

Western Communities Registry 

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

Colwood, B.C.
November 7, 2022

REX

v.



PROCEEDINGS
(Discussion re Disclosure)

COPY

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PROCEEDINGS
(Discussion re Disclosure)

Crown Counsel:

E.J. Weisenburger

Counsel for Accused:

R.L. Neary

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EXHIBITS

Nil

RULINGS

Nil

Proceedings

Colwood, B.C.
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(PROCEEDINGS COMMENCE AT 9:56 AM)

THE CLERK: Calling next from Your Honour's list number 4, the matter of [REDACTED]

CNSL R. NEARY: Good morning, Your Honour. That's my matter. It's a Federal Crown appearing. Elizabeth Weisenburger. Oh, great, she's here.

CNSL E. WEISENBURGER: Good morning, Your Honour. [Indiscernible].

THE COURT: I'm sorry, I couldn't hear you.

CNSL E. WEISENBURGER: Good morning, Your Honour.

THE COURT: Oh, it's Ms. Weisenburger. Good morning.

CNSL E. WEISENBURGER: My pronouns are she and her, for the Federal Crown.

THE COURT: The audio quality is very poor, Ms. Weisenburger.

CNSL E. WEISENBURGER: Oh. Does this improve it at all?

THE COURT: Yes, that's better. Thank you.

SUBMISSIONS FOR ACCUSED BY CNSL R. NEARY:

CNSL R. NEARY: So, Your Honour, for the record, Richard Neary, N-e-a-r-y. I use male pronouns. I'm counsel for Mr. [REDACTED]. There's a counsel designation notice on file. What you're about to hear is going to be yearly reminiscent of a number of appearances that were made before you on another file called [REDACTED] also involving Jones and Company as the prosecuting office and the West Shore RCMP as the investigating police agency.

This is a drug file. My client, in his early twenties, is charged with transporting a kilogram of cocaine. The Crown is seeking a penitentiary sentence. He is pulled over in the summer of 2021. He's not charged until the summer of 2022, over a year later. The entirety of the grounds for the search that unearths the kilogram of cocaine is said to occur at roadside when the police pull him over, and eventually they deploy a dog who sniffs around the vehicle and then the cocaine is located.

In the initial disclosure package received, you know, over a year after the events, there's no

Submissions for Accused by Cnsl R. Neary

1 video footage of the stop. It doesn't come --
2 they don't mention its existence and it's not
3 disclosed. I write and ask for it within a month
4 of the first appearance date, less than a month,
5 August the 4th, so some three, four months ago
6 now, I guess three -- three months ago now. I
7 don't hear anything in response to that request
8 for over 10 weeks. In the middle of October,
9 finally I get a response that the -- the police
10 officer involved says there's video footage just
11 of the interior of the car but not the -- not the
12 actual scan of the dog searching the car and the
13 important stuff that would have led to the
14 grounds. I get that video footage just a couple
15 weeks ago, and you can hear, about nine minutes in
16 -- I've told my friend this -- you can hear, about
17 nine minutes in, the police officer who's dealing
18 with Mr. [REDACTED] first and has the dog say to some
19 other officers who've arrived, "The video in the
20 front of my car is not working but his is,"
21 referring to somebody else. So there's another
22 video apparently that will show all this important
23 stuff at roadside, that's not been disclosed and
24 I've asked for it.

25 Additionally, there's a problem even with the
26 interior video that I have. It cuts off after the
27 15-minute mark or so when the video is 90 minutes
28 long. My friend says, tough luck, forget it, we
29 need to arraign, we need to arraign right now.
30 You need to -- your client needs to make his --
31 make up his mind whether he wants a trial in
32 Supreme Court, the Provincial Court, and enter
33 pleas right now. He doesn't get to see the video
34 of the stop that led to the search. You know, you
35 don't need that to make up those important
36 decisions.

37 My friend, I think, sent in this morning,
38 *Gillies* and *Adam*, the same cases that Mr. Corsi
39 sent in on this issue on the [REDACTED] matter. The
40 question is, the test that is not controversial in
41 terms of the law, if it's important disclosure or
42 essential disclosure, the accused can't be asked
43 to make important decisions about election and
44 arraignment and the like until he has it. If it's
45 peripheral stuff it can come in later, and he
46 ought to -- he ought to plead, he ought to
47 arraign. This is a video of the formation of the

Submissions for Accused by Cnsl R. Neary

1 grounds, the entirety, you know, of the formation
2 of the grounds that leads to the search of this
3 vehicle, leads to the seizure of cocaine, that my
4 client is looking at a penitentiary sentence in
5 connection. It is preposterous for the Crown to
6 ask the defence to make those decisions right now.
7 It's preposterous that I have to come here and
8 explain this to you today again, in a very similar
9 situation. My request is that we adjourn eight
10 weeks. The Crown took 10 weeks to even answer
11 whether there was video. We adjourn eight weeks,
12 that the Crown is in a position to say you've got
13 the video footage that exists, they can ask the
14 matter be brought forward and put on a list. I
15 shouldn't have to come here and explain this to
16 Your Honour and go through these motions in these
17 circumstances again.

18 So, those are my submissions.
19 THE COURT: Thank you. Ms. Weisenburger.

20

21 **SUBMISSIONS FOR CROWN BY CNSL E. WEISENBURGER:**

22

23 CNSL E. WEISENBURGER: Your Honour, first of all, with
24 respect to the grounds, the grounds did not come
25 entirely from the dog search. What had occurred
26 was there was a confidential informant tip which
27 resulted in grounds for detention, and from there
28 the stop occurred. There was a dog search.

29 Initially, the video was provided as
30 requested and from there, because the front of the
31 dash cam footage was not available due to some
32 technical issues with the vehicle, my friend sent
33 a request for a will-say indicating some
34 information regarding the operation of the
35 vehicle, and it was the Crown's position that we
36 do not need to produce evidence or create
37 additional evidence. And my friend also requested
38 the maintenance records for the vehicle's dash
39 cam, and it was with respect to that request that
40 the Crown's position was that the maintenance
41 records are third party and would be subject to an
42 O'Connor application and the officer can be cross-
43 examined regarding his knowledge of the
44 maintenance of the dash cam.

45 The request that my friend has made with
46 respect to additional video were made over this
47 weekend and I've not had a chance to review them

Submissions for Crown by Cnsl E. Weisenburger

1 in great detail as I came in to them this morning.
2 So these are very new disclosure requests.

3 My friend has indicated that some case law
4 was provided; that's true. It's my understanding
5 you have reviewed them with respect to another
6 matter, but for the record, the cases are *Giles*,
7 *Adam* and *Tran*, all of which indicate that perfect
8 or complete disclosure is not required not only
9 before arraignment but also before preliminary
10 inquiry.

11 So what we have here is a situation where my
12 friend seems to be aware that he's going to be
13 challenging the dog search and that potentially
14 he's going to be making some applications with
15 respect to the sufficiency of the dash cam footage
16 and the maintenance of the vehicle. The Crown's
17 position, that knowing that those are things that
18 could be coming, we can schedule those voir dires
19 and that there is sufficient evidence, per the
20 case law, that has been provided and that my
21 friend has indicated that he's aware of. There
22 is, quite frankly ample information upon which to
23 make these preliminary decisions with respect to
24 the file, because otherwise my friend has
25 indicated that he wants the records with respect
26 to the dash cam. Those are going to be third
27 party records. If we're going to get all of this
28 information, then does this mean that we need to
29 wait until the outcome of the *O'Connor* application
30 so that my friend can have all of the information
31 regarding the maintenance of the vehicle before in
32 a position to arraign? Because that could take
33 months and months and months, depending on the
34 responsiveness of Watch Guard. So there -- there
35 is enough information referring to the case law
36 that's been provided, two Supreme Court decisions,
37 *Giles*, which at 171 deals with this, noting:

38
39 First, with respect to . . . disclosure, I do
40 not agree that "full disclosure" is
41 required [to make] for the accused to make
42 elections and set dates.

43
44 In *Adam* it's dealt with as well, where the court,
45 at 110 notes:

46
47 In my respectful view, the behaviour of the

Submissions for Crown by Cnsl E. Weisenburger

1 defence reflects the mistaken view that their
2 clients were entitled to full disclosure
3 before the initiation of the preliminary
4 inquiry in order that defence counsel could
5 have a proper opportunity to test the Crown's
6 entire case before the trial began.

7
8 And in *Tran*, very similarly dealt with. My
9 understanding that these have been provided
10 previously.

11 So that is the Crown's position, that there
12 is sufficient disclosure in order to make these
13 preliminary decisions. I will look into what
14 additional videos are available based on the
15 disclosure requests that have been made over the
16 weekend.

17 THE COURT: So Ms. Weisenburger, you don't know at
18 present whether there is one video or two?

19 CNSL E. WEISENBURGER: I haven't had any opportunity to
20 make those inquiries as, again, these are requests
21 that were made over the weekend.

22 THE COURT: What I find surprising about this, Ms.
23 Weisenburger, is that, as I understand it, the
24 Crown's disclosure obligation is not limited to
25 responding to defence requests. The Crown has an
26 obligation to proactively disclose. Am I right
27 about that?

28 CNSL E. WEISENBURGER: Yes, that's correct. We were
29 aware of the video after my friend requested it,
30 of the dog search stop from the vehicle that
31 actually did the dog search. The police have not
32 yet provided any of the -- any video from any
33 other vehicles. I haven't looked into which
34 vehicles were on the scene. I know that one of
35 the officers was involved in a police -- or in a
36 car accident on the way and wasn't there. So
37 we've not been provided any additional video yet.
38 I will make inquiries with the officers as to what
39 video is available from which vehicles now that
40 I'm aware that it's an issue.

41 THE COURT: But these events happened 16 months ago.
42 Shouldn't I reasonably expect the police to have
43 sent you the videos a year ago?

44 CNSL E. WEISENBURGER: They have not sent any videos
45 and I have not made any inquiries so I'm not aware
46 -- it hasn't been brought to my attention that
47 they may exist until now. So ideally, the police

Submissions for Crown by Cnsl E. Weisenburger

1 would have sent everything that they have right
2 off the hop. I don't know if there are additional
3 videos. Those are the inquiries I'm going to make
4 now.

5 CNSL R. NEARY: Your Honour, just briefly in reply.
6 August --

7 THE COURT: Please, Mr. Neary, just one moment.

8 CNSL R. NEARY: Yes, Your Honour.

9 THE COURT: So essentially because the police didn't do
10 their duty in the past 16 months, you're saying
11 that Mr. [REDACTED] should enter a plea today even
12 though he hasn't had disclosure. That fair?

13 CNSL E. WEISENBURGER: I don't know if there are
14 additional videos. I haven't made those inquiries
15 yet. So they may -- there may be. I'm not saying
16 that there aren't, but I haven't had a chance to
17 make those inquiries.

18 THE COURT: All right. Yes, Mr. Neary.

19 CNSL R. NEARY: Sorry, I didn't mean to interrupt, Your
20 Honour.

21

22 **REPLY FOR ACCUSED BY CNSL R. NEARY:**

23

24 CNSL R. NEARY: Just the only reason we know about any
25 video is because I asked for it on August 4th.
26 The police didn't include any video at all with
27 the initial disclosure package despite --
28 something could not scream obviously relevant more
29 shrilly, more loudly and more clearly than video
30 of the roadside stop. The police, over a year
31 after the event, don't give anything to the Crown
32 in that respect. I asked for it August 4th. It
33 takes over 10 weeks for me to get anything. I've
34 had it about two weeks. On -- I didn't get a
35 chance to review it in any detail until I'm
36 preparing for this court appearance on Monday.
37 That's when, at the nine-minute mark, with the
38 first video, you hear an officer say, "His video's
39 working". That, you know, is something all these
40 officers would have been aware of. There's
41 multiple cars on scene. I didn't ask for one
42 officer's video. I asked any relevant video
43 footage of the stop on August the 4th. It should
44 have come without any request. It surely should
45 have come after the August 4th request. And when
46 you get a scenario where there's multiple police
47 cars at a roadside stop all there prior to the

Reply for Accused by Cnsl R. Neary

1 dogsmith, prior to all the kind of key events
2 unfolding, it is mind-boggling that there would be
3 no video in this day and age, hence the requests;
4 and we still got no video of those events right
5 now. That -- and hence the request for the will-
6 say, et cetera. So my position remains as stated
7 earlier. Again, I apologize for interrupting.
8 THE COURT: No, not at all.
9 Madam Clerk, I don't want to get in trouble
10 with the JCM, can I adjourn this to a date about
11 10 days out?
12 THE CLERK: One moment, Your Honour.
13 CNSSL R. NEARY: Have to think about my calendar a
14 little bit up to next little bit, too, Your
15 Honour.
16 THE COURT: We'll find out what's available and you can
17 tell me.
18 CNSSL R. NEARY: Thank you.
19 THE COURT: And Mr. Neary, if you prefer to appear by
20 video, you're welcome to do that.
21 CNSSL R. NEARY: I may, Your Honour, just given the
22 timing issues I might do that, but I prefer to
23 come in person though. We'll see. Thank you,
24 Your Honour.
25 THE COURT: All right. Seems to me, Ms. Weisenburger,
26 that the police may not understand their
27 obligations to be proactive about disclosure. It
28 would be helpful if someone would remind them
29 about that.
30 CNSSL E. WEISENBURGER: I will provide the officers that
31 I'm dealing with on this matter.
32 THE COURT: Thank you.
33 THE CLERK: Your Honour, would -- should this matter be
34 back before you or just . . .
35 THE COURT: Doesn't need to be.
36 CNSSL R. NEARY: Not essential but preferable, in my
37 view, given you've already heard this rather than
38 starting from scratch with someone else, but
39 that's my -- that's my -- my request would be that
40 it come back before you given that you've kind of
41 started down the path already with it, Your
42 Honour.
43 THE COURT: I understand. Well, we'll see what we can
44 do.
45 CNSSL R. NEARY: Thank you.
46 THE CLERK: Sorry, Your Honour, I just haven't received
47 a response back yet.

Proceedings

1 THE COURT: No, it's all right. No rush.
2 CNSL R. NEARY: Perhaps, Your Honour, we could adjourn
3 to scheduling for a week or something and then we
4 could do this by email with Ms. Cole [phonetic].
5 I just thought if -- if Madam Registrar has not
6 received any response from her yet, perhaps she's
7 tied up with court in Duncan, I'm not sure.
8 THE COURT: All right. Then it'll be on the JCM's list
9 next Tuesday, which will be November 15th, at
10 11:00.
11 CNSL R. NEARY: And then the goal, Your Honour, as I
12 understand it is to try and get back before you.
13 I thought I heard you mention possibly in 10 days
14 time.
15 THE COURT: Yes.
16 CNSL R. NEARY: Can we have liberty to try and do it
17 within a month, just because of my own
18 availability? I know that, for example, the week
19 of the 21st I'm not available anywhere in the 22nd
20 to the 25th, then the following I'm unavailable
21 the 30th through December 2nd. I'm just concerned
22 about what if we can't get it in 10 days, that's
23 all.
24 THE COURT: I understand. Well, Ms. Cole should be
25 told that my objective is to have it heard as soon
26 as possible.
27 CNSL R. NEARY: Certainly. I'll copy my friend on any
28 emails, of course.
29 THE COURT: Of course, we have to take your schedule
30 into account. I think it would be better if I
31 were not seized.
32 CNSL R. NEARY: All right.
33 THE COURT: I'll do it if I'm available, but --
34 CNSL R. NEARY: Very good.
35 THE COURT: -- we don't want to build it around my
36 calendar.
37 CNSL R. NEARY: Mm-hmm. Understood. So approximately
38 10 days out, as soon as possible to get back for
39 an update from Crown, presumably, on --
40 THE COURT: Yes.
41 CNSL R. NEARY: -- on the status of what video's out
42 there, what they can -- what the police have to
43 say?
44 THE COURT: Yes.
45 CNSL R. NEARY: Thank you, Your Honour. Understood.
46 CNSL E. WEISENBURGER: Thank you, Your Honour.
47 THE COURT: Very well. Good day.

Proceedings

1 CNSL R. NEARY: Thank you very much.
2

3 (PROCEEDINGS ADJOURNED AT 10:13 AM TO
4 JUDICIAL CASE MANAGER, NOVEMBER 15, 2022,
5 11:00 AM, TO FIX DATE)
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10 Transcriber: C. King
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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 be 'C. King', written in a cursive style.

C. King
Court Transcriber