

Superior Court of Justice

BETWEEN:

HER MAJESTY THE QUEEN

- and -

NICOLE YVONNE KISH

Accused

TRIAL PROCEEDINGS

EVIDENCE AT TRIAL

MONDAY, JANUARY 24, 2011

SUPERIOR COURT OF JUSTICE

B E T W E E N:

HER MAJESTY THE QUEEN

- and -

NICOLE YVONNE KISH

Accused

--- Before THE HONOURABLE MR. JUSTICE NORDHEIMER,
without a jury, at the Metropolitan Toronto Court
House; commencing on Monday, January 24, 2011 to
Tuesday, January 25, 2011.

EVIDENCE AT TRIAL

A P P E A R A N C E S:

W. THOMPSON, Esq. &
E. MIDDELKAMP, Ms.

for the Crown

J. SCARFE, Esq. &
V. SIMPSON, Ms.

for the Accused

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Admissions
(Thompson)

UPON RESUMING ON MONDAY, JANUARY 24, 2011

5
--- UPON RESUMING AT 10:03 a.m.

--- Other matters dealt with

10
--- UPON RESUMING AT 10:13 a.m.

R v KISH

15
THE COURT: Mr. Thompson.

MR. THOMPSON: Yes, Good morning, Your Honour, for the record Thompson W on behalf of the Provincial Crown, I'm here on the Kish matter.

20
MR. SCARFE: Good morning, Your Honour, Scarfe, initial J, counsel for Ms. Kish, who is sitting to my left. My co-counsel, Ms. Simpson, and my student Ms. Santerre, and Ms. Kish is present, and we are ready to proceed.

25
THE COURT: Thank you.

30
MR. THOMPSON: Your Honour, there has been an arraignment, and if there had been a jury here, I would ask for another re arraignment, but I think at this point in time, we can proceed on the basis of the arraignment on the trial applications.

THE COURT: Yes.

Opening
(Thompson)

5 MR. THOMPSON: Just before I open to Your Honour, there is a couple of things I would just like to cover off. There have been a number of admissions made. Jurisdiction is not an issue. The identity of the deceased Mr. Hammond is not an issue. There is a number of the forensic exhibits that continuity would not be an issue as well. So for the most part the evidence will go in without necessary proof of continuity, and I think there are a couple of exceptions and my friend will bring those to your attention at the time. I do plan to open or my first witness will be Officer Giroux, and through Officer Giroux, will be putting in all the exhibits with respect to the plan scene, a number of videos and a number of pictures. Once again, he is not necessarily the author of those, but he can at least speak to them, so there is no issue as to the continuity with respect to those.

15 I do want to give a brief opening, Your Honour, with respect to the Crown's position on this matter. And essentially, it is on the evening of August 8, 2007, Mr. Hammond, deceased, was out with a number of associates for the evening. There was about a group of six of them and they were in the Toronto Entertainment District area, here in Toronto. And around 10:00 p.m., Mr. Hammond and a Mr. Dranichak, who you will hear from, broke off from that group, and they went to the Big Bob Reverb, which is located at

Opening
(Thompson)

5 Bathurst and Queen Street. They stayed there for a while,
and they leave shortly after midnight and head west on Queen
Street north. They stop at an outdoor green machine, TD
green machine to get some funds. And there, they are
10 approached by a woman on a bike, who wants some money. They
refuse, and a shouting match ensues, and as they head west,
additional quote "street people", join up with them, and one
of which is Ms. Kish, the accused before the court, Nicole
Kish. And as they progress down the street, the argument is
15 becoming more physical, garbage is being thrown, and at some
point, Ms. Kish either falls or is pushed but end up on the
ground. She now starts yelling, "they hit a woman, they hit
a woman". At some point, Mr. Dranichak and Mr. Hammond get
separated. Mr. Hammond runs to an eastbound streetcar. He
20 is not able to get on it, and at which point in time he's
confronted on the south side of the street by the streetcar,
and he engages in a fight with a gentleman called Mr. Fresh,
who you will hear some evidence about. Mr. Hammond quickly
25 gets the upper hand of the fight, and starts striking Mr.
Fresh's head against the side of the streetcar. While this
is going on, it's the Crown's position that Ms. Kish is
striking Mr. Hammond with a knife. Mr. Hammond, now aware
that Ms. Kish has a knife, tries to run around the streetcar
30 to get away from her. We have a videotape taken at One of a
Kind Pasta, Your Honour, and you will see in that video, a

Opening
(Thompson)

5 short clip of Mr. Hammond running towards the north side of
the street. Once on the north side of the street, however,
he's brought down by two men and Ms. Kish. There they kick
and punch him on the ground, and Ms. Kish still has the knife
10 in her hand, and she is stabbing out, quote "punching out at
him", while's on the ground. Somehow Mr. Hammond gets the
knife away, in the melee from Ms. Kish, and she winds up
getting stabbed in the arm.

15 You will hear from a number of witnesses say
the woman with the cut is the woman with the knife. Ms. Kish
starts screaming at this point, Mr. Hammond is able to get
up, and with a knife in his hand that he's taken from, sorry,
from Ms. Kish, he's able to get into a cab, or get, tries to
20 get into a cab. The cab driver, seeing the knife in his
hand, doesn't let him in. Mr. Hammond pounds on the window
of the cab and drapes himself on the hood. He eventually
falls off the hood of this cab and goes to another company
cab, in where he is able to hook his arms around the door
25 post between the front door and the back door. He holds on
to that as the cab goes westbound. He eventually falls off
at St. Nicholas Street on the north side, and the knife falls
from his hands on to the steps. Eventually emergency
30 officers are called, and Mr. Hammond remains in critical
condition until he succumbs to his injuries on August 11,
2007.

Giroux, in-chf.
(Thompson)

5 That is the case that the Crown is going to put forward to this court today, Your Honour, and I am going to start the first witness, Mr. Giroux, Officer Giroux.

DET. SGT. GARY GIROUX, SWORN

10 MR. THOMPSON: All right. Your Honour, we are going to play some of the stuff through the Elmo system, so it will show up on your screen, but we also have some paper representations of it as well. So I am just getting
15 this warmed up here now. In any event, let me go through some preliminaries with the officer.

EXAMINATION-IN-CHIEF BY MR. THOMPSON

20 MR. THOMPSON: Q. Officer Giroux, you are a member of the Toronto Police Services and have been for how long?

25 A. Since 1979.

Q. And currently, you are assigned to what division of the Toronto Police Services?

A. To the Homicide Squad.

30 Q. And how long have you been with the Homicide Squad?

A. 14 years.

Giroux, in-chf.
(Thompson)

5 Q. All right. And can you tell me, officer, your involvement -- we'll get into some more details of your involvement, but you are going to be using notes throughout this proceedings?

A. Yes.

10 MR. THOMPSON: And I can qualify the notes, unless my friend has any issue of the notes. He's seen them.

MR. SCARFE: No objection to the officer referring to the notes to refresh his memory.

15 THE COURT: Very well officer, you may refer to your notes as necessary in giving your evidence.

THE WITNESS: Thank you, sir.

20 MR. THOMPSON: Q. Just so it's clear, officer, can you just give a brief background as to how the Homicide Squad gets involved in this matter? In other words, as I have -- are you, are you originally involved in it or what, at what point in time do you become involved in it?

25 A. The Homicide Squad was not originally involved. It was a investigation that we were monitoring for approximately in excess of 48 hours. 14 Division in the west end of the city started the investigation as an aggravated assault, and updated the Homicide Squad, and then my partner, myself, more particularly, with regards to the possibility
30 that Mr. Hammond could succumb to his injuries.

Q. Okay. So first of all, what's the date,

Giroux, in-chf.
(Thompson)

the date of offence with respect to the aggravated assault?

5 A. It took place on the, on the 9th of August, 2007. It was a Thursday.

Q. Okay. And can you give me a rough idea of the time, please?

10 A. Ah, approximately 12:30 a.m. in the morning.

Q. When 14 Division comes involved in it, do you have an idea roughly how many officers were involved at that point in time?

15 A. There would have been a number of uniform police officers that would have responded to the scene. As well as a contingent of investigators from the divisional Detective office would have attended as well.

20 Q. We'll get into more detail of that, but can you tell me what approximately time does homicide become involved, per se? In other words, does homicide become involved as soon as the death happens or are they notified in advance. And I know you spoke briefly about that. We'll

25 have to get into some detail.

A. Yes, we were notified in advance on the morning of the 9th of August, 2007. My escort at the time, Detective Stacy Gallant, G-A-L-L-A-N-T, received an update

30 from the division.

Q. And you are notified at that point in

Giroux, in-chf.
(Thompson)

5 time. There any mechanical process that you do in order that you technically come, take over the case?

A. Not until death is pronounced do we take over the investigation.

10 Q. All right. So when do you take over the investigation, per se?

A. On the 11th. On the 11th of August. As a result of Mr. Hammond passing away.

15 Q. All right. Physically what do you do when you take over?

A. At that point, all of the investigative decisions are mine to make as the lead investigator.

Q. Okay?

20 A. And we have total autonomy over the direction of the investigation, and at that point, Detective Scott from 14 Division and his escort would be in essence assisting us at that point. The investigation is no longer his.

25 Q. And so Detective Scott was the officer in charge of the investigation of the aggravated assault?

A. Correct.

30 Q. Is any physical evidence that's gathered at that point in time, what happens to it?

A. It would be collected by the Homicide Squad. In this particular case, I collected the materials on

Giroux, in-chf.
(Thompson)

5 the morning that Mr. Hammond passed away. I had left instructions with Detective Scott --

Q. Officer, could you just slow down a little bit, please?

10 A. I had left instructions with Detective Scott that in the event that Mr. Hammond should pass away, that the Homicide Squad should be notified through the duty desk, which is a customary way for the Homicide Squad to be notified, and, in fact, I did receive that notification in
15 the early morning hours of Saturday August the 11th. And I can indicate to you that it was approximately 2:34 a.m. in the morning, I received a page, as I traditionally would, as being the investigator in charge from the duty desk, and they inform me of that information with regards to Mr. Hammond's
20 death. And then at that point, I give certain direction to, to the officers with regards to the continuity of Mr. Hammond's body.

25 Q. Is there a point in time when you pick up any physical evidence that had been picked up at that point in time?

30 A. Yes. In the morning, I attended on my way from home to headquarters to get up to speed on this particular investigation as that I attended the division, number 14 Division, and from the Staff Sergeant on duty, Staff Sergeant Ralph Brooks, I picked up a box of material

Giroux, in-chf.
(Thompson)

with regards to this investigation, to this particular point.

5 Q. Sorry, what time did you pick it up,
sorry?

A. Approximately 9 o'clock in the morning.

MR. THOMPSON: Court's indulgence.

10 MR. THOMPSON: Q. All right. We are going
to leave that area for the time being now, officer. If I can
just, going now to the physical, the diagrams and exhibits we
are going to use for this trial. Now, you, as the officer in
charge on the -- court's indulgence, please.

15 And you, when the homicide investigation take
place, there is certain diagrams that are made?

A. Yes, at my direction, yes.

20 Q. At your direction. Okay. I am going to
show you this diagram here. Can you just basically tell
me --

MR. THOMPSON: There is no issue as to these
diagrams, is there?

25 MR. SCARFE: No.

MR. THOMPSON: Q. Okay. So this is a
diagram, officer, of the scene at Queen Street and Niagara
Street. Is that correct?

30 A. Yes, it's an expanded City of Toronto
plan drawing map of that particular area.

Q. Okay?

Giroux, in-chf.
(Thompson)

5 A. It includes of the area in question of Queen and Niagara, but it also demonstrates some streets to the east and to the west.

Q. Okay.

10 A. There is a different picture on the screen than there is on this particular exhibit here.

15 Q. All right. Let's just use the -- okay. Roughly, can you just, so it's clear, I am going to have this actually entered as Exhibit Number 1, we don't need a letter because you are content it goes in on the basis of this officer's knowledge?

MR. SCARFE: Absolutely.

20 MR. THOMPSON: That can be entered as Exhibit Number 1.

THE COURT: Exhibit 1.

THE REGISTRAR OF THE COURT: Exhibit 1.

Your Honour, if I can mark it later. Thank you.

THE COURT: Yes.

25 --- EXHIBIT NO. 1: City of Toronto plan drawing map of area around Niagara Street and Queen Street.

30 MR. THOMPSON: Q. Okay. Can you just briefly tell me exactly what that exhibit shows, please?

A. Yes, I can indicate to the far right is Euclid Avenue. That's an easterly direction. Queen Street

Giroux, in-chf.
(Thompson)

5 runs east and west. Euclid, Manning Avenue, Claremont Street, Bellwoods and Gore Vale run north south, they intersect with Queen Street. The area in question is at Queen and Niagara Street. Your Honour, which is in this particular area right here. And then what I did, I requested that the plan drawing section of the Forensic Identification Unit plot the street addresses and the residential buildings on both the north side and the south side of Queen Street. I asked them to plot St. Nicholas Ukrainian Catholic Church which comes into this investigation.

10
15 Q. Would you mark that off, please. Or show with the pointer?

20 A. St. Nicholas Church is on the far left-hand side, at the intersection of both Bellwoods and Gore Vale Avenue. It takes up an entire city block. In addition, the area of Euclid Avenue is a portion of the map to the east that starts part of the narrative of this investigation, and the TD Bank as indicated on the northwest corner of Euclid Avenue and Queen Street West.

25
30 Q. Okay. You also had another schematic done on this, which is a tighter version of the area. And this one we do have schematic for Your Honour to deal with. And just briefly explain, and I'll enter this as an exhibit, please?

A. Yes. Once again from the City of Toronto

Giroux, in-chf.
(Thompson)

5 plan drawing section, we're able to extract more detailed
version of the previous map and narrow in on specific areas
within the Queen and Niagara, and Queen and Claremont Street.
Once again, it shows the street addresses, the residential
and commercial businesses on the north side and south side of
10 Queen Street West. It shows St. Nicholas Ukrainian Church to
the west. It has a legend that I asked our Forensic
Identification Unit to imbed in the top right hand corner,
with corresponding letters, that would reflect the various
15 businesses on the north side of the street.

Q. Okay. And just so we can identify a
couple of things, that will become an issue, even in your
evidence. Can you point out to us where One of a Kind Pasta
20 is?

A. One of a Kind Pasta is letter J and it's
at 746 Queen Street West.

Q. Okay?

A. And it's in that location there, and the
25 legend is corresponding to it.

Q. Can you just point to it where on this
map, if this can be entered as Exhibit Number 2, this diagram
30 please?

THE COURT: Exhibit 2.

THE REGISTRAR OF THE COURT: Two, Your
Honour.

Giroux, in-chf.
(Thompson)

5 --- EXHIBIT NO. 2: Detailed version of Exhibit 1.

10 MR. THOMPSON: Q. Point out where it is on the south side of the street, the, ah, exhibit, shelter for the streetcar that is on an eastbound direction.

15 A. It's indicated right here by rectangle on the south west corner of Niagara Street and Queen Street is a bus shelter for eastbound, Toronto Transit Commission street cars.

20 Q. Okay. And without going into details, can you just sort of circle the area on, this is a much tighter match as to where the alleged offence is to have taken place. Roughly?

25 A. The narration of the offence and the witnesses in this area where I am circling now starts on the south side sidewalk and includes the north side and the street in between.

30 Q. Okay. And I don't know if that's showing up.

MR. THOMPSON: Does Your Honour prefer it through the Elmo, or on the thing or does it --

THE COURT: Right now, this is probably a little easier to see for my eyes, at least --

MR. THOMPSON: Fair enough.

Giroux, in-chf.
(Thompson)

THE COURT: -- Mr. Thompson.

5 MR. THOMPSON: Q. Now, I understand you also had some pictures that you caused to be produced.

A. Correct.

MR. SCARFE: If I could just ...

10 MR. THOMPSON: I am just wondering, you are getting a copy as well. All right.

MR. THOMPSON: Q. I am showing you a picture, can you just briefly describe to us what that is?

15 A. Yes, Your Honour, this photograph is taken by the Toronto Police Forensic Identification Unit on the first night of the investigation. It's obviously a nighttime photograph. The photographer is standing in the eastbound passing lane of Queen Street, and the photograph is
20 taken in an easterly direction. To the north is some commercial businesses on the north side of the street, or the top left-hand side of the photograph. As I indicated, it faces eastbound, you can see in the far distance there is
25 some police tape that's blocking off the intersection at Claremont Street. And there are some forensic identification evidence markers that are on the pavement on the north side of Queen Street, in the westbound passing lane, and in the westbound curb lane of the street and they extend towards
30 Claremont Avenue, or in the photograph, from west to east.

Q. I am not sure those are visible from His

Giroux, in-chf.
(Thompson)

Honour's distance, but can you just basically show us?

5 A. There is a series of markers, Your Honour, that are numbered forensic identification markers to identify evidence that's on the street.

10 Q. All right. And can you just point out some of the stores that are on that picture, too, for us, please?

15 A. There is a shoe store here in the far left-hand side corner of the photograph, and to the east is One of a Kind Pasta store, and I believe this store to the east of One of a Kind Pasta, I believe it's called Kama Kazi. Then there is a store called Anne Sportun, Girl Friday, and then there is a Starbucks coffee shop on the south, sorry, on the north, ah, west corner of Queen and Claremont Street.

20 MR. THOMPSON: Can this be entered as the next exhibit, please, Exhibit 3.

THE COURT: Exhibit 3.

25 THE REGISTRAR OF THE COURT: Exhibit 3, Your Honour.

--- EXHIBIT NO. 3: Photo of scene taken in evening, first day of investigation

30 MR. THOMPSON: Q. Now, showing you another picture. Can you indicate to us what that is, please?

A. Yes, Your Honour. This photograph was taken on the first day of the investigation. It was taken

Giroux, in-chf.
(Thompson)

5 when the sun came up. The photographer from the forensic
identification section of the Toronto Police is taking this
photograph in a westbound direction. He is standing in the
eastbound curb lane. He is standing east of the intersection
10 of Niagara and Queen. And Niagara Street, Your Honour, is
this intersection right here. Niagara Street runs southbound
towards King Street. Once again, there is some uniformed
officers in the distance, they would be substantially west of
the scene, and also you can see some police tape down in the
15 area of the St. Nicholas Ukraine Church, which is the large
church that you can see on the north side of the street,
which forms part of this investigational narrative. There is
uniform officers standing by as scene security and traffic
and pedestrian traffic is going to be stopped, and it has
20 been stopped at that location.

Q. Okay. Go in as the next exhibit, please?

THE COURT: Exhibit 4.

THE REGISTRAR OF THE COURT: Exhibit 4,

25 Your Honour.

--- EXHIBIT NO. 4: Photograph of scene taken at sunrise
first day of investigation.

30 MR. THOMPSON: Q. And can you tell us what
that depicts, please?

A. This photograph was not taken on the
first day of the investigation, but what I instructed the

Giroux, in-chf.
(Thompson)

5 officers from our, again, from our forensic identification
section to do a number of days after the investigation is
with the assistance of the Toronto Fire Service, is that the
photographer was in what's commonly described as a bucket
10 ladder. The photographer is high above Queen Street, the
photograph depicts the intersection of Queen Street West and
Niagara Street. Queen Street West running east and west.
Niagara Street running north and south. It forms a T
15 intersection at that particular location. As indicated, the
officer is high above the street and he's photographing
virtually straight down. Ah, it shows might be a little bit
more westbound of Queen Street than it does in an easterly
direction, but the officer is the virtually leaning over the
20 bucket and photographing straight down at that location.

MR. THOMPSON: Okay. Can that go in as the
next exhibit, please.

THE COURT: Exhibit 5.

THE REGISTRAR OF THE COURT: Exhibit 5,
25 Your Honour.

--- **EXHIBIT NO. 5**: Aerial photograph of intersection of
Queen Street and Niagara Street.

MR. THOMPSON: Q. All right, now officer, I
30 understand that subsequent, and probably not that long ago,
over the last month or so, you went down and took a bunch of
additional pictures of the area, with a streetcar parked at

Giroux, in-chf.
(Thompson)

that location?

5 A. Yes.

Q. Okay. And I am going to show you a number of pictures, and perhaps you can just explain what the pictures show, what they represent?

10 A. Yes, Your Honour. On the 11th of December of 2010, and with the assistance of the head of the security department of the TTC, I asked for an out of service streetcar with two-sided -- one, the one that's conjoined in the middle, to be brought out of service to this particular area of the intersection. And I asked for it to remain static there, again, so that myself and a member of the Forensic Identification Services could be hoisted up once again in the fire department bucketed ladder above Queen Street so that I could have the ability to direct the photographer to take some photographs with a static streetcar in position facing eastbound in its traditional stopping location in front of the bus shelter, which was, which is indicated in the photograph on the south side of the street. The south side of the street in the photograph is on the left, the north side is on the right. So while in the bucket ladder with the officer taking the photographs, I directed a number of these photographs to be taken as a result of the streetcar forming part of the narrative. I asked for the traffic to be blocked by officers to the east and to the

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Giroux, in-chf.
(Thompson)

5 west, so that it would not interfere with the photographs being taken. This process took approximately two hours, and approximately 90 photographs were taken.

10 Q. Okay. And just in terms, the streetcar that's here, you have it stopped at a particular spot. Can you just indicate to the court why it is that you had the streetcar stopped there?

15 A. Ah, the streetcar stopped there, uhmm, on its own, when it was brought out of service into that location, and it remained there as a result of a conversation that I had with it's operator with regards to the traditional TTC stopping location at this particular intersection. As a result of that, it remained in that position, and photographs were taken.

20 Q. Okay.

MR. THOMPSON: Court's indulgence, if I may.

25 MR. THOMPSON: Q. Just in terms of the conversations that you had with the individual about where the streetcar is parked, can you just replay that to us, as to what his comments were as to why the streetcar should be stopped there?

30 A. Yes, Your Honour. As a result of the conversation, I walked up to the, to the driver's side of the streetcar and the operator opened the window, and I confirmed with him, is this the traditional stopping location for a

Giroux, in-chf.
(Thompson)

5 streetcar that is eastbound at this particular location, and he indicated to me that it was. And as a result of that, the streetcar was left in that position for approximately two hours so these photographs could be taken.

10 Q. All right. And in terms of this white line that is here, did you find out any information in respect to that?

A. It's a white painted line on the street. It's, ah, the stopping location for motor vehicle traffic.

15 Q. Okay. And it has nothing necessarily to do with where the streetcar stops?

A. Correct.

20 MR. THOMPSON: So if that could be entered as the next exhibit, please?

20 THE COURT: Exhibit 6.

25 THE REGISTRAR OF THE COURT: Exhibit 6, Your Honour.

--- EXHIBIT NO. 6: Photograph depicting streetcar in position at scene

30 MR. THOMPSON: Q. I'm showing you another picture of what appears to be the same location. Can you just give us a brief description of what's in there, please?

A. Yes. On this particular photograph, the fire department ladder is lower, or closer to the street. The photograph shows the north side of Queen Street

Giroux, in-chf.
(Thompson)

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15
predominantly. The north sidewalk, which is reflected on the right-hand side of the photograph. The streetcar is in the original position as it was throughout the entire process. A portion of the south side of the sidewalk can be seen on the left-hand side of the photograph, and a number of the residential homes on the south side, above the Select Mart and some commercial businesses on the north side are reflected in this photograph. And it also shows straight west along Queen Street for a substantial distance, including the St. Nicholas Ukrainian Church, which can be seen.

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25
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Q. Just looking at the left-hand side of the picture, which appears to be a blue building. Do you know what's in the top portion of that building?

A. There are some residential homes, these are some balconies of residential apartments that are above some commercial businesses and there is a photograph, I believe it's coming up where the photographer and I, I made arrangements for a resident of that particular area to allow into their apartment so that photographs could be taken of the building, and down on to the entranceway or to the south side of the streetcar.

Q. To be clear, are those balconies open or closed?

A. They are open.

MR. THOMPSON: Next exhibit, please.

Giroux, in-chf.
(Thompson)

THE COURT: Exhibit 7.

5 THE REGISTRAR OF THE COURT: Seven, Your
Honour.

--- EXHIBIT NO. 7: Photograph of scene predominantly
north side of Queen Street.

10 MR. THOMPSON: Q. Now, can you just briefly
describe why you took that picture?

15 A. Yes. This is the photograph I was
referring to, Your Honour. I had a conversation with a
resident who is an occupant on the south side of the street
above the businesses and we are able to gain access to his
balcony, and we took this photograph of the south side of the
streetcar, so the photographer is above the south sidewalk.
20 The photograph is taken in a northerly easterly direction
towards the front portion of the streetcar and a smaller
section of the rear portion, and it's this particular area
of the streetcar, the north section on the south side that
forms part of the witness's narrative of their observations,
25 and I felt it would be helpful for the court and the
witnesses to have a photograph like this taken.

Q. Just so it's clear, this is a, what's
referred to as a double streetcar?

30 A. Yes.

Q. And this would be the front here to the
far right?

Giroux, in-chf.
(Thompson)

5 A. The traditional entranceway in line with the bus shelter is in the far right-hand side of the photograph, and, of course, there is an entrance way into the middle of the streetcar on the centre half as well.

MR. THOMPSON: Next exhibit, please.

10 THE COURT: Exhibit 8.

THE REGISTRAR OF THE COURT: Exhibit 8.

--- EXHIBIT NO. 8: Photograph of scene

15 MR. THOMPSON: Q. One final picture, explain why this picture is in there?

20 A. This photograph, Your Honour, again was taken on the same date in December. It's higher in elevation than the previous photographs, and in doing so, you are able to capture in the photograph the north side sidewalk, the south side sidewalk, the streetcar in the middle and some of the surrounding area as well. So higher elevation, in the photograph that includes more detail.

Q. Okay.

25 MR. THOMPSON: If that could go in as the next exhibit, please.

THE COURT: Exhibit 9.

30 THE REGISTRAR OF THE COURT: Exhibit 9 Your Honour.

--- EXHIBIT NO. 9: Photograph taken from higher elevation, showing more detail of

Giroux, in-chf.
(Thompson)

scene.

5 MR. THOMPSON: Q. Now, I understand as a result of the investigation, there was a number of videos involved?

A. Yes.

10 Q. Which you seized at the scene?

A. Yes.

15 MR. THOMPSON: I am going to ask that they be played, Your Honour. May take a minute to make sure that screen gets working as well. But, what I intend to do, Your Honour, is to play the entirety of the one, and then go back and show inch by inch. The first one will last about five minutes. And they refer to the video that was taken at One of a Kind Pasta.

20 MR. THOMPSON: Q. And just before we key that up, can you just tell us, and we did look at One of a Kind Pasta, and perhaps it would be helpful if I take one of these pictures. I am using Exhibit Number 7. Just show us again where One of a Kind Pasta is, with your marker.

25 A. Your Honour, it's on the north side of Queen Street. It's reflected here by my pointer. It's, it's west of the traffic lights, for westbound traffic, and it faces south out on to the north sidewalk of Queen Street. It's a commercial business, specializing in pasta dishes.

30 Q. Okay. And this is probably the best

Giroux, in-chf.
(Thompson)

5 picture to show it, but can you indicate where the camera is that, that is the subject of the next exhibit?

A. The camera, the westbound camera is located in the top east section of this commercial business. It's right in the area where my pointer is now. Just below the sign that's imbedded on the north side of the street, and it's facing in a diagonal angle in a westbound direction.

10 Q. Okay. And just so it's clear, is there another camera on that particular building?

A. Yes. There is another camera, it's on the west side of the building, and it's facing on a diagonal angle eastbound, towards the sidewalk as well down in this section.

15 Q. So it's clear, the one that I am going to be showing now, is which one again.

A. Is the west camera. Facing, east mounted facing west, recording west.

20 Q. Okay. So I am going to queue that up if I can, and play it in its entirety. As I indicated it's about five minutes, starting, just so everyone is clear, 28.07 according to our, we'll go to 33.20.

25 There is no sound, just so it's clear.

30 MR. THOMPSON: Sorry about that, Your Honour, I don't know what's causing it.

MR. THOMPSON: Q. All right. Just One of a

Giroux, in-chf.
(Thompson)

5
Kind Pasta to that video, so it's clear, the time I took off
the video area between 27:07, and 23:3, that's the 17:33,
let's leave it 33:17. Can you just indicate whether or not,
to your knowledge, there was anything prior on that tape, or
after that tape that had anything to do with this matter.

10
A. No. Just prior to, ah, the recording
running completely through, there was, there was an image,
you know, on the north sidewalk of the deceased in this case,
and then the computer went down, and it came back on again,
and that portion of it was seen just very briefly. But --

15
MR. THOMPSON: Q. All right.

A. Other than that, I would agree with your
comments.

20
Q. We are going to go back over the tape
now, and probably the best way for us to do this and so His
Honour can see it as well, and I thought that screen would be
a little bit easier for His Honour to see, I am going to ask
you to point out various individuals in that screen. And if
25
we can just re key that back up, the time? Perhaps you can
narrate that. Do you have a marking pen there that will show
up on His Honour's screen, so I just want to make sure that
it does.

30
A. Yes.

Q. Let's try that?

A. I just made a mark in the upper right

Giroux, in-chf.
(Thompson)

5 hand corner and it would appear to be on His Honour's screen
as well.

10 Q. So, it does show up, and all screens,
apparently it's just a little touchy at times. I just wanted
to make sure it's working. If we can go through this in very
slow motion, and start, and can you indicate to us what it is
15 that you observe, and just so it's clear to Your Honour, all
of this, just stop here for a second. All of this in terms
of identification of who and what is taking place, is
something my friend and I have already agreed on. Other
witnesses would be able to call to give those specific
20 identifications, they have provided that information to the
officer, and on that basis, the officer is relaying that to
the court.

20 THE COURT: Thank you.

MR. THOMPSON: All right.

25 MR. THOMPSON: Q. So, you are seeing a
gentleman here coming into the top part of the screen, and if
we could just play that through. Just that portion.

30 A. Yes. I am not going to mark up the
screen but this is Mr. Hammond the deceased who is on the
north sidewalk, and is being captured by the camera from One
of a Kind Pasta store. In this particular location, Mr.
Hammond would be facing south or he would be facing towards
Queen Street. He would be the, he would be closest to the

Giroux, in-chf.
(Thompson)

5 westbound curb lane of Queen Street at this particular location. I believe there is some garbage bags positioned on the street, that would be just in front of Mr. Hammond's position out for a pick-up, and they would be right at the curb level of the street, and you can see in the area of 10 2007, the screen gets slightly darker. That's where the actual pavement of the street would start.

Q. Okay. So, just play that through. Okay. So he now goes off screen?

15 A. Yeah, Mr. Hammond appears to be going in a south easterly direction back towards Queen Street.

Q. All right?

MR. SCARFE: I wonder if just for the record my friend would, as we go through this, put the time 20 references, if possible.

MR. THOMPSON: Okay. Actually, it was at 28.10, that he actually gets on to the video.

25 A. Shadows can be seen again on the north sidewalk closer to the, the westbound curb lane and the garbage that's on the street. Nobody's come into view but a shadow can be seen in that location.

MR. THOMPSON: Q. Okay.

A. Again, 12:29 there is some shadows.

Q. Okay. Continue, please.

A. At this location there is a male, and he

Giroux, in-chf.
(Thompson)

5 is walking from, the first male who is now in the top right hand corner, you can just see his feet. He is walked from east to west, he's approximately two feet from the north face of the commercial businesses. In addition, there is another individual in the bottom left-hand side corner, with a 10 baseball cap. He's carrying what appears to be a white plastic bag in his left-hand side. They are both walking in a westerly direction on the north sidewalk of Queen. And this individual appears to be looking to his left, and he would be looking towards Queen Street. He would be looking 15 south.

Q. Okay. Thank you. Continue, please?

A. Ah, the young woman who could possibly be 20 with the gentleman with the white plastic bag is coming into view. She's slightly further north, closer to the north face of the businesses on Queen, and she's also looking over her left shoulder at something that appears to be going on in a southerly direction towards Queen Street West.

25 Q. Okay. Continue, please?

A. More shadows that can be seen in the bottom right hand corner of 12:29 and 29 seconds. Sorry, 12:30 now, approximately there is some still shadows.

30 Q. Stop please?

A. It would appear to me that it's the same woman that just passed westbound is now coming eastbound, has

Giroux, in-chf.
(Thompson)

5 a purse over her right shoulder and she stops in the centre
of the screen, and she is looking back in a westerly
direction. And she stops at that location, and turns around
and returns in the direction that she came, which is from the
west. She's returning in that direction, out of view.

10 Once again there is some shadows on the, on
the Queen Street side of the sidewalk. Somebody is slightly
coming into view, I can see a portion of someone's arm and a
number of different shadows. Again, on that particular
15 location, on the bottom left side of the screen closer to
Queen Street. The individual now who is fully in the screen
at 12:30 and 44 seconds is someone that was later known to be
Douglas Fresh, or Douglas Kerrs. Involved in this particular
investigation.

20 There is a young woman who's now just come in
view, she has a tank top on, she's facing Mr. Fresh, face to
face. It's a woman that I went on to learn her identity to
be Faith Watts, W-A-T-T-S. Again involved in this
25 investigation as well.

Q. Can you just indicate to us what she is
wearing?

30 A. I can see that she appears to have a tank
top on. She may have another garment that's covering her
arms, and there may, it may be a light sweater. Ummm, looks
like she has some cargo pants on. It appears that I can see,

Giroux, in-chf.
(Thompson)

5 at least the portion of her lower leg on both legs. And she has what appears to be boots, heavy boots on, that are dark.

Q. Okay.

10 A. The individual with the, in the screen, which seems to be a turquoise baseball cap and no shirt, is somebody that I know now to be Jeremy Wooley, also involved in this investigation.

Q. Okay.

15 A. There is a woman with blonde hair, a little bit obscured at this particular moment. She is in the bottom left-hand side corner of the screen. She's an individual that I now know to be Dina Raposo, and there will be other images of her. She has a walking cast on, I believe, her left foot. And she will be seen in other
20 images. But she's in the bottom corner. Ms. Raposo does have the cast on her left foot as can be seen in this photograph.

25 Q. Can we just back up a second. Just back up. Sorry about that. I just wanted to back up for a second. I just backed up a little too far. Can you stop there? You indicated Ms. Watts. Can you just describe to me what her hair looks like there?

30 A. Ah, it appears to be, it's pulled off her face. I'm not sure if it's in a bun or it's being held in place by any means, but it appears to be pulled back. It

Giroux, in-chf.
(Thompson)

seems to being fairly long.

5 Q. Okay. Can you just move it a little further?

A. It's dark brown or dirty brown.

Q. Okay. Is that her there again?

10 A. Yes.

Q. Does this assist you in terms of what her hair is like?

15 A. Again, dark, dark brown. In this, in this image. Ms. Raposo is a blonde, and it seems to be quite a bit of a contrast between the two.

Q. All right. Continue please?

20 A. I have a photograph of Ms. Watts that was taken several hours later as well. Mr. Wooley in the ball cap has some hair to his shoulders. He has an auburn or reddish beard in this photograph or the stills. Mr. Wooley moving in and out of the camera, Mr. Fresh is in the right-hand corner of the camera bending over. Somebody walking
25 through with a package in their right hand. I don't know who that is. Coming into view now in the bottom right-hand corner is Ms. Kirk, her back is to the camera at this
30 particular location. Mr. Fresh actually appears to be looking directly at the camera.

Q. That's at 31:58?

A. And in this photograph, Ms., Ms. Watts is

21:54?

Giroux, in-chf.
(Thompson)

5 to Ms. Kish's left, and a witness is appearing in this image,
this particular location, Mr. William Patsiopoulos is the
gentleman that appears to have a light coloured shirt on,
something over his shoulder, and I'll get the spelling of
this gentleman's name. William, last name,
10 P-A-T-S-I-O-P-O-U-L-O-S. There is another individual now,
who is, we are looking at the left side of his face, has some
sideburns that come down around his chin or neck. Somewhat
with the assistance of Mr. Scarfe, I have made some efforts
to try to determine who that person is. I am not convinced as
15 to who that person is at this particular time. But the
individual whose name was given to me by Mr. Scarfe has been
investigated.

20 Q. Okay. With respect, I believe that
individual's name is Hatal? (phon)

A. Yes. Known as Hal, his real name is
Harold Amero. A-M-E-R-O.

25 Q. All right. Was there anything about Mr.
Amero that you were able to indicate that is or is not like
this gentleman here?

30 A. Mr. Amero, Your Honour, was one of the
witnesses that was bound over on the first day of this
process. He has what I would describe as a brush cut or
almost a shaved head. He has numerous tattoos covering both
of his arms and other parts of his body, including his chest.

Giroux, in-chf.
(Thompson)

5 And by that physical description, it does not appear to be
the same person.

Q. Okay. Continue, please?

10 A. Ms. Kish is again, she's standing, right
now you can see everything except the shoulders to the top of
her head. She appears to have a tank top on with straps over
the shoulders, and a long skirt right down to the ground, and
the witness, Mr. Patsiopoulos, is standing on Ms. Kish's side
and appears to be holding one of her arms, and appears to be
15 holding her left arm.

Q. Okay.

A. There is quite a bit of movement in the
images now.

20 Q. Okay?

A. This individual, who I am clear of his
identity, completely, is alone in the photograph, and he's
looking directly south towards Queen Street. There is a
bicycle shadow that you can see in the bottom left-hand side
25 corner of the screen as well.

30 A larger frame man that I described as being
unclear whose identity he is, wiping his forehead with his
left arm, now right arm. He also appears to have shorts or
shorts that go right to the knee. He's just walked out of
view towards Queen Street. Mr. Wooley is back into the image
moving around and Ms. Kish is coming back into the screen,

Giroux, in-chf.
(Thompson)

5 uhmm, she has a, a bandage now around her left wrist. You can see her from the front. Dark hair, again with the straps around the shoulder, garment that goes to the waist and what appears to be a long skirt.

10 Q. Okay. Just for the record, are you able to determine how long that skirt really is at that location or what it appears, at least?

15 A. Well it appears to go almost to the ground, but I believe I can see the top of her footwear of her, ah, left foot in this particular photograph.

20 Q. Okay. I am just, all right. Just go to -- all right.

A. Bicycle is now appears to be moving back and forth in the bottom left-hand side corner of the screen.

25 Q. Okay. Now, that's, that is a, we might as well, we might as well do this while we have you here, on this video. Can you, just hold it there. And I am going to refer to another exhibit. Try to determine where it is that that video camera -- and I am going to pull out an exhibit, so you can mark it -- where that video camera goes in terms of the extent. Pointing in an easterly direction. I refer you back to exhibit I think exhibit number 7 would be the best. How far out does that video, that being the video that's pointing in a westerly direction, how far does that video actually extend down the street or on the sidewalk.

30

Giroux, in-chf.
(Thompson)

5 A. There is, there is other, other
photographs, but it extends, uhmm, as a result of an
experiment we did, the entire viewing distance of both
cameras, Your Honour, is about 26 feet, is covered in the,
uhmm, in front of that store, both eastbound and westbound.
10 So approximately half that direction is covered by each of
the cameras.

15 Q. Okay. Just for the time being in any
event, we'll get some more details of it. But in terms of
the actual street, how much of the street does that cover,
that camera?

20 A. It just, at this particular location, the
only portion of the street that's covered is slightly west of
the garbage bags, and it's a very very small portion of the
street that's covered.

Q. Okay. Thank you.

A. Maybe a foot or two.

25 Q. I was referring to Exhibit Number 7, for
the record.

So --

MR. THOMPSON: And I am going to file the
actual video, Your Honour, as the next exhibit.

30 THE COURT: Exhibit 10.

MR. THOMPSON: Exhibit Number 10.

THE REGISTRAR OF THE COURT: 10, Your

Giroux, in-chf.
(Thompson)

Honour.

5 --- EXHIBIT NO. 10: Video taken from One of a Kind Pasta
store

10 MR. THOMPSON: Q. Now the next video, Your
Honour, I want to put in is somewhat of a disturbing video,
Your Honour, just so it's clear, it's a video that was taken
prior to the Emergency Task Force getting on scene. It was
taken by City TV. It's fairly explicit. I just want to make
15 that clear that it's a problem. But in any event, we plan to
play the entirety of it, and again go back and identify
certain parties in that. So if that could be teed up.

(City TV video played)

Q. All right. Couple things.

20 MR. THOMPSON: Just a couple things, Your
Honour. First of all, my friend consented the video go in.
Mr. Bert Dandy of the City TV is the author of it. It is a
little choppy. That's not the way it shows up on the DVD,
but unfortunately, there is obviously some breaks or change
25 of angles there that was, I don't believe it's going to be
much of an issue, but my friend has consented, without having
Mr. Dandy called with respect to why they were done at
certain angles.

30 THE COURT: Thank you.

MR. THOMPSON: But in any event.

MR. THOMPSON: Q. All right. So now if I

Giroux, in-chf.
(Thompson)

5
can just go back through it, and obviously there is no need
to go through the first part of the video with respect to Mr.
Hammond being on the site of the street there. But I would
like to at least go back and start at about three, if we can
go through and have the officer narrate who comes into the
10 scene.

MR. SCARFE: While my friend is teeing up, I
just want to make a couple comments about the video. My
friends did not have the benefit of being Crown counsel at
the preliminary hearing, and at that time, the City TV video,
15 which I think was subpoenaed directly from the news source,
was played numerous times through the preliminary hearing.
but on a DVD player. And the DVD player was a lot less
choppy, the breaks we see in the screen. But more of a
20 concern, this computer version doesn't seem to tee up the
audio in the same way. So, at some point later in the
proceeding, I would reserve the right to play the smoother
version, give you a clearer idea of how --

25 MR. THOMPSON: I am content.

MR. SCARFE: -- how it tees up with the
video.

THE COURT: Very well.

30 MR. THOMPSON: All right. Let's proceed,
please. If you just go to three, please.

(Video played)

Giroux, in-chf.
(Thompson)

5 MR. THOMPSON: Q. Can you tell us who is coming into the screen here, please, now?

10 A. Okay. Ms. Kish is coming into the screen, and she can be heard saying, "let me in". She's holding her left wrist with a bandage or garment around it. She's accompanied by a uniform police officer. Ms. Watts, who is just out of the view behind the pole that's obstructing her, and Douglas Fresh and Jeremy Wooley are to the left of the, of the street pole there, and they are just coming into view as well.

15 Q. Just so it's clear, they are coming from what direction?

20 A. They are coming from the area where this incident started so they are coming from the east to the west, and they are on the north side of the street, and they are walking towards the St. Nicholas Church, which is where Mr. Hammond has been located on the north sidewalk.

25 Q. All right. Continue, please.

30 A. That's Ms. Kish's voice you can hear. Unfortunately, the lights of the fire truck are bleaching out the image there, but you can see Mr. Wooley, who is the closest to the ambulance, and Mr. Fresh and Ms. Kish and Ms. Watts are here on the same image as well. Mr. Wooley is pointing at Mr. Hammond, who is on the sidewalk, and says something.

Giroux, in-chf.
(Thompson)

5 Q. And while he's pointing, can you indicate to me whether or not you can see what direction Ms. Kish is looking at that time?

A. I can't from this area, only because of the lights of the fire truck.

10 Q. Okay. Can we move forward a bit, please. Back to where we were.

15 A. It, it appears they are all looking in the direction that Mr. Wooley is pointing in. It's in the direction where Mr. Hammond is, there is uniform police officers, paramedics, and fire department staff on the north sidewalk. This would be on the west side of St. Nicholas Ukrainian Church, and you can see the concrete face of the church and the west staircase in the top left-hand side
20 corner of the screen.

Q. Once again, so it's clear, St. Nicholas is on what side of the street?

25 A. On the north side of the street, at Gore Vale Avenue.

Q. Continue, please.

30 A. Ms. Kish is being escorted over to the ambulance by uniform officer. Ah, Ms. Watts is standing on her left. She has her arm around Ms. Kish's waist, and Douglas Fresh is directly facing the City TV camera man.

MR. THOMPSON: Court's indulgence.

Giroux, in-chf.
(Thompson)

5 MR. THOMPSON: Q. Can you, in that angle, can you indicate to me what Ms. Kish is wearing, and the length of what it is she's wearing.

10 A. Yes, Your Honour. Again, you can see the straps of the garment she's wearing going over her shoulder like a tank top, to the waist, and then from the waist down, it appears to be a long skirt that I can, in this image, see in contact with the ground.

15 Q. Okay.

A. Mr., Mr. Fresh at this point is, is confronting the camera man with regards to what the camera man is doing, taking those pictures.

20 Q. Okay. Can you once again describe what Ms. Watts is wearing?

25 A. Ms. Watts I can see wearing what appears to be doc marten boots, possibly some white or tan socks that protrude above that and a portion of her lower leg can be seen, like the back of her calf. She's wearing some dark cargo like pants. Again she has some kind of a shawl or other sweater like garment over her shoulders as well. It's off the shoulder on the right hand, and you can see again what appears to be a tank top with some straps over the shoulder, and some kind of a, uhmm, over the shoulder bag or
30 knapsack.

Q. Okay.

Giroux, in-chf.
(Thompson)

5 A. Mr. Hammond is continuing to be worked on on the north sidewalk, and you can hear again from the recording that's ongoing Ms. Kish's voice being picked up from the ambulance, which is south of Mr. Hammond's location. At that point Ms. Kish is calling to Jeremy Wooley to go get her backpack.

10 Q. Okay?

A. She's now seated at, Ms. Kish and Ms. Watts are seated at the rear of the ambulance, and I can hear Ms. Kish asking the paramedic staff if she wants them to take it off, which referred to me if she wants them to take the bandage off around her wrist.

15 Q. Okay.

A. That's Ms. Kish in the background asking if somebody would come with her, that she doesn't want to go by herself.

20 Q. Okay?

A. And Mr. Hammond is transported first.

25 Q. All right. If I could file as the next exhibit a copy of that video?

THE COURT: Exhibit 11.

THE REGISTRAR OF THE COURT: 11, Your Honour.

30 --- EXHIBIT NO. 11: Video taken by City TV of scene

THE COURT: Appropriate point to take the

Giroux, in-chf.
(Thompson)

morning recess.

MR. THOMPSON: Yes, please, Your Honour.

THE COURT: 15 minutes.

--- COURT RECESSED AT 11:43 a.m.

--- UPON RESUMING AT 12:03 p.m.

THE COURT: Counsel, certain members of the media have requested that they have access to Exhibit Number 11, being the City TV video. I don't see any reason not to allow them to have access, but I invite your input.

MR. SCARFE: I --

MR. THOMPSON: Is it possible we can reserve, think this over a little bit more depth and give you an answer later on today? There may be an issue, that's why I am saying, there may be.

MR. SCARFE: Yes.

MR. THOMPSON: Rather than giving you a response from the podium, I would just like to talk to my friend about it before that answer is provided.

THE COURT: We can address the matter at 2:15, after lunch?

MR. THOMPSON: Yes.

Giroux, in-chf.
(Thompson)

MR. SCARFE: Thank you.

THE COURT: Very well.

MR. THOMPSON: Okay.

MR. THOMPSON: Q. All right. Officer, the other matter I want to deal with is, I understand Ms. Kish, there is a booking video of Ms. Kish?

A. Correct.

Q. We have that, we brought that today to court?

A. Yes.

Q. If that could be queued up, please.

A. What, what's this showing, Your Honour, as we know, all prisoners that arrive at a Toronto Police Service facility come through the sally port area and there is a warning that's read to each of the accused that the sections of the building are being recorded with audio and visual equipment, and that warning was just read to Ms. Kish. She's been to the hospital at this point, and her left wrist is and arm is bandaged, and she's arriving at number 14 Division into the booking area through the sally port doors. She'll appear before the officer in charge, who is a uniform Sergeant, his back to us. He's on the left of the booking officer, whose head is down and he's writing on a piece of paper on desk. Ms. Kish will appear before the officer in charge and the reason for her detainment will be explained to

Giroux, in-chf.
(Thompson)

the Sergeant before she is taken to the investigative office.

5 What this shows and this image as well is that, is the long garment that appears to be a dress that Ms. Kish is wearing, the tank top and long skirt to the floor can be seen in the video as well.

10 Q. Okay. I think that's all we need, Your Honour, with respect, unless my friend wants it, we'll file the entirety of it, but that's all the Crown wants to show at this point in time. To be put in. Just so it's clear, it stops at, let's use the top, 10:36:35, and Your Honour, with respect to an exhibit, I'll file it later. I'll file a copy of it later?

15 THE COURT: All right. Exhibit 12 held for that, Mr. Registrar.

20 THE REGISTRAR OF THE COURT: Thank you, Your Honour, Exhibit 12.

--- **EXHIBIT NO. 12**: Booking video of Nicole Kish

25 MR. THOMPSON: Q. Now, I am going to go, officer, I am referring to Exhibit Number 2, officer. In any event, let's, okay. In Exhibit Number 2, officer, could you indicate to us, and you may want to do it with your marker pen or your laser pen, where One of a Kind Pasta is again, in terms of the numbers on here? Letters?

30 A. J and 746 Queen Street West.

Q. Okay. And could, that's, just so it's

Giroux, in-chf.
(Thompson)

5 clear, when I referring to One of a Kind Pasta, I am referring to Exhibit 9, is that one and the same place?

A. Yes. Correct. The sign extends over the north sidewalk.

10 Q. Okay. And also a store by the name of Anne Stortun? [Sic].

A. Yes, is L 472 Queen is --

15 Q. Okay. So it's clear, what is the spelling of that.

A. It's --

20 Q. Ah --

A. Anne, A-N-N-E, and S-P-O-R-T-U-N.

25 Q. Okay. On this diagram, so it's clear, it says Stortun as opposed to Sportun?

30 A. It's Sportun. Okay. Thank you.

Q. And so, in terms of location, can you just indicate, you have indicated a number where it's at, 742, but is there a store between them, then?

A. Yes.

Q. And the name of the store in between?

A. Is, ah, Kama Kazi, as I indicated in my earlier testimony.

35 Q. Okay?

A. The distance between the two stores, which I was present for when it was measured between the

Giroux, in-chf.
(Thompson)

5 centre of the glass entrance door of One of a Kind Pasta to
the entrance door of Anne Sportun is 39 feet.

10 Q. All right. Now, I am referring you now
Exhibit Number 6. Are you able to indicate to us, you did
earlier, you were actually able to see on this Exhibit
Number 6 where the cameras are placed --

A. Ah --

Q. -- at One of a Kind Pasta.

15 A. Yes. Your Honour, just in the larger
photograph here there is a camera that's positioned in the
top of the sign that's on the north side of the street, and
it's the camera that's mounted east, but it faces in at
20 westerly direction, diagonally as my pointer indicated. Then
there is another camera that's mounted on the west side of
the building, and it faces east and on a diagonal angle down
towards the pavement as well.

25 Q. Just so it's clear, the exhibit that's
filed as Exhibit Number 10, which is the video of One of a
Kind Pasta, could you tell us again, which direction and
which camera that came from?

30 A. The one that was played in court was the
camera that was mounted to the east, but it faces in a
westerly direction, or, quite frankly, a south westerly
direction.

Q. Okay. Now dealing with that issue alone,

Giroux, in-chf.
(Thompson)

5 can you tell us what efforts were made to obtain those videos
at that location?

10 A. The capturing of the recordings was something that I had a conversation with Detective Scott, and I had that conversation while he was still the officer in charge of this investigation. And so those conversations took place in the early days of this particular investigation with regards to capturing the video. And more specifically, with regards to One of a Kind Pasta, I specifically had a conversation with Detective Constable Rob Olver from our computer crime section with regards to attending that address and capturing that video.

15 Q. Okay. So, I am aware, officer, you have voluminous copious amounts of notes there, so just take your time, and perhaps you can indicate to us the conversations that you had with respect to those videos.

20 A. On, Your Honour on August the 10th, 2007, it was a Friday, Detective Scott, from number 14 Division, attended the Homicide Squad and I had a conversation with him, and at that particular time, I had a conversation with him about capturing the video of the affected area, and in doing so, was with the assistance of the computer crime section of the technical support aspect of intelligence to be
25 utilized to capture that video. And I have that on page 5 of my notes. And then when the investigation became mine, on
30

Giroux, in-chf.
(Thompson)

5
Tuesday, August the 14th, 2007, I had a conversation with Detective Constable Olver, with regards to attending the One of a Kind Pasta store with regards to capturing a video.

MR. THOMPSON: Court's indulgence.

10
All right. Just so it's clear, Your Honour, my friend is not objecting to any of those conversations going in. It's possible we are going to call Detective Olver, we are reserving that to the very end of the proceedings to see whether or not it's going to be necessary. In any event, at this juncture, I am going to ask the officer to go into the details of that, in the event that Officer Olver does
15
come, and becomes an issue, my friend wants to put it to him. So it's gone in on consent. Please.

THE COURT: Thank you.

20
MR. THOMPSON: Q. Could you just replay to the court what it is the discussion you had with Officer Olver.

25
A. Yes, sir. I, again it was on August the 14th, 2007, it was a Tuesday. Mr. Hammond had just passed away three days earlier. I had a conversation with a series of things to do list that I have in my notes on page 48, and the request was for Detective Rob Olver, go to the pasta location on Queen Street, get digital video
30
downloaded re camera, and then I went into another request with regards to another witness that's going to be coming up

Giroux, in-chf.
(Thompson)

in this process.

5

Q. Okay?

A. So I directed Mr., Constable Olver to go and capture that video.

10

Q. Okay. And as far as, and what's the next thing that happens in stages of terms of getting that video?

15

A. The video is created for me for disclosure purposes and is forwarded to me in a DVD format. The technical crime section imbeds it, or burns the DVD and has some identifiers on the DVD with regards to who created it and when it was created and it came to me for disclosure purpose, so in essence, that would be the original, and then I would make copies for Crown and defence.

20

Q. Okay. So you weren't there at the scene when they took the video or took, created the individual or the video that you subsequently disclose from the cameras, were you?

25

A. No, I wasn't.

Q. Okay. Without going into exact detail as to what, what is to be the best of your knowledge as to how that process took place?

30

A. Well, it's not my area of expertise, and that's why I use these individuals, but my understanding --

Q. I am not asking for an area of expertise, I am just trying to determine, so at least we inform the

Giroux, in-CHF.
(Thompson)

5 court the actual process that take place of going down there,
and, and what's, how it's captured, without going into the
technical details?

10 A. Since I have been there at that time, I
can tell you that it's a, the two cameras record, there is a
hard drive, and as a result of that, the images were, were
collected from the hard drive. It's not the type of
15 recording equipment where something is ejected from that
piece of equipment and handed over to the police with regards
to the capturing of the images. The images are recorded on
the hard drive. The detectives go there, and they download a
portion of the recording on to a, on to their own computer,
and then that material is burnt on to a DVD or a CD for
disclosure purposes.

20 Q. Okay. So when did you become in receipt
of that downloaded material?

25 A. I don't have a specific time. I have a
series of disclosure logs with regards to this investigation.
Not with me here. Ah, but, ah, there is --

Q. Okay. That's --

30 A. -- areas of itemized disclosure that
would be given out and that would be listed on there.

Q. Let me ask you this. To your knowledge,
were you aware there was two cameras there at the time?

A. No, I wasn't.

Giroux, in-chf.
(Thompson)

5 Q. Okay. When did you become aware that there was two cameras?

10 A. There is a series of inquiries through defence counsel at one point, uhmm, indicating that there may be a portion of the video that's missing. I started to look into that, and at a future point, requested that Detective Olver return to the store with regards to seeing if that video was still available to, to be captured.

15 Q. Were you aware at that point in time that there were? Was that when you became aware that there was two cameras?

A. Yes.

20 Q. And to your best of knowledge, was there actual footage taken from both cameras?

25 A. There was footage taken by both cameras. I can give an explanation as to what happened.

Q. Please?

30 A. The, uhmm, again it's, what's been explained to me is that Detective Olver captured the images in the westbound direction. Then when he went to capture the images in the eastbound direction, the camera defaulted to a separate time. That timeframe was captured, but it's not the applicable timeframe. So we do have a recording in the eastbound direction, but it's not at the material time.

Q. Okay. And, and, is it an hour later?

Giroux, in-chf.
(Thompson)

A. Yes.

5 Q. So, in essence the 12 to 1 o'clock slot for the camera pointing in a westerly direction has been captured, but for the camera that's pointing in an easterly direction, it's been captured from 1 to 2?

10 A. Correct.

Q. So when, roughly, did you find that out?

15 A. Well, I have a notation that as a result of a series of letters from defence that I made a request on the 8th of April, 2008, to have Detective Constable Olver return to the One of a Kind Pasta with regards to a lost portion of the recording.

20 Q. Okay. And who is ultimately responsible for getting that, that tape? Like who who is ultimately responsible for taking that, ah, those two video captures off those cameras?

A. Detective Constable Rob Olver of the, ah, computer crime section.

25 Q. And in terms of, was there any other officer involved in terms of, is it his ultimate responsibility for that, or is it homicide's or is it 14 Division's or whose ultimate responsible.

30 A. Ultimately it's the officer in charge responsibility, it's my responsibility.

Q. Okay?

Giroux, in-chf.
(Thompson)

5 A. I directed Constable Olver there.
Everything that happens in the investigation is my
responsibility. I directed the officer to go there and
capture the video, and when it would appear that a portion of
it was missing, I, ah, ordered Detective Constable Olver to
10 re-attend, to see if the video was still in existence with
regards to capturing it at that point.

Q. Just so it's clear, before the
preliminary inquiry, was that known?

15 A. My difficulty is the preliminary hearing
went on for about a year, so I am directing the officer on
the 8th of April to re-attend --

Q. All right?

20 A. -- to see if it's possible if it could be
recaptured. I'm just not sure of the dates at this point.

Q. What efforts have you done in order to
determine what it is that would be missing from that video?

25 A. I re-attended this year with regards to,
on two separate occasions with regards to doing a test
recording --

Q. Yes?

30 A. -- of, uhmm, of the images to the east
and to the west, to demonstrate to the court and to all
individuals here how much material would have been captured
had it been recorded at the appropriate time.

Giroux, in-chf.
(Thompson)

5 Q. Okay. And just so it's clear, there is
footage of the camera pointing in an easterly direction from
that date. It's just the wrong hour?

A. Correct.

10 Q. So, were you able to determine the, on
your subsequent efforts to view that, that lost footage,
whether or not the cameras had, in fact, been moved or not?

15 A. Again, as a result of conversation I had
with the owner of One of a Kind Pasta, I did receive certain
information with regards to the camera.

Q. And what is that?

20 A. That the only, ah, alteration or the only
touching of the camera took place when Mr. To, T-O, who is
the proprietor and owner of that particular store, would
clean, clean the camera, clean the lens so that the images
would be visible, but as far as its structural position,
they are in the same position, and so I went ahead on two
25 occasions with the assistance of the Forensic Identification
Officer, to put out some forensic markers on the sidewalk,
and some traffic cones to the outer east reaches of the
video, and the outer west reaches of the video to demonstrate
how much of the images were captured and were not captured.

30 Q. Okay. Now I am showing you a picture,
One of a Kind Pasta, can you just briefly explain to us what
that is, please?

Giroux, in-chf.
(Thompson)

5 A. Yes, Your Honour. On the 14th of January
of this year, I attended just after darkness to reflect as
close to the time of the offence as possible, and what I
asked the forensic officer to do is to place some of the
forensic markers on the north sidewalk in front of the store.
10 Ah, they were 13 of these such markers placed on the
sidewalk. Number 1 is to the furthest east, number 13 is to
the furthest west. They are using the traffic measurement
wheel, they are two feet apart from each other, for a total
of 26 feet. While these markers were putting, being put down
15 on the sidewalk, I am on the telephone with the computer
crime section staff, who is monitoring the camera, so that I
can be able to be assured that the markers are in the outer
east region and the outer west region, so that they can just,
20 just be barely seen in the, in the video recording. And then
what I went on to do is, uhmm, the recording commenced with
the markers in this position, and then I walked around inside
the field of view of the camera, touching different things
and pointing at different things to landmark the, the images
25 with regards to what could be seen in the picture. The
recording that was done, Your Honour, on this particular
night, ah, the complication that took place is that the
photographs were, ah, were done, but the sign, the One of a
30 Kind Pasta sign that hangs over the sidewalk and the other
sign remained illuminated, and as a result of that we found

Giroux, in-chf.
(Thompson)

5 when we did this particular recording there was a blanching
of the recording in the top right hand corner, when it was
captured and recorded and disclosed. As a result of that, I
returned on the 17th of January, I re-did the recording
again, the test recording again, I had Mr. To, the
10 proprietor, turn off the equipment that's flashing in front
of his store so all of the signs that hang over the sidewalk,
and the one against the face of the store were turned off,
and then the recording was re-created. The photographs were
not re-done. I moved again through the recording, I pointed
15 at landmarks that were fixtures, like street signs and street
poles, to demonstrate the outer reaches of the recording.
And then that copy was downloaded and disclosed.

20 Q. Okay. So, officer, I am just, a number
of these, and just with the assistance of the court, file the
pictures only, but this shows, this particular picture shows
numbers from 1 to 13. Is that correct?

A. Yes. Two feet apart.

25 Q. Okay. And I am going to show you another
picture, and can you just -- all right, first of all, in this
picture, can you tell us which direction that was taken from?

30 A. Yes. The photographer is standing to the
east and he's photographing west on the north sidewalk from
number 1 towards number 13.

Q. Just so it's, just so there is no

Giroux, in-chf.
(Thompson)

5 confusion, let me file this as the next exhibit, and if they
could be, because there is a group of pictures, subject to
Your Honour?

THE COURT: A series, 13 A, B.

10 MR. THOMPSON: Please. If that could be 13
A.

THE COURT: 13 A.

THE REGISTRAR OF THE COURT: 13 A, Your
Honour.

15 --- EXHIBIT NO. 13A: Photograph

MR. THOMPSON: Q. And I'm showing you
another picture, and can you indicate what that shows,
please?

20 A. Yes, the photographer is standing to the
west. He's photographing in an easterly direction from
number, marker 13 to number 1.

Q. Okay. Go on, 13 B, please?

25 THE REGISTRAR OF THE COURT: 13 B, Your
Honour.

--- EXHIBIT NO. 13B: Photograph

30 MR. THOMPSON: Q. And I am going to, this
is another close-up picture of that.

A. Yes. Close-up of, again the photographer
is to the west, photographing east on the north sidewalk from

Giroux, in-chf.
(Thompson)

marker 13 to marker 1.

5

Q. 13 C?

THE REGISTRAR OF THE COURT: 13 C, Your Honour.

--- EXHIBIT NO. 13C: Photograph

10

MR. THOMPSON: Q. And I have just got two more pictures here. That just shows what, officer?

A. Just a close-up of marker number 13 to number 11 and it demonstrates how much of the individual concrete tiles on the pavement that each of the distances is in between.

15

Q. Okay. And that could go as 13 D. And this one here shows?

--- EXHIBIT NO. 13D: Photograph

20

A. From, from the opposite direction to the east from the previous photograph, there is, uhmm, three markers, approximately three, three of the markers were within each of the marked out concrete tiles on the sidewalk.

25

MR. THOMPSON: Okay.

THE REGISTRAR OF THE COURT: 13 E, Your Honour. Exhibit.

--- EXHIBIT NO. 13E: Photograph

30

MR. THOMPSON: Q. Now, if I can have one of those exhibits back please. 13 A.

Giroux, in-chf.
(Thompson)

THE REGISTRAR OF THE COURT: Sorry, 13 A?

5 MR. THOMPSON: Q. Now, I am going to go back to Exhibit Number 13 A. Can you tell me between the two cameras, just so it's clear, those markers indicate the full range of both the cameras if they were both operating?

10 A. Correct. I'm speaking to the officer in front of the recording equipment, and I'm first of all made a determination between the outer reaches. So, from number 1 to number 13 are placed down first, and then, ah, those are the outer reaches where you can just see, ah, people's feet, at 1 and 13, the outer reaches, and then the markers are put on the pavement two feet apart to fill in the space.

15 Q. Okay. Can you indicate approximately what, at what number, uhmm, that the east pointed camera would produce a picture at, that would not be visible on the west pointed camera or the one picture that we already have. So how much of the picture basically of that entire 13 markers is missing by having no screen or no video from the east pointed camera?

20 A. Approximately 10 to 12 feet.

25 Q. And you say approximately for what reason?

30 A. When you look at the screen the marker number 8 is slight out of picture in one camera and in view in the other camera. So number 8 appears to be a constant in

Giroux, in-chf.
(Thompson)

both.

5

Q. Yes?

A. So, 8, 9, 10, 11, 12, 13.

10

Q. Okay. And just so it's clear, you've taken to the full extremes in which all you would be able to see is a foot?

15

A. Well, correct. And then what I did is I moved around within the field of recording to demonstrate just how much of a human being you could see in this recording.

20

Q. Okay. And did you have any rough notes with respect to how much you could see at various length or not?

A. Well, the difficulty was that I was part of the recording.

25

Q. Okay.

A. And the recording was being done as I move about pointing at certain fixtures like the windows, or the pole that you can see on the far left-hand side of the screen, to orientate someone as to the distances that the camera will cover, and how close to the street you can get.

30

Q. Okay. Just in terms of adding perspective here, I am going to use Exhibit 13 C, and can you tell us roughly, either point it or what I'm referring back to Exhibit Number 6, where it is that these markers 1 and 13,

Giroux, in-chf.
(Thompson)

5 and in relationship to, of Exhibit Number 6. Do you want to look at the exhibit? Or the picture?

10 A. It's approximately in line with this darkened framed of that particular store, that would be the outer east area right there and then the westerly area comes into view of the shoe store, which is unfortunately obscured by the sign of One of a Kind. I can see it on this photograph.

15 Q. I am wondering, if anything, is this of any better assistance Exhibit Number 7? Does that help you or not? It is a different angle?

20 A. It's, it's slightly better, but unfortunately, again, when the photographs are taken there is a gentleman standing in the view there.

25 Q. How does that one help. Exhibit Number 8. Does it help you at all.

30 A. Yes. Approximately right here from the photograph I have in my hand, in the westerly direction right in front of the shoe store that's to the west of the pasta store.

Q. Okay. And can you just, so we are referring to Exhibit Number 8, just do the further east related extremity as well?

A. It would be right there in line with the frame of the, with the store with the manikins in the window.

Giroux, in-chf.
(Thompson)

Q. All right.

5 MR. THOMPSON: Can I have the court's
indulgence please, Your Honour.

THE COURT: Yes.

10 MR. THOMPSON: All right, thank you for that
indulgence, Your Honour.

15 MR. THOMPSON: Q. I understand with respect
to that portion of the missing video, that although it was
subsequently not downloaded properly, that an officer did
attend and did view what was on that portion of the video
that we don't no longer have?

A. Correct.

20 Q. And without going into the details of
what it is that he saw on that, we may at a later junction
call him, but in any event, at this juncture, you are aware
that in any event what is on that portion of the video. Or
you were told.

25 A. Yes. It was some, some time ago, as a
result of, ah, testimony that I overheard at the preliminary
hearing.

30 Q. Okay. And I'm not going to ask you the
details of that. I just wanted to be aware that you were, in
fact, aware of what is on that video?

A. Yes.

Q. Okay. Did it give you any concern?

Giroux, in-chf.
(Thompson)

5 A. Well, the concern that I would have preferred to have had the recording, but I had a witness who viewed it at the time, Detective Scott, and his escort, and I was able to get at least a briefing with regards to that.

10 Q. Okay. We'll leave it at that. And the proprietor of that store, just so it's clear, have you made any efforts to determine whether or not that a copy is kept for a number of years of the, of that video. By him?

15 A. What, what I did do is when I was back with the officer doing the test recording, it's a different officer, his name was Ryan Kelly, on my behalf, he checked to see if it had been parked or placed into another area of the hard drive with regards to efforts that Detective Constable Olver had done three years ago, and those efforts were made during these test recordings and they could not be found.

20 Q. Okay. Thank you. Now, all tolled, how many videos were there of the scene?

A. With, with regards to what.

25 Q. Well, let me re-word that question. Uhmm, how many videos are you aware of that may or may not have been functioning that night that potentially looked or cameras that looked out on to the street?

30 A. There is Mr. To's business.

Q. Which would be how many videos?

A. There is two cameras that look out onto

Giroux, in-chf.
(Thompson)

the street.

5 Q. Let me use the word "camera" then,
please?

A. All right. Mr. To has two cameras at his
pasta store. Uhhh, I believe that we recovered video from
10 Kama Kazi, which is a retail store at 744 Queen.

Q. Okay. While we're just dealing with
that, was that video captured and disclosed?

A. Yes.

15 Q. And was it, and what did that video show?

A. The store, the camera is within the store
itself, and it is a robbery prevention type of piece of
recording equipment, and it shows the interior of the store
well, as far as exploring out onto the north sidewalk of
20 Queen. It's blurry as it goes through the door, and at times,
you can see motor vehicles because of their headlights. But
that's about all you can see.

25 Q. Okay. Thank you. Was there any other
video?

A. There was, to my understanding, there was
a video that was recovered from Anne Sportun, which is an old
style VHS recording.

30 Q. Okay. Once again, can you just indicate
where Anne Sportun is on the Exhibit Number 2.

A. L, 742 Queen.

Giroux, in-chf.
(Thompson)

5 Q. Okay. And where, and where was that in relationship to One of a Kind Pasta, if you don't mind?

A. It's to the east, approximately 39 feet.

10 Q. Now, dealing with that videotape, can you relay to the court what you know about that tape.

15 A. Ah, what I know that on December the 9th of 2010, Ms. Middelkamp here in the courtroom, one of the Crown Attornies on this case, indicated to me that Detective Constable Umbrello indicated that a VHS recording had been seized from that location of Anne Sportun, at 742 Queen that had not been disclosed. And I indicated to her that I was unaware of its existence until this point.

20 Q. Okay. And can you tell us what you did then, please?

25 A. Then I sent a series of e-mails to, ah, Detective Constable Umbrello, who is Detective Scott's partner during this investigation, with regards to the whereabouts of that recording.

30 Q. Okay. If you can relay to us what it was that Officer Umbrello indicated to you, please?

A. I am just going to that page in my notes now.

Q. Yes. Take your time.

A. Sent an e-mail, which I have appended in my notebook here, dated the 9th of December, 2010, at

Giroux, in-chf.
(Thompson)

6:24 p.m. And it indicates -- should I read it?

Q. Please?

A. Says:

Franco, with regards to the Nicole Kish case, the Crown Attorney has asked me to speak to you about a VHS tape seized from 742 Queen Street West, Anne Sportun. The entry in question is on page 35 of your memo book notes with regards to this investigation. As a reminder it took place on the 9th of August, 2007. I am not in possession of this cassette in any of the homicide case boxes. Can you shed any light on the whereabouts of this tape. Please let me know as soon as possible.

Q. Okay. What is the reply?

A. On the 14th of December, 2010 at 1:13 p.m., an e-mail was received by me from Constable Franco Umbrello. He says:

Hi Detective Sergeant Giroux. In regards to the video, when the homicide team took carriage of the case, myself and Detective Scott provided all we had investigated, including the tape to them at that turnover. I will check at my end to

Giroux, in-chf.
(Thompson)

confirm that for you ASAP.

5 Q. Just so it's clear, what is the turnover refer to again?

10 A. The, uhmm, the traditional practice when cases from the divisions transfer to the Homicide Squad, it's the collection of the box that I spoke about in my testimony. Ah, I did that on the 11th of August. I went to, ah, traditionally in the Staff Sergeant's office in the various division, boxes created with materials inside, including
15 tapes and discs, interviews that have been done, officers' memo books, canvass sheets, ah, crime scene logs are put into this box, and in this case, that box was going to be transferred to my care, and I picked it up in the morning. And this, this individual, ah, tape that I'm speaking about
20 was not present.

Q. Okay. Uhmm, any further follow-up after the December 14th call or e-mail, sorry.

25 A. Yes. On the 6th of January, 2011 I sent Constable Umbrello another e-mail, that indicated:

30 Franco, on the date of your last e-mail... that being the beginning, that being the 14th of December 2010:

...you indicated that you were going to check on the location of the VHS tape. You have indicated that all materials were

Giroux, in-chf.
(Thompson)

5 turned over to the Homicide Squad. As
indicated in an earlier e-mail, as the
officer in charge, I only have digital
images in the case file box, no VHS (older
10 style tape). Your e-mail indicated that
you were checking on your end. Can you
confirm you checked, and what are the
results.

15 Q. Okay. And just so it's clear, officer,
uhmm, everybody has holidays, but can you indicate to the
court when it is that you took your holidays this year?

A. Approximately, ah, the latter two weeks
of the, ah, year.

20 Q. Okay. And all right. So you came back
on duty when?

A. I believe it was January 3 or 4 and then
efforts continued with regards to this reporting.

25 Q. So, just so it's clear, who is the
officer again who is responsible for seizing that tape?

A. In, it's in Officer Franco Umbrello's
notes.

30 Q. Okay. And can you tell me whether or not
you are aware of whether or not Officer Franco Umbrello
testified at the preliminary inquiry?

A. Ah, I can't say for certain whether he

Giroux, in-chf.
(Thompson)

did or didn't.

5

Q. Okay.

A. I know his partner Detective Scott did.

Q. Did you, as a result of the tape missing, did you go down and speak to the proprietor of that store?

10

A. Yes. I did. I spoke to him over the telephone, and I took a statement from him with regards to, uhmm, whether or not there could be possibility, the possibility exists of a recording still being in existence.

15

Q. Yes?

A. I received certain information from him.

Q. Could you please relate that to the court?

20

A. He indicated to me that there was not another recording, that it was the VHS tape, and the old traditional style that was turned over to the police, and that since that time, ah, the system had been transferred over to a digital format, and the reason for my question was that I was going to do a similar test recording had the equipment been the old style equipment, ah, at this particular location. The camera is mounted inside the store.

25

Q. Yes?

30

A. It is a robbery prevention based recording equipment, and it was predominantly there in the store in the event that there should be an act of violence

Giroux, in-chf.
(Thompson)

5 that took place in the store. But the camera does reflect
some images out on to the sidewalk. So I took a statement
from the proprietor over the telephone, Mr. Brodi Bigold,
B-I-G-O-L-D, at Anne Sportun and I also asked for some
measurements to be done in relation to the distance from the
10 pasta store to the front door of this particular location.

Q. Okay. In terms of those measurements,
can you tell us, based on what you were told, what the, I
mean so it's clear, the new camera is different. Is that
correct? Or not?

15 A. Yes. The new camera is different.

Q. That was changed approximately when?

A. Approximately, ah, two years ago.

Q. Okay. So, in terms of being able to
20 perform a test, if you were, you have no idea whether or not
it would be accurate?

A. It, it wouldn't be accurate because the
cameras are in different locations.

25 Q. Okay. So, you did do some measurements,
did you not?

A. Yes.

Q. What would those measurements consist of
essentially?

30 A. As indicated earlier, I have asked the
officer when we were doing the test recording at One of a

Giroux, in-chf.
(Thompson)

5 Kind Pasta to measure the distance between the centre glass door of the restaurant at One of a Kind Pasta to the centre glass door of Anne Sportun going in the eastbound direction with the traffic wheel and it was 39 feet.

10 Q. Okay. So, I am going to once again show you Exhibit Number 8, and if we can, can you indicate to us roughly what your understanding of the, what that camera would have been able to project or at least observe, I guess, is the proper terminology?

15 A. Well, the camera was affixed to the inside of the store at this location.

Q. Yes?

20 A. It's pointing at the door. It's video, videotaping at that time through the glass and out on to, ah, the sidewalk, and it extends, I believe Mr. Bigold said it may extend as far as to the street, to Queen Street.

25 Q. Okay. Did you ever measure the size of each, should I say square, concrete square on the, uhmm, sidewalk?

A. Yes.

Q. How, how much, how wide are they?

30 A. The, uhmm, from north to south they vary with regards to the distance, but the average, the average distance of the blocks from the store fronts, outwards to the first seam in the concrete blocks are approximately six feet.

Giroux, in-chf.
(Thompson)

Q. Okay?

5 A. And they encompass about three of the markers, maybe three and a bit of the markers, so there, each of the blocks is approximately 8 to 9 feet. Eight feet. Approximately. In, in the east west direction.

10 Q. So, in totality, each one of these blocks is how wide?

A. Approximately, ah, eight feet.

Q. Okay?

15 A. And, uhmm, they vary from, the one in front of Williams Shoe Store, going in a north south direction at that particular location was five six and going in an easterly direction, from the store front to the first scene six three, six one, and six two. Going north south.

20 Q. Now, in your discussions with the proprietor, any discussions as to how old those videos, the quality of the videos would have been at that location, how old the tapes are or how often they are used or recycled?

25 A. He indicated that there wasn't a great deal of maintenance done on the system. Monday's tape was Monday. Tuesday's tape was Tuesday, and so on. And Monday's tape would be taken out, Tuesday's tape would be put inside the machine, and that would continue until the tape broke and then the tape would be replaced.

30 Q. Okay. Did he ever indicate to anything

Giroux, in-chf.
(Thompson)

in terms of the level of quality on the tapes?

5 A. He, he indicated that, again it's a robbery based piece of equipment, you could see out, ah, on to the sidewalk. I don't have his statement in front of me, which I had --

10 Q. Fair enough.

A. -- taken over the phone, but he says it was, it encompassed the majority of his store for a number of different reasons, robbery prevention being the centre issue. But as a result of pointing at the door, did show out on to the sidewalk.

15 Q. Did anyone indicate to you at all whether or not anybody had ever seen the contents of that tape. As opposed to the pre, the One of a Kind Pasta. Do you know if anybody had seen the contents of the tape that was taken from Anne Sportun?

20 A. Not that I am aware of.

25 Q. And did anybody, was anybody actually able to determine whether or not the system was working that evening at Anne Sportun?

A. The difficulty is that, I, I don't know what's on the recording that I never came into possession of.

30 Q. No, and I understand that, but I'm asking, did anybody ever relay to you whether or not they knew, in fact, that the system was working that day?

Giroux, in-chf.
(Thompson)

5 A. No. In the event that the recording was submitted to the property bureau without my knowledge, I contacted them to determine whether or not the recording was there. I did have a property tag number from the officer. I was told that it wasn't, wasn't physically present at the property bureau. Ah, and again, without my knowledge, whether it had been submitted to the video services unit, and I contacted them, and the tape was not present at that location either.

15 Q. Okay. Officer, I have no further questions. Thank you.

THE COURT: Start the cross-examination after lunch, Mr. Scarfe.

MR. SCARFE: Thank you, Your Honour.

20 THE COURT: 2:15.

--- COURT RECESSED AT 12:57 p.m.

25 -----
--- UPON RESUMING AT 2:18 p.m.

30 MR. THOMPSON: Your Honour, from the Crown's perspective in any event, I have apprised myself of R v. CBC, point 10 OC. ONCA September 22, and on that basis the Crown is not making any submissions.

Submissions re release of City TV video to media
(Scarfe)

5 MR. SCARFE: If I might make a few. Your Honour, just prior to the, prior to the preliminary hearing, I received fairly extensive amount of disclosure with respect to this matter, and it was, identified early on that a big issue in this case would be the assessment of the reliability of eyewitness testimony. And to that end, the Crown had disclosed to me what appeared to be scientific valid photo line-up procedures that occurred with most of the key eyewitness, eyewitnesses in this case, some time in the few weeks subsequent to the incident. The preliminary hearing started in January of 2009 and went on for several months. And at that preliminary hearing, it became aware, I became aware, at least in the first few days, that as part of the normal Crown pre-trial or pre prelim preparation, that they would come in and have the person review their video statement, which is normal, but then prior to coming into court, there were at least a couple of witnesses who were shown the City TV video, ah, prior to testifying and being cross-examined. And I raised this last Monday. As part of the re-election issue. And one of the concerns I had, that part of the motion was the general topic of assessing eyewitness testimony, but then the more specific fact that a couple of witnesses had actually conceded as part of their preliminary hearing testimony, that they had been tainted to some, to some extent, I can read you the passages, but,

10

15

20

25

30

Submissions re release of City TV video to media
(Scarfe)

5 tainted to some extent as a result of having been shown the
City TV video, before testifying, which prompted the
discussion about what did you remember before you watched the
City TV video, and how that is that affected at least in the
case of Mr. Dranichak, he said oh, things became clearer
10 after I saw the City TV video. And Mr. Newman actually used
the words that he was totally tainted as a result of having
watched it. I objected to this procedure, neither Justice
Horkins or I had any jurisdiction to prevent the Crown from
doing this, but I said, this, and Justice Horkins also
15 indicated this may become an issue later, I think I used the
rather soft pedal approach saying if the Crown wants to
continue with this process, they will have to deal, do so at
their peril, later on, when it comes to the final trier of
20 fact, having to sit down and assess the reliability and
quality of the eyewitness testimony. So, here we are at the
commencement of trial, and the officer on the stand, I
understand, we are going to hear from a number of officers,
25 and then my friend is going to get into calling civilian
witnesses to talk about their recollections with respect to
ID and it will be clear we couldn't pick anybody out of a
photo line-up, some of the witnesses, and at least with a
couple, and they will have to spend some extra time talking
30 about this tainting issue, you know, since seeing the City TV
video, and it's affected your perception, your recollection,

Submissions re release of City TV video to media
(Scarfe)

your memory.

5 And so, I appreciate that the media has a job
to do, and I appreciate that this court doesn't really have a
basis for saying, no, we are never releasing the City TV
video. My proposal, however, and Your Honour has
10 overwhelmingly jurisdiction to govern matters in your room.
My proposal would be that that DVD be released only after
we've heard from the civilian witnesses, that you are going
to have to assess the quality of their eyewitness testimony.
15 If we release it now, it will prolong the proceedings to some
extent, it'll, because I will have to deal with, did you see
this in the media, and then it will also perhaps erode, to
some extent, our ability to assess the quality of that
20 eyewitness identification. And it's important, because if
the City TV video makes somebody surer about something, how
do we go back and say, well you weren't as sure before you
watched the City TV video. So in a sense releasing this now
could lead to grave prejudice to my client. And I wish I had
25 a case a precedent, another identification case where we had
something like this, the Supreme Court decided not to release
it until after all the eyewitness tes -- but I haven't had
time to do the research. It's pretty rare that City TV is
30 there within three or four minutes of an incident. We have
this problem, so I'm not sure if my research would amount to
anything. But certainly the media request is reasonable from

Submissions re release of City TV video to media
(Scarfe)

5 their perspective, but from the perspective of us going
through this trial, and I wouldn't repeat myself, it's going
to be, it's going to have an affect on this court's ability
to accurately assess the reliability of the eyewitness
10 testimony, and could very well go to the prejudice of Ms.
Kish. As a result.

So those are my submissions, subject to any
questions.

15 THE COURT: I guess I have two difficulties
with that, Mr. Scarfe. One is as always my view that once
something was made an exhibit it became part of the public
record and was entitled to be seen by members of the public,
which includes the media.

MR. SCARFE: Mm-hmm.

20 THE COURT: And certainly I have done any
number of trials in the past where I have received a request
from the media for copies of exhibits, and I think I can say
without fail, I have never refused to allow that to happen.
25 Even if I was inclined, Court of Appeal now seems to say to
me, ah, you cannot prevent the media from having access to
exhibits. The other practical aspect is, I assume City TV
still has this video. Nothing prevents City TV from showing
30 that video, now, tomorrow, the next day. It's there, they
can do with it as they please. If it's a matter of
accommodation to their competitors, they wish to give copies

Giroux, cr-ex.
(Scarfe)

5 to the other media outlets, there is nothing I could do to prevent that from happening. And they could then show the video, leaving the credit to City TV in the process.

10 I appreciate the concern, but it seems to me that insofar as it arises, you have the opportunity to cross-examine any witness who is called, regarding whether they have seen this video, and if they have, whether it impacts their evidence. And I think that remedy means that the prejudice to your client, such as it may be, cannot trump the media's right to access.

15 MR. SCARFE: Thank you for hearing me.

THE COURT: All right. Mr. Registrar, you make Exhibit 11 available to any member of the media that's asked for it, please.

20 THE REGISTRAR OF THE COURT: Thank you,
Your Honour.

MR. THOMPSON: One other additional, I have that booking video which is Exhibit 12.

25 THE REGISTRAR OF THE COURT: 12.

THE WITNESS: Your Honour, I just realized I left a document downstairs in my office, if I may be excused for five minutes.

30 THE COURT: Yes.

THE WITNESS: Thank you, sir.

--- Witness leaves and returns

Giroux, cr-ex.
(Scarfe)

THE WITNESS: Thank you, sir.

MR. SCARFE: Thank you, Your Honour.

CROSS-EXAMINATION BY MR. SCARFE:

Q. Detective Sergeant Giroux --

A. Yes.

Q. -- thank you for coming. If you can't hear or you don't understand any of my questions, please interject and let me know.

A. Thank you.

Q. I understand you have been a police officer now coming up on 31 years?

A. Yes.

Q. And a member of the Homicide Squad for almost 15 years?

A. Ah, I would be starting my 15th year on the 27th of this month.

Q. Okay. So, you are almost there?

A. Yes.

Q. 15th birthday in homicide. And, uhmm, during your 30 years as a police officer, you have seen an evolution of a number of investigative tools?

A. Yes.

Q. All right. One example is the collection and analysis of DNA?

Giroux, cr-ex.
(Scarfe)

A. Correct.

5 Q. So, 30 years ago, in an investigation, if an officer failed to take a swab of a blood sample, the DNA as a crime solving tool, was sort of in its infancy then. Right?

10 A. Yes.

Q. And so you wouldn't really fault an officer for maybe forgetting to take a swab, because of the limited value it had back then.

15 A. It's --

Q. Whereas today, things are different. Right?

A. Certainly it's changed a great deal, yes.

20 Q. Right. And the same goes for video surveillance, does it not?

A. Yes, we're in the digital age now.

Q. Mm-hmm. And, ah, there is a reporter with CTV Toronto named Sandie Benitah? Do you know her?

25 A. No.

Q. No? She published an article back in May of 2009, ah, entitled "Report casts critical eye on police camera project", in which you were quoted heavily. Do you recall something like that?

30 A. I don't sir, no.

Q. The article, ah, talks about a case in

Giroux, cr-ex.
(Scarfe)

5 Scarborough, a fight that broke out in a Scarborough restaurant called Little Ochie, where seven people were inside. Were you involved in an investigation of that, like that?

A. I don't believe I was, no.

10 Q. All right. The article goes on to quote you, says:

15 'With surveillance footage we can corroborate stories, identify witnesses and support and investigative theories', end quote, said Sergeant Giroux in a recent interview with ctvtoronto.ca.

20 Is it coming back to you at all? Do you remember making a quote like that?

A. I don't sir, no.

Q.

25 Giroux, a seasoned homicide detective, has headed some of Toronto's most prolific murder cases. He said that over the last few years, footage from surveillance videos -- and the information it gleans from the public -- have become a key component to any investigation.

30

Giroux, cr-ex.
(Scarfe)

Do you recall saying anything like that to the media.

5

A. I don't recall the interview.

Q. Okay. Notwithstanding that you don't recall the interview, do you sort of adopt the quote?

10

A. I don't disagree with the comments that are made, no.

Q. It goes on later on to say that:

15

Giroux said police "absolutely" use surveillance footage to locate witnesses, many of whom end up being hesitant to speak with officers.

And then quote:

20

"People flee a crime scene for a number of reasons", he said. "Many of them would never have come in on their own. It's happened many times".

25

Those sound like your words?

30

A. I, I don't know if they are. And again, I don't disagree with the comments if they are my words, I don't disagree with them.

Q. You agree with the comments.

Giroux, cr-ex.
(Scarfe)

A. Yes.

Q. And then finally:

Giroux said it would be "irresponsible" not to track down everyone who was at a scene and it could jeopardize a case. "It's good police work," he said. "The investigation would be derelict if we didn't do that because defence attorneys would question why you didn't talk to someone who could possibly exonerate their client".

You agree with that as well?

A. Yes.

Q. Okay. So, we've heard through your evidence today that you first received some notice I think on the morning of August 10th, just --

A. As far as this case is concerned?

Q. Yes?

A. Actually I heard an update from Detective Gallant on August the 9th.

Q. On August the 9th?

A. Yes.

Q. And Detective Gallant is, was your

Giroux, cr-ex.
(Scarfe)

partner at the time?

5 A. Yes.

Q. And a member of the Homicide Squad.

A. Correct.

10 Q. And essentially, correct me if I'm wrong, if I can paraphrase, but, the essence of what Gallant heard and conveyed to you was that Mr. Hammond wasn't expected to survive. And that this would likely become a, a responsibility of the Homicide Squad?

15 A. Well, I think as a courtesy, based on the seriousness of Mr. Hammond's condition, Detective Scott, who is an experienced officer, as a courtesy, alerted the on call team to a potential, that the case could be moving in our direction. As a courtesy. Which is something that I have
20 seen evolve over the last few years, ah, so that investigative decisions can be made by the Homicide Squad with regards to the evolution of the investigation. In the event that the victim should survive for a week, a month,
25 three months, ten months, whatever happens to be, uhmm, we would be involved and consulted as a courtesy.

30 Q. Mm-hmm. And that, it's not uncommon, I mean, in the many, you have been involved in perhaps over a hundred homicide investigations?

A. Ah, not quite a hundred, I don't think, but, ah, a substantial number.

Giroux, cr-ex.
(Scarfe)

5 Q. And certainly this isn't the first time where the person who becomes the deceased person in a homicide, ah, doesn't die right away?

A. Correct.

10 Q. Right. So, you had other occasions where you have had to take over an investigation from a local division or another investigative team, ah, at the point where the person passes away?

A. Correct.

15 Q. Okay. Now, we got a little bit into it, and my friend will stop me, I am sure, if I go too far into the permissible hearsay that we've sort of agreed to. But you received an indication from Detective Gallant on the 9th that, ah, this investigation may be coming your way?

20 A. Correct.

Q. Did you speak to Detective Scott on the 9th?

25 A. I have indicated on page 1 of my notes, "escort having contact throughout the day with OIC Detective Gord Scott", so that would suggest to me that I did not.

30 Q. All right. Your escort Stacy Gallant was having conversation with the OIC. Did you say OIC or OICs plural?

A. OIC.

Q. The OIC was 14 Division aggravated

Giroux, cr-ex.
(Scarfe)

assault investigation. You recall that.

5

A. That's right.

Q. Detective Gord Scott has been an officer for somewhere like in the area of 30 years.

A. I believe so, yes.

10

Q. Ummm, you consider him to be an experienced officer?

A. I do.

Q. All right. And, ah, generally speaking, in an investigation like that, each Detective has an escort?

15

A. Correct.

Q. In his case, Detective Franco Umbrello?

A. Yes. Either for six months or the year, or three years, depending on the individual division.

20

Q. And did you know Detective Umbrello before this case?

A. I did not.

Q. Okay. Now, pages 4 to 20 of your notes, it's about a 16 page section of your notes, describe a briefing that take place, in fact, before Mr. Hammond dies. And I just give you a chance to turn to it. I've got mine all indexed in tabs, but --

25

A. Yes. On the following day. On the Friday, the 10th.

30

Q. On the Friday, the 10th at what time?

Giroux, cr-ex.
(Scarfe)

5 A. Well, I reported for duty at 9 o'clock in the morning, and, ah, it would appear that within a short period of time after that we're having an interview with Detective Scott, who is physically present in our squad.

10 Q. So, Detective Scott actually came to homicide to your office at 40 College Street, to give you a briefing?

A. Yes.

15 Q. Now, and it was quite a detailed briefing, if your notes are any indication.

A. Yes.

20 Q. Yes. And he wasn't, did he come alone or did he bring his escort?

25 A. Present at the interview was myself, Detective Gallant, Detective Scott, Detective Carbone, Detective Constable Robin Jitta, and Detective Constable Sabrina Ponzi.

30 Q. Mm-hmm. And with the exception of Jitta, uhmm, the other four officers, Hansor, Ponzi, ah, I lost you.

THE COURT: Carbone.

MR. SCARFE: Q. And Carbone sort of became your investigative team when homicide initially took over?

A. Yes.

Q. Okay. And is it unusual at the time to,

Giroux, cr-ex.
(Scarfe)

5 to have a briefing of that level of detail when the individual hasn't yet passed away?

A. No, it's not.

Q. It's not unusual?

A. No.

10 Q. Ummm, was that based on the fact that chances are, from your perspective back then, he wasn't gonna live?

15 A. I, I would think that that's a strong possibility that Mr. Hammond's condition was certainly not improving, the strong possibility that death was likely, and again, Detective Scott being an experienced officer is keeping up, updated with regards to the evolution of the investigation.

20 Q. All right. So, your notes indicate that you go and you, ah, the briefing takes place and starts some time after nine in the morning on August the 10th, and what time does it end?

25 A. Well, I have indicated here on page 5, the start of the briefing is at 10:25.

Q. Mm-hmm?

A. And the briefing ended at 11:20 a.m.

30 Q. It's about an hour?

A. Yes.

Q. Just a little less. And during that

Giroux, cr-ex.
(Scarfe)

5 time, you were obviously feverishly taking notes, because in that 55 minutes you were able to fill about 16 pages of your memo book?

A. Correct.

10 Q. And so you list the, on pages 4 and 5 you sort of list everybody that's there, and the fact that we're having a briefing at homicide. And then you indicate, "the following are point form notes re information from investigation of Detective Scott"? Have I got you there on page 5?

15 A. Yes.

Q. And then you put "start of briefing, 10:25 a.m.". And what is the very first item that's discussed at the beginning of the briefing?

20 A. The video.

25 Q. Video. Indicate in your notes, correct me if I'm wrong, "the video re affected area collected re stabbing. Going to get technical support staff recapturing images"?

A. Yes.

30 Q. So I notice that when you said the video or you wrote "video re affected area collected" is used "collected" in the past tense. Can you just help us a little bit with what you meant when you wrote that?

A. Like what I meant is Detective Scott

Giroux, cr-ex.
(Scarfe)

5 indicated to me that the video in the area had been
collected.

Q. All the video?

10 A. Well, at this point the investigation is
not mine, so I am writing down that he's given me some
assurances that the video's been collected and there appears
to be a need to download certain images with regards to the
computer crime section.

15 Q. So on the one hand, the statement is
something has been collected, but yet we're going to get
technical support staff recapturing the images. Is that
right?

A. Correct. Yes.

20 Q. And were you present when Detective Scott
testified at the preliminary hearing with respect to all of
this? Or maybe you were asked to --

25 A. I may have been asked to step out. But I
remember being in the College Park courts. I don't recall if
I was inside at the time.

30 Q. You gave some evidence this morning about
several days later, the 14th, detailing Detective Olver to go
to One of a Kind Pasta and get that video?

A. Correct.

Q. Are you aware from your review, and your
conversations with Detective Scott, whether or not that

Giroux, cr-ex.
(Scarfe)

request had already been made?

5 A. On this day on the 10th.

Q. No, yes. On this day, on the 10th?

A. On the date of the briefing?

10 Q. Sorry, on the 9th or the 10th, before the
14th when you detail Olver to go and get that video, are you
aware as to what Detective Scott had already attempted to do
that?

A. No, I'm not certain whether he had or
hadn't.

15 Q. Okay. Now, page 22 of your notes
indicates, I believe just the following day, the 11th, after
Mr. Hammond passes away overnight, you go to 14 Division and
get what we'll call the box?

20 A. Correct.

Q. Investigative box. Right?

A. Yes.

25 Q. And that's, you told us that that's
something that's generally kept in the Staff Sergeant's
office?

A. Correct. And indicated that it's Staff
Sergeant Ralph Brooks was on duty that day.

30 Q. All right. And the idea is that all the
work that had been done by the various officers from 14
Division, as to the investigation of the stabbing in that

Giroux, cr-ex.
(Scarfe)

5 area of Queen Street, that all, the idea is they are all,
before they go off shift, supposed to put their notes, uhmm,
copy their notes and put them in the box.

A. Yes.

10 Q. And, uhmm, that would include Detective
Scott, who is leading the investigation, as well as his
escort?

15 A. The difficulty with the OIC is oftentimes
their notes are continuing because they are assisting us, so
oftentimes, an excuse is given for them to submit their notes
at a later time. Ah, the uniform officers were doing canvass
and their shifts were transitioning from one to the other and
they had the extended days off, are often requested to keep
up, and put their notes in on a day to day basis. The
20 officers in charge are, are given a little extra leeway to
submit their notes at a later time.

Q. I see. So the box you go to pick up is
mostly notes. Right?

25 A. Notes, uhmm, interviews that were done.
Uhmm --

30 Q. Just to be clear, when you say
interviews, uhmm, sometimes people are interviewed on the
street, and there are some notes made in the interviewing
officer's memo book notes?

A. I would agree. Ah, but in addition to

Giroux, cr-ex.
(Scarfe)

that, DVD interviews.

5 Q. Right. Sometimes witnesses are brought
to 14 Division, sat down in one of the video interview rooms,
and a detailed interview is conducted by one of the
detectives and that interview is recorded and a DVD is
10 created at 14 Division?

A. Yes.

Q. Right. That also would be the kind of
thing that should make it into the investigative box?

A. Correct.

15 Q. In, now, there was a Forensic
Identification Services team involved in the early
investigation before you took over. Right?

A. Yes.

20 Q. And so they would collect things like the
knife, ah, swabs from the scene, any other items of interest
at the scene, and that, that wouldn't go into the
investigative box at 14 Division, would it?

A. No, it wouldn't.

25 Q. Those people would take their evidence
directly to the Forensic Identification Unit, which is
located at 2050 Jane. Near Jane and 401?

A. Yes.

30 Q. Right. So in this investigative box that
you go to pick up on the morning of the 11th I believe it is,

Giroux, cr-ex.
(Scarfe)

5 you are not expecting to find a bunch of blood swabs and,
uhmm, photographs, ah, a murder weapon, things like that.

A. There could be a CD of photographs
inside, but I'm certainly not expecting to find those other
items in there.

10 Q. Mm-hmm. So part of your general routine,
in sort of getting the box back and starting taking it over
as the chief homicide investigator is you have to sort of do
an inventory of what's in the box, but also consider other
things you have to collect as well?

15 A. Yes.

Q. And you know that there is a whole bunch
of evidence that's in the custody of the forensic
identification team up on Jane, Jane Street?

20 A. Yes. Biological evidence, photographs,
measurements, scene examination.

25 Q. Correct. Uhmm, now, the collection of
video evidence has evolved, as I think we already
established. It used to be that where there was surveillance
video, it was almost always on a big VHS tape?

A. Yes.

30 Q. Right. Is, that's started to change in
recent years. We're seeing fewer VHS tapes and more digital
systems?

A. I would agree.

Giroux, cr-ex.
(Scarfe)

5 Q. There is a number of reasons for that, but for the convenience of the shop owner, they don't have to be remembering to switch tapes every 24 hours?

A. That's certainly one aspect.

10 Q. And getting a portion of the surveillance off a tape like that is much easier with a digital system?

A. Yes.

15 Q. Right. So but regardless even today you still come across investigations where you are seizing video and the person is still using an old VHS?

A. Occasionally.

20 Q. Right. And you don't send, as a matter of course, a person from high tech crimes or intelligence to seize a VHS tape?

A. That's right.

25 Q. Because, it's really just a matter of pushing eject and taking the tape. It's not like a whole bunch of stuff is going to get erased, in the capture?

A. That's correct.

30 Q. Right. And my friend asked you this morning about the VHS tape that was sized from Anne Sportun Jewellery. And we'll get into what it showed and all of that later. But is it fair to say that something like that would normally be in the investigative box you pick up from the Staff Sergeant at 14 Division?

Giroux, cr-ex.
(Scarfe)

A. Yes, it would.

5 Q. I'll come back to that. Now, a part of taking over an investigation that's already begun is getting up to speed with respect to what's already been done?

A. Correct.

10 Q. Right. It's obvious. So, what do you generally do when you pick up a box like that, and you get back to homicide, and you, the morning of the 11th you attended on your way from home to headquarters, you stopped in at 14, you picked up the box, and you took it to your office. Right?

15 A. Yes.

Q. And something you have done before in other investigations?

20 A. I have.

Q. So, do you sort of have a standard operating procedure of what to do when you get the box into your office?

25 A. My priority is usually to have the interviews that have already been completed summarized.

Q. So what eyewitnesses have conveyed to detectives at 14 Division, you, you want to learn about that first.

30 A. That's right. If there is interviews that have been done, I want one of my detectives to sit down,

Giroux, cr-ex.
(Scarfe)

5 watch the interview and conduct an investigative summary and
e-mail that to me so I can move through the interviews,
instead of watching the interviews myself. I want to see
what the summary of it is so I can move through them more
quickly.

10 Q. And the reason why you want to move
through things more quickly, may be obvious, but can you just
explain to the court what the rush is?

A. I want to learn the case as quickly as I
can.

15 Q. How come?

A. Ah, so, but I can start to make, ah,
investigative decisions with regards to the case's evolution.

20 Q. Things like whether to lay charges, who
to charge, that kind of thing?

A. Really just to feel comfortable about
knowing what the case is all about, considering that I am
approximately two and a half days behind.

25 Q. Okay. And so, do you, you assigned one or
more detectives to review all the DVD interviews?

A. Correct.

30 Q. That's being the number one most
important thing. What would follow that, obvious important
things to do when you get the box back?

A. Maybe review the memo books, the existing

Giroux, cr-ex.
(Scarfe)

paper material that's inside the box.

5

Q. Mm-hmm.

A. And make the DVD surveillance tape, should there be any inside the box.

10

Q. Okay. And at some point, did you do an inventory in the sense of is everything I think should be in this box, in this box?

A. Well, I, I know it's in the box when I receive it.

15

Q. Right?

A. And I start to examine that material that's inside the box.

20

Q. Do you have a -- maybe you didn't understand my question. But do you have a system for ensuring that what you've got, what you'd expect to be in the box is complete?

25

A. I don't per se. I, taking over the investigation two days into it, I take the collective materials and I start to comb through them.

30

Q. Okay. Do you ever sit down with the officer who was sort of spearheading the investigation in this case, Detective Scott, ah, you ever sit down with him, once you have taken over the investigation, and sort of go through the box with him, just to try and get his best recollection as to whether what you picked up is complete?

Giroux, cr-ex.
(Scarfe)

5 A. No, I didn't. And I, I traditionally don't. The case transfers to, ah, to my care, and, uhmm, they are in a support position, and they provide me with their notes and their involvement has been completed.

10 Q. So, you are assuming that all the important interviews, all the memo book notes from all the Constables and Detectives involved, in the initial 14 Division, ah, investigation, you are assuming when you get there at 9 in the morning that everything is in the box?

15 A. Well the clerks in our office, they'll do a list of the number of officers and the submissions of their memo books. They'll go through the notes with regards to other officers that are mentioned, and then of traditionally a large global e-mail will go out to officers who have not yet submitted their memo book notes for one reason or 20 another, and to do so as soon as possible.

25 Q. So if you get a memo book note, and it says, you know, officers, they have that cover page --

A. Yes.

30 Q. -- when they disclose notes. You get a memo book from Officer Jones, right, and at the bottom, it kind of lists who his escort was that night. In this case, perhaps it's Smith, right? And you go through and you see you've got notes from Jones but none for Smith, that would be one way that you add Smith to the name, to the list of people

Giroux, cr-ex.
(Scarfe)

to get e-mailed to say hand in your notes?

5

A. That's right.

Q. Right. Now because there is different things in the box that you pick up, did you sort of divide them into sub files, and do you have your own filing system kind of thing or do you just leave it all loose in a box?

10

A. No, again the clerical staff assists with us filing.

Q. Mm-hmm?

15

A. Put it in folders, officers names or forensic officers' notes, uhhh, canvass sheets, ah, scene continuity, it's all done for us.

Q. I see. And so there is some standard sub files, in any kind of investigation like this?

20

A. Well, we follow the major case management module.

Q. Right. Does the major case management module sort of dictate that you would have a crime scene continuity file?

25

A. For the scene, yes.

Q. Yeah. And, ah, there would be a file for the sort of local P.C.'s who were involved in sort of the interviewing people on scene, you would have a sort of officers' notes filed?

30

A. Yes.

Giroux, cr-ex.
(Scarfe)

5 Q. And would you have a separate officers' notes files for the sort of the junior officers doing the leg work as opposed to the detectives?

A. The officers are filed under officers' notes, alphabetically.

10 Q. They are all in there together.

A. Yes.

Q. And what about a surveillance video file? Is that part of the protocol?

15 A. Well, if it's a physical item, then that item would have been taken up to video services and it would have been, it would have been registered with them, and then an investigative copy and disclosure copies would be made. Which, which, which is traditionally done. Interviews of
20 individuals, surveillance tapes, they go upstairs, and they would be stored on the 10th floor of our building.

Q. So, digital surveillance is generally collected by high tech crimes and eventually delivered to you on a DVD format. Right?

25 A. Yes.

Q. And downloaded at the computer and then they burn copies for you?

A. Correct.

30 Q. In this case, we know Detective Olver, when finally got there, he copied the files on to his, like

Giroux, cr-ex.
(Scarfe)

5 a little thumb or flash drive, I think was what he said,
but --

A. I, I wasn't present when that was done.

Q. Right.

10 A. But I was present when, ah, Detective
Constable Ryan Kelly did it when I did the test tape and
that's what he did, he downloaded it from the hard drive on
to another format, like junk drive or hard drive of his
laptop computer and then burnt the image from that.

15 Q. I see. And is, is he, he works with tech
crimes, as did Olver?

A. Yes.

20 Q. Tech crimes is different from video
services?

A. Yes.

Q. Two separate departments?

A. Correct.

25 Q. So, if you get the DVD's back from tech
crime, do you take them to video services for some reason or
do you just hold on to them?

30 A. No, then I burn copies for disclosure
from, from that master copy, and the master copy is in my
case boxes, and I have five of them.

Q. So if you get video surveillance in a
digital form from high tech crimes, and it's delivered to

Giroux, cr-ex.
(Scarfe)

you, you just burn the disclosure copies yourself?

5 A. Yes.

Q. There is no reason to take them up to the 10th floor and have them logged in and make them do it or anything like that?

10 A. That's right.

Q. And the difference, I think, then, when you describe that process, that's more for the VHS tapes, isn't it? This whole, if I, if the box came with VHS tape, you take it up to the 10th floor, the video services?

15 A. Yes. And, or other DVD interviews that have been done of civilian witness, then I would take them up to the 10th floor, I would register with the video services unit the interview and they would make an investigative copy for me and a defence copy and a Crown copy.

20 Q. I see. So, you have now in the Anne Sportun video, from the jewellery store, been able to determine through reviewing both Detective Scott's notes and Detective Umbrello's notes that this VHS tape was seized either on the 9th or the 10th, right?

25 A. Yes.

Q. And you've gone back and tried to figure out why it wasn't in the box you picked up, and --

30 A. I've tried to find it.

Q. You've tried to find it. Uhhh, so you've

Giroux, cr-ex.
(Scarfe)

checked video services?

5

A. Yes.

Q. They don't have it?

A. No.

Q. You've checked, ah, Forensic

10

Identification Services to see if it's somehow got mixed in with, with their stuff, scientific stuff.

A. Well, I asked Detective Constable Lukings to go through the existing forensic identification boxes that are in her possession for it, with negative results.

15

Q. Okay?

A. And I asked the staff at the property bureau, because of the fact that the video cassette had a tag on it, and I was wondering if somebody without my knowledge had submitted it to the property bureau, and it had been there all along.

20

Q. Mm-hmm?

A. And it was not there. And then I asked Officer Umbrello to go back, to search his own desk, he's not assigned to the division any more, to go back and search the Detective Office, Detective Scott's old desk and the old boxes of files that they have with regards to completed and active case, and my understanding is that the division has a storage unit that's attached to the building for old cases, and to go and search that area for the recording.

25

30

Giroux, cr-ex.
(Scarfe)

Q. Negative results?

A. Yes.

Q. All right. And in the end, what you've got is Umbrello saying, I gave it all up when the investigation was turned over to homicide?

A. I asked him if, you know, if, in essence, in normal practices, did you put it in the box, and he said yes, he did.

Q. All right. But yet when you went to pick the box up, are you a hundred percent sure there is no VHS tape in the box?

A. Correct.

Q. Sort of sounds like one arm of the police blaming the other?

A. I am not blaming anybody, sir. I don't know what happened to it, but I am not pointing a finger at anybody.

Q. Now, one of the things that you do early, as I understand, is you review the file materials?

A. Yes.

Q. You get this box back, and you, you delegate the DVD interviews to some of the more junior detectives to do the summaries you talked to us about. But you are still left with a whole bunch of notes?

A. Yes.

Giroux, cr-ex.
(Scarfe)

Q. And do you try to read those yourself?

A. I try to get through them, yes.

Q. Mm-hmm. And is it fair to say that the notes you are interested in reviewing first, ah, would be the notes that the lead investigator and his escort?

A. I can't say with certainty which notes I prioritize first, and made my way through.

Q. Okay. When you picked up the box, you've made that comment earlier that sometimes a lead investigators have a little more time to hand in their notes. Do you recall when you got the box back to homicide, Detective Scott and Detective Umbrello's notes were in there?

A. I don't recall whether they were there or not. You know the size of the investigation, and you know the amount of witnesses and officers that were involved. I can't say with certainty if those two officers were inside the box.

Q. Mm-hmm. Did, in fact, an e-mail go out a few days into the, after you took over the investigation to say, hey, we don't have notes from these several officers?

A. Could very well have done. The clerical staff usually take care of that, and the notes there is usually another round of notes that start to arrive through the internal departmental mail --

Q. Mm-hmm.

Giroux, cr-ex.
(Scarfe)

5 A. -- to my attention with regards to this
investigation.

Q. And do you have a recollection of that
happening?

10 A. I can't say with certainty. That's,
that's the normal practice, but I can't say with certainty.
I always note to myself that it amazes me that a number of
officers that know it's a high profile investigation, you
15 know, don't submit their notes at the time. It's sort of an
ongoing complaint that we wonder why there is so many people
are included in the e-mail, but that's just a common
practice.

20 Q. Do you have any recollection of when you
first got Scott and Umbrello's notes?

A. No, I don't.

25 Q. Do you know whether it was before you
went away on vacation, or, ah, I think you had a vacation
sort of the last two weeks of August, that year?

30 A. I don't, sir. In fairness, I found out
the same day that you found out that this tape was missing.
When it was brought to my attention by Ms. Middelkamp that
this tape was missing, I was alerted and you were alerted it
was missing and I have been looking for it ever since.

Q. Well, in fact, you don't know when I was
alerted, do you?

Giroux, cr-ex.
(Scarfe)

5 A. I know when Ms. Middelkamp told you about it. Because she indicated to me she was going to disclose to you that this tape was missing.

10 Q. Right. So she told you about it on December 10th, 2010, and told the defence about it, January 7th of 2011.

15 A. I, I don't know what date it was. I have been looking ever since. Still am.

20 Q. You gave a number of press conferences in the early part of this investigation?

25 A. I did.

30 Q. Now, is it normal when there is a homicide like this happens out in the public with many witnesses that the various local media outlets show a great deal of interest?

A. Yes, they do.

35 Q. And so you end up getting a lot of voice mails and phone calls from various reporters trying to get something to write about.

A. Correct.

40 Q. All right?

45 A. And, and also I am trying to draw witnesses out of the community to come forward. So it's in my best interests to speak to the media regards to keeping the story going, so that witnesses can continue to come

Giroux, cr-ex.
(Scarfe)

forward.

5

Q. Mm-hmm?

A. Like in this investigation where it was
in the public view.

Q. Right?

10

A. Not inside an apartment, or in the
underground garage, or, you know, where it's unlikely that a
number of people would be there. This was in a, in a public
area where the possibility existed that a number of people
saw what happened. Maybe not all of it, maybe some of it,
maybe part of it. And so it's certainly in my best interest
to speak to the media to try to keep the story going.

15

Q. Uhmm, now, last Sunday, Ms. Middelkamp
and Ms. Fineberg and I here met you at your office at 40
College?

20

A. Yes.

Q. We were trying to get some copy, old
copies of the first couple of press conferences that you
held?

25

A. Correct.

Q. And in the end, while there were maybe
some snippets on the media, uhmm, the press conference that
you gave on the 11th of August, and the one on the 13th,
there are no copies anywhere in the possession of the police?

30

A. If I did one on the 13th, it wasn't in

Giroux, cr-ex.
(Scarfe)

the media gallery. The one on the 11th was.

5

Q. Mm-hmm?

10

A. And as I indicated, it was not available to the traditional media with regards to a bell feed that goes to their individual media outlets so that was not available to them because it was a weekend. And on the 16th of, ah, the 16th of August, they did another one, in the media gallery, that was available for the media to pick up on a feed. And that was the day that I was doing the media release and your client was being arrested at the College Park, I believe.

15

Q. Thursday August the 16th?

20

A. Yes. And I had sent officers over to perfect the arrest, and effect the arrest at court, and then I was speaking to the media, and making that, that announcement.

25

Q. All right.

A. If I spoke to the media in between, it might have been what you suggested, which is, uhmm, an individual media outlet suggesting, can I meet you at the back door for a clip, or, are you going back to the scene, can I see you there? And again, it's all in relation to witness participation that I do these things.

30

Q. Right. And so just, so I fully understand, there were, the one on the 13th was more likely,

Giroux, cr-ex.
(Scarfe)

5 was not something that was held in the Toronto Police Service, what do you call it, the media gallery?

A. Media gallery.

Q. Right. And that's a room at 40 College, that's dedicated to, for officers giving press conferences?

10 A. Yes.

Q. And just so I am completely clear, the Toronto Police Service, when there is a press conference going on, whether it be the week day or weekend, they don't run an independent recording of that press conference?

15 A. They, ah, they did, uhmm, as I indicated to you, I believe on the 16th that one was available, and was, was recorded, uhmm, in its entirety on the day of the arrest. But the other one was on a weekend.

20 Q. Mm-hmm?

A. And it was not available to, ah, there was no staff available then, there was nobody in on the Sunday to record it, and as a result of that, that one was not recorded. Any of the other ones would have been recorded by the individual media agencies that I spoke to. CTV, CBC, City TV, CP24, whatever it happens to be.

25 Q. Okay. So, just to cover this off briefly, what I've proposed to do, subject to my friends and Your Honour, is to play two very brief sort of 30 second clips of interactions you had with the press prior to the

30

Giroux, cr-ex.
(Scarfe)

5 August 16th press conference, and then that will help us put
into context some of the things that were said at the
August 16th press conference that we do have?

A. This is before the August 16th? Or --

Q. This is before August 16th?

10 A. Okay.

Q. This is the first clip, and I am very
grateful to my friends for their cooperation and Ms. Fineberg
of the Crown's office, first clip is on a collection of CTV
news footage that was subpoenaed by the defence, a copy
15 provided to the Crown and it starts, I believe, at 7 minutes
12 seconds and goes for about 30 seconds; given my friend the
time references. I am happy to file the whole disc as part
of, these are the two important clips.

20 (Clip played)

MR. SCARFE: Close enough. Start at 7:04 but
the clip is important at 7:12. Did you want to put -- the
large TV is supposed to be on? Thank you, Ms. Middelkamp.

25 (Clip played)

MR. SCARFE: We have a little duplicate.

(Clip played).

MR. SCARFE: Perfect. Thank you. Put the
next one on and I'll ask a couple questions.

30 MR. SCARFE: Q. Oftentimes the media
attention focuses on a terrible thing has happened and what

Giroux, cr-ex.
(Scarfe)

5 are the police doing about it. Sometimes those are the tenor
of the questions that you are getting from the media?

A. Yes.

10 Q. Right. And so, if somebody is murdered
on the street and nobody's been charged in the subsequent
four or five, six days, the media tend to focus on that a
lot, in these kinds of investigations, kind of create the
impression that they are rushing you. Is that fair?

15 A. Are you saying, are you asking me did I
feel rushed? Or ...

20 Q. Well, I am coming to that. But I'm
saying, it's not unusual that the media attention in an
investigation where you don't decide to charge anybody right
away, but it actually takes a few days, you find that the
media attention around who is getting charged with what
intensifies as the days go on. There is a sort of thirst in
the public to get some finality of who is getting charged
with murder?

25 A. I think from the media, there is more
interest in the story and its evolution than there is whether
any charges are going to, are going to come from it.

Q. Right?

30 A. Depend on the story, story to story are
different. But I didn't feel rushed to answer your
anticipated question. And I commented on that to the Crown

Giroux, cr-ex.
(Scarfe)

5 Attorney at, ah, in this building with regards to dealing
with Ms. Capozzi with regards to this case.

Q. Mm-hmm. And, ah, we also learn from that
clip that Ms. Kish had a bail hearing scheduled for Thursday
the 16th of August?

10 A. Yes.

Q. Right. And just so everybody
understands, most criminal offences, including aggravated
assault, an accused is entitled to have a bail hearing at the
Provincial Court level, in this case, College Park, sometimes
15 shortly after their arrest?

A. Yes.

Q. But when a murder charge is laid, or any
other charge under Section 469 of the *Criminal Code*, the
20 rules about an accused getting their bail changed, right?

A. Yes.

Q. Instead of just the lawyer cruising into
the bail court at the Provincial Court house and saying I
25 want to have my bail hearing today, and the Crown reading in
the allegations, there is a, a more elaborate procedure when
you are charged with murder. Correct?

A. There is. But aggravated assault is a
very serious offence as well.

30 Q. True. But for the purposes of how you
get your bail, there is two different processes, and

Giroux, cr-ex.
(Scarfe)

5 aggravated assault is, with the majority of criminal
offences, where you have your bail hearing in the Provincial
Court, as opposed to murder, where you can't have a bail
hearing in a Provincial Court. Right?

A. That's my understanding, yes, sir.

10 Q. Yeah. And as you know, if you want to
have a bail hearing for a murder, you have got to apply to
the Superior Court, and you have to file a bunch of
paperwork, three, four days ahead of time, in order to
facilitate that bail hearing?

15 A. Yes.

20 Q. Right. And Mr. Eby of City TV news, I
know he doesn't work there anymore, but at the time, he, he
was in contact with you regularly. He was sort of the
reporter covering the case for that media outlet. Correct?

A. There is a lot of interest from a number
of different media agencies. I don't think it was just Mr.
Eby. But quite a few reporters.

25 Q. And Mr. Eby, earlier in the week, made it
clear that this coming Thursday, or at least one of the
anchor people, that this coming Thursday, not only was there
going to be a bail hearing at College Park for Ms. Kish, but
on the same day was going to be the funeral of Mr. Hammond.
30 Do you remember seeing that just now?

A. The funeral of Mr. Hammond on the same

Giroux, cr-ex.
(Scarfe)

day? Yes.

5

Q. Same day?

A. Could very well have been.

Q. As the anticipated bail hearing?

A. Right.

10

Q. It was just made clear in the clip we just watched?

A. Yes. Right.

15

Q. Certainly in addition to having to sort of talk to people calling you because they have an interest in the case, some of it's the media, they want to be able to report to their viewers and their readers, but you also, as an obvious courtesy, try to keep the family of the deceased in the loop as far as what's going on with the investigation. On a basic level?

20

A. On a very basic level in this case, yes.

25

Q. All right. So what I guess I am suggesting from the clip we just played is that you feel any pressure to get somebody charged by the time the funeral came around. Do you think it would have helped the family in their grieving process to know that someone was being charged with murder and being held accountable for their son?

30

A. No, sir. That's, didn't enter into my decision. I don't think it would have helped anybody. Whether it was the day before or the day, or the day after.

Giroux, cr-ex.
(Scarfe)

I don't think it would have helped the family any at all.

5 Q. So you deny the suggestion that --

A. Absolutely.

10 Q. -- that you, you had Ms. Kish charged on the morning of Thursday August 16th, in order to allay the public pressure, and in order to sort of make the family feel as though someone is being held accountable?

15 A. That's right. I, I had Ms. Kish charged on that day because I had the two interviews with regards to Ms. Stopford and Mr. Paget completed and I had Ms. Kish across the street from headquarters making a physical court appearance so that she could be arrested and the charges could be upgraded.

20 Q. Okay. Can we play the second.

(Clip played)

25 Q. So the clip that we've just heard is, is once again, Mr. Eby going into the public forum and dealing with the fact that several days have gone by and no one's been charged. And he seems to quote "some police officers saying essentially we won't be rushed". Is that likely to be you?

30 A. I, I think it's likely me, and as I recall, I believe at some press conference saying that, you know, with all due respect to the division and the investigation that they have done, ah, I am not just going to

Giroux, cr-ex.
(Scarfe)

5 automatically upgrade the four individuals who are in custody
for aggravated assault to murder, until I am satisfied, and
that I won't be pressured into doing it. And so I'll look at
the evidence, and if the evidence suggests that all four
10 should be charged and I have reasonable and probable grounds
all four should be charged, all four will be charged. If I
believe none of them should have been charged, then no one
would be charged. In this case, I felt I had reasonable and
probable grounds Ms. Kish would be charged and that's why she
15 was charged and the remaining counts were left in the
carriage of the division for prosecution.

Q. You familiar with a reporter named
Natalie Alcoba?

A. No.

20 Q. No? Do you recall in the days leading up
to Ms. Kish being arrested and charged with second degree
murder on Thursday the August the 16th, 2007, uhmm, making a
comment to the press about how you would work to block her
25 bail?

A. How, how I would work to block her bail?

Q. Yeah?

A. I don't recall a comment.

30 Q. Okay?

A. Is this for the aggravated assault? Or,
if she was charged with murder?

Giroux, cr-ex.
(Scarfe)

5 Q. If she tried to have a bail hearing that week, that you would work to block her bail?

A. Of course. I could very well have said that. Community safety is my primary function.

10 Q. So talked a little bit about video generally, and, ah, thank you for that, Ms. Fineberg. The August 16th press conference. You've had an opportunity to review the transcript from that preparation for last week's anticipated hearing on lost evidence application?

15 A. The press conference.

Q. The, that was given on August 16th, the day of the funeral, and the day Ms. Kish's charges were upgraded.

20 A. The transcript of the actual media gallery press conference?

Q. Yes?

A. No, I haven't seen it.

25 Q. So, you haven't seen that. It indicated at the time, and I can provide with you a copy, but, just tell me if, if, ah, you, you attended the media gallery and you gave a press conference announcing the fact that Ms. Kish's charges were being upgraded today, being August the 16th, 2007. Correct?

30 A. Yes. Correct.

Q. And you were still undecided with respect

Giroux, cr-ex.
(Scarfe)

5 to the other three individuals who were in custody, facing aggravated assault charges, Mr. Wooley, Ms. Watts, and Mr. Fresh.

A. Did, did it say, Mr. Scarfe, that I was undecided or --

10 Q. No. What it says is:

I am not going to comment on whether there will be any additional charges in this investigation. Investigation is going to
15 continue. As indicated I have six officers working with me on this. Evidence still being collected from the area, video tapes, and photographs and so
20 forth.

Does that sound accurate.

A. It could. I, like I say, I don't have a
25 copy in front of me. The sole decision that day was for a individual, your client.

Q. The investigation was ongoing, still in the process of collecting and analyzing evidence. Right?

A. My sense, my recollection is that the
30 investigation was going to be ongoing, as far as Ms. Kish's case was concerned.

Giroux, cr-ex.
(Scarfe)

Q. Mm-hmm?

5 A. And as far as the other three were concerned that I was no longer going to be involved in, in their charges unless things took a significant turn.

10 Q. Okay. On August 16th, when the decision was made, and you've already told us it was based mainly on a couple of interviews with eyewitnesses, but on the, at the time you made that decision, had you viewed the video from One of a Kind Pasta?

15 A. I am going to, I am going to say I suspect that I have, but I can't recall with certainty back three years whether the timing of the video was before or after. I suspect that I had.

20 Q. Wasn't something you delegated to somebody else?

25 A. If I had, then they probably would have brought it to my attention, but again, the certainty of it, and the length of time, I can't say for sure. But I would think that I did.

30 Q. You think that you did. You testified this morning that you didn't know there were two cameras?

A. That's right.

Q. Right?

A. What I got from Detective Constable Olver I felt was the entire product from that, ah, particular

Giroux, cr-ex.
(Scarfe)

place, and that's why it was disclosed, ah, in that fashion.

5 THE COURT: Appropriate point to take the
afternoon recess, Mr. Scarfe.

MR. SCARFE: Yes, sir. Thank you.

10 --- COURT RECESSED AT 3:30 p.m.

15 --- UPON RESUMING AT 3:47 p.m.

THE COURT: Yes, Mr. Scarfe.

20 MR. SCARFE: As matter of housekeeping, the
two brief clips that, although it's already filed on the
application, my friends asked me to file the media disc on
the trial proper.

THE COURT: Exhibit 14.

25 THE REGISTRAR OF THE COURT: 14, Your
Honour.

--- EXHIBIT NO. 14: Media disc with clips played

30 MR. SCARFE: Q. Detective Sergeant Giroux,
before the break, I asked you if you recalled when you
watched the Pasta Perfection video. You indicated you
watched it by, I am not sure you are clear on when you did
that.

Giroux, cr-ex.
(Scarfe)

A. That's right.

5 Q. I think we covered this at the preliminary hearing, you are not actually clear whether you watched it before you went on vacation, or when you came back on September 4th, 2007?

10 A. I just can't be certain, sir. I don't want to commit, but I just can't be sure.

15 Q. All right. I've asked Ms. Fineberg if she would put into the Elmo system the disc, and bring up, so first of all when you, when you get a DVD, an investigative DVD, you put it in to your computer and look at what's on it, by way of files. Right?

A. That's right.

20 Q. And at least the copy, the copy that we have before the court, I'm not sure, my friends put it in, but are you aware whether or not that's the actual original copy that you received from Detective Olver?

25 A. I don't believe it is, because I believe I made copies from the original, and the original would be in the investigative case box, which, which I have.

30 Q. Which is here on the second floor of the building?

A. Correct.

Q. And stuff, so if we need it, we can get?

A. Absolutely.

Giroux, cr-ex.
(Scarfe)

5 Q. All right. Now, if you just direct your attention to the screen, when I put the Pasta, ah, One of a Kind Pasta video in my computer, I got a screen much like this, which indicates files currently on the CD, and then two file folders. Do you see that there?

10 A. Two file folders, yes.

Q. And they are labelled camera one and camera three?

A. Yes.

15 Q. Do you have any explanation, because I think my friend asked you earlier, did you know there were two cameras on this? Now, surely you, is there some procedure where when you put the disc into your computer, you don't get a screen like we are getting here?

20 A. No, I suspect I would get exactly the same as, as you would get, as the Crowns would get and those are the copies that I made from the original.

25 Q. Okay. And do you have any explanation for why you wouldn't have noticed at the time you viewed the One of a Kind Pasta surveillance video, that there were two cameras, when you would necessarily have to go through this screen to, to get to the footage?

30 A. Why wouldn't I know that there are two cameras? I am not sure I understand your question.

Q. My friend was asking questions this

Giroux, cr-ex.
(Scarfe)

morning.

5

A. Right.

10

Q. The impression I was left with, and correct me if I'm wrong, it wasn't till several months later when my office began, ah, conveying to you and the Crown that there was a problem with the video, that you learn there were two cameras?

15

A. That, that's right. What, what I did was I directed the officer from, from a specialized unit to go and capture those images and, rightly or wrongly, I assumed I had them. And I disclosed the image, images that I have, and I even recall at one point you indicating that you had trouble opening them, and I suspect was the early stages of you determining that there was part of the video missing, and I re-burnt, ah, from the original, another copy, and brought it over to a JPT at College Park, thinking that there might have been an error in the, in the copying process, and I provided to you that at that point. So, I was unaware of it until it was brought to my attention as well.

20

25

Q. Okay. So, you were unaware of the problem until about March or so of 2008 when you got an e-mail or a letter indicating that there was a problem with the video that had been disclosed. Is that what I am understanding?

30

A. I would agree from your office there was

Giroux, cr-ex.
(Scarfe)

5 some letters, and from Ms. Khan, there was some phone
calls --

Q. Mm-hmm?

A. -- between her and I. And, ah, as a
result of that, I detailed the officer to return.

10 Q. Okay.

A. Yeah.

Q. So moving backwards from there, you,
assuming that was in March of 2008, you had actually
attempted to view the footage before then, hadn't you?

15 A. Yes.

Q. You would have viewed the footage either
in preparation for charging Ms. Kish on August 16th, or
perhaps in preparation for bail hearing, on September 4th,
20 2007?

A. Well, the images that I had and the image
that was shown this morning didn't, didn't really assist me
with a great deal with regards to my decision to charge. Ah,
25 it, that came from, ah, from witnesses who were on the
streetcar.

Q. Right?

A. I was certainly aware of it, and then
later became aware that, ah, a portion of it was missing and
30 tried to do my best to recover it to see if it actually
existed or had it been written over.

Giroux, cr-ex.
(Scarfe)

5 Q. Okay. What I am focusing on, though, is
early in the investigation before you are alerted to the
problem, by Ms. Kahn, in my office, right, in March of 2008,
the incident happens on August 9th of 2007, right?

10 Eventually video is provided by high tech crimes to your
office, and I am assuming, and correct me if I'm wrong, but
somewhere within a month or two of having, ah, of the
incident, on August 9th, given how important video is, you
would have sat down and tried to watch the video?

15 A. Yes.

20 Q. Right. And I think you've already
testified that you did sit down with your own computer, and
you put the disc in, ah, and you attempted to view the video.
Right?

25 A. Well, I did view it, I didn't "attempt"
to, I did view it.

30 Q. You did view the video. At least you
viewed the video that is the westbound facing video that,
that we have, and that was played this morning?

35 A. Correct. And to my knowledge, that was,
that was the extent of the video. That we had. At that
time.

40 Q. Right. Now, you had been yourself to the
scene?

45 A. I, I have. And I don't believe I went

Giroux, cr-ex.
(Scarfe)

specifically to look where the cameras were --

5 Q. But at some point?

A. -- until --

Q. After you took over the investigation
from Detective Scott, you would have necessarily gone and
familiarized yourself with the area.

10 A. Yes, sir. But my focus, as you can
imagine, in an overwhelming investigation such as this is not
to determine where the cameras are located physically. I
asked an expert to go and do that on my behalf. I detailed
15 someone who does nothing but this function.

Q. Okay?

A. So I, I had, I have to say that I trusted
that that function was going to be done appropriately, and as
20 it turns out, it wasn't.

Q. All right.

A. So I wasn't --

Q. So --

25 A. -- wasn't so concerned about the
positionality of the camera. I felt at the time I had
captured or had in my possession the digital recording of One
of a Kind Pasta in its entirety. And it wasn't until much
later that I determined that there was a portion of it was
30 gone, and it was gone at that time.

Q. All right. At some point early in the

Giroux, cr-ex.
(Scarfe)

5 investigation, you started reading investigative summaries of
the various civilian witnesses?

A. Yes.

Q. Some of them described a fight in front
of the pasta restaurant.

A. Yes.

10 Q. Right. And at some point in the first
two months of the investigation, you necessarily would have
walked down to the scene and had a look at generally that
area of Queen Street?

15 A. Yes, I directed those photographs to be
taken by the fire department, and I have been there.

Q. Okay?

A. And I'm familiar with the intersection.

20 Q. And from what I am gathering from your
evidence, fair to say that you didn't notice, you didn't
actually look at the pasta restaurant and notice there were
two cameras?

A. I didn't.

25 Q. No. And at some point in the first two
months of the investigation, you necessarily would have put
the disc you received from Detective Olver into your
computer, and tried to view the footage?

A. Yes.

30 Q. And you had no explanation for why you

Giroux, cr-ex.
(Scarfe)

5 wouldn't have noticed the screen, you would have had to pass that, says camera one and camera three, that hey, there is two cameras?

10 A. No, I, it could have been called camera one, camera three, I don't know what the system is down there, and I assumed that it had done, been done appropriately.

Q. Right.

15 A. I didn't immediately look at it and say oh my goodness, camera 2 and 4 are missing.

Q. But, clearly, you would have seen this screen that shows there is a folder for camera one and a folder for camera three?

A. Yes, I would have. I agree.

20 Q. Okay. And at that point it didn't clue in the importance of hey, maybe there is more footage on here than, no?

A. No, sir, it didn't clue in.

25 Q. No. And you don't remember trying to play all the tracks that were there?

A. I would have played folder one, folder two.

30 Q. Okay. If, ah, Ms. Fineberg, you could assist me by just opening the folder, camera one. Open the folder camera one, Detective Sergeant Giroux, and you see two

Giroux, cr-ex.
(Scarfe)

AVI files, and two WNV files?

5

A. Yes.

Q. And the file names are, in fact, the date of the recording?

A. Yes.

10

Q. D2007 08 09 with a bunch of other numbers. Correct?

A. Correct.

Q. And would you have attempted to view all these files?

15

A. Yes, sir.

Q. Okay.

MR. SCARFE: If we could open, go back to the screen we were on before, and open camera three, please.

20

MR. SCARFE: Q. Camera three, we also have four files, two AVI's, and two WNV's. Correct?

A. Yes.

Q. And in the first two files, the date is the file name, essentially?

25

A. Yes.

Q. And it matches the offence date. But in the second two files, the date is not the offence date, it appears to be the date Detective Olver went and actually captured the footage. Correct. You see that in the file?

30

A. Yes, was that on the 14th that he was

Giroux, cr-ex.
(Scarfe)

sent? Yes?

5 Q. Yes. And the file number is it 2007, 08,
14?

A. Correct.

10 Q. So that makes sense. Right? Do you have
any explanation for why when you were viewing the videos you
didn't notice that?

A. I don't sir, no.

15 Q. All right. So when the problem was
alerted to you by defence counsel in my office, is it true
that you told Ms. Kahn to call Detective Olver herself?

A. Yes.

20 Q. Yes? You were alerted to a problem with
disclosure by defence counsel, is that a normal procedure for
you to say well, call the guy yourself?

25 A. It was with regards to a technical aspect
of it that I didn't think I could appropriately explain to
her. So I was assuming that the Detective Constable Olver
could explain it to her in layman's terms with regards to
whether or not there even was a problem. And when I
determine that there was, then I re-detailed him back to that
scene.

30 Q. Now, on January 27th, we had our first
JPT with Justice Mocha?

A. Okay.

Giroux, cr-ex.
(Scarfe)

5 Q. And you have had an opportunity to review
the Application Record for the lost evidence application?

A. No, sir, I didn't.

10 Q. No. Materials in there indicate, in my
office, that you essentially you were asked about video
surveillance and you said, there is nothing on it. Do you
remember that?

A. Do I remember saying there is nothing
wrong with it.

15 Q. Nothing on it?

A. I don't, I don't, is this something that,
I don't recall saying that, at the JPT?

Q. Mm-hmm?

A. No, I don't sir.

20 Q. Okay.

A. On the 27th?

Q. Of January.

A. Okay.

25 Q. At that -- you don't recall saying, being
asked about video surveillance, and saying, there is nothing
on it, or there is no value to it or something to that
affect?

30 A. I don't, ah, recall saying that. And I
can't, I can't determine, again, without the logs, which
you've already received disclosure of that One of a Kind

Giroux, cr-ex.
(Scarfe)

5 Pasta at that point. I'm not sure. I suspect you would have.

10 Q. Well, it's my suggestion to you at the first judicial pre-trial at College Park took place that defence counsel raised the issue of the fact that they hadn't been disclosed surveillance video, and would like to see it. And you said well, there is no value in it, there is nothing on it, you can come down to the police station and watch it here. You have no recollection of that?

15 A. I don't sir, no.

Q. And then the second JPT, the issue was raised again, defence counsel wanted a copy, and you said you'd look into it. Do you remember that?

20 A. I don't, sir. I don't remember the meetings, specifically. I remember the JPTs, I don't remember the narrative of what was spoken about. I remember one specifically with regards to some attempt to recover some evidence that might be in existence at a sewer, I remember that one.

25 Q. Mm-hmm?

A. But I don't remember the videos. The videos would have been disclosed.

30 A. If I asked Detective Constable Olver to go, uhmm, three days into the investigation and he provided me with disclosure, then it would be disclosed.

Giroux, cr-ex.
(Scarfe)

5 Q. Eventually. Not necessarily in the first round.

A. Well, I have to get the logs, and I am fairly good at keeping track of what was disclosed with regards to when and on what date.

10 Q. So if we don't finish tonight, you would be able to look at that and help with us that in the morning?

A. Sure.

Q. All right.

15 Q. Next I want to go to the value or the perceived value of that video surveillance at the time, from an investigative point of view. And I am going to show you a series of five photographs, which I'll ask at the end be marked as exhibits, A B C D and E.

20 The first photograph that I am going to show you, thank you Ms. Fineberg. Do you recognize that photo?

A. Yes, sir.

25 Q. That's one of the photos that was taken by the Forensic Identification Services team on the evening of the incident?

A. Correct.

30 Q. The early morning hours of the incident before the sun came up?

A. Yes.

Q. And, ah, what direction is the

Giroux, cr-ex.
(Scarfe)

photographer looking in?

5

A. He's looking westbound.

Q. And on which side of the street?

A. North side.

10

Q. The north side of the street. And in that photo, if you look very carefully, along the sidewalk, how many placards, identification placards do you see on the sidewalk?

15

A. I don't know if that's a placard that's in the forefront of the photograph. If it is, it seems to be flattened, but I would say closer to the One of a Kind Pasta store, maybe three underneath the sign, and then five on the street, maybe six on the street.

20

Q. Okay. It's where, I am going to be focusing on the three underneath the sign. Okay?

A. Yes.

25

Q. And not to go out of order, but just to outline the importance of it. Those placards mark blood on the street. Right? As far as you understand from your review of the file?

30

A. Ah, they could be blood or other physical evidence. It could be cigarettes, ah, it could be, you know a lighter, it could be, it's physical evidence.

Q. Okay. Of the, of the placards that do mark blood, though, a map was eventually constructed and

Giroux, cr-ex.
(Scarfe)

produced at this trial to outline where that evidence was.

5 Correct?

A. Yes. I had a number of rounds of, ah, DNA testing, and then one of the submissions was from the blood that's on the street.

10 Q. All right. So, before I get into the other court photos, I placed a large board in, on the easel. Can you just explain to His Honour what that represents?

15 A. Yes, Your Honour. There is a number of blood samples that were collected from the street during that investigation. And then I asked, ah, the, ah, DNA results to come from those blood samples that were collected, and then I asked the Forensic Identification Officer and the plan drawer to plot to scale the blood that was found on the street and to append a legend in the bottom right hand corner as to who the donor of that blood sample is.

20 Q. And again, now that we've got the photo and the map up here, the three placards, you see on the photo, correct? There is also happens to be three locations marked on what I call the DNA map. I don't know if that's what you guys call it?

25 A. Yes.

30 Q. Right?

A. 9, 8, and 7.

Q. Or 7, 8 and 9?

Giroux, cr-ex.
(Scarfe)

A. Correct.

5

Q. Depending on which way you are going.
Okay. My friend's asked me if I could enter this as an exhibit now, so instead of giving it a nickname, I can refer to it by exhibit number?

10

THE COURT: Exhibit 16.

THE REGISTRAR OF THE COURT: Sorry, thank you, Your Honour. 15 would be the photo then.

THE COURT: 15 A was say for the photo, as I understood there's been a series.

15

THE REGISTRAR OF THE COURT: Yes, thank you.

MR. SCARFE: Thank you.

THE REGISTRAR OF THE COURT: 16.

20

--- EXHIBIT NO. 16: DNA plan drawing to scale showing
blood locations at scene

25

MR. SCARFE: Q. So having set out 7, 8 and 9, I'll put this down here for Mr. Murphy to mark later, and proceed to the next photo. The next photo, can you identify that photo from your recollection of the evidence?

A. Well, I wasn't there that evening particularly, but it appears to be blood on the sidewalk or on the street.

30

Q. Fairly sort of significant trail of, not just one drop?

Giroux, cr-ex.
(Scarfe)

5 A. No, absolutely. It's quite a bit of
blood there.

10 Q. Okay. And the placard number 7, it's
your understanding that it accords with the exhibit I just
showed you, at one of the placards on the road, or sorry, on
the sidewalk?

15 A. Yes, my understand something that a swab
would have been taken from that location.

Q. All right. So now we have, this would be
A, what are we, 15?

15 THE COURT: 15 A.

MR. SCARFE: 15 A and 15 B before I lose
track.

20 THE REGISTRAR OF THE COURT: 15 A and B,
Your Honour.

--- EXHIBIT NO. 15A: Photograph

--- EXHIBIT NO. 15B: Photograph

25 MR. SCARFE: The next photo I will get you to
identify quickly, appears to have placard number 8 on it and
the blood you see all over the side of the sidewalk.

A. Yes.

30 MR. SCARFE: Q. You agree that's a
significant amount of blood?

A. Yes, it is.

Giroux, cr-ex.
(Scarfe)

5 Q. Okay. And I'll ask that that be C, but I'll bring it to you in a sec. The fourth photograph, placard number 9, appears to be on the sidewalk?

A. Correct.

10 Q. Not as significant an amount of blood as in 7 and 8, but there is some blood there?

A. Yes.

Q. You can see with your naked eye?

A. Correct.

15 Q. All right.

MR. SCARFE: If that can be C and D, Mr. Murphy.

THE REGISTRAR OF THE COURT: 16 C, and D
Your Honour.

20 --- EXHIBIT NO. 15C: Photograph

--- EXHIBIT NO. 15D: Photograph

25 MR. SCARFE: Q. The final photo in this series is, ah, a photograph that's taken, or you can tell us where is this photograph taken from?

A. Appears to be on the, taken -- the photographer would be on the south side of the street looking directly north at the One of a Kind Pasta store.

30 Q. Okay. And you recognize that photo from the master CD of photos that were provided by the Forensic

Giroux, cr-ex.
(Scarfe)

Identification Unit. Right?

5 A. Yes.

Q. All right. What I am going to do, I'll
put this back on the projector in a second. But I am just
going to take my, ah, pen here, and I am gonna ask you to
make sort of five markings on it. And stop me if I do
10 anything too confusing. But if you can put a little circle
around each of the, ah, video cameras that are attached to
the front of the One of a Kind Pasta restaurant. And if you
could just do one more thing for me. If you put a little
15 circle around the three placards that are on the sidewalk.
The 7, 8 and 9 placards. And if your recollection from the
DNA map helps, you could even put a little number over the
circles, I believe it's 7 to the east, and 9 to the west.
20 You got that? Thank you.

So what you have done, just for the court
record, is you have put three circles along the three
placards that go along the sidewalk we saw on Exhibit 15 A.
25 You also put a circle around the camera on the right side,
and the photographer's perspective and a camera from the left
side?

A. Correct.

Q. Correct. And the file that has been
30 lost, for whatever reason, is what comes from this camera
here, on the right side of the pasta restaurant?

Giroux, cr-ex.
(Scarfe)

A. No.

Q. No, that's the camera that we have?

A. Correct.

Q. And it displays an area which you talked a little bit about today, when we, my friend filed all those photos with, ah, the placards two feet apart, 1 to 13, measuring the 26 feet, in front of the pasta restaurant, and beyond?

A. Yes.

Q. All right. So, is it fair to say that the lost camera, the one that faced east, would have picked up whatever activity surrounds the sort of cluster of blood marked by placard number 8, from your experimentations and having gone back and analyzed it?

A. The difficulty is without seeing the video that I did, the re-creation, and, and I stood in that location, I can't say with certainty whether or not it could have, and, and again, the one that's further to the east, I'm not sure that would have been captured. Because what I did, at the advice of the Crowns, is that I went and touched tangible objects that were in the video so that I could narrate where I physically was.

Q. Mm-hmm?

A. And some of the, some of the images, for example, according to, and hearsay a bit, but I was speaking

Giroux, cr-ex.
(Scarfe)

5 with the officer on the telephone, as I got closer to the sidewalk, ah, only a portion of my lower body could be seen, like my feet, for example. So, uhmm, again, the video that I did, the test video would reflect like that particular area as I moved in and around the sidewalk in the darkness.

10 Q. You see that number 8, the placard number 8, ah, is sort of between, at least from the perspective of that photo, two lights standards?

15 A. Yes. And I remember specifically using the light standards, and I would go and put my hand on either one of them so that I can narrate myself. And again, without looking at the video, to determine whether or not my, like, a part of me could be seen or whether it was my upper half or lower half in the video. It's, it's difficult to say, ah, with any, with any certainty, because I have that video available, and I, and I did that for that specific reason to see how much would, would we have been able to see or not been able to see.

20 Q. Mm-hmm?

25 A. And at that particular location, being maybe your foot, or 18 inches from the north sidewalk curb leading into the street, I'm not sure whether or not, ah, you would be able to see an entire human being at that location. As well as the one that's further east.

30 Q. Now, that video wasn't played in court

Giroux, cr-ex.
(Scarfe)

this morning.

5

A. No.

Q. No. You know why?

A. No, those are decisions that are left up
to the Crown.

10

Q. Okay. But you have it, it's available?

A. Yes.

Q. If we wanted to watch that tomorrow.

A. Yes.

15

Q. Okay. Good. Just from a very simplistic
point of view, placard number 8, which falls between the two
light standards, would you agree that in the test video or
the part that was captured that was an hour later, originally
that both light standards are visible in the eastward facing
camera? You recall seeing both at the bottom of both poles?

20

A. I do, when I recall doing the test video,
I recall seeing it. The one to the east that I circled would
be very close to the --

25

Q. This one?

A. I am sorry?

Q. This one?

A. Yes. Would be very close to the outer
easterly rim of the recording.

30

Q. Mm-hmm.

A. And at that point, uhmm, I would have

Giroux, cr-ex.
(Scarfe)

5 travelled down there in the area of that would be in the area
of, ah, cone number 1 or 2, at that location. And that may
only show the lower part of my body.

Q. Okay?

A. As I move into the camera view.

10 Q. So, number 8, just before we leave
number 8 --

A. Yes.

15 Q. -- your recollection of having done all
these experiments in the test video is that if that placard
had been there, you would be able to pick that up in the
eastward facing camera?

20 A. Well, again, sir, the difficulty is the
placard might be visible, but as an entire adult human being
visible, like all the way up to their face and head, or is it
just a portion of their body that's visible.

Q. I see.

25 A. Because as you move away from the camera
towards the street, you start to, it starts to drop down and
cuts you off.

Q. I understand that.

A. Right.

30 Q. But as far as being able to see the
sidewalk, someone's boots or their sneakers, that would have
clearly been visible, if they had been put in the location of

Giroux, cr-ex.
(Scarfe)

placard number 8?

5 A. Something below the waist may very well have been visible by where your pen is right now.

10 Q. Just following up what you said, you moved on to placard number 7, which is farther to the east. You say that's sort of right at the very end of the area, that was covered by the video, and may or may not been visible right on the ground?

15 A. If you, if you extend your pen slightly to the east to that darkened pole of the Anne Sportun store.

Q. There?

20 A. That is the outer edge, and at that location, just the edge of the cone can be seen, at that location. Cone number 1.

Q. Okay. So that gives us an idea of what would have been covered by this lost portion of video from the One of a Kind Pasta store?

A. Yes.

25 Q. All right. And I am just going to leave that there for a moment, and try and cover off, in the very right hand corner of the photo, or the very right-hand side, you see the store Anne Sportun Jewellery?

A. I do.

30 Q. This photo doesn't necessarily do it justice because you don't see the whole store. But, ah, for

Giroux, cr-ex.
(Scarfe)

5 the record, what you've got is, for that, I guess that
municipal address, is on the very left, you've got a dark
door that's presumably the door to go up to the upper
apartment. Correct?

A. Correct.

10 Q. And then the next door you've got light
coming through what appears to be a commercial glass door.
Just using my pen to point out. You see that?

A. Yes.

15 Q. That's the entrance where, to Anne
Sportun Jewellery?

20 A. It is. That's the measurement, actually
that's the area I measured where your pen tip is. The centre
of the glass door to the centre of the One of a Kind Pasta
store. That's, that's approximately 39 feet.

25 Q. 39 feet. Now, when you went to see,
where you called Mr. Bigold, who was the proprietor for Anne
Sportun Jewellery. Right?

A. Yes.

30 Q. And you conducted an interview over the
telephone about what cameras he had at the time.

A. Yes.

Q. And he told you that there was a, well,
it was a VHS system at the time, that he had, I guess, a
quadraplex multiplex kind of system where there were four

Giroux, cr-ex.
(Scarfe)

5 cameras, and all went on to one screen that was divided into four? You recall him telling you that?

A. I do. Yes.

10 Q. And the camera which he described as camera number 1 or the doorway camera, ah, did you ever go there and look, the location of the cameras as they are today?

15 A. Uhhh, I can see the camera probably most notable, the one that's mounted on the west wall of the store, inside the jewellery store as you come in the door there is one mounted on the left side of the wall. But he indicated to me those cameras have changed positions since 2007.

20 Q. Right. In fact, the one that's pointed at the door, if I understood your interview correctly, and I have a transcript of it here, the one that's pointed at the door was actually on the east side of the store. Isn't that what he told you. And that it pointed at the door, but picked up the street in a south westerly direction?

25 A. Yes, I have a recollection of that, yes.

Q. That sounds accurate to you?

A. Yes.

30 Q. So, instead of just picking up the area, well first of all, the purpose of that camera was to get a clear visual of anybody who came into the store for robbery

Giroux, cr-ex.
(Scarfe)

prevention or solving a robbery later, right?

5 A. Yes.

Q. So the camera, you didn't go there,
right?

A. I have been there, yes.

10 Q. Okay. So over on the east side of the
store, about 8, 10 feet back from the front, you recall
seeing a camera up on the wall, about 6, 7, 8 feet off the
ground?

A. I believe I do, yes.

15 Q. Right. And he confirmed to you that
before they went from VHS to digital, he had a camera in that
general area as part of the old system too?

20 A. I just have a recollection that the
camera positions were no longer the same. I don't have a
specific recollection about the camera mounted on the east
wall and I don't have a transcript of that interview.

Q. All right?

25 A. But I know the positions were changed.

Q. What I've done is had a transcript
prepared. On page 4 of that transcript, is, you asked the
question:

30 Okay, now this particular camera, the
first one we are speaking about, the one
that's on the east side of the store, it's

Giroux, cr-ex.
(Scarfe)

5 filming in what direction.

South.

Or you say south. And then he says southwest.

10 A. Correct.

Q. Right?

A. Yes.

15 Q. So we understand on the photo, that
would, that would cover the, I guess the area in front of the
store, and the area to the west a little bit?

A. Yes.

Q. Right? And, ah, so you say:

20 Southwest. Okay. So east side filming
southwest, and that's, ah, that's a camera
that would reflect any images out on the,
on to the street or is it predominantly
25 for store purposes.

And he says:

Uhhh, it's predominantly for store
purposes, but it does catch images of what
happens on the street.

30 A. Correct.

Giroux, cr-ex.
(Scarfe)

Q. Does that refresh your memory?

A. Yes.

Q. Okay. So looking at the photo and the location of placard number 7 where we see a significant amount of blood, would you agree that that area, based on Mr. Bigold's recollection, probably would have been covered by his camera at the time?

A. It may have.

Q. It may have?

A. Yes.

Q. All right. Now, you were present in court today when Mr. Thompson gave his opening?

A. Yes.

Q. He talked about Ms. Kish being involved with a knife on the fight on the south side of the street, and then sort of running over to the north side, and being involved in a second altercation over there?

A. Yes.

Q. And having a knife in her possession at that point?

A. Yes.

Q. You recall he mentioned that this morning?

A. I do.

Q. And that there was significant activity

Giroux, cr-ex.
(Scarfe)

that took place in the area of the pasta restaurant?

5

A. Ah, yes.

Q. Right. And accordingly, looking at Exhibit 16, the DNA map, there is a significant blood trail along that stretch of sidewalk. Correct?

10

A. Yes. And in the street as well. Yes.

Q. And in the street. But for the moment, the sidewalk. And all three of those sort of blood spatter clusters, if I can call it that, came back after DNA testing as, I don't want to say matching, because the scientists always talk about how you can't exclude anybody, but it appeared to be the blood of Ms. Kish.

15

A. Correct.

Q. Correct. And, so it appears that what, at some point, she's bleeding all along that, that area that we see with 7, 8 and 9?

20

A. Yes. What we did was we met with Ms. Sloan with regards to triaging a number of swabs from the street and the sidewalks that would go in for DNA testing and this is the product of that.

25

Q. So you'd agree my friend opens and says that Ms. Kish was involved in an altercation, with the deceased, on the north side, where she had a knife, and then she lost the knife and ended up getting stabbed in the process. That's a pretty significant part of the story?

30

Giroux, cr-ex.
(Scarfe)

A. Yes, it is.

5 Q. Right. And clearly, to determine whether that was true or not, that accusation, it would have been pretty darn helpful to have those two cameras and the footage that they were recording at the time?

10 A. Yes, sir, it would have.

Q. Right. So the perceived investigative value of the two lost videos would be, fair to say, between low, medium and high, would have to be high. Right?

15 A. Well, I would agree with you, but we also have witnesses, too, to that same narrative as well.

Q. So, you've got eyewitnesses, we don't need video?

20 A. No, sir, I am not saying that. But we have, we have witnesses as well.

Q. All right.

MR. SCARFE: If this could be the last of the series of five photographs.

25 THE REGISTRAR OF THE COURT: 15 E, Your Honour, and I apologize, what I said was 16 C and D should 15 C and D. Thank you.

--- EXHIBIT NO. 15E: Photograph

30 MR. SCARFE: Q. What we learned in, when we

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(Scarfe)

5 found out six, seven, when you found out six, seven months later that the One of a Kind Pasta video had been lost, and you sent Detective Olver back, the system did essentially taped over itself. And the footage was not available.

10 A. My understanding is it had been written over.

Q. Right. And that these sort of systems have about a 12-day expiry? Do you recall that coming out in the evidence?

15 A. I wasn't pre -- I certainly wasn't present for Detective Olver's evidence, for other investigative reasons, I wasn't there, but I don't know what the shelf life of maintaining the video was.

20 Q. All right. We may get that from him later. Assuming that the shelf life was 12 days, all right, that would take us from August 9th to August 21st?

A. Yes.

25 Q. And by that time, you have interviewed Ms. Stopford, Ms. Paget, and collected the box, and do you know if you viewed any of the FIS photos by then?

30 A. I may have, I may have seen the photographs. I can go back and go through those days with you, if you like, with my notes.

MR. SCARFE: I note the time, Your Honour. Sort of segueing into a different area at this point. I ask

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(Scarfe)

if we could break at this point.

5 THE COURT: Very well.

Counsel, I have a sentencing tomorrow at 9:30, I am hopeful we will be done by 10 o'clock, but if I am not quite ready to start at 10, that's the reason.

10 MR. SCARFE: We will be here at 10. As a matter of housekeeping, as we raised, Your Honour, being defence counsel having other commitments, I have cleared my deck, and I can be here every day, all day, for the next two, three months. But if you knew that there was a day that you had booked aside that we wouldn't be sitting, even for half a day, I would appreciate knowing that sooner than later.

15 THE COURT: I will let counsel know, I will check my schedule overnight.

20 MR. SCARFE: Thank you.

THE COURT: Thank you.

25 --- COURT ADJOURNED AT 4:27 p.m. to TUESDAY, JANUARY 25, 2011
