

Western Communities Registry [REDACTED]

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

Colwood, B.C.
June 30, 2022

REX

v.

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

PROCEEDINGS AT HEARING RE ACCUSED [REDACTED]
AND [REDACTED]

COPY

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v.

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

PROCEEDINGS AT HEARING RE ACCUSED [REDACTED]
AND [REDACTED]

Crown Counsel:

T. Corsi (by videoconference)

Counsel for Accused, [REDACTED]
[REDACTED]

R. Neary

Counsel for Accused, [REDACTED]
[REDACTED]

C. Massey

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EXHIBITS

Nil

RULINGS

Nil

Proceedings

Colwood, B.C.

June 30, 2022

(VIDEOCONFERENCE COMMENCES)

(CROWN AT REMOTE LOCATION)

THE CLERK: Calling number 8 on Your Honour's list in the matter of [REDACTED]

CNSL C. MASSEY: Morning, Your Honour. Mr. Corsi --

CNSL T. CORSI: Your Honour, these are federal files, it's Mr. Thomas Corsi, pronouns he/him for the Federal Crown.

THE COURT: Thank you.

CNSL T. CORSI: It should be numbers 6 through 8 on the list.

CNSL C. MASSEY: Your Honour, Chris Massey, I am counsel for Ms. [REDACTED] with your leave appearing as her agent this morning by way of Counsel Designation, pronouns he/him my client's pronouns she and her.

THE COURT: Thank you.

CNSL R. NEARY: Good morning, Your Honour, for the record it's Richard Neary, N-e-a-r-y, pronouns he and him, as does my client use male pronouns. I appear for Mr. [REDACTED] pursuant to a Counsel Designation notice.

SUBMISSIONS FOR ACCUSED, TREVOR [REDACTED] BY CNSL R. NEARY:

CNSL R. NEARY: This matter, Your Honour, was put into this courtroom at the Crown's request. That being said, if I could, I'll just start laying out what brings us here. There was an investigation in February of 2021 that resulted in the execution of a search warrant at the residence said to be shared by my client and Mr. Massey's. As well as another residence said to be owned and occupied by client's mother. Some 10 months later -- at the time the execution of those warrants had said that illegal substances and a firearm. There are some other accused who had warrants related to other residences, they're not in a squabble that brings us before you. I understand one has never been located and one that intends to plead guilty.

So, it's just my client and Mr. Massey's that are currently engaged in a dispute with the Crown

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1 about what should be happening. So, dealing --
2 focusing on my client and Mr. Massey's, these
3 warrants were executed in late February of 2021
4 and some 10 months later in December, there is
5 charge approval. A number of trafficking related
6 offences alleged as well as firearms.

7 Initial disclosure is not provided until
8 April of this year, 2022. Upon receipt of the
9 initial disclosure package which includes the ITO
10 upon which the search of my client's residence and
11 his mother's residence was based. Which is
12 obviously going to be the key document in a case
13 like this. All of the charges against my client
14 and Mr. Massey's client derives from the fruits of
15 those searches. It is no mystery to anyone
16 involved in these cases, of course, that that
17 makes the ITO upon which that warrant was granted,
18 the most important piece in the entire case. Upon
19 receipt of initial disclosure in April and
20 including that ITO, I wrote my friend in early
21 May, the 12th, I believe, I've got copies of
22 correspondence that'll actually hand up now, it's
23 probably a good time, if that's all right.

24 THE COURT: Certainly.

25 CNSL R. NEARY: This was put together somewhat hastily,
26 Your Honour, but it's a package of
27 correspondences -- letter from myself to Crown
28 dated May 12th, stapled to it, also is a reply
29 from the Crown, June 20th, 2022, so last week.
30 Then a letter from Mr. Massey, I think the same
31 day, you know, following up on that and the
32 Crown's reply. And then some email correspondence
33 that has -- that has gone on since. There's one
34 separate piece because it's an email from me to
35 Mr. Corsi, somehow I didn't get into the other
36 emails chains like, for replied to one of Mr.
37 Massey's and not mine. So, there's -- there's the
38 two --

39 THE COURT: Thank you.

40 CNSL R. NEARY: -- of those, thank you.

41 THE COURT: Should I take a minute to read all these.

42 CNSL R. NEARY: No, I think it -- it would take --
43 maybe I'll go through it with you if you wish.

44 THE COURT: Please.

45 CNSL R. NEARY: So, as Your Honour will note, the
46 document on top is my letter of May 12th focusing,
47 you know, not surprisingly on this ITO. And I

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1 say -- here's what I require arising out of my
2 initial review of the ITO, you know, first glance
3 of the ITO, here's what's clearly missing. And
4 there's some discussion in paragraph A about
5 informant information and then in addition I
6 request of number of reports that the affiant of
7 the ITO is said to have reviewed in preparing the
8 ITO and relied on. You know, we say, you know,
9 one of the reasons you should let us kick your
10 client's door in judge, is that this report says
11 this.

12 THE COURT: Mm-hmm.

13 CNSL R. NEARY: Well, we need the report. I mean, the
14 judge reviewing the ITO at first instances, of
15 course, taking the officer at his word given the
16 expeditious nature of the procedure, the fact
17 there's no one on the side that's the way it
18 works. Now, we as defence counsel, going to get
19 the ITO, we were the ones, the only ones, we're
20 going to fact check. When a police officer says,
21 this report tells me this and you should believe
22 me, it's one of the reasons you should let us kick
23 this door.

24 THE COURT: Mm-hmm.

25 CNSL R. NEARY: We're the ones who go look at the
26 report and make sure that the affiant has
27 accurately stated, in the ITO, what the contents
28 in report in fact are. The only way defence
29 counsel can do that is if they're provided the
30 report. Not -- again, not in this -- we've got a
31 case where there's 10 months before charge
32 approval. Lots of time -- presumably four, the
33 police and the Crown to get their ducks in a row,
34 so that they could make proper disclosure.

35 There's then four months after charge
36 approval before any disclosure is provided and
37 when that first package comes, it doesn't contain
38 this kind of essential obvious stuff the reports
39 referred to in the ITO. And these are the ones
40 that I identified just kind of first glance and
41 write my friend about.

42 THE COURT: Okay.

43 CNSL R. NEARY: He replies a little over a month later,
44 June 20th, that letter is attached, and addresses
45 some of the questions raised in my letter but
46 you'll see, and this is jumping ahead, you'll see
47 from my email reply to Mr. Corsi, it's on the top

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1 of that second page, that separate page --
2 THE COURT: Yes.
3 CNSL R. NEARY: -- that I point out to him about you
4 didn't actually give me any of these reports, you
5 listed that they exist.
6 THE COURT: Mm-hmm.
7 CNSL R. NEARY: I mean, you gave me a list of the
8 [indiscernible] reports that are referred to in
9 this ITO but I actually realized they haven't
10 provided them.
11 THE COURT: Right.
12 CNSL R. NEARY: And that's in my -- so, then -- and Mr.
13 Massey, at this point, reviews what's -- what's
14 coming, it's 82 pages that we get on June 20th, so
15 like a little over a week ago. We get 82 pages.
16 But it's missing these reports that I've
17 identified as essential back on May 12th and Mr.
18 Massey writes promptly and says, hey, there's a
19 bunch of other stuff missing including an entire
20 ITO. There's an ITO that's referred to in the ITO
21 for the houses like, a prior ITO granted for, I
22 think it's a tracking warrant, that we don't even
23 have.
24 THE COURT: Mm-hmm.
25 CNSL R. NEARY: So, we say, clearly, you know, we need
26 this stuff in order to properly advise our clients
27 about what kind of election they ought to make,
28 what their plea ought to be, what -- what we're
29 going to do in this case.
30 THE COURT: Right.
31 CNSL R. NEARY: And the Crown says -- Mr. Corsi says,
32 in his email of June 27th at 3:05 p.m., which is
33 immediately behind --
34 THE COURT: Yes.
35 CNSL R. NEARY: -- Mr. Massey's letter, certainly this
36 disclosure has relevance and the Crown is
37 addressing it ASAP with West Shore RCMP; However,
38 in Crown's opinion this is something that can be
39 provided once we obtain, it should not prevent us
40 from electing and fixing voir dire and trial
41 dates. And we -- we have a significant difference
42 of opinion between defence counsel and the Crown
43 on this point and we say, we are not in a position
44 to properly advise our clients as to their -- the
45 extension of their jeopardy and the strength of
46 available defences because the essential document,
47 in this case, the ITO, did not come with the

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1 reports that are essential to review in order to
2 assess the strength of the ITO and we still don't
3 have it.

4 And there is law and we'll get into, Mr.
5 Corsi's got some case extracts he's sent and I've
6 got a couple of cases I'm going to hand up.
7 There's law on this point and to summarize
8 we'll -- I'll take you through the cases, but to
9 summarize my take on the law in this point, it is
10 that an accused is not titled -- entitled to full
11 and complete and perfect disclosure before making
12 an election. That is not every scrap or shred of
13 a material that could possibly fit within the
14 whelm of potentially relevant.

15 However, an accused is titled -- entitled to
16 essential disclosure, that is the disclosure he or
17 she requires to make informed decisions about
18 important steps before they make an election. And
19 I think that that's really -- there's not ought to
20 be any quarrel between Crown and defence as to the
21 fact that that is the state of the law, so I think
22 the only issue becomes, do you care trust -- can
23 you characterize what's outstanding is essential
24 disclosure as I say it ought to be and necessarily
25 has to be, or could it be considered some sort of,
26 you know, extraneous, not so important stuff that
27 we don't need before we -- we help our clients
28 make informed decisions. So, that's -- that's my
29 summary of the law. And I'll go through a couple
30 of cases that I brought that address that point.
31 And then turn things over to my friends.

32 So, the two cases I have are -- one's a very
33 recent Ontario decision from 2021 in a sex assault
34 case and the other is a -- a 2016 Nova Scotia
35 Supreme Court decision. And I came across these
36 during a quick search looking up *Girimonte* which
37 was a 1999 Ontario Court of Appeal decision that
38 was, you know, the leading case for a very long
39 time on this issue saying, you need to have
40 essential disclosure before you can make informed
41 decisions on election. I'm looking at cases that
42 have said it very recently and these are the ones
43 that -- that came up quickly and seemed most on
44 point. So, dealing with *L.L.*, Your Honour.

45 THE COURT: Yes.

46 CNSL R. NEARY: At paragraph -- and they're -- the --
47 they arise in the context of looking back in

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1 hindsight in the -- in the context of delay
2 applications --

3 THE COURT: Mm-hmm.

4 CNSL R. NEARY: -- and it's the same with Mr. Corsi's
5 cases. If you jump ahead to paragraph 26, we see
6 the court's examining a period of delay, it looks
7 like six months or so between December 9th, 2020
8 and May 7th, '21. And paragraph 27, the judge
9 says:

10

11 What I've determined is:

12 1. Did the applicant have sufficient
13 disclosure in December 2020 to make
14 an election of mode of trial?
15

16 And in his reference to *Girimonte* in paragraph 30
17 and directly quoted in paragraph 31, Court of
18 Appeal in *Girimonte* stated:

19

20 Crown's obligation to disclose is triggered
21 by a request for disclosure from counsel for
22 an accused. Initial disclosure must occur
23 sufficiently before the accused is called
24 upon to elect or plead to permit the accused
25 to make an informed decision as to the mode
26 of trial and the appropriate plea.
27

28 Now, jumping ahead to paragraph 32, the judge
29 noted, he agreed with Crown that the prosecution
30 was not obliged to disclose every piece of
31 disclosure before a trial date is set, before a
32 pretrial held, or before an election is made.
33 However, went on to note that the applicant was
34 not insistent on every piece of disclosure.
35

36 Moving ahead to paragraph 33:

37

38 The requested occurrence reports, in my view,
39 are not trivial in nature. They were not
40 dated. They did not involve incidental
41 contact between the complainant and the third
42 parties. They did not contain information
43 about *Highway Traffic Act* matters with other
44 mishaps or fun ins with the law. [Playing
45 with the kind of things we can't insist on
46 having before you make your informed
47 choices.] Investigative records contained

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1 information about interactions between the
2 complainant and the applicant in the days and
3 weeks leading up to the complainant's
4 allegation of sexual assault.

5
6 It goes on to say, at paragraph 34: [as read]

7
8 The disputed disclosure, in my view, is more
9 in line with the disclosure described in *R.*
10 *v. DA.*

11
12 And that's a court -- Ontario Court of Appeal case
13 that the citation can be found in paragraph 7
14 further in this decision. And it said, it's
15 essential disclosure and in *D.A.*, the last
16 sentence of paragraph 34, so the judge -- Judge
17 Rutherford notes:

18
19 The Court of Appeal went on to say, it was
20 not fair to have expected the defendant to
21 set a trial date when the essential
22 disclosure was outstanding.

23
24 So, again, the question becomes, is the disclosure
25 that we're still seeking essential or not. Moving
26 ahead, Your Honour, again, in *L.L.* before I leave
27 it. At paragraph 37:

28
29 Had the defendant made an election without
30 the disclosure it may not have been simple to
31 re-elect mode of trial. He may have had to
32 rely on the Crown's consent. It is unclear
33 whether consent would have been given in
34 these circumstances.

35
36 Paragraph 38:

37
38 Electing mode of trial is an important part
39 of the criminal trial process. It as well as
40 how to plea and whether to testify are the
41 three things an accused person must decide in
42 a criminal trial. These decisions can only
43 be made when armed with essential disclosure.
44 The applicant did not have it.

45
46 And we say, in this case, the accused don't have
47 it. We don't have essential disclosure. Mr.

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1 Corsi says, let's arraign them today. We -- we
2 want -- says, the accused should be forced today
3 to elect and arraign and tell this court what
4 their election is and set -- start setting trial
5 dates. We're not in a position to properly advise
6 our clients and seek instructions about those most
7 crucial decisions in this prosecution. And it's
8 particularly troubling in my submission and I'm
9 going to move ahead to the case [indiscernible], I
10 just want to make this point. But we've got a
11 scenario where the police and Crown had ample time
12 to identify, compile and provide what they ought
13 to have recognized out of the gate, would be the
14 essential disclosure in this case.

15 We've got a search that occurred in February
16 of 2021. That ITO and every report that we're
17 asking for now, existed in February of 2021.
18 During that entire period where there was build up
19 to charge approval, the investigating officers,
20 presumably they had done any work in this area
21 before ever and the prosecutors would have known
22 the key piece of material for Mr. [REDACTED] and Ms.
23 Christensen was going to be that ITO. And it
24 would be essential for defence counsel to be able
25 to examine the reports referred to in the ITO, to
26 test the viability of a challenge to those
27 warrants. It'd be not a mystery at all. Yet here
28 we are, well over a year later from the time of
29 arrest and how ever many months from charge
30 approval now, six, seven months for charge
31 approval without that essential disclosure having
32 been provided and the Crown's saying, well because
33 we're worried about *Jordan* and delay even though
34 we didn't give you the stuff you should have
35 obviously had and you still don't have it, we want
36 to set trial dates because boy oh boy, we might
37 have a delay problem otherwise. That maybe true,
38 but it's not the accused's responsibility to waive
39 their rights of in full answer and defence and
40 waive the rights without making informed
41 decisions, to relieve the Crown or police of
42 errors they may have made in complying and
43 providing disclosure.

44 THE COURT: Do you have a copy of the ITO somewhere.

45 CNSL R. NEARY: I don't, I didn't bring a copy,
46 actually. I don't know if Mr. Massey does or not.

47 CNSL C. MASSEY: I -- I only have a copy of the second

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1 ITO, there's -- I believe there are three.

2 THE COURT: I see.

3 CNSL C. MASSEY: So, if any assistance, I certainly
4 would pass up, it's -- it's lengthy though.

5 THE COURT: I was -- I was just thinking it would help
6 me to look at the ITO and see what these reports
7 are that they refer to.

8 CNSL R. NEARY: Yeah, there's no reference to them in
9 correspondence for sure, Your Honour, but I
10 apologize, I don't actually have a copy of the
11 ITO. Certainly, we could get you one if -- I
12 mean, I -- I'll -- this is probably a good time to
13 put something else on the record that's occurred
14 to me and I've discussed briefly with Mr. Massey
15 but not with Mr. Corsi. I'd ask Your Honour to
16 consider, you know, assigning yourself to the case
17 management judge in this prosecution in light of
18 the problems and the issues that we're having
19 right now --

20 THE COURT: Yes.

21 CNSL R. NEARY: -- so, that perhaps we can come back
22 to court. But what I say is really obvious, is
23 that we can't be forced to make an election and
24 plea today. We just got 80 pages of disclosure,
25 new disclosure a little over a week ago and
26 there's all the items [indiscernible] outstanding
27 and the Crown can see the relevance of in these
28 emails. Shirley, at the very least, we need a
29 little time to figure out whether what's coming,
30 how fast it's coming, all those things. And it
31 may make a great deal of sense to come back before
32 Your Honour in three weeks time or four weeks time
33 and see what the Crown has further provided in
34 [indiscernible] ITO in the interim and then of
35 make [indiscernible] on where to go from there.

36 So, it's something that I think could be
37 useful rather than -- presuming you don't order us
38 to elect and plead today, rather than coming back
39 before another judge to have, you know, this
40 argument and explain the whole situation to them
41 again, it may make a great deal of sense to -- to
42 have you seize yourself as the case management
43 judge. So, I'd -- I'd ask you to consider doing
44 that.

45 And I apologize for not having not brought
46 the ITO. I just -- I just don't have it.

47 THE COURT: This -- you speak, I'm wondering about a

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1 slightly different approach.
2 CNSL R. NEARY: All right.
3 THE COURT: Mr. Corsi, would you object to me assigning
4 myself to be the pre-trial judge in this case?
5 CNSL T. CORSI: No, certainly not, Your Honour.
6 THE COURT: What I'm thinking is that if -- if I would
7 to adjourn the present application for a week
8 which is not very long, I could read the ITO in
9 the meantime and we might proceed better in a week
10 from today than we could today.
11 CNSL R. NEARY: I would ask for two weeks, Your Honour.
12 Next week, I'm off all of next week, I have a
13 [indiscernible] date set a week, I'm just simply
14 not available.
15 In two weeks -- and I like the idea very
16 much, I'm just not available at the one week's
17 time [indiscernible].
18 THE COURT: Mr. Corsi, what would you say --
19 CNSL R. NEARY: Two weeks --
20 THE COURT: -- to July 14th?
21 CNSL T. CORSI: Well, Your Honour, I think it does make
22 sense for you to review the ITO as you suggest to
23 see exactly what material has been provided and
24 what is still missing. I haven't had much of a
25 chance to discuss or -- or put Crown's thoughts to
26 the court this morning.
27 Given the time estimate that we have, I'm not
28 going to go much into it but suffice to say, Crown
29 suggests that the essential disclosure has been
30 provided. So, we're looking for at least an
31 election and we are going to want a date set.
32 Crown says they have enough to know the case
33 before them, they have the essential information
34 to obtain for the search warrants. What they're
35 looking for now is supplemental stuff.
36 In particular, what my friend is suggesting
37 is an ITO for a cellphone that was seized. That's
38 referenced in paragraph 51 of the ITO. So,
39 obviously, there's a lot of material there and
40 that's the one aspect of it. Crown says that's
41 not essential to make an election and to fix
42 dates. But it makes sense for Your honour to see
43 that complete ITO. I prefer, of course, one week
44 but if my friend is not available in one week, I'm
45 left with little choice but to go over to two
46 weeks.
47 THE COURT: Given that -- Mr. Massey, you haven't said

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1 anything yet, are you okay with it?
2 CNSL C. MASSEY: It's not for want of things to say but
3 I'm agreeing -- agreeable with the proposal going
4 over two weeks if Your Honour feels it will be
5 helpful to include ITO, I think that perhaps we'll
6 be in a better position to -- to move the matter
7 forward at that time.
8 THE COURT: Okay. Well, why don't I refer you to the
9 JCM this morning. I think you gentlemen should
10 book a date in the week of July 11th for a one-
11 hour hearing. And in the meantime, if someone
12 would provide me with the ITO, I'll have read all
13 of the material by the time we come back.
14 CNSL R. NEARY: Yeah, I'll do that, Your Honour, and
15 I'll make sure that Mr. Corsi has identical copies
16 of the correspondence that I gave you. I thought
17 he was going to be here today. So, I brought hard
18 copies with me. Here we are.
19 THE COURT: Right.
20 CNSL R. NEARY: But I will -- I mean, it's all stuff
21 that he has is between the two of us, but I'll
22 make sure he's just so -- he knows exactly what
23 you've been provided --
24 THE COURT: Yes.
25 CNSL R. NEARY: -- I'll send it him -- scan it to him
26 just as it's been handed to you, in addition to
27 getting you the ITO.
28 THE COURT: Thank you. Yes, I don't it should
29 necessarily come back on July 14th which is a
30 remand date, I think it's going to take at least
31 an hour, so you'll have to schedule a hearing for
32 it.
33 CNSL R. NEARY: Makes good sense to me, Your Honour.
34 THE COURT: All right.
35 CNSL T. CORSI: Thank you, Your Honour.
36 THE COURT: Thank you.
37 THE CLERK: Your Honour, just to clarify, this is going
38 to the JCM Conference for July 5th at eleven
39 o'clock to fix a date.
40 THE COURT: Yes.
41 THE CLERK: Thank you.
42 CNSL R. NEARY: Thank you.
43 THE COURT: Counsel will arrange the date today.
44 CNSL C. MASSEY: Thanks, very much.
45 CNSL R. NEARY: Yes, Thank you, Your Honour.
46 THE COURT: Thank you.
47

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1 (PROCEEDINGS ADJOURNED TO JULY 5, 2022, AT 11
2 A.M. TO FIX DATE)
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4 (VIDEOCONFERENCE CONCLUDES)
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7 Transcriber: K. Stone
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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.



K. Stone
Court Transcriber