ico. As I understood it, the security module logs are a by-product of this access, or attempted access.

[58] Mr. Lam testified that the access logs "roll over", and are not kept longer than a month or two. Mr. Lam said that the access logs will tell you who is accessing a site, but the security module logs show only a security scan relating to this access or attempted access.

[59] I note that when I granted Mr. Fox's disclosure request for the proxy server access logs, it was October 2022, approximately six months after May 16, 2022.

[60] Mr. Lam testified that the VPD restricts the internet access of most of its employees, including police officers, to "white sites" only. This would explain why after interviewing Mr. Fox on May 16, Sergeant McElroy was not able to access the website Ms. Meiklejohn had been able to access earlier in the day. Sergeant McElroy received an error message which she believed was internal to VPD.

[61] Ms. Meiklejohn, by virtue of her role, had full access to the internet, and accessed the internet through a different server. Mr. Lam was equivocal on the point of whether Ms. Meiklejohn accessed the internet through a different server. First, he said she did not. Then on the break, while he was still testifying in chief, he called and spoke to one of his senior technicians. After the break, he came back and said, in fact, he had been mistaken earlier, and Ms. Meiklejohn did access the internet through a different server.

[62] Mr. Fox argued that I should disregard Mr. Lam's evidence on this point because it had been inconsistent and it was based on hearsay.

[63] Mr. Lam's evidence was inconsistent on this point and it was a material inconsistency. However, I find it was a mistake which Mr. Lam corrected. I do not find Mr. Lam's evidence on this point to be based on hearsay, because Mr. Lam, by virtue of his role, had an independent knowledge of this fact. Specifically, that civilian data analysts have unfettered access to the internet, and use a different server to access the internet. This piece of evidence made sense to me and I accept it.

[64] The purpose of Mr. Lam testifying was to allow Mr. Fox to explore his suggestion that VPD had manufactured evidence against him. Even though the logs disclosed were not the logs Mr. Fox initially requested, I declined Mr. Fox's application to adjourn the trial and request further disclosure after Mr. Lam testified. At this point in the trial, as opposed to in the pretrial period, I had seen what the defence was and had seen no evidence supporting it. The architecture of VPD's internal IT would not become the trial's focus of inquiry.

[65] With respect to the website being publicly available May 16, 2022, the evidence of both Catherine Meiklejohn and Sergeant McElroy was clear and straightforward. I found both to be credible and reliable witnesses. The suggestion that this website was not truly available on the internet, but that these two witnesses had been fooled by some nefarious agent within VPD, was without evidence and remained speculative.

[66] Exhibit 5 was publicly available and on the internet May 16, 2022. It had recent content, depicts D.C., had blogs purportedly written by D.C., and had posts that contained information disclosed to Mr. Fox in previous court proceedings which were subject to a publication ban, and therefore, not publicly available. The subject matter of the blog posts was personal and idiosyncratic to Mr. Fox.

[67] I accept Sergeant Shook's evidence about the searches performed by the user of Mr. Fox's cell phone, "Patrick", on May 13 and 14, 2022, and the continuing connection to accounts using the name D.C., also found on Mr. Fox's cell phone. These are further pieces of evidence supporting the conclusion that the only reasonable inference from the evidence is that Mr. Fox was the user of his personal

cell phone, and that on May 16, 2022, Mr. Fox had made publicly available, directly or indirectly, information, comments, or photographs of D.C. I find Crown has proven Mr. Fox's guilt beyond a reasonable doubt on Count 3 of the information.

Kienapple

[68] Turning to the *Kienapple* principle. The principle enunciated in *R. v. Kienapple* [1975] 1 S.C.R. 729, is that "it would be contrary to law that the accused should be punished more than once for the same offence".

[69] Here Mr. Fox is charged with two counts of breach of probation, Counts 2 and 3 of the Information. Count 2 alleges a breach of Condition 4 of the Probation Order. Count 3 alleges a breach of Condition 6. The Crown admits that the same facts underlie both Count 2 and Count 3. I agree. Therefore, there is a factual nexus between the counts. As Justice Laskin noted at page 12 of *R. v. Kienapple*, "if there is a verdict of guilty on the first count and the same, or substantially the same, elements make up the offence charged in the second count, the situation involves application of a rule against multiple convictions".

[70] Crown argued that in this case, the second step of *Kienapple* was unfulfilled because there is no nexus between the two counts. I prefer the phrase, "legal nexus" which some case law has used. Crown submits that the -- and this is in the letter that Mr. Fox did not receive, but was summarized for him, I understand, by Crown before we were on the record here this morning - Crown submits that the *actus reus* for the breach of probation charged in Count 2 is different than the *actus reus* in Count 3. Crown did not further elaborate, but provided a case in support, which I find to be distinguishable.

[71] In *R. v. C. G.F.*, 2003 NSCA 136, at paragraph 41, the accused in that case was bound by two separate undertakings and the question was, could he be convicted of two counts of failing to keep the peace and be of good behaviour on the same facts. The Court in that case held that, yes, he could. The reason, at paragraph 46, was that an essential element of each alleged breach was a particular and different undertaking. On this basis, the rule in *Kienapple* did not apply in that case.

[72] Here, there is only one Probation Order. I have acquitted Mr. Fox of failing to report on the "reporting part" of Condition 4. As I understood Crown's submission, it was that the "exact steps" requirement in Condition 4 was additional to the "continuing obligation to ensure criminal materials were not available", and that this was the reason that the rule in *Kienapple* did not apply.

[73] However, Count 2 of the information does not mention the "reporting part" of Condition 4. Its focus is the "continuing obligation" part of Condition 4.

[74] My view is that the offence charged in Count 2 is substantially the same as that charged in Count 3. I have decided that the "reporting part" of Condition 4 was either complied with, or ambiguous enough, that I have a reasonable doubt with respect to Mr. Fox's *mens rea* for failing to report on April 21.

[75] That leaves the "continuing obligation" part of Condition 4 as what is enforceable, and what was the subject matter of the charge in Count 2. Both Condition 4 and Condition 6 have the intent of ensuring that criminal material is not publicly available. Both import a continuing obligation to do so. The "continuing obligation" part of Condition 4 is the same, or substantially the same, as the

prohibition in Condition 6. There is no additional element.

[76] I have found Mr. Fox guilty of Count 3. I direct a conditional stay on Count 2 according to the principle enunciated in *R. v. Kienapple*. Although I was given a copy of Judge Denhoff's decision from February 2022, and the B.C. Court of Appeal decision in *R. v. Fox*, 2022 BCCA 424, I did not consider either in making this decision. These are my reasons for decision.

(REASONS CONCLUDED)