


Victoria Registry

In the Provincial Court of British Columbia
(BEFORE THE HONOURABLE ASSOCIATE CHIEF JUDGE WISHART)

Victoria, B.C.
September 6, 2023

REX

v.




PROCEEDINGS RE APPLICATION FOR DISCLOSURE

COPY

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v.

[REDACTED]
[REDACTED]

PROCEEDINGS RE APPLICATION FOR DISCLOSURE

Crown Counsel:

M. Adams

Counsel for Accused

N. Brooks

Counsel for Accused

R.L. Neary

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Victoria, B.C.
September 6, 2023

(PROCEEDINGS COMMENCE AT 10:26 AM)

THE CLERK: Thank you, Your Honour. Is Mr. Brooks and
Mr. Neary ready to go on the [REDACTED] and [REDACTED]
matter?

CNSL N. BROOKS: Yes.

CNSL R. NEARY: Certainly are.

(OTHER MATTER SPOKEN TO)

THE CLERK: And are you expecting your clients today?

CNSL N. BROOKS: No.

THE CLERK: No? Okay. Your Honour, calling the matter
of [REDACTED] [REDACTED] and [REDACTED] [REDACTED]

CNSL M. ADAMS: Your Honour, it's Mr. Adams, first
initial M., he/him, for the federal Crown.

THE COURT: Thank you.

(OTHER MATTER SPOKEN TO)

THE CLERK: Recalling the matter of [REDACTED] [REDACTED] and
[REDACTED] [REDACTED]

CNSL M. ADAMS: Again, Your Honour, it's Mr. Adams,
initial M., he/him, for the Federal Crown.

THE COURT: Thank you.

CNSL R. NEARY: Morning, Your Honour, Richard Neary, N-
e-a-r-y. I use male pronouns, as does my client,
Mr. [REDACTED]. He's not here today. There's a CDN
filed. I'm co-counsel with Mr. Massey.

CNSL N. BROOKS: And Your Honour, Brooks, initial N,
he/him/Mister. Ms. [REDACTED] is a she and a her.
Stand before you on the strength of the CDN.

THE COURT: Thank you.

CNSL R. NEARY: Your Honour, just briefly before Mr.
Adams begins, this is, I think, direction for --
we're before you for directions from the judge,
and in particular, the dispute is with respect to
whether there's sufficient disclosure to arraign.
It's the second time we've been before a judge on
this issue. The last time was July the 13th,
before Judge Mrozinski. I have a transcript of
those proceedings as well as the two documents
that were made exhibits at those proceedings, that
I think I'd like to give you before Mr. Adams even

Proceedings

1 commences, just so you've got them.

2 THE COURT: Yes. So I can tell you, counsel, I have
3 the information and a release order and
4 undertaking. That's all the information I -- I
5 have on this file.

6 CNSL R. NEARY: So may I pass this up to you, Your
7 Honour?

8 THE COURT: Yes. Yes. Sorry, for the court -- court
9 clerk.

10 THE CLERK: [Indiscernible/overlapping speakers], Your
11 Honour.

12 THE COURT: Trying to pass me some documents. Thank
13 you.

14 THE CLERK: Thank you, Your Honour.

15

16 **SUBMISSIONS FOR CROWN BY CNSL M. ADAMS:**

17

18 CNSL M. ADAMS: So, Your Honour, yes, we're here for --
19 for some direction from the court. Essentially,
20 it's the Crown's position that it's provided
21 sufficient disclosure for the defence to
22 understand the -- the case to be met and that any
23 further adjournments should be considered as
24 defence delay. The Crown has been in a position
25 to arraign these matters since May of this year.

26 I have a couple cases I hand up and I may
27 rely on.

28 I think Your Honour has the -- a copy of the
29 timeline that Mr. Neary submitted at the last
30 appearance. I'll just hand up the other cases, if
31 I may.

32 THE COURT: Thank you.

33 CNSL M. ADAMS: So as you can see, Your Honour, the --
34 the allegations here are from March of 2022.
35 Information was sworn November 21st, 2022. There
36 were several interim appearances in December.
37 Initial disclosure was -- was provided on March
38 10th of this year, and then there were some
39 further adjournments. Essentially, May 10th, so
40 nearly two months after the initial disclosure was
41 provided, defence, and I believe this was Mr.
42 Massey, contacted the Crown advising there were
43 certain technical issues with reviewing the
44 materials; and the Crown then, May 29th, provided
45 some additional material. It was essentially
46 mostly firearms -- firearms reports and rather
47 ancillary matters.

Submissions for Crown by Cnsl M. Adams

1 In terms of the ITOs and the supporting
2 material for the ITOs in this case, those were
3 provided -- those were provided in the May 10th
4 disclosure package.

5 There was then some subsequent adjournments
6 from defence: temporary lost contact with the
7 accused. There was a -- a adjournment June 15th
8 with defence waiving delay.

9 Mr. Neary then came on as co-counsel and sent
10 the Crown a disclosure letter June 26th, and then
11 ultimately a second disclosure letter. I believe
12 that was the day before the -- the July appearance
13 before Judge Mrozinski.

14 Now, at that appearance before Judge
15 Mrozinski, there was a similar application on --
16 on the part of the Crown to, essentially, direct
17 defence to enter an election. The court declined
18 to make that direction and instead ordered that
19 the police -- or the Crown request and the police
20 provide, believe it's page 35 of the transcript,
21 beginning at line 34. There was much discussion
22 about in the June 26th letter from Mr. Neary
23 requesting disclosure, there were nine witnesses
24 that he -- nine police officers that he itemized
25 who he did not have any indication of whether they
26 had notes or not. There was a total of 22
27 officers who either had not made notes or -- or
28 there was no indication of whether or not they had
29 made notes, and so the court directed that of
30 those 22 officers, that they provide will-says
31 itemized in that, essentially, giving what their
32 -- their evidence would be at trial, the dates
33 they worked on the investigation, the reason for
34 not making notes. And then, of the nine officers,
35 it was -- they were to provide notes if they had
36 any, and will-says if they did to have any notes.

37 So since that appearance, the Crown has
38 provided two follow-up disclosure letters.

39 UNIDENTIFIED SPEAKER: Three.

40 CNSL M. ADAMS: I'm hearing three, but my -- there were
41 certainly three packages, but I believe they were
42 sent in two letters; but essentially, they were
43 sent July 26 and August 16th, so the Crown has
44 requested from those nine officers that were
45 itemized in -- in Mr. Neary's letter to clarify
46 whether or not they had notes and to provide will-
47 says. And then, because the remaining 13 officers

Submissions for Crown by Cnsl M. Adams

1 were not actually state -- their names were not
2 actually stated in the disclosure letter, the
3 Crown went through the materials and located the
4 13 officers who had stated in their will-says that
5 they did not have notes and asked for follow-up
6 will-says from those officers, with some more
7 detailed will-says.

8 Crown was able to provide further will-says
9 from those officers as well as, believe there was
10 only one additional officer from the officers who
11 -- the nine named officers who had notes, but
12 those other officers did provide at least some
13 further will-say.

14 So I should just say that, overall, this case
15 is about some surveillance that's done on the
16 accused. There's trackers warrants issued for two
17 vehicles, further surveillance and a subsequent
18 search warrant. As I said before, the ITOs were
19 -- those judicial authorizations have been
20 disclosed, the supporting materials have been
21 disclosed. As you might see in the transcript,
22 there's much debate in the previous appearance
23 about the -- the fact that the surveillance
24 reports that are generated are really all that we
25 have about surveillance that was done. There was
26 no independent note-taking taken by police
27 officers.

28 And in the Crown's submission, ultimately
29 that means that there really are no notes
30 generated from the officers in the investigation
31 other than the observations that were recorded in
32 their surveillance report, and that's already been
33 provided.

34 So because the ITOs have been provided, the
35 supporting documents have been provided, in the
36 Crown's submission that is sufficient for the
37 defence to know what the case is to meet and so
38 they, at this point, should be directed to enter
39 an election.

40 In terms of in the cases that cover this
41 area, I have three cases that I've handed up. The
42 first one is *Elite Farm Services Limited*. It's a
43 2021 BCSC 1996, decision of Justice Devlin.
44 Looking at paragraph 49 to 52, this is a delay
45 application, and essentially a part of the delay
46 is the result of one of the defence counsel
47 declining to enter an election until they had

Submissions for Crown by Cnsl M. Adams

1 received -- it's an animal cruelty case and much
2 of the Crown's case revolved around video that was
3 taken by one of the witnesses of the alleged acts.
4 The defence for one of the parties declined to
5 enter an election until they had received
6 disclosure of the full unedited raw video, and
7 delay was incurred by that. And that's -- so
8 looking at paragraph 49, the second -- pardon me,
9 looking at the third line of paragraph 49:

10
11 Defence counsel submit that they were
12 entitled to have the information necessary to
13 determine whether the videos could be
14 authenticated before making an
15 election, . . .

16
17 Turning to paragraph 50:

18
19 In my view, there is no merit in . . .
20 defence submission. *R. v. Stinchcombe*, . . .
21 establishe[s] that initial disclosure should
22 occur before the accused is called upon [to
23 enter] to elect mode of trial and plea so
24 that they are aware of the strengths and
25 weaknesses of the Crown's case before
26 committing on these issues . . .
27 However, *Stinchcombe* does not require Crown
28 disclosure to be complete before an election
29 can be made. The Crown is not obliged to
30 disclose "every last bit of evidence" before
31 trial dates can be set [citation to *R. v.*
32 *Gandhi*]. As set out by the . . . Court of
33 Appeal . . . *R. v. J.E.K.*, . . . at para. 66,
34 outstanding disclosure requests, especially
35 with respect to third party records, is not
36 [the] basis to delay setting a date:

37
38 There's an inset paragraph that goes into that in
39 more detail. And looking at that inset paragraph,
40 end of the third line:

41
42 Where an accused asserts a disclosure delay,
43 the fact of that delay must be shown to
44 have . . . some real effect on the right to a
45 fair trial and to make full answer and
46 defence in order [for there] to be a
47 *Charter* breach. . . . delay in Crown

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1 disclosure may not require delay of the
2 trial, much less delay in setting
3 either . . . date for a preliminary inquiry
4 or a trial date.

5
6 Continuing on over the next page, the underlined
7 portion of that inset paragraph, third line:

8
9 It amount[s] to a notion that outstanding
10 disclosure, no matter how trivial or
11 technical, and no matter that disclosure
12 review (especially with respect to third
13 party records) is restricted to the trial
14 judge hearing the trial itself, somehow puts
15 the case into stasis with the clock ticking
16 against the Crown. This is simply not so.

17
18 And then ultimately, paragraph 52 Justice Devlin
19 finds that after receiving the initial disclosure,
20 defence was aware of the core of the Crown's case,
21 with the testimony of Mr. -- I won't pronounce any
22 -- Mr. L.:

23
24 . . . regarding what he observed while
25 working [at] Elite Farm[s]. Whether the
26 [video recording he obtained] video
27 recordings he obtained were admissible was an
28 issue to be determined at trial.

29
30 So essentially, once the Crown has provided
31 disclosure that shows that the core of what the
32 case is to be met, that should be sufficient to --
33 for the defence to enter an election. Any further
34 follow-up -- there can be further follow-up in
35 providing additional materials but there's no need
36 to delay the election till absolutely everything
37 is provided.

38 And a similar position was taken in *R. v.*
39 *Regan*, looking at paragraphs 64 and 65. This is
40 again a delay application. Ultimately, it's --
41 it's dismissed. And so looking at paragraph 65:

42
43 While the accused did not have [to elect a]
44 mode of trial, he was entitled to
45 his lawyer's considered professional
46 opinion about the strength of the Crown's
47 case before making other important decisions,

Submissions for Crown by Cnsl M. Adams

1 such as considering a guilty plea or pursuing
2 resolution discussions.

3 Further down in that same paragraph, after the --
4 the footnote number 2:

5
6 The accused cannot hold out for every last
7 shred of disclosure before setting hearing
8 dates: . . .
9

10 And there's some citations, including a citation
11 to *J.E.K.*, which was cited in -- in *Elite Farms*.

12
13 In some cases it is reasonable to expect
14 defence counsel to book a trial or
15 preliminary inquiry [date] before they['ve]
16 had an opportunity to review all . . . the
17 Crown's disclosure. But defence counsel
18 should not be expected to set a hearing date
19 before they have [had] a reasonable
20 opportunity to review the essential aspects
21 of the Crown's case.
22

23 And down at paragraph 68:

24
25 . . . defence counsel must make reasonably
26 prompt efforts to meet with their clients and
27 secure instructions . . .
28

29 So gain, disclosure does not have to be perfect
30 before an election should be entered and trial
31 dates or preliminary inquiry dates set. The last
32 cases the Crown will refer to is *R. v. Spackman*,
33 the Ontario Court of Appeal decision from 2012.
34 I'm looking at paragraphs, starting at paragraph
35 106.

36 This is a case about whether the -- the
37 police had sufficiently investigated a potential
38 alternative suspect and disclosed that to -- to
39 defence.

40 So paragraph 106:

41
42 Under our system of law enforcement, [there's
43 a] general duty to investigate allegations of
44 criminal conduct [the general duty to
45 investigate allegations of criminal conduct]
46 falls upon the police. The fruits of a
47 criminal investigation, it follows, are

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1 gathered by the police who also determine,
2 often with the benefit of legal advice from
3 the Crown, whether criminal charges will be
4 laid. The Crown obtains the fruits of the
5 investigation because of the corollary duty
6 of police investigators to disclose to the
7 Crown all relevant material[s] in their
8 possession:
9

10 A citation to *McNeil*.

11
12 It does not follow from the disclosure
13 obligations imposed upon the Crown, or the
14 correlative duty imposed upon the police to
15 turn over [the] fruits of the investigation
16 to the Crown, however, that an accused is
17 entitled to a particular kind of disclosure
18 or assured of a specific form of
19 investigation.
20

21 108:

22
23 . . . disclosure obligations of the Crown
24 do *not* require the production of witnesses
25 for discovery, . . .
26

27 And farther down in that same paragraph:

28
29 Nor does an accused have a constitutional
30 right, as . . . incident[al] [to] the right
31 to make full answer and defence or otherwise,
32 to an adequate police investigation of the
33 crime with which she or he is charged:
34

35 Some citations to *Darwich* and *Barnes*.

36
37 Further, an accused has no constitutional
38 right to direct the conduct of a police
39 investigation of which she or he is the
40 target or, through a disguised disclosure
41 demand, conscript the police to undertake
42 investigatory work for him or her:
43

44 Citation to *Darwish*. Further on:

45
46 On the other hand, the police and Crown
47 should give serious consideration to

Submissions for Crown by Cnsl M. Adams

1 investigative requests . . .

2

3 And at some point -- this is at paragraph 109, at
4 some point there may arise a point at which the
5 police do have to investigate, essentially,
6 alternative suspects.

7 But what the -- the Crown's submission, what
8 this stands for is that the -- the defence can't
9 use disclosure requests to require the police to
10 produce material that doesn't otherwise exist,
11 because in the defence position, you know, the
12 materials that were produced in the investigation
13 were insufficient.

14 I think it goes hand in hand with the idea
15 that the Crown is -- is supposed to -- or has an
16 obligation to disclose materials that exist.
17 They're not required to disclose material that
18 doesn't exist.

19 So I think that by going back to the police
20 and requesting that the police produce additional
21 will-says, the Crown has already gone beyond what
22 -- what is actually even required of *Stinchcombe*
23 disclosure, and if -- if it's the position of the
24 defence that it's still insufficient disclosure,
25 the Crown's position is that that is a application
26 that should be made to a trial judge. The only
27 way to get there is, of course, for the accused to
28 enter an election, set a date for a preliminary
29 inquiry or a trial; ultimately make an application
30 to the trial judge arguing that the material is
31 insufficient.

32 So overall, it's the Crown's position that
33 the accused know the key aspects of the Crown's
34 case. They know the case to meet. They've had
35 disclosure of those key aspects for quite some
36 time, since May, and any further concerns about
37 police notes, particularly as it applies to some
38 -- some of the officers that are quite peripheral
39 to the investigation, that can be sorted out after
40 a preliminary inquiry, or a trial date is set.

41 So, happy to answer any additional questions
42 the court has, but those are the Crown's
43 submissions.

44 THE COURT: Thank you.

45

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

47

Submissions for Accused [REDACTED] by Cnsl R. Neary

1 CNSL R. NEARY: I'm going to hand up a couple other
2 things, Your Honour;
3 First is just a single-page letter that was
4 referred to in the proceedings before Judge
5 Mrozinski but did not end up being attached as an
6 exhibit. My friend mentioned it was just sent the
7 day before we were before Judge Mrozinski.
8 The second is a package of, I think it's five
9 items. The first is a letter, one of the letters
10 that my friend referred to that was sent to us
11 after Judge Mrozinski's directions, just to give
12 you an idea of what kind of, you know, the
13 correspondence looks like; and then four examples
14 of will-says that were produced after Judge
15 Mrozinski's directions.
16 Finally, I'm handing up a decision, a very
17 recent decision from May of this year from your
18 brother judge, Munro, case called *McNeil*,
19 involving my friend's office that has a lot of
20 similar issues.
21 I would say at the outset, you know, my
22 friend's position taken to the extreme, like you
23 know, the Crown and the police don't ever have to
24 produce anything that doesn't already exist would
25 result in, well, we don't have to make any notes,
26 and because we don't have notes you don't get to
27 learn what our evidence will be until trial. I
28 mean, that's the extreme of that position.
29 And that was obviously rejected by Judge
30 Mrozinski when she directed will-says for 22
31 officers, the last time we were in court. And
32 we'll get to what some of those will-says look
33 like momentarily. But just touch briefly on the
34 cases my friend referred to, because I don't
35 disagree with a lot of the statements in them.
36 The accused is not entitled to every last
37 shred of disclosure, as is written in *Regan*.
38 However, the accused is entitled, as the Court of
39 Appeal said in their reasons, to his lawyer's
40 considered professional opinion about the strength
41 of the Crown's case before making important
42 decisions.
43 This is a surveillance-driven case, and I'll
44 get to the July 26th letter that's an exhibit to
45 the proceedings before Judge Mrozinski in a
46 moment.
47 And the surveillance-driven case where, as my

Submissions for Accused [REDACTED] by Cnsl R. Neary

1 friend alluded to, all we've got for notes from
2 the surveillance officers -- well, we've got
3 nothing. We've got the surveillance reports, and
4 not a single occasion where a surveillance officer
5 had made any entry at all in their notebook as to
6 their own observations. And moreover, on top of
7 that, a deviation from the standard practice of
8 meeting right after surveillance concluded and
9 reviewing the report. That didn't occur in this
10 file, either. Often a week later and separately,
11 people are signing off on the report.

12 There is, in my submission and in submission
13 I made before Judge Mrozinski, on this file, a
14 glaring deviation from the standard practice that
15 we usually see, such as to raise a flag of the
16 how-did-this-occur?

17 So one of the things that Judge Mrozinski
18 ordered was, as part of the will-say, why you have
19 no notes? If you have no notes, why do you have
20 no notes? I'll tell you right now, we've got
21 nothing in that regard. I'll give you some
22 examples of what police officers say for why they
23 have no notes:

24 I have no notes because the surveillance
25 report is my notes. You know, things like that.
26 So that -- that part has not been addressed
27 whatsoever.

28 THE COURT: Mr. Neary, I don't -- like I don't know
29 when the surveillance reports were made and . . .

30 CNSL R. NEARY: Well, this isn't controversial. This
31 is -- in terms of what I've just said, told you
32 about the facts, none of that's controversial.
33 I'd invite my friend to stand up and tell you I --
34 I've got it wrong if there's anything that he
35 thinks I've not stated accurately.

36 THE COURT: No, but I don't know if the officer is
37 typing on a computer instead of writing things by
38 hand, saying these are my notes because I'm making
39 these at the same time I'm making observations. I
40 don't know if that's what's happening.

41 CNSL R. NEARY: Well, either do I. No one does.

42 THE COURT: Yes, but . . .

43 CNSL R. NEARY: Right. No one has any idea what --
44 what happened. No one has any idea why the
45 individual officers didn't make their own notes.
46 All we've got is a report that was completed by
47 one officer, the scribe, and only signed off on by

Submissions for Accused [REDACTED] by Cnsl R. Neary

1 other officers a day, a week, whatever they are.
2 THE COURT: Right But what does further disclosure get
3 you? You want them now to go back and --
4 CNSL R. NEARY: Yes.
5 THE COURT: -- create notes?
6 CNSL R. NEARY: And explain why there weren't notes in
7 the first place.
8 THE COURT: Isn't that a trial issue?
9 CNSL R. NEARY: In my submission, no. Because what
10 happened, of course, if -- in my submission it's
11 extremely counterproductive and unfair to have the
12 accused sitting there, prepared for trial, having
13 gone to the expense of retaining a lawyer, the
14 court having gone to the -- to set aside the
15 resources to have a trial when, of course, if
16 someone gets up on the witness stand and says
17 something that's really important and has never
18 been said before, the inevitable result is an
19 adjournment to try and deal with the new
20 information, and allow the defence to prepare for
21 the new information.
22 THE COURT: Right. But we're talk -- we're talking
23 about setting trial dates.
24 CNSL R. NEARY: That's right.
25 THE COURT: Of preliminary inquiry dates. You can
26 continue to pursue disclosure.
27 CNSL R. NEARY: Mm-hmm.
28 THE COURT: Between now and whenever the trial dates,
29 and if you don't get that disclosure, that's a
30 remedy you can pursue at trial.
31 CNSL R. NEARY: I hear what you're saying, Your Honour.
32 I mean, I think we're -- I haven't had -- I
33 haven't said much so far today. I'm just kind of
34 getting started. I mean, I'd like to be able to
35 show you that the Crown hasn't complied with what
36 Judge Mrozinski told him to do.
37 THE COURT: You can certainly show me that, but what I
38 really want to know is, what don't you have that
39 you need to be able to give your client advice
40 about the next step. If it's you're not happy
41 with the disclosure, that's a trial issue. If
42 it's I need this key piece of information to be
43 able to advise my client about the next step,
44 that's a different issue. I'm certainly happy to
45 hear what you don't have that Judge Mrozinski
46 ordered.
47 CNSL R. NEARY: If the -- are the ITOs vulnerable to

Submissions for Accused [REDACTED] by Cnsl R. Neary

1 challenge based on frailties with the surveillance
2 information? That's what we can't answer.
3 Because, of course, what one does when -- as
4 defence counsel, when assessing an ITO and whether
5 there's a viable challenge to it, is compare the
6 ITO to the sourcing documents. Included in
7 sourcing documents for surveillance are, in my
8 submission, virtually always not just surveillance
9 reports but also notes from individual officers
10 who participate in surveillance. The next
11 comparison then becomes between the surveillance
12 report and the notes from the individual officers.
13 It is often an extremely fruitful area for mining
14 for discrepancies and contradictions.

15 If there's a difference between the ITO and
16 the surveillance report, that's good. If there's
17 a difference -- for the defence, in terms of being
18 able to attack a particular paragraph, or the
19 strength of an observation, asking for it to be
20 excised. If there's a difference between the
21 surveillance report and the notes of an individual
22 officer as to what occurred, that is also, of
23 course, an extremely fruitful area for cross-
24 examination and for arguing that that passage of
25 the ITO ought to be struck and excised.

26 I can think of a very recent case I did in
27 front of Judge Barrett, called *Hamish* [phonetic],
28 where -- you know, I could obtain the decision at
29 some point -- where that was the crux of the
30 problem. There were surveillance reports that
31 didn't match the notes, the police officers'
32 notes, who -- of the people who did
33 [indiscernible/rapid speech] in the surveillance,
34 resulting in certain observations being deemed
35 unreliable. And the police and the Crown not
36 being able to rely on those purported observations
37 as grounds. It's, of course, not an uncommon,
38 whatsoever, way to do things.

39 The benefit to the police -- if the police
40 are trying to be cagey and trying to protect
41 themselves from situations where they are subject
42 to being caught in contradictions or
43 discrepancies, it is far safer for them to produce
44 one report authored by one person and all say,
45 this is our collective notes. That prevents a
46 situation where they're far less likely to be
47 contradicted or caught up in error or discrepancy.

Submissions for Accused [REDACTED] by Cnsl R. Neary

1 It is, however, grossly counter to the principles
2 upon which the courts operation and on which the
3 Charter operates, in that we want the truth, not
4 the safest version for the police. We want the
5 fullest information about what happened, not the
6 safest version for the police.

7 So it is in a case where the Crown is looking
8 for a decade in prison for a man with no criminal
9 record, and it will largely turn on the
10 reliability of the surveillance information to
11 have no notes whatsoever and will-says that say
12 things like, I don't have notes because I don't
13 have notes. In my respectful submission, grossly
14 unfair to say, well, you go to -- you go to your
15 client and tell him, I can't tell you how things
16 are going to look on testing the surveillance
17 because they don't have to tell us much about it.
18 They've just got this one report. We don't have
19 the usual stuff we have to challenge and go after
20 it. We've just got to rely on this one document.
21 And even though a judge told them to go produce a
22 will-say that says, what did you do on this day,
23 what are your recollections, that's changed, they
24 don't have to do that after all before we arraign.
25 So make up your mind, you want to fork over tens
26 of thousands of dollars for a trial where I can't
27 really give you much of a good assessment on
28 what's going to happen, or -- or what do you want
29 to do? That -- that's the advice -- that's the
30 position that the accused is put in. That's the
31 position that the accused's counsel is put in. So
32 to address that question, that's what I have to
33 say.

34 *Elite Farm* is very, very distinguishable in
35 my respectful submission. They weren't asking for
36 stuff that went to the heart of the case, the
37 heart of the strength of the case; they're asking
38 for, like, the metadata on a video that had been
39 disclosed, investigate the possibility that it had
40 been fabricated or doctored, or something along
41 those lines. And Justice Devlin found it was, you
42 know, only remotely connected to the case.

43 I fully accept the accused is not entitled to
44 every last shred of disclosure. What I say the
45 accused is entitled to is the important stuff, and
46 in this case the important stuff relates to the
47 surveillance notes primarily.

Submissions for Accused [REDACTED] by Cnsl R. Neary

1 *Pipping*, which is cited at paragraph 51 of
2 *Elite Farm* is a case I -- I argued very recently
3 with another member of Mr. Adams' office. They
4 were relying on *Elite Farm* and *Pipping* in a case
5 called *Moore* [phonetic], that resulted in a stay
6 over disclosure problems the week before last, I
7 think.

8 In that case -- well, in *Moore*, what had been
9 missing at first was a video of a roadside stop,
10 and then a refusal or extreme delay in providing
11 answers, will-says, the questions arising from the
12 video. So initial batch disclosure comes no video
13 of the roadside stop. You know, that -- that
14 turns on a search of the car. It's just not
15 there, period. You know, it's parallels here,
16 like things are just really obvious, the common
17 things, like things that jump out as obvious,
18 missing from the initial package, and then a
19 letter is written and then there's a lengthy delay
20 in any -- any response. So in *Moore* it was a
21 fight about the video that eventually got
22 disclosed late, and then request the will-says
23 about questions arising from the video. We ended
24 up in a hearing like this before Judge Gouge. He
25 said, no, you don't have to arraign. We ended up
26 in a PTC before Judge Browning after election was
27 made, and he said, you can't set dates if you
28 don't have the material.

29 In *McNeil* there's three of these appearances
30 before Judge Gouge where we walked away and we
31 didn't have to arraign, and that was for -- for
32 source documents on an ITO. So there's no
33 question that an accused is entitled to the
34 important information before being forced to -- to
35 arraign. I don't think that's controversial.

36 What my friend says is, is this isn't
37 important or we don't have to produce it because
38 it didn't exist in the first place. I say the
39 argument you don't have to produce it because it
40 didn't exist in the first place can't succeed
41 because that is an invitation, from a policy
42 perspective, of just don't write it down, don't --
43 don't record it because you can't be contradicted
44 later. They won't make you produce that in
45 advance of trial and then we're ready to go in and
46 -- and -- and get, you know, things organized to
47 match up for the first day in court. And

Submissions for Accused [REDACTED] by Cnsl R. Neary

1 that's --
2 THE COURT: Right. That's -- that's an excellent
3 argument at a voir dire or a trial, but how do I
4 make an order for the police to create things that
5 did not exist at the time?
6 CNSL R. NEARY: Well, Judge Mrozinski did it at the
7 last appearance.
8 THE COURT: Well, she asked for will --
9 CNSL R. NEARY: There's lots of cases where it's been
10 done.
11 THE COURT: Yes, so there's will-says but I can't ask
12 police officers, can you please create your
13 surveillance notes.
14 CNSL R. NEARY: No, the will-says that Judge Mrozinski
15 directed be created were, if you don't have notes,
16 please provide an explanation of -- not "please",
17 provide an explanation. I'm a judge. Provide an
18 explanation of why you don't. And they include
19 what your notes would have had, what days did you
20 work on the investigation and what did you do.
21 Okay.
22 So let's -- let's look at -- let's look at
23 page 35, line 35 of Judge Mrozinski's ruling. And
24 she -- she found last time it's premature to
25 direct these accused to arraign given the state of
26 disclosure. And she -- and she said, Crown, go
27 get these things.
28 Let's look at what we've got? I wish we had
29 water. Let's look at what we've got.
30 THE COURT: I don't know why we don't have water today.
31 CNSL R. NEARY: I don't either but . . .
32 THE COURT: It's a . . .
33 CNSL R. NEARY: It's all right, obviously.
34 THE CLERK: Your Honour, I can step out and get some
35 water.
36 THE COURT: That would be . . .
37 CNSL R. NEARY: I would really appreciate it.
38 THE CLERK: Okay.
39 CNSL R. NEARY: My mouth is dry when I talk so much.
40 Thank you.
41 Oh, I handed those up already, right?
42 There's the letter from the Crown and some
43 materials?
44 THE COURT: I've got the transcript, yes.
45 CNSL R. NEARY: So say, look at the transcript quickly,
46 then I also want to take you to a bundle of stuff
47 that I handed up that's been produced after Judge

Submissions for Accused [REDACTED] by Cnsl R. Neary

1 Mrozinski's direction.
2 So jump ahead, if we could, to page 35, line
3 35.
4
5 Twenty-two officers, do they have notes; if
6 they don't . . .
7
8 Sorry, I should back it up even a little bit more,
9 because this is the point where she's essentially
10 directing the Crown to: here's what you should go
11 get before Mr. Neary and his client and -- should
12 have to arraign. And I was asking at -- at line
13 16 of page 35:
14
15 What days they were involved in the
16 investigation and what they did. The
17 things we would typically see in a
18 notebook. What days they were involved
19 in . . . investigation, . . . to the
20 best of their recollection their
21 activities on those dates.
22 THE COURT: In respect of this investigation?
23 [Yes] of course, . . .
24
25 And Mr. Adams, at line 27:
26
27 CNSL M. ADAMS: Sorry, . . . what days they
28 were involved in the investigation and?
29 THE COURT: And their activities, if they
30 were involved in this investigation,
31 their activities on those days in
32 relation to this investigation.
33
34 Page 34:
35
36 . . . I think we have it. Twenty-two
37 officers, do they have notes; if they don't
38 have notes, why don't they have notes? What
39 would their evidence be at trial with respect
40 to this investigation? What days were they
41 working on the investigation, and what were
42 they doing during those days, on this
43 investigation. That should do it.
44
45 So I may want to look at other parts of the
46 transcript but that's a good segue into what we've
47 got in response to that direction.

Submissions for Accused [REDACTED] by Cnsl R. Neary

1 So just before I take you to the letter, one
2 of the complaints I made before Judge Mrozinski
3 and, again, I don't think that my friend takes
4 issues with, the disclosure in this file came --
5 the initial batch of disclosure came with no
6 index. A bunch of Adobe documents with numbers.
7 You have no idea what you're opening. Is one --
8 what is 171? Is it Sergeant Jones, is it
9 Constable Brown? We just don't know. So, you
10 know, hundreds of documents, number numbered. No
11 -- no index whatsoever.

12 So, you know, and we also came to court on
13 July 13th in a situation where I'd written this
14 really detailed letter on June 26th. That's you
15 have up there, and it makes, you know, a lot of
16 noise about the -- the notes issues and the state
17 of the disclosure, and there'd been no response to
18 that letter before we got to Judge Mrozinski. No,
19 like I have your letter, here's what we'll give
20 you, where's what we won't, here's our position.
21 Nothing, no response from the Crown. And in the
22 end, none of the requests had been made of the
23 police.

24 So we walked in front of Judge Mrozinski not
25 knowing what parts of the June 26th letter the
26 Crown's prepared to comply with and which ones
27 they weren't. I still don't have response to that
28 letter. I do not have a, in response to your
29 letter of June 26 we say this.

30 After the appearances before Judge Mrozinski
31 there've been these additional batches of
32 disclosure -- I'm just going to stop and get a
33 little water.

34 They come attached to boilerplate letters
35 that are in no way responsive to my July twenty --
36 my June 26th letter or what happened in front of
37 Judge Mrozinski. There's no, you know, as you
38 asked for in June, as Judge Mrozinski directed.
39 Nothing like that. [As read in]:

40
41 Please find (1) supplemental disclosure; (a)
42 documents; (b) tasks; (c) inventory ledger.
43 (2) supplemental disclosure; (a) documents;
44 (b) tasks; 3 inventory ledgers.

45
46 So we got something that sort of resembles an
47 index now, but I mean, I just -- it's sort of. I

Submissions for Accused [REDACTED] by Cnsl R. Neary

1 mean, that's what the -- that's what the letter
2 says. And then when you go to look at the
3 inventory ledger, which is the closest thing I
4 have to -- to an index, it comes out like this:
5 So on a computer screen you've got to go [non-
6 verbal sounds] and the only way you can print it
7 is like this. And the documents attached to it,
8 in response to what Judge Mrozinski directed, are
9 [indiscernible/rapid speech].

10 One thirty-seven is an occurrence report from
11 Detective Constable Ford. She's the lead
12 investigator on this thing. She's the head of the
13 surveillance team. She's the lead investigator on
14 this thing, who had no notes about her
15 surveillance activities. None of the eight
16 surveillance officers had a single thing in a
17 notebook about the surveillance activity, zero.
18 So we've got, you know, why -- why don't you have
19 it in your notes? Because that's Constable Ford,
20 boss of the show What's going on?

21 And we have the -- you know, the first
22 paragraph, the following is provided in response
23 to Crown request. The request comes in July 17th,
24 so four days after we were before Judge Mrozinski.

25 Second paragraph talks about ERT members.
26 I'm not taking issue with the state of disclosure
27 on the ERT members anymore. We didn't -- I don't
28 think we had anything before the appearance before
29 Judge Mrozinski. We've got what I would say is
30 sufficient now. It's not like the heart of the
31 case stuff. I -- I might still be asking for more
32 material but nothing that would prevent a person
33 from arraigning. [As read in]:

34
35 Detective Constable Ford was a member of
36 surveillance throughout the investigation,
37 and the dates that she was involved in
38 surveillance is noted in the surveillance
39 report from each day of surveillance.
40

41 I guess that's her attempt to say what she did on
42 a certain days. Maybe that's her attempt to --
43 maybe that's her -- what she was offering for an
44 explanation for no notes, too? I don't know. Is
45 that supposed to be a full response to why do you
46 have no notes? What did you do on the days that
47 you worked on this investigation? That paragraph.

Submissions for Accused [REDACTED] by Cnsl R. Neary

1 And then we've got, [as read in]:

2
3 Any members involved in surveillance were
4 noted in the reports as being involved in
5 surveillance each day surveillance occurred.
6 No other police officers were involved other
7 than those listed.

8
9 Then the last sentence:

10
11 There was no surveillance conducted on [REDACTED]
12 prior to the inception of the file, which was
13 February 9th, 2022.

14
15 And that -- that ties into an important issue that
16 was raised before Judge Mrozinski and it was
17 raised in my letter of July 12th, and that is,
18 there's -- there's some fairly significant gaps,
19 it would appear, in the surveillance reports, at
20 least, like a week between surveillance reports,
21 10 days between surveillance reports. And of
22 course, Your Honour, if surveillance had been
23 conducted in the week between dates -- or the 10
24 days between, you know, surveillance report A and
25 surveillance report B, that didn't produce any
26 results that would -- would build ground, and that
27 information was not disclosed, that would be
28 significant, because if you go set up on a guy
29 who's supposed to be a drug dealer and all he does
30 is walk his dog and go to the mall and, you know,
31 go fishing, then that's a day that suggests
32 perhaps you're wrong on your theory. So one of
33 the requests was: were there days in between the
34 dates that we have surveillance report, where any
35 surveillance was conducted? This doesn't answer
36 that. This says there was none conducted before
37 the investigation started. Well, no kidding. But
38 when looking at the important question of, for
39 these periods where there's a big gap in
40 surveillance, was there any occasions where you
41 set up on this fellow and nothing happened?
42 'Cause, because no one made any notes, we can't go
43 to the traditional, you know, on this day worked
44 on [REDACTED] started at 9:30, here's what we did,
45 you know, so are there days where there's
46 surveillance that we don't have reports for and
47 where nothing was observed? That question remains

Submissions for Accused [REDACTED] by Cnsl R. Neary

1 unanswered.

2 And just -- I would just say that -- and I'm
3 going to ask that this be marked an exhibit on
4 this proceeding.

5 There's no possible way to interpret this, in
6 my respectful submission, as complying with the
7 direction made by Judge Mrozinski, this will-say,
8 and this is the most fulsome one we've got.

9 The next one from -- the next one on my pile,
10 hopefully yours, Anthony Norman.

11 THE COURT: Yes.

12 CNSL R. NEARY: Will-say: Retrieved video from Thrifty
13 Foods, exhibit officer for woman, 1021 Tolmie.
14 This is the exhibit officer for the house where I
15 think my -- my client was believed to be living --
16 exhibit officer Hyundai Elantra, member of
17 surveillance on five dates; no notes were
18 generated. During surveillance, notes were
19 produced as a surveillance report but not by him.
20 No notes during the exhibit process. Is the
21 exhibit officer. [As read in]:

22
23 No notes during exhibit process as notes were
24 generated in the form of photos, exhibits,
25 flowchart and memory.

26
27 Is that, what did you do? What days did you work
28 the investigation, and what did you do on those
29 days? And why don't you have notes explaining
30 that? Does that will-say -- is there any rule
31 where that will-say could be reasonably construed
32 as compliant with what Judge Mrozinski was
33 directed at page 35, line 35? In my respectful
34 submission, absolutely not.

35 So are we in a situation where an accused can
36 come to court, make -- argue something -- I mean,
37 I suppose it's open to Your Honour to say, I take
38 a different view that Judge Mrozinski, but I mean,
39 if an accused can come to court, these issues get
40 fleshed out pretty fully in like an hour-long
41 hearing, and a judge says, okay, no, it's
42 premature to arraign, defence should have this
43 stuff before they have to arraign, and the police
44 and Crown just don't do it. There's, we'd rather
45 not. That seems inconvenient. Whatever the
46 reason might be, we're too busy. You know, if you
47 want to go to non-nefarious reasons, you know.

Submissions for Accused [REDACTED] by Cnsl R. Neary

1 Look, no, we're actually not going to, you know,
2 do that. And let's go back to court and say you
3 have enough to arraign now, without having
4 complied about that. Just blatant non-compliance
5 with what you were told to do the last time we're
6 in court, because that's the situation in my
7 respectful submission.

8 Craig Barker, member of surveillance on March
9 9th, 2022. Surveillance report on March 9th, 2022
10 will act as notes for my actions. No notes. Is
11 that Constable Barker telling us what he did on
12 March 9th, 2022, to the best of his recollection
13 and why he didn't make notes? Surely not.

14 And I would pause to say, you know, there's a
15 kind of fall-through-the-crack issue on this,
16 unfortunately, in that the three will-says I just
17 took you through are from members of the
18 surveillance team that had no notes whatsoever.
19 Five members of the surveillance team had random
20 notes for -- for different days they weren't on
21 surveillance. For those officers, the Crown has
22 given us nothing further, so we still know
23 nothing, we still have nothing other than
24 surveillance reports for five of eight of the
25 surveillance team, because the Crown's position
26 is, well they actually, if you think about it,
27 they had a note from another day, so they don't
28 fall into the no-notes category. We don't have to
29 -- we don't have to -- they don't have to ask them
30 to -- to explain what they did when they're on
31 surveillance and why they didn't make notes on
32 surveillance, despite, if you look at the June
33 26th letter, this huge, you know, flashing theme
34 being, this is highly unusual and makes it very
35 hard to make full answer and defence, and that
36 being a huge scheme of the argument before Judge
37 Mrozinski. And that's readily abundant from the
38 transcript and from the letter of June 26th, that
39 we can't make full answer and defence without
40 knowing what these surveillance officers would say
41 outside of this report. What is their independent
42 recollection of what they did? And why didn't
43 they make notes?

44 Because another theme, of course, is that if
45 there was some sort of top-down direction
46 somewhere, don't make notes, that would -- that
47 would surely ground a potential stay application.

Submissions for Accused [REDACTED] by Cnsl R. Neary

1 It can't be. I mean, the law -- in law notes is
2 -- is really -- is interesting and -- and -- and
3 in a lot of ways there's really firm, you know,
4 suggestions and recommend, so of course it's
5 really important to make notes. Officers really
6 ought to make notes. It's a long-recognized duty
7 to make notes, all these things, but it's not an
8 independent breach not to.

9 So -- so sometimes I think the only
10 [indiscernible/rapid speech] the officers here is
11 it's not an independent breach not to -- not the
12 whole it's really important, fundamental to our
13 system of justice and knowing the truth later,
14 when we're talking about things months and years
15 later to make notes. All they hear is, it's not
16 absolutely mandatory, an accused won't get a
17 *Charter*, you know, breach just out of you not
18 making notes. And if that's the message that's
19 being heard by higher-ups and they're directing
20 the surveillance team, don't make any notes. We
21 will insulate ourselves from cross-examination
22 about discrepancies by not producing individual
23 sets of notes and only having one set of notes for
24 everyone.

25 THE COURT: Well, what I don't know, Mr. Neary, is I
26 don't know if officers are making notes
27 electronically, and that's what's -- that's what's
28 generated to the surveillance report.

29 CNSL R. NEARY: You would think the Crown might say
30 that given the stink that's being made about this,
31 you know.

32 THE COURT: So I -- I think there does need to be an
33 answer to -- like, I just say, say there are no
34 notes; well, could you just go one step further
35 and say, I made these notes at the time,
36 electronically, that's why I have no handwritten
37 notes.

38 CNSL R. NEARY: There's no -- I mean you think about
39 how surveillance is done, that's highly unlikely.
40 People are driving and everything else, that's why
41 there's one person making notes because everybody
42 else is busy doing things. You can't be scrawling
43 it at the time.

44 THE COURT: I -- I don't know that.

45 CNSL R. NEARY: And then you go back later and look at
46 them, right. I mean, this is what countless cases
47 centre on this kind of, you know, scrutinizing

Submissions for Accused [REDACTED] by Cnsl R. Neary

1 what occurred in these situations. This is a
2 situation that insulates, you know, scrutiny.
3 THE COURT: Well, we -- we don't know because they
4 haven't answered the question --
5 CNSL R. NEARY: We don't know --
6 THE COURT: -- about why they don't --
7 CNSL R. NEARY: -- thank you. We don't know because
8 they haven't answered the question.
9 CNSL M. ADAMS: -- why they don't have handwritten
10 notes, so I think that is something -- I don't --
11 I don't think the answer, just saying there's no
12 notes, is sufficient.
13 CNSL R. NEARY: Thank you.
14 THE COURT: If, in fact, they're going to say, I made
15 these notes electronically at the time, that's why
16 I didn't duplicate it with handwritten notes,
17 these are my notes, or --
18 CNSL R. NEARY: I mean, just one more example of the
19 will-says, Constable Atwell: No notes, as per
20 conversation over phone with Constable Taylor.
21 That -- that's his will-say in response to the
22 directions of Judge Mrozinski.
23 So those are just kind of a sampling, and in
24 my respectful submission what's happened here is
25 the police and the Crown have not provided the
26 information they were directed to, and the accused
27 is not in any different position to meaningfully
28 assess the strength of the grounds contained in
29 the surveillance evidence than it was when we were
30 before Judge Mrozinski. And I would ask the court
31 to make the same -- some of the same decisions
32 Judge Mrozinski did. It's premature to force the
33 defence to arraign, and reiterate Judge
34 Mrozinski's directions on the last occasion.
35 And further, I respectfully request that it
36 be made clear specifically that the surveillance
37 officers, even if they have a note for having done
38 something, you know, four weeks later, moved an
39 exhibit from one locker to another, need to
40 produce will-says for what they did in terms of
41 their surveillance activities, addressing the best
42 recollection of their activities that day and why
43 they didn't produce notes. Because if there's no
44 direct answer to why there are no notes here, and
45 certainly if the answer is, we were told not to,
46 the accused is entitled to know that and begin
47 preparing applications accordingly. I mean, no

Submissions for Accused [REDACTED] by Cnsl R. Neary

1 one has said, we weren't told not to. No one has
2 said, no, no, no, no such direction was made. I
3 mean, that's a -- that's a fair question in the --
4 THE COURT: Or, we made notes, we made them
5 electronically.
6 CNSL R. NEARY: Right. It hasn't been answered. It
7 hasn't been answered. Well, made them
8 electronically, they weren't concluded -- included
9 separately. I mean, you know, when I said no
10 notebook entries, there's no -- there's no --
11 there's no typed notes for surveillance
12 observations either. There's nothing but one
13 master surveillance report. So are they -- are
14 they made electronically, they would have had to
15 have been made electronically, incorporated in the
16 surveillance report, and then never attributed
17 back to the officer. Like, why wouldn't you
18 disclose them and say, here's the surveillance
19 report, here's the typed thing I got from
20 Constable Jones, here's the typed thing I got from
21 Constable Barker, here's the typed thing I got
22 from Constable Mayo, especially when you're in a
23 situation where there's a clear joint issue.
24 There's no doubt about that, and that's why Mr.
25 Adams is saying arraign. I'm sure that's why your
26 -- Your Honour is concerned.
27 Nobody thinks that cases should just get
28 thrown out and not tried on their merits as
29 involving fentanyl and all sorts of serious
30 things. But that doesn't mean that the accused's
31 rights to make full answer and defence just have
32 to take a back seat, you know. They don't have to
33 do what they're supposed to, because otherwise the
34 consequences are icky. So -- so let's -- we're
35 just going to have to push that right to make full
36 answer and defence aside because if we don't, it's
37 a bad situation. There's a potentially bad
38 result. That can't be, in my respectful
39 submission, the way.
40 This is the -- the exact situation we ended
41 up in, in *McNeil*, and it -- and it ended up being
42 stayed; and *Moore*, that ended up being stayed a
43 week and a half ago. But if there's something
44 wrong, going wrong in -- in the investigative
45 agency, in terms of their ability to put
46 disclosure together, if the Crown office is
47 overwhelmed and there's a resource issue there,

Submissions for Accused [REDACTED] by Cnsl R. Neary

1 those are all really unfortunate things but the
2 accused's right to make full answer and defence
3 can't take a back seat to those issues. Can't be
4 like, well, so he doesn't get his s. 7 right to
5 make full answer and defence, because they're
6 really strapped right now. You know, they're
7 super busy so we can't do it today.

8 THE COURT: Well, I guess the s. 7 rights is whether
9 it's happening before or after arraignment.

10 CNSL R. NEARY: Well, in my respectful submission, the
11 -- the -- the right -- s. 7 does encompass, and I
12 think there's -- there is [indiscernible/rapid
13 speech] too, well judges are regularly ruling.
14 There's no -- there's no question that a judge in
15 your capacity right now has jurisdiction and very
16 often will properly say, no, it's not -- there's
17 not sufficient disclosure for arraignment. I
18 mean, that -- that's -- there's no -- there's no
19 doubt that that happened. If we were here with
20 nothing and I was saying to you, we don't have a
21 shred of disclosure, and the Crown was saying,
22 that's okay, arraign, clearly you have the ability
23 to say, no, it's not. So the question is
24 sufficiency. It's not whether, you know --
25 there's no question that this forum is an
26 appropriate forum in the appropriate circumstances
27 to say disclosure is insufficient to force
28 arraignment. The question is whether disclosure
29 is sufficient.

30 And you know, my friend says, no, no, no, let
31 the trial judge worry about it later. But this is
32 -- this is an appropriate forum for the argument
33 about, is disclosure sufficient to arraign. Your
34 Honour's in a good position to make that
35 determination, in my respectful submission,
36 particularly with the transcript you have, the
37 clear direction was made, and the blatant non-
38 compliance.

39 Those are my submissions, subject to further
40 questions.

41 THE COURT: We need to take a morning break, so let's
42 do that.

43 CNSL R. NEARY: Sure thing. Thank you.

44 THE CLERK: Order in court.

45

46 (PROCEEDINGS ADJOURNED AT 11:26 AM)

47 (PROCEEDINGS RESUMED AT 11:46 AM)

Submissions for Accused [REDACTED] by Cnsl R. Neary

1
2 THE CLERK: Order in court. All rise.

3 Thank you, Your Honour. Recalling the matter
4 of [REDACTED] [REDACTED] and [REDACTED] [REDACTED]
5

6 **SUBMISSIONS FOR ACCUSED [REDACTED] BY CNSL R. NEARY,**
7 **CONTINUING:**
8

9 CNSL R. NEARY: Your Honour, I'm just going to be
10 brief. I thought I was done but I just wanted to
11 -- I didn't actually take you to the letter of
12 June 26th that kind of started all this. I'd like
13 to just ask you to look with me at that briefly.

14 THE COURT: Yes.

15 CNSL R. NEARY: And clarify, I guess, what I'm going to
16 ask that you consider doing today.

17 THE COURT: I have it. Yes.

18 CNSL R. NEARY: Do you have it?

19 THE COURT: Yes, I do. Thank you.

20 CNSL R. NEARY: Thank you. If I could turn to the
21 second page of that letter, and it doesn't look
22 like they're actually numbered, but second page of
23 that letter we have this, you know, clear focus on
24 the theme about the disclosure not including any
25 notes relating to any of the police surveillance
26 activities, how none of the eight officers
27 identified a period of taking independent notes.
28 Some explicitly stating they had no notes. I
29 write, [as read in]:
30

31 It appears many of the police officers intend
32 to rely on the surveillance reports as their
33 notes in place of taking independent notes.
34

35 I go on to say:

36
37 It should be obvious the idea of multiple
38 police officers recording a surveillance
39 report, which has been collectively
40 collaborated on, where independent notes is
41 not only highly problematic but antithetical
42 to the very principles underpinning an
43 officer's duty to make notes.
44

45 And I make reference to the Supreme Court of
46 Canada in *Wood and Schafer* [phonetic], which is
47 one of the many cases with the firm -- firm

Submissions for Accused [REDACTED] by Cnsl R. Neary

1 admonitions to -- to make notes, but doesn't go
2 quite as far as to say that there's a duty, or at
3 least a *Charter*-protected duty.

4 I go on to say:

5
6 The absence of independent notes by entire
7 surveillance team is such a marked departure
8 from accepted police conduct, the standards
9 regarding police notetaking, it seems highly
10 unlikely every member of the surveillance
11 team deviated from expected norms on their
12 own accord; that a full explanation for this
13 glaring deviation from standard policing
14 principles and procedures, Mr. [REDACTED] cannot
15 make full answer and defence.
16

17 And I want to jump ahead to point 7, because -- so
18 there's -- then there's a list of disclosure
19 requests that are made, and in terms of what I'm
20 asking Your Honour to consider doing today is
21 saying, it's premature to arraign because the
22 direction of Judge Mrozinski, at page 35, line 35,
23 hasn't been complied with and that needs to be
24 complied with before the accused are going to be
25 directed to arraign, and I would like to also ask
26 Your Honour to consider adding this, that the
27 accused is entitled to the information sought in
28 point 7. Because, as I said, there's a kind of
29 slip through the cracks when this happened
30 because, you know, officer -- there's a sergeant
31 named Jorgensen who was on surveillance like five
32 days. Didn't make any notes on surveillance but
33 made a note, like literally like moved the H
34 envelope, you know, 10 feet down the hall, and so
35 the Crown has given me nothing for -- for a will-
36 say from them in terms of what they're doing on
37 surveillance and why they don't have surveillance
38 notes. So, to avoid that -- I don't want to call
39 it a loophole, but whatever the -- that issue, and
40 to clarify that that's not good enough, I would
41 ask Your Honour direct that before the accused is
42 going to be required to arraign, he's entitled to
43 have the information directed by Judge Mrozinski
44 at page 35, line 35 and following of the
45 transcript of the July 13th proceeding, as well as
46 the information sought in paragraph -- numbered
47 paragraph 7 on page 3 of the accused's letter

Submissions for Accused [REDACTED] by Cnsl R. Neary

1 disclosure request of June 26, 2023.

2 There are multiple other things that are
3 requested, and outstanding policies and things
4 that I -- that are going to be pursued. I'm not
5 saying we can't arraign without those things.
6 Those we can keep pursuing. The Crown still
7 hasn't said whether they'll give them to us or
8 not. I don't even know if we have a fight about
9 it or not. But in terms of this essential
10 information about the police surveillance notes
11 requested in this -- this numbered paragraph 7 on
12 page 3, my submission is that that is essential to
13 assessing the strength of the case, and the
14 accused ought to be -- ought to have it before
15 he's forced to arraign, in addition to the
16 information directed by Judge Mrozinski, which is,
17 for the 22 officers with zero notes, so not even
18 with Sergeant Jorgensen, I moved the H envelope 10
19 feet, for -- for zero notes, that there be a will-
20 say that actually, you know, addresses why they
21 don't have notes and actually addresses what they
22 -- they did.

23 Those are my submissions, Your Honour.

24 THE COURT: Thank you, Mr. Neary.

25 Are you making any submissions today?

26 CNSL N. BROOKS: I'll just say that Ms. [REDACTED] echoes
27 exactly what my friend has said and there's
28 nothing more that I would add --

29 THE COURT: All right. Thank --

30 CNSL N. BROOKS: -- to the persuasion.

31 THE COURT: Thank -- thank you, Mr. Brooks.

32 Yes, Mr. Adams.

33

34 **REPLY FOR CROWN BY CNSL M. ADAMS:**

35

36 CNSL M. ADAMS: Yes, Your Honour, I just want to raise
37 a point about my friend's submission about
38 essentially ultimate goal here is a potential
39 challenge to the -- the ITO.

40 Now, just want to raise the issue of
41 essentially Mr. Neary is asking for will-say -- as
42 I understand, he's asking for essentially a will-
43 say that would encompass what those officers
44 presently remember about the observations they
45 made over a year ago at this point, year and a
46 half ago at this point. And I'm just thinking,
47 what I'm struggling with here is how that is going

Reply for Crown by Cnsl M. Adams

1 to be -- how that could be used in a challenge to
2 a -- an ITO, because the -- what the officer
3 currently remembers about surveillance that took
4 place an extended period of time ago doesn't
5 necessarily mean that the observations that were
6 made on -- on the date in question that are
7 recorded in the surveillance reports are
8 unreliable.

9 So, and to add to this, my -- my friend made
10 some submissions about, you know, we don't know
11 how these -- these observations made it into the
12 surveillance reports. Well, we have some
13 indication, at least the -- the standard operating
14 procedure about how surveillance is done. Believe
15 the Crown's disclosed the document called the
16 Business Rules for Strike Force. It's the --
17 Strike Force is the surveillance focus group
18 within the Victoria Police. And that has some
19 detail about typically how -- how the surveillance
20 reports are compiled, and it also includes
21 information, and my friend alluded to about the --
22 the typical standards for reviewing the reports
23 and signing off on them. So there -- there is
24 some information there.

25 Now, in terms of the point that Mr. Neary
26 made about there being essentially no table of
27 contents or -- or -- or anything like that. Well,
28 he's shown you what the ledgers look like, the
29 printed-off versions of the ledgers. Those are
30 how the Crown received it. It's a newer way of
31 receiving disclosure from the police. It's, in
32 fact, searchable, it's in some ways, better than a
33 simple, you know, hard copy list of -- of the
34 material that the Crown is providing. It's
35 hyperlinked. So it's not just a -- a folder of
36 untitled documents. You go into the ledger and
37 you click that and it brings up what -- you click
38 the link, and it brings up what the document is.
39 So it's not as if the Crown is dumping untitled
40 documents on defence and hoping that they sort it
41 out.

42 So, now think the key issue here is that Mr.
43 Neary is arguing about sufficiency of the material
44 that was provided after Judge Mrozinski directed
45 that the police provide certain will-says. So if
46 -- and of course, this is not the Crown's
47 position, but if Your Honour directs that at least

Reply for Crown by Cnsl M. Adams

1 some of this material isn't -- doesn't comply with
2 the direction of Judge Mrozinski and the police
3 have to go back and provide additional will-says,
4 but I would ask is that we have -- because Mr.
5 Neary made some submissions about, well, the ERT
6 guys, you know, their -- their stuff is fine for
7 now, I might ask for more but it's not necessary
8 to arraign, but there's some other officers who --
9 for whom he says the follow-up will-says were
10 insufficient. If the court directs that the --
11 that the follow-up will-says ordered by Judge
12 Mrozinski are insufficient, what I would ask for
13 is a list from defence about which particular
14 officers they say will-says are insufficient and
15 in -- in what say, just so that the Crown could
16 actually follow up effectively with those specific
17 officers rather than guessing at -- at which will-
18 says are insufficient and which aren't.

19 I think that that would be -- because we are
20 dealing with a fairly large amount of police
21 officers here and we're also dealing with police
22 officers from different jurisdictions: we're
23 dealing with RCMP, we're dealing with Saanich
24 Police as well as Victoria Police. I think that
25 accounts for the -- the difficulties in -- some of
26 the difficulties in -- in getting these -- these
27 will-says.

28 So that's -- and then in terms of the point 7
29 that Mr. Neary raised from his June 26 letter, if
30 -- if the court is directing that that material --
31 that additional will-says be provided, I would
32 again just ask that -- that Mr. Neary provide the
33 names of the officers that he specifically is
34 looking for. Because part of why it took the
35 Crown a couple days to ask the police for this
36 material after Judge Mrozinski ordered it, is
37 because it required going through and weeding out
38 which officers hadn't provided notes from, you
39 know, couple dozen officers so it's -- it's a
40 labour-intensive process.

41 CNSL R. NEARY: There's eight officers involved in
42 surveillance. I could put their names on the
43 record right now. I think my friend it's not that
44 hard to figure out who they are. And --

45 THE COURT: Well, that's what we're talking about here,
46 Mr. Neary, is the eight officers involved in
47 surveillance?

Reply for Crown by Cnsl M. Adams

1 CNSL R. NEARY: Yeah, the primary concern -- what --
2 what I would ask then, Your Honour, is that the
3 directions that came to the eight officers
4 involved in surveillance and that my friend's
5 request is not unreasonable. You know, if there's
6 people other than those eight officers with whom
7 we're taking issue, that they be identified just
8 within a week. I can provide my friend a letter,
9 if there's any officers outside -- and there will
10 be -- outside of the eight officers for whom I say
11 the will-says are insufficient, there are some
12 folks who had interactions with Mr. [REDACTED] shortly
13 before warrants were executed, like stops,
14 roadside stops that made their way into the ITO,
15 that we're going to want more than we have for,
16 but I can identify the eight officers involved in
17 surveillance right now, and the other officers
18 that I would be pointing to are officers named in
19 the ITO, like as having, you know, that their --
20 their information gets incorporated into the ITO,
21 and we don't have notes for the officers. And I
22 would identify those for my friend outside of the
23 surveillance officers within a week. There were
24 22 officers we had no notes for, so we've gotten
25 22 of these will-says in three batches, and you
26 know, I'm going to go back and -- and look at
27 who's who and what we have for the 22, but I can
28 tell you we still have nothing for the
29 surveillance officers that touches on, in my
30 opinion -- you've seen what we have for three of
31 the surveillance officers. For the other five we
32 have zero in terms of what they did.

33 And those officers are the scribe, report
34 author Constable Taylor, supervisor Acting
35 Sergeant DeWit, Constable Ford we have a will-say
36 for. In my respectful submission it is clearly
37 non-compliant with the direction of Judge
38 Mrozinski. I would ask again that Your Honour
39 incorporate, in terms of your directions today,
40 compliance with Judge Mrozinski's directions from
41 page 35, line 35, and to be even more specific,
42 paragraph -- numbered paragraph 7, page 3 of the
43 -- my letter of June 26th, which is an exhibit to
44 those proceedings. So is that three officers so
45 far? We've got Constable Norman, again. Will-
46 say, the two-line will-say that we have, in my
47 respectful submission, is clearly non-compliant.

Reply for Crown by Cnsl M. Adams

1 Constable Bayda, Acting Sergeant Jorgensen.
2 Just want to double-check. We're at five,
3 correct?
4 UNIDENTIFIED SPEAKER: And six.
5 CNSL R. NEARY: Six. Good, because I've only two other
6 stickies.
7 Constable Barker, we have a will-say, but I
8 respectfully submit it's non-compliant. And,
9 Constable Mayo. Those are officer who are all
10 involved in surveillance on one or more dates, in
11 most cases multiple dates for whom no notes have
12 ever been produced in relation to their
13 surveillance activities. The briefings, you know,
14 how -- how was it -- the comparison of the
15 surveillance reports done? The briefings? No --
16 no notes at all in the briefings, no notes at all
17 on the surveillance activities, and no information
18 for the lack of notes. In my respectful
19 submission, the accused is entitled to that
20 information as requested in numbered paragraph 7
21 on my letter -- in my letter of June 26th, 2023
22 that refers to all the surveillance officers.
23 I've just named those eight individuals. As I
24 said, I can commit to, within a week, identifying
25 for my friend any other officers for whom I say
26 the accused is entitled to will-says before being
27 forced to arraign, and I can further confine the
28 -- or define the boundaries for those officers to
29 be officers who had involvement with the accused
30 and made its way into the ITO.
31 Not to say there won't be further disclosure
32 provided, but in terms of, you know, essential
33 information before the accused ought to be forced
34 to arraign, that's the direction I'm asking for
35 from the court.
36 I should clarify, there's multiple ITOs, Your
37 Honour, tracking warrants and a couple of
38 residences. So ITOs, plural.
39 THE COURT: Mr. Adams, do you have any information in
40 terms of how the surveillance reports are
41 generated?
42 CNSL M. ADAMS: In terms of a statement that's from the
43 file itself or . . .
44 THE COURT: Just in terms of general knowledge in terms
45 of --
46 CNSL M. ADAMS: Yes. Yes.
47 THE COURT: -- how that occurs?

Reply for Crown by Cnsl M. Adams

1 CNSL M. ADAMS: General knowledge about how Victoria
2 Strike Force works when they generate a
3 surveillance report is that there is one master
4 scribe. They're typically the members of the
5 surveillance team are in communication with each
6 other, usually by police radio. The master scribe
7 takes the notes, typically on a laptop, and the --
8 or not -- not notes necessarily, but usually is
9 generating the surveillance report on a laptop
10 while surveillance is being conducted.
11 Surveillance observations are radio -- often
12 radioed in by the various surveillance members.
13 The sur report then indicates the time that the
14 observation is made, a brief description of what
15 the officer saw, usually the officer's name, and
16 then there's a field often for the officer to
17 initial at the end.

18 Then the -- there's an area at the bottom of
19 the surveillance report for the officers to sign
20 off. The practice typically, as I've seen from
21 the Strike Force business rules, that the officers
22 are supposed to meet, believe in -- and Mr. Neary
23 can correct me if I'm wrong, believe they're
24 supposed to meet at the end of every shift and
25 review the surveillance report and then sign off
26 confirming it -- it's correct.

27 CNSL R. NEARY: Which didn't happen in this case, and
28 it's not disputed. Did not happen.

29 CNSL M. ADAMS: Apparently some -- in some cases
30 officers did not sign off at the end of every
31 shift. So that's fair enough. That's something
32 that can certainly be explored --

33 THE COURT: Yes.

34 CNSL M. ADAMS: -- at trial. So, and so from, at least
35 from my experience of -- of these types of files
36 where surveillance is conducted, it's not uncommon
37 that the officers do not generate their own
38 contemporaneous notes, either handwritten notes or
39 any other electronic -- it makes sense in a lot of
40 cases because this is a covert surveillance team.
41 Whipping out your notebook and taking a little
42 note is perhaps a little suspicious.

43 That's all I can say about the -- the general
44 practice there.

45 CNSL R. NEARY: May I offer my general knowledge on
46 these [indiscernible/rapid speech]? To me, it's
47 highly unusual for them not to have any individual

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1 notes whatsoever, and in fact I've -- I've never
2 had another case where no member of the
3 surveillance team had any individual notes
4 whatsoever, never -- not once in 20 years seen
5 that.

6 THE COURT: I guess we'll find out, Mr. Neary, what the
7 -- what the new world may hold, but and I'm not
8 saying this is what's happening, but if an officer
9 is communicating verbally to one scribe, that's
10 probably better than later that day making
11 handwritten notes, which may or may not be
12 accurate. If they're in real time saying, or
13 radio, or whatever it is, yes, this person just
14 went into that house, here's what they're wearing,
15 here's the time . . .

16 CNSL R. NEARY: In my submission it's always been both.
17 The -- the officer's on the radio doing that,
18 they're usually in teams of two, one person's
19 driving, one person's making notes in the car, and
20 they're -- and they're radioing to the scribe
21 who's doing somewhere else. That's always --
22 that's the way I've always seen it done. So then
23 the other thing that that allows for is at the end
24 of six hours of surveillance, when they go have
25 the meeting they're supposed to have, they didn't
26 have in this case, when the scribe says, I heard
27 this on the radio while we were driving down the
28 highway and I was also talking to the guy in the
29 car with me, I heard you say this on the radio,
30 and this is what I wrote down. Did I get it
31 right? And then, you know, the officer who -- who
32 radioed in the observation gets to look at his
33 notebook and go, 10:20, yeah, that's what I wrote
34 down, too. Or, alternatively, say, no, actually,
35 that's not right.

36 THE COURT: Mm-hmm.

37 CNSL R. NEARY: Dah-dah-dah-dah-dah. So that's --
38 that's the point of making notes while you're
39 doing it.

40 THE COURT: Again, excellent argument for another --
41 another forum.

42 CNSL R. NEARY: Well --

43 THE COURT: I am going to make an order today. I don't
44 think the order of Judge Mrozinski has been
45 complied with. And Mr. Adams, this is not any
46 criticism of you because I expect that you asked
47 for the information and the information you got

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1 back was woefully insufficient to meet the -- the
2 purpose of the order. I will do the sort of
3 official terms in a moment, but what I -- I am
4 going to be a little bit more specific. We will
5 name those eight officers, and then, Mr. Neary,
6 you will provide any additional officers' names
7 within a week.

8 CNSL R. NEARY: Yes, Your Honour.

9 THE COURT: What these officers -- well, maybe I am
10 doing it officially now. Let's just do that.

11 So it is Constable Taylor, was Sergeant
12 DeWit, Constable Ford, Constable Norman, Constable
13 Bayda, Acting Sergeant Jorgensen, Constable
14 Barker, and Constable Mayo, plus any additional
15 officers identified by either Mr. Neary or Mr.
16 Brooks to Crown by September 13th, 2023. The
17 identified officers are to provide the following
18 information:

19 One, indicate if any notes were taken when
20 they were participating in surveillance and, if
21 notes were taken, these must be disclosed. If no
22 notes were taken, an explanation as to how the
23 officers' observations became part of the
24 surveillance report and when that occurred for
25 each surveillance date, and a will --

26 CNSL M. ADAMS: Sorry, Your Honour.

27 THE COURT: Yes?

28 CNSL M. ADAMS: Not to interrupt, sorry. That was --
29 that was how the officers' observations became
30 part of the report and when?

31 THE COURT: And when. Sorry, yes, and when. So were
32 they -- if they were providing information to the
33 scribe, was it happening at the same time? Did
34 they have a meeting later in the day when
35 everybody provided their information? Or when was
36 that information -- when were their observations
37 communicated for each surveillance date.

38 Then a will-say for each identified officer
39 involved in the investigation for either accused,
40 including the dates and the activities the officer
41 participate in, in relation to either accused.

42 So, counsel, I have in mind here if it was a
43 surveillance day, they can put in surveillance.
44 If they were doing something else, they should
45 indicate what that other thing is. I do not know,
46 Mr. Neary or Mr. Brooks, are you looking for -- I
47 am not going to ask them to go back and recreate

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1 notes. I am not going to ask them is there
2 anything that is not in the surveillance report
3 that you remember now. I do not think that is
4 appropriate for this disclosure request and order,
5 but I do want to make sure that you have got
6 enough information so that you know, okay, on this
7 date, Constable Ford participated in surveillance,
8 and then you have got the surveillance report, or
9 they were doing something else; what is it that
10 you need to know in terms of a will-say?

11 CNSL R. NEARY: I would ask Your Honour to direct that
12 the will-says include the recollections of the
13 contents of any briefings and an explanation for
14 lack of notes of their independent surveillance
15 observations.

16 I mean, the glaring question is, did someone
17 tell you not to make notes? Were you directed not
18 to make notes? And no one seems to want to answer
19 that question. Mean maybe they should be directed
20 to answer that, was there a direction at any point
21 not to make notes of surveillance observations,
22 because if so, that's a big deal not -- not to
23 come out for the first time at trial, because
24 that's surely to result in adjournment. Mean, or
25 -- or the defence is to prepare a stay application
26 thinking is -- are they going to stay it or not,
27 because if there was such a direction, I think the
28 accused is in a very, very strong position to --
29 to bring a stay application.

30 So I would again -- I mean, Judge Mrozinski
31 directed the will-say address this point, you
32 know, an explanation for the lack of notes. To be
33 even more specific, was there ever a direction not
34 to -- not to prepare notes and the contents of any
35 briefings.

36 Because what we also have, the clear picture,
37 if the briefings would include, of course, these
38 reviews of the report and it's a -- it's a very
39 murky picture of how that happened in this case.
40 The rules, as Mr. Adams said, direct it's supposed
41 to happen at the end of the shift. That's the way
42 it typically always occurs. Didn't happen here.
43 All we know is it didn't happen here. Do we -- do
44 we know it didn't happen here because officers are
45 putting beside their name on the date, for
46 example, a week or 10 days after the -- the report
47 was generated, and not the same date as other

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1 officers. So they sure didn't sit down together
2 and do the traditional thing. So what -- what --
3 what happened? You know, I -- so and there's a
4 [indiscernible/rapid speech] in it. I mean, I
5 don't -- you've said you're not going to . . .
6 THE COURT: Well, in terms of your paragraph 7,
7 advising to any --
8 CNSL R. NEARY: You don't like the last part of it.
9 THE COURT: Advising to any relevant observations they
10 can presently recall, they're not
11 [indiscernible/rapid speech]. That -- that's a
12 question for trial.
13 CNSL R. NEARY: Right.
14 THE COURT: I'm not going to have them try to recreate
15 notes that they didn't take.
16 CNSL R. NEARY: So -- so striking that part of the
17 sentence -- or the paragraph, Your Honour, the
18 first two lines of the sentence, I would ask Your
19 Honour consider including in your order. And I
20 will say, as to the basis for their lack of notes
21 of their own surveillance observations and the
22 contents of briefings. In my respectful
23 submission, that's likely to capture the -- a good
24 part of the crucial missing information that --
25 that I say makes this case so out of the ordinary.
26 THE COURT: Judge Mrozinski did order, if they don't
27 have notes, why don't they have notes, so I am
28 going to make this a term of this order.
29 So we have got the very beginning: Indicate
30 if any notes were taken the day of surveillance,
31 and if yes, disclose. Then we have: if not, how
32 did officers' observations become part of the
33 surveillance report, and when was that
34 communicated for each surveillance date. I will
35 ask for each officer, if they do not have any
36 notes, was there a direction that they not take
37 notes and, if yes, who gave that direction.
38 CNSL R. NEARY: Thank you.
39 THE COURT: And Mr. Adams, I'd like to hear from you on
40 the issue of contents of briefings. I don't know,
41 are there any, you know, notes or reports in terms
42 of briefings?
43 CNSL M. ADAMS: I -- I'd have to go and look back at
44 the -- the -- the business rules, but it does
45 remind me that I believe -- there is something
46 that is reminding me of having -- having reviewed
47 those business rules, that there's some concern

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1 about police officers taking notes in briefings,
2 particularly in these types of investigations,
3 because there is privileged information that's
4 sometimes involved. So that's the one thing that
5 really jumps out at me about a risk of ask -- and
6 additionally, I mean, if the officers have no
7 independent recollection of -- of the briefing
8 that happened a year and a half ago I assume they
9 would -- would put that in their will-say and say,
10 you know, they attended this briefing, but they
11 don't recall what happened.

12 Those are my -- my only thoughts of the issue
13 of notes from -- or will-says about the contents
14 of briefings.

15 CNSL R. NEARY: So may I, Your Honour?

16 THE COURT: Yes.

17 CNSL R. NEARY: In my respectful submission, they ought
18 to be asked to produce will-says with respect to
19 their recollection of the contents of briefings
20 subject to privilege. There is analogous caselaw
21 certainly on roadside stops and recordings where
22 stays have been granted in instances where police
23 officers mute the microphone while they chat
24 amongst themselves, and that -- one -- one case,
25 [indiscernible/rapid speech], and there's --
26 there's others that have followed it, feature
27 prominently in the arguments that I made with my
28 friend office on the *Moore* case that I referred to
29 a couple weeks ago. There's crystal clear law
30 that's not allowed. And their policies now say
31 they're not allowed to, you know. So you don't
32 pull a guy over and then, you know, record
33 everything and to except you kind of pow-wow about
34 -- or you chit-chat about your planning meeting
35 about what you're going to do. So it's an
36 analogous situation, in my respectful submission.
37 The accused is entitled to know what was discussed
38 in those meetings, subject to privilege. It ought
39 to have been disclosed in the first instance.
40 Because it hasn't and because of the other unusual
41 features of this case, there ought to be a
42 direction for will-says of the officers' best
43 recollection of the contents of briefings, subject
44 to any redactions for privilege.

45 THE COURT: Yes, I think that's more a matter for
46 trial. But is there one officer who would have
47 been in charge of the briefings?

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1 CNSL R. NEARY: Well, Constable Ford, I believe,
2 although supervisor's referred to as Acting
3 Sergeant DeWit on occasion, too, so it's a bit
4 unclear to me. I mean, Constable Ford is kind of
5 -- refers to herself as being in the surveillance
6 on a number of occasions but DeWit is identified
7 as the supervisor on a number of the surveillance
8 reports, so perhaps from DeWit and Ford. The two
9 who are identified as supervisors.

10 THE COURT: So I will make a term for Sergeant DeWit
11 and Ford to provide a will-say with respect to
12 briefings.

13 CNSL R. NEARY: Thank you, Your Honour.

14 THE COURT: I am going to just say regarding dates,
15 names of officers who attended. I will say, and
16 the contents of the briefings, subject to
17 privilege. Other than that, subject to privilege.
18 And do we have next dates in the system,
19 counsel?

20 CNSL R. NEARY: No, Your Honour, we do not. So I
21 suppose in terms of the next day question becomes
22 the ball's in Mr. Adams' court to give us the best
23 estimate he can. I'm -- you know, it's not going
24 to be -- obviously it's dependent on a number of
25 others, but best estimate he can as to when this
26 material might be available, and then I would ask
27 for a couple weeks after that to be back in court,
28 and hopefully you can arraign, or maybe we get for
29 more of a monitoring date, I mean to check on the
30 status of -- of it.

31 And then the other question is, do we come
32 back before a judge, we go to 103. On the last
33 occasion I suggested just come directly before a
34 judge. Judge Mrozinski decided 103 and come back
35 here if we need to. It did result in a little
36 more delay because then we had to find time to get
37 back in front of a judge, but so I would again
38 suggest that potentially there's some value in
39 just getting straight before a judge, particularly
40 given that there's -- there's no doubt there's a
41 looming *Jordan* issue here. And if there's going
42 to be further -- you know, this is -- we're almost
43 two months out from Judge Mrozinski's order and,
44 you know, woefully inadequate has been used to
45 describe the -- the response to that direction.
46 So getting back before a judge may make a great of
47 sense within a month or so, about six weeks maybe.

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1 And certainly if Your Honour is prepared,
2 having been brought up to speed -- I suggested to
3 Judge Mrozinski she might want to hear the next
4 one; she didn't. But Your Honour's --
5 THE COURT: Well, she's -- she's away for a period of
6 time so that's --
7 CNSL R. NEARY: Oh, fair enough. Yeah, there's --
8 THE COURT: -- that's probably why, okay.
9 CNSL R. NEARY: -- there's a lot of reasons you don't
10 want to listen to me, too, then. I get it.
11 THE COURT: Yes. I -- I think it makes sense for it to
12 come back before me so we --
13 CNSL R. NEARY: I think so, too, thank you.
14 THE COURT: -- don't have to start all over again.
15 Counsel, I'm sitting October 16th and 17th.
16 I don't know where. So I'm going to -- it's here,
17 I just don't know what I'm doing that day, but
18 even if it's video bail, we could schedule this in
19 a -- in a morning and do it virtually. Don't know
20 if either of those days . . .
21 CNSL R. NEARY: I might have to just check with my
22 office quickly. I didn't actually bring my
23 calendar.
24 THE COURT: Yes. So what I'm going to suggest is that
25 you go to the JCM.
26 CNSL R. NEARY: Shoot for October 16/17.
27 THE COURT: Yes.
28 CNSL R. NEARY: Yes. I understand and that makes sense
29 to me.
30 THE COURT: Mr. Adams? I can give you --
31 CNSL M. ADAMS: Yes, I'm sorry. I'm just looking at
32 16th. Yes, I'm -- sorry, was it the 16th or 17th?
33 THE COURT: 16th or 17th.
34 CNSL M. ADAMS: Yes, either -- either date. I'm
35 available either day.
36 THE COURT: So I'll leave it for counsel to -- so what
37 I'll do right now is just adjourn it to me to get
38 something, so we'll adjourn it to the JCMs for
39 next Tuesday.
40 CNSL R. NEARY: I think there's a very good chance I
41 can make court. I know I'm not in anything like
42 the whole week or anything like that, so I should
43 be able to make that work, too, Your Honour.
44 THE COURT: And if not, they can -- I can find time,
45 even if this is the only thing I do on a -- on a
46 day. But for now, let's just put it over to next
47 Tuesday, the 12th, at 11:00 a.m. on the JCM's list

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1 to . . .
2 THE CLERK: Your Honour, I'm not sure if it helps, but
3 I am reaching out to the JCM to see which
4 courtroom you're sitting in on October 16th, 17th.
5 THE COURT: Well, I think counsel will need to --
6 CNSL R. NEARY: You know it's this building, did you
7 say, Your Honour? For sure it's in this building?
8 THE COURT: I'm in --
9 THE CLERK: Yeah.
10 THE COURT: Well, I'm in -- as far as I know.
11 CNSL R. NEARY: Okay.
12 THE CLERK: She said she was just looking.
13 THE COURT: Okay. I'm not seeing anything.
14 CNSL R. NEARY: As I said, I'm sorry, I should have
15 brought my calendar, but I suspect I can make that
16 work.
17 THE COURT: No, so --
18 CNSL R. NEARY: I can confirm this afternoon.
19 THE COURT: Yes. So I'll adjourn to the JCMs next
20 Tuesday, the 12th, at 11:00 a.m., and think we
21 should just show it as application.
22 CNSL R. NEARY: Directions, application for direction?
23 THE COURT: Yes.
24 CNSL R. NEARY: I mean, hopefully we're back before you
25 arraigning. I mean, that's -- that's what we hope
26 is occurring. But we probably should book a bit
27 of time in case we're not.
28 THE COURT: Let's -- let's say 30 minutes on that date.
29 CNSL R. NEARY: Sounds good, Your Honour, thank you.
30 THE COURT: Yes. What was it showing for today, this
31 application? This application -- let's just have
32 it show as application on that date.
33 CNSL R. NEARY: Thanks very much, Your Honour.
34 THE CLERK: And Your Honour, did you seize yourself?
35 THE COURT: Yes.
36 THE CLERK: Okay. And just one housekeeping matter. I
37 do have an outstanding warrant on the [REDACTED]
38 [REDACTED] file.
39 CNSL N. BROOKS: Your Honour, it was brought to my
40 attention that Ms. [REDACTED] has, I think, a 512 is
41 [indiscernible/low voice]. I have communications
42 with her. I can get a hold of her. My
43 understanding she's under a curfew and whatnot.
44 She's not just gone in the -- so I'll endeavour to
45 have her come down and deal with that --
46 THE COURT: All right. So it's --
47 CNSL N. BROOKS: -- but it was just brought to my

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1 attention.
2 THE COURT: We'll just leave the warrant as is.
3 CNSL M. ADAMS: Yes, thank you. And sorry, Your
4 Honour, just before we go, I'm just looking at my
5 notes of the order that you made. I just want to
6 make a hundred per cent sure that I know which
7 officers I'm going to be contacting. I just have
8 a note that says for each officer involved in the
9 investigation of either accused, to include dates
10 that they participated. Are we speaking about the
11 eight officers -- or --
12 CNSL R. NEARY: Plus any others identified within the
13 week.
14 CNSL M. ADAMS: And then the ones identified by.
15 THE COURT: Yes. So the first one was about notes of
16 surveillance. That's just those eight. So the
17 will-say is in relation to any of the officers.
18 So those eight plus whoever else --
19 CNSL M. ADAMS: All right.
20 THE COURT: -- Mr. Neary or Mr. Brooks might identify
21 are to -- are to provide the -- the will-say, and
22 then it was just Sergeant DeWit and Constable Ford
23 with respect to the briefings.
24 CNSL M. ADAMS: And briefings. So essentially, it's
25 three -- three distinct chunks of --
26 THE COURT: Yes.
27 CNSL M. ADAMS: -- individual. Okay, very good. Thank
28 you. That -- that will be helpful in organizing
29 the follow-up.
30 CNSL R. NEARY: So the note that I have, Your Honour,
31 is that I had it just kind of in six paragraphs.
32 I don't know if it makes sense for it. So for the
33 eight and any others identified within the week in
34 parameters that you've discussed: one, indicate
35 if any notes were taken.
36 THE COURT: No, I was just talking about surveillance
37 because --
38 CNSL R. NEARY: Oh, okay.
39 THE COURT: -- I think we've already dealt with --
40 CNSL R. NEARY: All right.
41 THE COURT: -- the other notes.
42 CNSL R. NEARY: Okay. Understood, sorry.
43 THE COURT: So those eight --
44 CNSL R. NEARY: Yeah.
45 THE COURT: Indicate any notes taken the day of
46 surveillance.
47 CNSL R. NEARY: Yeah.

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1 THE COURT: And then from there. So there's the eight
2 who are going to do that and then, if they didn't
3 take notes, how were their observations become
4 part of the report. If they didn't take notes,
5 were they given a direction not to. And then
6 we've got those eight plus any else that you
7 identify will do will-says for each day they're
8 involved in investigation, whether it's
9 surveillance or otherwise. And then we have
10 Sergeant DeWit and Constable Ford with the
11 briefings.

12 CNSL R. NEARY: I've got it. Thank you very much.,
13 Your Honour.

14 CNSL M. ADAMS: Oh, okay. I'm sorry, Your Honour, I
15 kind of have that in . . . So the -- the
16 direction about if they don't have notes, whether
17 they were directed not to take notes and who made
18 that direction, that only applies to the eight?

19 THE COURT: That applies to the eight.

20 CNSL M. ADAMS: Thank you.

21 CNSL R. NEARY: Okay.

22 THE COURT: Yes.

23 CNSL M. ADAMS: Okay. I think -- I have it straight --

24 THE COURT: Okay.

25 CNSL M. ADAMS: -- now finally. Thank you very much.

26

27 (PROCEEDINGS ADJOURNED TO SEPTEMBER 12, 2023,
28 AT 11:00 AM TO FIX DATE)

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33 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 read 'C. King', with a stylized flourish at the end.

C. King
Court Transcriber