

C53904

SUPERIOR COURT OF JUSTICE
(Toronto Region)

5

B E T W E E N :

10

HER MAJESTY THE QUEEN

15

- and -

NICOLE KISH

Accused

20

TRIAL PROCEEDINGS

25

FEBRUARY 14-16 AND 22, 2011

30

VOLUME IV

SUPERIOR COURT OF JUSTICE
(TORONTO REGION)

B E T W E E N :

5

HER MAJESTY THE QUEEN

- and -

10

NICOLE KISH

Accused

15

---heard before THE HONOURABLE MR. JUSTICE

NORDHEIMER, on January 26-28, 31, February 1-3,
8-10, 14-16 and 22, 2011, in courtroom 4-9
at 361 University Avenue, Toronto.

20

TRIAL PROCEEDINGS

25

APPEARANCES:

30

Mr. W. Thompson and
Ms. E. Middlekamp

Appearing for the Crown

Mr. J. Scarfe and
Ms. V. Simpson

Appearing for the Accused

1457

Submissions Re: Lost Evidence Application
February 14, 2011

---MONDAY, FEBRUARY 14, 2011

5

---UPON RESUMING

(10:03 a.m.)

THE COURT: Mr. Thompson?

10

MR. THOMPSON: Yes. Good morning, Your Honour. With respect to the matter before the Court, the Kish matter, the Crown is formally closing its case.

THE COURT: Thank you. Mr. Scarfe?

15

MR. SCARFE: Yes. Good morning, Your Honour. At this point, I'm prepared to proceed with the lost evidence application. I've reviewed the materials that were filed originally and supplemental materials and I think we've got pretty much all of it covered. I suppose I could have filed a couple of other things but I will deal with that in submissions.

20

I asked -- or I advised my friend on Friday that I did require one other officer for cross-examination briefly.

25

1458

Submissions Re: Lost Evidence Application
February 14, 2011

Detective - sorry - Carbone who was I believe
Detective Sergeant Giroux's acting partner at
the time with respect to this case. And I
also indicated to him at the time that I just
wanted to file a two page section from
Detective Gallant's notes as well, from the
briefing that occurred.

So I don't know if detective
Carbone is here yet. He's on his way up? I
think that will be the best way to start.

While we're waiting I suppose I
could deal with Detective Gallant's notes.
I'm just trying to fill in the picture for
you of that original briefing that took place
at Homicide with Detective Gord Scott.

THE COURT: Detective Carbone is here as
well.

MR. SCARFE: Oh. Thank you.

MS. MIDDLEKAMP: Your Honour, prior to him
entering the witness stand, I will be arguing
the motion. My colleague had discussions with
my friend regarding having Detective Carbone
today. My position is that my friend can call
Detective Carbone and the Crown will have an
opportunity to cross-examine if necessary.

1459
M. Carbone - in-ch. (Scarfe)
February 14, 2011

THE COURT: Yes?

---MIKE CARBONE: SWORN ON VOIR DIRE

5 ---EXAMINATION IN-CHIEF BY MR. SCARFE:

MR. SCARFE: We're not going to waste Your Honour's time with who's calling who but I expect I will get a little leeway from my friend.

10 THE COURT: Thank you.

MR. SCARFE:

Q. Detective Carbone, thank you very much for coming today. My name is John Scarfe. I'm counsel to Ms. Kish.

15 A. Yes. Good morning.

Q. Good morning. I just wanted to ask you some questions about your role in the investigation, sort of at the outset of this case in relation mainly to the videos, if that's all right with you.

20 A. Yes.

Q. So you worked -- did you bring your notes with you today?

A. Yes.

25 Q. Have you made any changes, alterations to your notes?

1460

M. Carbone - in-ch. (Scarfe)

February 14, 2011

MS. MIDDLEKAMP: Your Honour, I don't have any objection with the officer referring to his notes for the purposes of refreshing his memory.

5 THE COURT: Very well. Officer, you may have reference to your notes as necessary in giving your evidence.

THE WITNESS: Thank you, Your Honour.

MR. SCARFE:

10 Q. Prior to Mr. Hammond passing away, you attended a briefing at 10:30 in the morning? That's sort of the very first section of your notes. You took about six pages of notes from a briefing?

A. Yes, that's correct.

15 Q. All right. And Detective Scott gave you an overview of the investigation focusing quite a bit on the interview you'd had with a Mr. Dranichak, do you recall that?

A. Yes, that's correct.

20 Q. But while that formed a significant part of those six pages, there was sort of an overall, ah, set of details with respect to who'd been arrested, and the narrative of what had happened.

A. Yes, that's correct.

25 Q. Right. And a number of pieces of evidence

1461
M. Carbone - in-ch. (Scarfe)
February 14, 2011

were highlighted by Detective Scott and at the bottom of page 1 of 6 of your notes, can you just indicate for me the reference to 746 Queen? Do you see that?

5

A. Yes.

Q. Maybe if you just read that out for us and then elaborate a little bit on where that fit into the briefing?

A. It says "746 Queen has video".

10

Q. And then below that?

A. "Fifth male shows injury to chest".

Q. Mm-hm. And you understood that those three lines flow together in the sense that the fifth male is captured on this video.

15

A. Yes, that's correct.

Q. All right. Is it at this point in the briefing that Detective Scott is relating to you the fact that he's seen this?

20

A. Ah, you mean Scott has actually seen -- is that your question?

Q. Yeah. Can you help us a little bit?

A. I don't remember if it's directly what Scott saw.

25

Q. Mm-hm? But whether it was him or not, he's describing the content of what's on this

1462
M. Carbone - in-ch. (Scarfe)
February 14, 2011

surveillance video.

A. Yes, that's right.

Q. And this six pages of briefing, did that
later become sort of a guideline in the organization
of this file?

A. Ah, I don't really understand your
question.

Q. Well, you know how we start a new
project, we organize the information we have and
then we sort of put a bunch of to-do lists together?

A. The process from there would involve
identifying as many civilian witnesses as possible.
Not necessarily in conjunction with what was told to
us by Scott but it was a series of, um, identifying
different witnesses who either called the police at
the time or who have actually seen the incident or
anyone who we have identified or some other
witnesses that we haven't identified yet.

Q. Okay. Now, page 3, I was referring before
to the six page briefing and you've numbered those
pages separately.

A. That's right.

Q. And do you recall how many officers were
at that briefing?

A. I know I was, Detective Sergeant Giroux

1463
M. Carbone - in-ch. (Scarfe)
February 14, 2011

was there, I believe Detective Stacey Gallant, um,
and obviously Detective Scott of 14 Division. There
might have been --

Q. Ponzi and Hanza (ph) --

5 A. I believe there were two other detective
constables from our unit that were there as well.

Q. And then Detective Geeta (ph), who didn't
end up being involved in the investigation beyond
that. May have been there?

10 A. He may have been, sir. I don't recall
exactly.

Q. Now, page 3 of your notes starting at
Saturday, August 11th, you have the notation at nine
o'clock in the morning at Headquarters, and the
15 notation before that indicates that Mr. Hammond had
passed away over night?

A. Yes, that's correct.

Q. So this sort of commences your official
role in the investigation?

20 A. That's correct, yes.

Q. All right. And you just take us through
those five or eight or nine lines that show -- that
go below the nine o'clock at Headquarters and just
explain, if you could, what that refers to?

25 A. Some time around eight o'clock in the

1464
M. Carbone - in-ch. (Scarfe)
February 14, 2011

5 morning on the 11th of August, Your Honour, I
received a call from Detective Sergeant Giroux who
informed me that Mr. Hammond had passed away, and
that we were going to conduct our investigation from
our Headquarters office.

Q. You make reference to "prepare working
file and organize info consistent with "Major Case
Manager"? Can you elaborate on that a little bit?

10 A. All homicide cases are prepared and
organized consistent with the Ontario Major Case
Management system. It's one of the well-known,
documented system that every homicide investigator
uses.

Q. And sort of like a checklist?

15 A. No, I think it's more of a data
management system.

Q. Divides various types of data into
categories?

A. Yes, that's right.

20 Q. So it would separate sort of handwritten
officers' notes from physical evidence, exhibit
lists, that kind of thing?

A. That's right.

25 Q. And because these categories sort of
preexist, they help you make sure you don't forget

1465
M. Carbone - in-ch. (Scarfe)
February 14, 2011

anything, right?

5 A. I suppose it can help as a checklist but primarily it's put together in that fashion, so that if this were an unsolved case and there is an investigation similar in Sudbury, the officers from Sudbury could come down to our -- into our case box and find everything they need in the spots that they would actually file their investigation as well, so it's more of a data management system. Myself and
10 Detective Sergeant Giroux have been around for a long time. We -- we know where to go from one investigation to another.

15 Q. Okay. It sort of sounded like you were, and just because I've looked at everybody else's notes who were there, it sort of sounds like you were sort of tasked with file management. Organizing the file? Or is that something that someone else was?

20 A. No, I wasn't tasked with file management. I initially was tasked with preparing some summaries of the different witnesses that had already been identified and I subsequently prepared some interview summaries. In a nutshell, what that means is reviewing the statements that were given and
25 putting it in point form fashion.

1466

M. Carbone - in-ch. (Scarfe)

February 14, 2011

Q. All right. So Detective Sergeant Giroux was in charge of the investigation, and your initial, at the very beginning, focused on summarizing existing witness interviews.

5 A. That's right.

Q. Okay. Just before I leave the Major Case Manager, the Major Case Manager we have already established creates various categories for different types of evidence that is useful in the investigation, correct?

10

A. That's correct.

Q. Does it make a distinction, I guess one of the categories is -- is sort of digital recording, right?

15

A. Um, I don't think there's an actual spot where you actually put the digital recording in the actual file. There's a spot that actually will, um, help you noting the different numbers that are associated with different digital video recordings.

20

Q. Okay. And there's two kinds of digital recordings typically on a homicide or any investigation like this. One is the recording of interviews, right? You end up with a whole bunch of DVDs that you've got to sort through in order and keep in one place, right? Witness interviews.

25

1467

M. Carbone - in-ch. (Scarfe)

February 14, 2011

A. Yes.

Q. And then on the other hand you have other types of recordings like surveillance video.

A. Yes, that's right.

5 Q. Does the Major Case Manager and it's sort of basic system help you to keep those two things separate --

A. Um --

10 Q. -- in a different category than the other?

A. I don't think they are a different category from another. I think they're just obtained and then they're ultimately turned over to our Video Services Unit to maintain the originals and make copies when necessary.

15 Q. Okay. Part of organizing your file is recognizing that not everything you have in the file is located in your office at 40 College. For instance, a bunch of swabs get seized and taken to FIS, right?

A. That's right.

Q. So part of your file is a subfile that catalogues what's part of your investigation but exists elsewhere in the Toronto Police Service.

25 A. Are you making a distinction between the

1468
M. Carbone - in-ch. (Scarfe)
February 14, 2011

actual physical evidence or the actual document
that's in our file?

Q. Um, well, I guess one begets the other so
to speak.

5 A. Right. The actual physical exhibit in
this case that you're referring to, the swabs, is
actually at the Centre of Forensic Sciences but the
document that actually tells us that the exhibit,
the hard physical exhibit, is actually at CFS is
10 contained in our file.

Q. All right. So some of the items as your
investigation unfolds are at the CFS, but you've got
a list somewhere in your file that says, Okay. All
this stuff's at CFS?

15 A. That's right.

Q. And lists it?

A. That's right.

Q. Some of the stuff is up at 2050 Jane,
like people's clothes in lockers, things that were
20 seized from the street that -- not everything goes
to CFS.

A. Right. I don't think they're still there
now but during the course of the investigation, yes,
those items would have been at FIS.

25 Q. Right. So you've got a separate list that

1469
M. Carbone - in-ch. (Scarfe)
February 14, 2011

tells you, Hey, we've got a bunch of stuff in this location.

A. Yes.

5 Q. And then the VHS tape has been picked up, it's supposed to go to Video Services, right? To get transferred on to DVDs?

A. If there was a VHS tape, yes, that would be the normal course of the day or the normal course of action.

10 Q. So presumably like the physical items at CFS and FIS, somewhere in your organization of the file there is something that indicates, Hey, we've also got stuff over at Video Services.

15 A. Yes. We've had -- at that point we'd had already several witnesses interviewed on DVD and they eventually would go up to -- I don't exactly remember when they actually got taken over to the Video Services office but they eventually did get there.

20 Q. And eventually someone follows up because copies are made for disclosure, for the Crown, et cetera, and you've got to eventually get all that stuff back and centralized in your office, right?

25 A. Yes. The original stays at the Video Services and then we get copies for the court

1470
M. Carbone - in-ch. (Scarfe)
February 14, 2011

system. For the Crown and the -- or the defence.

Q. Right. And then there's another step when you have digital video that's seized. It's usually seized by someone in High-Tech Crimes? Or the technology division?

A. Yes. If it's -- if the data is captured on a DVR system, it's way beyond my capabilities and probably way beyond some of the capabilities of the people who actually work with us. We get assistance from the video -- no. The Technical Crimes Unit people and -- they provide that particular expertise in removing whatever data is on the DVR.

Q. Right. And presumably you made your case file, you've got a subfile like the other things that aren't on-site to remind you that there's stuff at High-Tech Crimes that's got to be eventually processed and centralized to the file.

A. Yes. If that's the process in -- and we have it, it gets taken to the technical crime people and there should be some documentation of that.

Q. All right. And when, just so I'm clear, when there's -- when the Technical Crime Unit manages to capture and put the relevant evidence I guess on the DVD, do they send it to you or do they send it over to Video Services and then pick it up

1471
M. Carbone - in-ch. (Scarfe)
February 14, 2011

from them?

5 A. Um, my experience has been that they send it to me. Like, in other investigations I've done, they've actually sent the material to my -- to me personally.

Q. Okay. So you get it, it's just the one copy, right?

10 A. Ah, I'm not certain if now they've actually changed it in giving you an extra copy but they certainly give us one copy.

15 Q. Back in 2007 though, if it was determined to be relevant, you would then have to take that disk over to Video Services to have it copied, so there were copies for the Crown, copies for disclosure, et cetera?

A. I don't believe you can actually -- you don't have to send that disk up to Video Services. I think you can actually make copies on your own.

20 Q. Oh. Okay. Moving ahead in your notes to I guess the main reason you're here, could you turn to page 48 of your notes. On August 28th it appears you watched a surveillance video from the pasta restaurant.

A. Yes.

25 Q. And did someone assign you to do that?

1472

M. Carbone - in-ch. (Scarfe)

February 14, 2011

A. I don't have a note specifically regarding that, but it would have been during the course of my investigation that I watched that video.

5 Q. We've heard evidence, and someone will correct me if I'm wrong, that around this date, Detective Sergeant Giroux I think had taken a couple of weeks off at the end of August? And wasn't back from vacation until the bail hearing on September
10 4th? Does that ring a bell for you?

A. Sorry, sir. It doesn't.

Q. Detective Sergeant Giroux goes away for a couple of weeks. Is someone sort of acting lead investigator?

15 A. In that case that would be me. I just don't remember him leaving the office or was on vacation that week.

Q. For all you can remember he was working the whole month of August there with you every day.

20 A. I don't remember, sir.

Q. You don't remember. You had several investigators working on the case?

A. Yes.

25 Q. So at some point did the process of watching all the video fall to you? Or just this

1473
M. Carbone - in-ch. (Scarfe)
February 14, 2011

video?

A. Um, from what I recall it's just this video that I started to watch.

Q. And was it because it was on a list of things to do? Or was it you felt bored that day? Or what was it exactly that prompted you to watch that video on that day?

A. I don't remember why I watched it that day. It was probably one of the things that was on a list but I don't remember exactly why I decided to watch that surveillance video on that day.

Q. Where did you watch the video?

A. At the office. At Headquarters.

Q. On like a desktop computer?

A. Yes.

Q. And do you recall anyone being with you when you watched that video? Ponzi or Hanza or --

A. There was no one else other than myself, apart from the other officers who share the same office with me.

Q. Mm-hm. And you see eleven o'clock, "watch surveillance video from the pasta restaurant at", and you sort of block out the number, but it's 746. My copy has a little --

A. It's vetted.

1474

M. Carbone - in-ch. (Scarfe)

February 14, 2011

Q. 746 Queen Street?

A. I have 748 Queen Street.

Q. 748? Okay. Fair enough. And then the next line? Can you help us with that?

5 A. "Observe on one of camera views at 00:28 minutes male, appears to be" --

10 Q. Okay. That's the part I wanted. "Observe on one of camera views". Can you tell me, does that refresh your memory as to how many camera views there were?

A. Ah, you know, sir, I don't remember. Other than the one I saw here that I'm referring to, I don't remember seeing any other video.

15 Q. The video was on a DVD?

A. Yes. That's the only way you can actually watch it on your work station.

20 Q. Right. And you have a number of media players that are sort of loaded onto the work station computer that you use to watch videos?

A. Yeah. I think they come -- they come standard with all the --

Q. Software?

A. Right.

25 Q. So you've got your Windows Media Player, which sort of comes with any Windows computer?

1475
M. Carbone - in-ch. (Scarfe)
February 14, 2011

A. I think so. I'm not a real big computer person so I agree with you. I think it's the regular Windows Media Player that comes with it.

5 Q. Sometimes that comes up when you put a disk in. Other times you get that blue screen with the Toronto Police software that allows you to select from different pictures, chapters?

10 A. Yeah, but I still think that's a Windows Media Player because that's just the way it's saved onto the disk and I believe that's why it comes up in those chapters like that.

15 Q. I just want to show you a couple of computer screens and see if you can help us out just a little bit. I think I have to press this button twice, if I've been watching Ms. Fineberg correctly. Do you have the Pasta Perfection disk? Sorry, I don't have the number.

THE COURT: Exhibit 10 I believe.

THE REGISTRAR: Sorry, Your Honour?

20 THE COURT: Exhibit 10.

THE REGISTRAR: Thank you.

MR. SCARFE: You just do that from memory.

There it is. Thank you, Mr. Murphy.

25 Q. All right. So we've put the disk, as I'm sure you just watched. Thank you for your patience.

1476
M. Carbone - in-ch. (Scarfe)
February 14, 2011

And Ms. Fineberg's taken us to the "my computer" screen and clicked on the DVD and this is the screen that opened up. Does that look familiar to you?

5 A. I mean, it's two files that you see pretty well any time you open one of these disks.

10 Q. Sure. And I guess what I'm going to humbly suggest, despite that we are in examination in-chief, is does this screen have anything to do with the reason why you wrote "observe on one of the camera views"?

A. It could be, sir. I just don't remember now just by looking at this -- these two files here.

15 Q. All right. If there was only one camera view you wouldn't have written "one of the camera views", would you. It wouldn't make sense, would it.

A. Sir, I don't remember -- I don't remember from watching this, or these two files on the screen, whether or not it -- whether or not it matches my notes or not. I don't remember, sir.

20 Q. Okay. When you put this in the computer to watch it, was it your understanding that it had been watched before by other people? Or --

25 A. It was my understanding, because the person who actually retrieved it from the DVR system, watched the video.

1477

M. Carbone - in-ch. (Scarfe)

February 14, 2011

Q. How do you know that?

A. Well, you have to watch the video to get the relevant times so that you can download it on to another system.

5 Q. So you assume that they had watched the video. But I mean someone in Homicide had -- as far as you knew, is this something that had already been reviewed by a Homicide investigator? Or is this something you thought, Hey, it's August 28th and
10 this investigation's two weeks old and somebody's got to watch this video.

A. I don't think I understand your question.

15 Q. Did you watch this video because it hadn't been watched in your office or did you watch this video because someone said, Hey, I watched that video. You should check this out.

A. I watched the video because it was in the file and I believed -- I felt I needed to watch it to try and move the investigation forward.

20 Q. Were you aware as to whether any of your colleagues at Homicide had watched it already.

A. No, I was not aware.

Q. Okay. So for all you knew it was the first time anyone was watching it.

25 A. Apart from the person who actually

1478
M. Carbone - in-ch. (Scarfe)
February 14, 2011

removed it from the -- from the, ah, actual source.

Q. Okay. Did you watch everything on the disk?

5 A. I don't remember. I don't remember how long these -- this clip is. If I actually -- if you open the file I can tell you if I did or not.

Q. Well, we'll open camera one first. You see there's four tracks there.

10 A. Yeah. If you could expand them a little bit you can actually tell the time.

Q. Does that help a little bit? Do you remember having to getting to that file and having to choose between more than one file?

15 A. Sir, I don't remember. I really don't. I know this is obviously the video for that pasta shop. If you open one of them I could have a better look at it and just might be able to help me out that way.

20 Q. You mean the actual content of the video?

A. Right.

Q. Okay. Before we do that, you saw originally that there was two cameras in the last screen, right? And we've clicked on camera one and there's four tracks on this screen, correct?

25 A. What I saw was images almost identical to

1479
M. Carbone - in-ch. (Scarfe)
February 14, 2011

each other.

Q. Did you see more than one camera angle?

A. No, from what I saw there it looked like they were from the same angle.

5 Q. Okay. And normally would you try to watch all of the video?

A. Yes, sir, I would, yes.

Q. And you've watched lots of surveillance video from private businesses in the past?

10 A. Yes, I have.

Q. Right? You have seen these fourplex screens or businesses have more than one computer? Or one camera?

A. Yes, I have.

15 Q. Right. So have you got any explanation for why your notes only refer to this one camera angle?

20 A. I'm sorry, I don't. I know if we actually started watching the video that might help me. By just looking at the two images that I saw on this screen in front of me, they appear to come -- they appear to be from the same camera angle.

Q. Okay. Well, could we play one of the images?

25 A. If you can actually bring it back to the

1480
M. Carbone - in-ch. (Scarfe)
February 14, 2011

other screen so you can actually see the two images
that I believe are identical.

Q. So --

A. No, the very first one that you brought
5 up. That had the images of --

Q. Yeah, we did that from Ms. Fineberg's
computer. It was all preloaded. But we're using --
here we go. I think this is the page you're
referring to?

A. Yes.

Q. Right. So if we click on one of those
10 images --

A. But just a minute, sir. They appear to me
to be the exact same images, from the same angle.

Q. Is that the angle you watched?

A. This is the only angle that's available
15 on this disk, that's the disk that I saw.

Q. Okay. So it's hard to see from over here.
Can you tell -- maybe if we just play a few seconds
20 of the first image, Ms. Fineberg?

---VIDEO PLAYING

25

1481
M. Carbone - in-ch. (Scarfe)
February 14, 2011

MR. SCARFE:

Q. When you watch this video, which is running now, were you able to determine which direction it was looking?

5 A. No.

Q. All right. Were you able to determine on which side of the screen the street is and on which side of the screen the store front is?

A. No.

10 Q. You're not able to tell from here which side the store front is?

A. Okay. The store front is on the right-hand side of the screen and it's facing out towards I believe it's the street which is Queen Street.

15

Q. Right.

A. That's what you meant obviously.

Q. Yeah.

A. Okay.

20

Q. So you could tell when you're watching the video that this looks west. Because the store -- you knew the store was on the north side of Queen?

MS. MIDDLEKAMP: Your Honour, if I can just object at this point. I'm trying to give my friend a lot of leeway in his questioning but

25

1482
M. Carbone - in-ch. (Scarfe)
February 14, 2011

he's doing a considerable amount of leading.
The officer has indicated that he can't tell
what the direction is on the video and I
would just ask that he frame his questions in
a more open-ended manner.

5 THE COURT: Mr. Scarfe?

MR. SCARFE: Thank you, Your Honour. I'll see
what I can do here.

10 Q. When you watched the video, did you know
where it was from?

A. Yes, I did.

Q. Did you know what side of the street the
store was from?

A. When I was watching the video I did not.

15 Q. You didn't know that. Do you know it now?

A. Well, you're telling me now it's on the
north side of the street, it's on the north side of
the street.

20 Q. Okay. And you couldn't tell from this
side that the store front's on the right and the
street's on the left.

A. I could tell that. That --

Q. You could tell that?

25 A. The store front's on the right and the
street's on the left.

1483
M. Carbone - in-ch. (Scarfe)
February 14, 2011

Q. Okay. And is that the clip you watched?

A. Yes.

Q. Can we just have a look at the other
camera angle? We'll go back to this time camera
5 three and we'll pick, ah, either one I guess. Now,
on this one, we have the opposite, correct? The
store front is on the left and the area of the
street appears to be over to the right?

A. That's right.

10 Q. Having seen both of those now, can you
recall which one you looked at?

A. You know, sir, I wish I had noted the,
um, camera that I was referring to. I don't know. I
don't know which one I saw.

15 Q. Mm-hm. Having gone over this now, do you
have a recollection of there being two camera angles
or one?

A. Can I just go back to the images of them
being the same, you know the -- what I'm saying is
20 --

Q. The other angle?

A. No. The screen that depicted two
different images on it?

Q. Oh. Yes. We can go up one screen. That's
25 the camera three screen.

1484
M. Carbone - in-ch. (Scarfe)
February 14, 2011

A. Right. So this one here looks like it's the same images and then the other one is camera one?

5 Q. That's right. So is this the first you've learned there are two camera angles? Today?

A. Sir, I remember watching this video and noting those -- those times in my book. I don't remember if there was two cameras or not, but now looking at this video, yes, there appears to be two
10 different angels to it.

Q. So you're unaware the defence brought an application to -- around some lost evidence and lost video?

A. I understand there was an application for
15 some lost video.

Q. Did you know that there was an application for lost video in relation to the video that you watched on August 28th? Or is this all just coming to you right now.

20 A. I understand there was some lost video but it was in reference to an actual videotape or --

Q. So you've never heard about this problem.

A. I knew there was -- I knew there was a problem with a digital recording that I watched, but
25 it had to do with several angles of -- of the tape.

1485
M. Carbone - in-ch. (Scarfe)
February 14, 2011

Q. This tape.

A. This DVD.

Q. Right. When did you learn that?

5 A. Oh, I understand back in December when they were looking for -- for a videotape for this investigation, I learned it from Detective Sergeant Giroux.

Q. That's the first you heard about any recordings being lost. Back in December.

10 A. That's right.

Q. Do you still work in Homicide?

A. Yes.

Q. You made almost a page of notes about what you saw, right?

15 A. Yes.

Q. Did you consider the evidence important at the time?

A. Yes.

20 Q. You did. And did you then assign anybody else to watch it?

A. Ah, no, I didn't.

25 Q. No? Did you recall reporting back to your officer or lead investigator, Hey, I've watched this video. Here's what I saw. I think it's important?

1486
M. Carbone - in-ch. (Scarfe)
February 14, 2011

A. I -- I believe I did, yes.

Q. You did, right? Did you have any further dealings with the video?

A. No, that's it.

5 Q. Having gone through the notes in as much detail as I did, I'd like to file them as an exhibit on this application.

THE COURT: This officer's notes?

10 MR. SCARFE: Excerpt of the two pages that I dealt with.

MS. MIDDLEKAMP: I don't think it's necessary but I don't object to it being -- the officer's just given all the testimony and I would say my friend has thoroughly taken him through the notes, so I leave it with Your Honour.

15 MR. SCARFE: I filed a lot of stuff on the application.

20 THE COURT: All right. I guess we don't have any exhibits on the application yet so it will be Exhibit 1.

THE REGISTRAR: Exhibit 1, Your Honour.

25 ---EXHIBIT 1: Pages from Officer Michael

1487
M. Carbone - in-ch. (Scarfe)
February 14, 2011

Carbone's notebook - produced and
marked for identification.

5 MR. SCARFE: Thank you, Detective Carbone. My
friends may have some questions.

THE COURT: Cross-examination?

MS. MIDDLEKAMP: Your Honour, I don't have
any questions in cross-examination.

10 THE COURT: Thank you. Thank you, Detective.

THE WITNESS: Thank you, Your Honour.

MR. SCARFE: The only other thing, as he was
approaching the stand, that I said I wanted
to file was two seconds -- two pages from
15 Detective Gallant's notes which I think my
friend's have already got, to just summarize
the briefing and indicate that in addition to
the pasta video, there's the jewelry store
video was also actually discussed at that
20 original briefing with Detective Scott. If
that could be Exhibit 2. I could circle it
but it's on the bottom of the second page.

THE COURT: Exhibit 2.

25 THE REGISTRAR: Exhibit 2, Your Honour.

1488

Submissions Re: Lost Evidence Application
February 14, 2011

---EXHIBIT 2: Pages from Detective Gallant's
notebook - produced and marked for
identification.

5

10

15

MR. SCARFE: Now, the only two things I
haven't filed on the application and I can go
and get them if necessary, but I want to
refer to them in passing, would be the
Crown's opening at the preliminary hearing,
and there are some officers who attended and
waited for Detective Scott who had indicated
at the preliminary, I didn't want to file the
entire preliminary hearing transcript, but
who indicated that they hadn't watched the
video before Detective Scott, Your Honour. Is
that something that's in issue?

20

25

MS. MIDDLEKAMP: It's not in issue that --
it's in Detective Scott's testimony, he
didn't believe that the constables that had
indicated that the video was at One of a Kind
Pasta, that they hadn't watched them yet but
they advised Detective Umbrello that it was
there. This is the first I have heard of my

1489

Submissions Re: Lost Evidence Application
February 14, 2011

friend wanting to file the opening from the preliminary inquiry, so...

MR. SCARFE: I only refer to it for this reason: The theory when the Crown opened at the preliminary hearing, well, we've already heard from Detective Sergeant Giroux that, um, he wasn't rushed or felt pressure to appease the press by charging Ms. Kish on August 16th, but instead it was because they had just interviewed Stopford and Paget, which, in my submission, suggests that the theory of the police and eventually the Crown at that point in the investigation was that Ms. Kish had stabbed Mr. Hammond on the south side of the streetcar, and the only reason I raise and offer to file the opening of Ms. Sweeney from January of 2009 at the outset of the preliminary hearing is because that, in a sense, was the theory then as well. And this is all to illustrate the point that I sure am glad I filed this application, because I didn't know what my friend Mr. Thompson, who has taken the case over, and Ms. Middlekamp were going to suggest when they opened to you at the beginning of this trial, eleven trial

5

10

15

20

25

1490

Submissions Re: Lost Evidence Application
February 14, 2011

days ago, but it certainly spelled out a very different theory and has highlighted the importance of this evidence even more.

5 So I can file it if it's in dispute. I will give my friend a chance to think about that. At this point what I'd like to do is basically take you through the evidence that's been filed, refer a little bit to the factum and some of the evidence
10 that we've heard from in this court directly, to passages in three or four of the cases that are filed, and commence my submissions at that point.

15 This is an application, as Your Honour has it, for relief pursuant to Section 7 and 24(1) of the *Canadian Charter of Rights and Freedoms*. At issue is whether the police violated the applicant's right to make full answer and defence by failing to secure and
20 preserve evidence capable of assisting the applicant in her defence.

25 At the time of writing, we were aware that there was two videos from the pasta store, and that the east facing video was captured I guess incorrectly, for the

1491
Submissions Re: Lost Evidence Application
February 14, 2011

5 relevant portion having to do with the date
not being reset by Detective Olver, and for
the reasons that follow it will be my
submission, Your Honour, that we can find
both a breach of Section 7, an abuse of
process, and the 24(1) leaves you with a
potpourri of remedies that are available to
you in addressing the breach of Ms. Kish's
rights.

10 Now, the first officer who had
significant dealings with this video was
Detective Scott, and his evidence is
summarized between paragraphs ten and 20
inclusive. In summary, Detective Scott took
15 charge of this investigation at one o'clock
in the morning within sort of a half hour, 45
minutes of the incident itself. He arrives on
scene at 2:35. He located two surveillance
cameras. It's not like nobody noticed,
20 outside the One of a Kind Pasta, and --
restaurant, and essentially at 1:43 in the
afternoon while he was at the hospital with
P.C. Umbrello, he got a call from P.C.
Westall and the content of the call was
25 actually exaggerated at the time, indicating

1492

Submissions Re: Lost Evidence Application

February 14, 2011

5 that there was video of the offence which he
thought meant, Hey, they've got the whole
stabbing on video, so they dropped what they
were doing and drove right over there and
spoke to the owner Mr. To, and Mr. To didn't
seem, according to Detective Scott, wasn't
that familiar with the inner workings of the
system, um, and he cued the video for the
police. Detective Scott told us at the
10 preliminary hearing that he didn't want to
mess it up so he only watched one camera
angle, it happened to be the one that turned
out to be the lost one, but he only watched
it for a minute or two.

15 Now, filed as Exhibit Z of the
supplementary materials, we've got the entire
preliminary transcript of Mr. To, and what I
would do is I would ask you to refer, with
some critical eye, to the section of the
20 transcript where he testifies in-chief at the
preliminary hearing. It's on the desk, Your
Honour. I don't think --

THE COURT: I forgot --

25 MR. SCARFE: I know you've been reviewing
this in your chambers, but essentially --

1493

Submissions Re: Lost Evidence Application
February 14, 2011

MS. MIDDLEKAMP: Does Your Honour want a hard
copy just to view now?

THE COURT: Ah...

MS. MIDDLEKAMP: Or would you rather view it
on your computer?

THE COURT: I think I can view it on my
computer if you give me two moments.

MR. SCARFE: Absolutely.

THE COURT: Did you say Exhibit Z?

MR. SCARFE: Z. I assume you're looking at it
in PDF, a scanned transcript so unfortunately
I don't have the PDF page number but it's
page 120 of the transcript.

THE COURT: Just a moment.

MR. SCARFE: Or where it starts.

THE COURT: Yes. I have it.

MR. SCARFE: Oh good. All right. So it's
those three pages that I wanted to highlight,
Your Honour, starting about the fourth line
in question.

"All right. So you invited them
upstairs where your video
computer is?

ANSWER: Yes.

QUESTION: And you played the

1494

Submissions Re: Lost Evidence Application
February 14, 2011

video for them?

ANSWER: Yes.

QUESTION: How many police
officers came upstairs to your
apartment to watch the video?

ANSWER: At that time, two.

QUESTION: Two police officers.
And did you watch the whole
fight on video?

ANSWER: Yes. I watched it with
the police officers.

QUESTION: All right. Now, the
two outside cameras, you had to
watch them separately, correct?

ANSWER: No. With each screen
you can see four sides. No, no.
Sorry."

Because Your Honour has it in front of
you and there's no jury I will skip over some of the
verbiage, but then it goes on to indicate, line 23,
that you can see four positions on the small
screens, but as you get to the bottom of the page,
around line 29, it says:

"But you can also do it

independently. You can choose
one." Over to page 121.

"ANSWER: They chose one and
then another one. They never
watched it back." He can't

5
remember which one they chose first and
watched but down around line 28, it's clear
they watched something in the area of three
to four minutes from each angle and then the
10 section I guess ends around line 12 of page
122, where he describes them watching each
angle repeatedly.

15
So when Detective Scott testified
at the preliminary hearing that he only
watched one angle and only for a minute, we
have some doubts about that as part of our
skepticism with respect to the explanation
that's being offered here.

20
The other issue that I think is
important for Mr. To as it relates to
Detective Scott, it has more to do with the
content of what's on it. He has some
recollection of what's on it. He sees some
females walking by but not in the fight.
25
That's the same as Detective Scott, but

1496

Submissions Re: Lost Evidence Application

February 14, 2011

5 certainly there is an indication that, you
know, it's clear view, there was nothing
obstructing it, and it's Detective Scott
indicates, and as does Mr. To, that you can
see a fight going on, and neither recalls any
females being part of any fight. It suggests
that the evidence was clear, not degraded,
and exculpatory to Ms. Kish.

10 If in fact it had been seized,
the other issue that comes up in paragraph 20
of the original factum is that Detective
Scott goes back to the station and he
interviews Mr. Wooley, and Mr. Wooley has his
15 version of events which aren't really before
the trial proper, but are relevant to this
application, and he's showing -- he's talking
to Mr. Wooley about a section that we
actually saw in this court where an
individual lifts up his shirt and shows a
20 wound, and he's asking Mr. Wooley to help him
identify that person, and at the time I think
Mr. Wooley indicates it's some random guy,
but yes, there's another fellow injured in
the fight. Whether that's the same individual
25 the defence alleges is named Harold Morrow

1497

Submissions Re: Lost Evidence Application

February 14, 2011

5 (ph), or Hal, and whether that's the same
individual or different individual of -- than
the one identified by Mr. Park leaving the
scene, sort of ten minutes after the fight,
stopping and showing his stab wound, bragging
about how he'd been stabbed 19 times, we'll
never know, but either Detective Scott was
not being all together frank with the Court
at the preliminary hearing when he said, Oh,
10 I only watched the one angle, because
although we don't have that angle, it's
either he watched both angles and asked Mr.
Wooley about the angle that we do have, or on
the other angle, there was this guy or
15 somebody else who also lifted up his shirt
and showed a wound, which seems unlikely, but
it's possible.

20 So there's some issues here with
respect to the story that you're getting from
the police that, you know, this video was so
important at the beginning, ah, and then so
unimportant later that no one can seem to
remember watching it or discovering that
there were two cameras, or that a camera was
25 missing, and it's got to leave Your Honour

1498
Submissions Re: Lost Evidence Application
February 14, 2011

with some discomfort with respect to some of
the evidence that you are being given.

Now, Detective Olver, summary of
his evidence starts paragraph 21 of my
5 application and his preliminary and goes to
25, and then it picks up again at 33 until --
yes. Paragraph 33 and 34. And essentially,
Detective Olver, well, first of all, Scott
calls Olver's boss on August 9th in the
10 afternoon, says, Make sure he comes here and
gets this. Scott's understanding is Olver's
already on scene over at the 7-11, but
somehow we get Olver in the court, his notes
start on the 14th, first he's heard about it
15 is the 14th. He comes, or gets the video the
next morning, so he hears about it on the
afternoon of the 13th, comes and gets the
video on the morning of the 14th, and
indicates that he just sort of copied the
20 four relevant files to his thumb drive rather
than cloning a drive itself. He shouldn't
have done that. That's clear from the
affidavit that's been filed of John Bradley
and the appending Guide for First Responders
25 that -- for -- and I can take you through it,

1499

Submissions Re: Lost Evidence Application
February 14, 2011

5 but essentially it is paragraphs 11 to 14,
where he gives his opinion that best practice
has clearly not been followed here, and he
focuses on the overwriting of these kind of
surveillance systems. These DVR systems have
enough room for sometimes four days,
sometimes 30 days. In this case it appeared
to be about 12 days. And, um, once you copy
the stuff, if -- you can't go back. But if
10 you clone the whole drive, you can always go
back.

15 So some bad assumptions were made
here. First assumption was that the only
relevant evidence was going to be between
midnight and two o'clock. Sure. Maybe if we
had had eleven to twelve we would have seen
people milling about or caught some evidence,
but that's kind of peripheral and that's
speculative and I understand all of that, but
20 I -- what I relate it to though is this sort
of practice of the officer not cloning the
disk because in other investigations it turns
out that if you focus the target of what
you're capturing too narrowly, you end up
25 missing other things. Here, that's probably

1500
Submissions Re: Lost Evidence Application
February 14, 2011

not the case. But it's -- Detective -- or our
expert John Bradley didn't find it to be a
satisfactory explanation that Detective Olver
knew the times he was trying to capture and
therefore he doesn't have to clone the whole
drive.

What's interesting about Olver,
and I filed his entire preliminary hearing
transcript, was he was asked if he had sort
of seized the box, the PC, and taken it back,
how soon could he have had it back? And he
answered that he could have had it back there
in a day. So I don't know if things have
changed since the Guide to First Responders
in 2003 and that somehow being less thorough
was now acceptable, but, in any event, you
would think that if you're going to take that
sort of renegade step of just copying this
two hour block and that two hour block, that
at the very least, when you got back to the
station and you plugged your thumb drive in
and you played it on that computer, that you
wouldn't just check to see if you got an
image. Check to see that it played. You'd
actually fast forward to the time that you're

1501

Submissions Re: Lost Evidence Application

February 14, 2011

5 trying to capture and make sure you've got a
clear image both ways. That clearly wasn't
done. He basically made sure that it could
play. He then burned the CD, interoffice mail
picked it up, went over to Homicide and
either they all watched it and realized there
was a mistake and they're not telling us the
truth about it, or nobody watched it until
10 August 28th when Detective Carbone put it in
the camera and inexplicably has very little
memory of, Well, I didn't notice there was a
second camera angle, and I dealt with the
same thing with Detective Sergeant Giroux at
the beginning of this application in the
15 beginning of the trial.

20 One thing that does cast some
suspicion on the police, which is also in Mr.
To's transcript from the preliminary hearing,
is that contrary to the notes of Olver, he
recalls the police coming back a short time
later. So they'd come on the day, they
seized the video, they came back three times.
One was shortly after and then one was many
months later when I guess the defence raised
25 it and maybe there was some hope that somehow

1502

Submissions Re: Lost Evidence Application

February 14, 2011

5 it got saved on some separate section of the
hard drive and they tried to recover it but
no such luck. And then that leads us into
that whole aspect about the unfolding
disclosure. And the fact that disclosure came
in December and then another installment in
January or February, and that the defence had
to ask several times about this video and
kind of got stonewalled a little bit. I think
10 I brought that out. I examined Detective
Sergeant Giroux on that point, but it was
clear it took at least a number of letters
and a couple of JPTs to pry this video from
the hands of the police. And of course as
15 soon as we got it we put it in at the office,
discovered the problem, and began contacting
people, and those are all included in the
various tabs in the original application.

20 And it was pretty shocking to
hear the investigator, lead investigator of a
homicide investigation, when we say, Hey, you
lost some video, Well, call the guy yourself.
It would seem to me that if I was in charge
of an investigation and I found that out, I
25 wouldn't send defence counsel on their own

1503

Submissions Re: Lost Evidence Application
February 14, 2011

5 investigation. I'd bloody well figure out
what happened. Leads one to reasonably think,
Well, maybe they knew about it the whole time
and just thought we'll keep putting road
blocks in front of defence and eventually
they'll just give up and let it go, which we
haven't done.

THE COURT: You referred to an affidavit by
Mr. Bradley?

10 MR. SCARFE: Sorry?

THE COURT: Did you refer to an affidavit of
Mr. Bradley?

MR. SCARFE: Yes, I did.

THE COURT: Where do I find that?

15 MR. SCARFE: I know we got it for -- First
Responders was A2 at the -- in the
supplementary materials, and I know I
forwarded a signed copy to my friend. Perhaps
I neglect to file the actual signed copy of
20 the affidavit but I thought I did on the
first day. Do you have an affidavit for Mr.
Bradley, Mr. Registrar? Mine's a little
marked up but I seem to recall filing it. It
would be separate. What I'll do is I'll pass
25 this up. Please excuse my rough underlying.

1504
Submissions Re: Lost Evidence Application
February 14, 2011

THE REGISTRAR: I can't seem to find it, Your Honour.

THE COURT: Thank you.

THE REGISTRAR: You're welcome.

5 MR. SCARFE: So I filed, in the end, I filed
all of Detective Sergeant Giroux's notes, but
tab 8 deals with the relevant excerpt
referred to in the original factum and tab 9
deals with, um, what he said under oath
10 before Your Honour on September 4, 2007 at
the bail hearing.

"Traditionally these
investigations, we capture all
the video that's in the area,
15 and I've had my staff look at
the video, and the only video
that's helpful is a pasta store
within the area that shows Ms.
Kish being tended to after she
20 received her injury of this
incident. Other than that it
does not show the narrative of
what took place and that's the
only one that's helpful."

25

1505

Submissions Re: Lost Evidence Application
February 14, 2011

5 So again, we have this sort of
flip-flop between it's really important and
then suddenly it's not so important. But when
you came to a decision whether to release Ms.
Kish, it was still pretty important.

10 The rest of it is just the
correspondence that I referred to in the
first application and the -- some of the
questionable things that seemed to happen in
that month of August and early September.

The only other thing that's in
the original application is at tab 20, the
photograph which eventually became I think
Exhibit 15C.

15 THE REGISTRAR: 13C or 13A, Your Honour?

MR. SCARFE: No. 15.

THE REGISTRAR: Sorry.

MR. SCARFE: It was from the -- across the
street view. This one.

20 THE REGISTRAR: 15 -- that's 15C.

MR. SCARFE: There it is.

THE REGISTRAR: Which one?

MR. SCARFE: This one. Sorry. It's 15E, Your
Honour.

25 THE REGISTRAR: E, Your Honour.

1506

Submissions Re: Lost Evidence Application

February 14, 2011

MR. SCARFE: I think that in the original application it now having been marked up through Detective Sergeant Giroux, it's perhaps the most helpful in setting out what the video would have lost, what area of the video would have been captured, and also helps us out a lot with the Anne Sportun Jewellery Store video, which I'll turn to next.

Subsequent to this, and I take responsibility for having missed it too at the disclosure phase and at the preliminary hearing, but there was -- for some reason I got it mixed up with the clothing store which only points inside, but there was a VHS tape that was picked up by Umbrello and that's all in the second supplement. And the VHS tape was picked up by Umbrello, was noted in his notes, um, Ms. Middlekamp found it but I can indicate that the original, and I filed a whole bunch of the correspondence which is part of your disk with the many exhibits on it and the supplemental, but I've filed a series of correspondence to indicate that the copy that was given to defence on the DVD was

1507

Submissions Re: Lost Evidence Application
February 14, 2011

very difficult to read, and it was a lengthy section of notes, so you sort of -- you get what you can out of it and you get ten pages in and you give up and you write a letter to the Crown and say, Look, is there any chance there's a better copy of this? And after a couple of requests we got a better copy. By then, we can only speculate. Many months had passed. We can only speculate that this last minute search for the VHS tape, Detective Sergeant Giroux is sending everybody over to 14 to check their old desk, whether we would have found that video eight months after when we got our legible copy or not is anybody's guess, but the long and short of it is it's lost. And I had considered, with trying to do a little bit of what Detective Sergeant Giroux did in December and January, have been trying to evaluate the value, the investigative value, of the video as it existed in the Anne Sportun Jewellery Store. I would be going over and doing some sort of re-enactment, hooking up a video camera and then coming into this court and playing it, and of course whoever would have done it

5

10

15

20

25

1508

Submissions Re: Lost Evidence Application
February 14, 2011

would have been asked, How do you know it's the same depth, breadth, it just would have been a totally different animal.

5 So the best evidence as to what would have been captured was from this fellow, Brody Bigold who you have this interview at tab S, in audio form, and then at tab -- or Exhibit T in the Supplemental Application you've got a transcript of the
10 call and it was actually quite a detailed call and relevant portions start around page 4. I just wanted to take you through that quickly before the break.

THE COURT: Yes?

15 MR. SCARFE: Detective Giroux goes from page 4 all the way to 15, talking about the various cameras that existed at the time, and it bears some attention. So he talks about the first one we're speaking about, and he's
20 established in the first three pages that there were four cameras as part of one of these fourplex systems and so he starts talking about the various cameras, so we'll call it the first one, and that's in that
25 first section on page 4, and that is an east

1509

Submissions Re: Lost Evidence Application
February 14, 2011

side filming southwest. It's a camera that would reflect any images out on the street and Mr. Bigold replies that it does catch images of what happens on the street.

5

Going over to page 5, he's asked, or bottom of page 4, once -- Detective Sergeant Giroux wants to know how far out from the store it would have gone and he says:

10

"About ten feet and maybe, you know, five to eight feet west out of the front of the store."

And then he's asked:

"Right out onto the sidewalk?"

15

"Yeah."

Then at the bottom of page 6, after talking about a different camera:

20

"Okay, what about the first one, the first one you can clearly see people", referring to the street.

And then skipping ahead to the bottom of page 10, Giroux asks:

25

"Okay, okay. At night, are the

1510
Submissions Re: Lost Evidence Application
February 14, 2011

lights in the store left on?

And again, in the interest of robbery prevention, or are they sort of in darkness at night?

5 BIGOLD: Some of the lights are left on. Ah, we leave the window pot lights, the front window pot lights on, um, and also the cash desk lights on."

10 So then Detective Sergeant Giroux asks about what effect it would have, and it says:

15 "Ah, the light don't help that much. It does get a little blurry but you can still make out things."

20 And then flipping ahead to page 13, we go back to this area of how much of the front of the store would have been shown, and it said:

25 "Well, it would have shown, you know, the front five feet of the store and one of our chandelier cases of jewellery, but it also

1511
Submissions Re: Lost Evidence Application
February 14, 2011

5 looks out into the window and --
the window and door obviously
and it -- and a good -- like,
the -- it shows the entire
sidewalk", and then he adds,
"and out into the street."

10 And then the issue as to the
southwest angle, how far west would it have
shown, and you go down to the middle of page
14 where it says:

15 "It probably would have begun
out a few feet past the lights,
because you can see the base of
the lamppost.

GIROUX: You mean the
streetlights?"

20 "Yeah. The street -- base -- the
base of the streetlights from
that camera. I think it can go
just a couple of feet beyond
that from my memory. I'd have to
have another look."

25 Then he asks at the bottom of

page 14:

"Do you know how many feet it
would have gone in a westerly
direction from your door as you
walk outside?"

And again, he repeats:

"It would have gone a few feet
past the lights because you can
see the base of the lamppost.

Just a couple of feet beyond
that."

So that's important evidence, and
I will just put on the overhead projector
portion of the Elmo, what we've got here,
Your Honour, the Anne Spartun Jewellery Store
is on the right and you can't see from this
photo but it's somewhere in the photo,
exactly how far it goes, but what he's
describing, in my submission, is a camera
right over on the edge of the photo inside
the store, back and obviously up a little
bit, and it points at the door, which would
put it in the southwesterly direction. So of
course we could follow the shadow from the

1513

Submissions Re: Lost Evidence Application

February 14, 2011

5 alcove and try and determine how far west it goes and we would probably, extrapolating from this photo, come to the conclusion that it probably would only pick up that first placard that's circled that I'm pointing to right now.

10 What's interesting about Mr. Bigold's evidence is that, if he is telling the truth, and we have no reason to believe he isn't, is that this picture's kind of deceptive when you get to that, because Mr. Bigold remembers watching that video and he had the system for a number of years. He says that that camera shines through the glass and
15 the door and you can actually see the base of the first lamppost from that camera angle. So that increases substantially the value of that lost video and, again, we have little to no explanation for how it could have possibly
20 got lost. Just a whole bunch of I don't know and we gave it to Homicide. Homicide: We didn't get it. So it's something that should be of fairly significant concern to Your Honour when it comes to that second video.

25 The rest of the application goes

1514

Submissions Re: Lost Evidence Application
February 14, 2011

5 to some of the points I dealt with in trying
to get to the fact that the notes were
illegible and I suppose protecting myself
from criticism that I should have noticed
this sooner, and maybe it would have been
recovered, but in any event, there we are.

10 So that's all provided to you for
your reference as well as complete copies of
the various notes which I sort of did out of
an abundance of caution in case there's other
stuff, like in Raymond To's testimony.

15 Now, I've already dealt with the
evolution of how we got to charging Ms. Kish
on August 16th and Detective Sergeant
Giroux's denial, wholehearted denial, that it
had anything to do with the pressure being
put on him, but I filed that letter from --
or article from Natalie Alcoba where he's
20 quoted as saying he would work to block her
bail, and the Chris Eby footage that talks
about how the family, charges haven't been
upgraded, she's going to have her bail
hearing on Thursday, it's the same day the
family's going to have their funeral for
25 Mr. Hammond, and, you know, I think it's

1515

Submissions Re: Lost Evidence Application

February 14, 2011

5 reasonable to assume that any investigator,
lead investigator in any investigation would
feel it's a little bit of public pressure in
the course of a highly reported murder and
senseless death of a man that, you know,
that's just out for an evening and people
want results, and Ms. Kish was about to get
out on bail and maybe that should have been
conceded and he could have upgraded the
10 charges later, but here we are.

15 Now, before I leave the evidence,
because of this evolving theory, and just
forgetting about the argument of ID. Just for
the purposes of argument I will concede all
of the ID, just for the purposes of outlining
how important this evidence is. Five people
in this trial have referred to a fight on the
north side of the street and tried to put a
location on it. First you had Mr. Mir and he
20 -- he said two different things. He talked
about a girl on the ground, Mr. Hammond on
top of her in a sitting position, and he said
at one point just north of the two light
standards and at another point he said just
25 west of the two light standards. That area.

1516
Submissions Re: Lost Evidence Application
February 14, 2011

Ms. Gallately describes the two squares of the sidewalk during Mr. Thompson's skillful examination in-chief of her. He had her actually look at a photo with the lines in the concrete and it's the two boxes so to speak. Two squares of the sidewalk near the left side of the light standard. Half on the side, half on the road, with the guy in a fetal position, girl -- girl on top, two guys kicking.

Mr. Hailmeraian, the other cab driver, has a fight on the pavement near the light post.

Mr. Patsiopoulos, who rides up from Niagara on his bike, comes around the front of the streetcar and sees a fight on the pavement by the two telephone poles and then goes and helps Ms. Kish somewhere around 740 to 744.

And finally as the streetcar is pulling away, Ms. Stopford looks over and sees a friend, a lady I think in a white bra and a red -- who's taken off a red t-shirt, wrapping the arm injury, quote, "in front of the pasta place.

1518
Submissions Re: Lost Evidence Application
February 14, 2011

encourage you, in your review of the evidence
in the disk that you have there in your
computer, to look at the exhibits I, J, K and
L. Probably L is the best one. And that's the
5 -- where we've gone and strung the footage
together in front of the pasta and you have
people walking down the street and you can
see one angle and the other. It shows a lot.
It shows at least the shadows, right to the
10 curb, both light standards, or the -- at
least the far light standards there and a
shadow from the closer light standard is
there. And ask yourself, as I indicated in
paragraph 12, if at a minimum this footage
15 could reasonably be expected to have
captured: A, the location Mr. Hammond
travelled to and whether any individuals
encountered him on the sidewalk; B, better
quality images of the individual who is
20 lifting his shirt and the unknown individual
who touches the stomach area of that; C, the
images of the scuffle and the aftermath. I
mean, that pretty much would have been there
if -- if we can rely on these witnesses, but
25 it also could very well have -- and I don't

1519

Submissions Re: Lost Evidence Application

February 14, 2011

think we're speculating when we picked up the
the stabbing of Mr. Hammond happened right
there, it would be on that lost pasta video,
might also be on that lost VHS video. The
stabbing of Ms. Kish, don't know where that
happened but certainly if my friend is going
to rely heavily on the eyewitness testimony
we've heard, it's taking the position that, I
think, that Mr. Hammond is stabbed there or
at least she's a party to his kicking and
stomping beating, and that clearly would have
been there, but from Ms. Kish's point of
view, the absence of her participating, the
absence of her flailing her arms or having
any interaction, although Ms. Gallately's
original statement, would be easy to
ascertain from either of the footages if not
the actual standing there herself, but sort
of the manner in which she comes, the manner
in which she goes, what stage she gets
stabbed at, what stage he gets stabbed at,
the presence of any weapons, presence of
anybody else doing the stabbing, and these --
I just can't imagine anything more helpful
than that video.

5

10

15

20

25

1520

Submissions Re: Lost Evidence Application

February 14, 2011

5 And from where Mrs. Kish is
sitting, it's just absolutely outrageous to
her that, I mean, it's one thing when the
police don't realize there's video and they
don't go there and they've -- time runs out
and you realize later that it's all been over
written. Well, they actually went to the
trouble of going and seizing all of this
stuff because they've learned how important
10 it is in these investigations. And through
just horrible inventory, that's the story, is
it's mysteriously gone missing and you, you
know, justice not only has to be done but
appear to be done, and from where Ms. Kish is
15 sitting, it's awful hard for her to believe
that, ah, too bad for me. Some guy's made
some mistakes. They didn't mean it. Ah, but
here my exonerating evidence is all gone.

20 So referring to the caselaw and
I'm going to talk mainly about *Carosella, La*
and *F.C.B.*, but to just --

THE COURT: The video wouldn't have been that
helpful though if -- the stabbing had to have
occurred on the sidewalk.

25 MR. SCARFE: Sorry ?

1521

Submissions Re: Lost Evidence Application
February 14, 2011

THE COURT: For the video to be that helpful,
you have to assume that the stabbing took
place on the sidewalk.

MR. SCARFE: As opposed to the road.

5 THE COURT: Correct.

MR. SCARFE: Let me stew on that over the
break.

THE COURT: All right. We'll take a break.

10

---RECESS (11:33 a.m.)

---UPON RESUMING (11:53 a.m.)

15

THE COURT: Mr. Scarfe?

20

MR. SCARFE: Thank you, sir. Before I answer
your question asked before the break, I
referred to five witnesses. There were
actually six. Mr. Paget as well, as the
streetcar was leaving, looked and saw
something going on on the north side and
again some of the witnesses have the light
posts as the reference. Some of the witnesses

25

1522

Submissions Re: Lost Evidence Application
February 14, 2011

5 were clearer about whether this happened on
the sidewalk or the street than others. They
all used the light posts as a reference and
Ms. Gallately had it on the curb right on the
edge, but some of them, it wasn't actually
clear from our notes whether it was right on
the street, right on the sidewalk or right on
the curb.

10 Having said that, the value here,
number one, the people that we're looking at
have distinctive footwear. All that's in
evidence. Ms. Kish is said to be wearing a
very long skirt and greenish brown sneakers
and that would have been distinguishable from
15 a pair of cargo pants, Doc Martin boots, and
certainly just shaping of legs you'd probably
be able to tell the difference between men
and women. Even at the outer edges of the
video. So that's the first thing I wanted to
20 say.

25 The second thing I wanted to say
is that even if this does take place out on
the street a little bit more, it doesn't mean
that nothing can be learned from the area
covered by the sidewalk. It may very well be

1523

Submissions Re: Lost Evidence Application

February 14, 2011

5 that the fight is taking place out on the street and Ms. Kish is just standing on the sidewalk complaining, screaming that she's been stabbed, and that would be very useful evidence for Your Honour to show an absence of interaction.

10 So I hope I've addressed your questions both by the height, even if all we can see is the people's feet, and the fact that there are a whole bunch of surrounding circumstances, even if the actual stabbing isn't caught on the video itself. Certainly people running away, people running away with weapons, people bleeding, ah, the aftermath or the leading up to, a lot can be gleaned, even though the particular moment doesn't happen right in the box.

15 THE COURT: I suppose, but what we do have is surveillance video that looks westward and it doesn't assist much, I suggest, in terms of helping us know what happened before.

20 MR. SCARFE: Before. As opposed to during or after.

25 THE COURT: Well, doesn't help us much even during.

MR. SCARFE: Well, it certainly doesn't help us with what happened on the south side of the streetcar, it doesn't help us with Mr. Hammond interacting with the taxis and anything that happens out on the street specifically, but it seems fairly clear to me that there's -- my friend's relying on, and maybe he'll correct me, what happens either right on the sidewalk or right at the edge of the sidewalk, and that would have been captured clearly by the video, if I understand Your Honour's comment.

THE COURT: I'm not sure I accept the statement that it would have captured that clearly. It might have captured something.

MR. SCARFE: Mm-hm.

THE COURT: It might not have.

MR. SCARFE: Okay. Fair enough. I'm going to turn to the law now, and as I started to indicate, I'm really only referring to three or four cases as far as principle goes.

Our research indicates, and I stand to be corrected, that this is a pretty unique situation. There's not a whole lot of cases on point here. I know that, so before I

1525

Submissions Re: Lost Evidence Application

February 14, 2011

5 get to the three main cases, the rest of the
casebook deals with the difference between
where I think a statement goes missing as per
the typical historical sexual assault and
they go back to investigate and something's
gone, and there is a lot of cases in there
from the New Market video catastrophe. Before
the new system they kept losing booking
10 videos and breathalyzer videos from
impaireds. Those cases are in there to
highlight the difference between statements
and videos, and it's best put in that famous
three or four paragraph passage that's often
cited from *Nikolovski*, which I'll spare you
15 the reading of, but *Nikolovski* was a robbery
case and there's a lot of talk in there about
just how important video evidence was in a
case like that.

20 Now, in my original factum I made
a mistake, and the mistake I made was between
paragraphs 57 and 62, and I was mistaken on
the law in the sense that I suggested that in
order to qualify for a stay, I actually had
to show evidence, whatever standard, that
25 this happened intentionally. I was incorrect

about that, and I take you to the famous passage in *La* which is at tab 4, Volume 1, and you'll indulge me, I'm just going to read the first part of paragraph 20.

5 "This obligation to explain" -
 explain the loss of the video -
 "arises out of the duty of the
 Crown and the police to preserve
 the fruits of the investigation.
10 The right of disclosure would be
 a hollow one if the Crown were
 not required to preserve
 evidence that is known to be
 relevant."

15 Skipping down to paragraph 21:

 "In order to determine whether
 the explanation of the Crown is
 satisfactory, the Court should
20 analyze the circumstances
 surrounding the loss of the
 evidence. The main consideration
 is whether the Crown or the
 police (as the case may be) took
25 reasonable steps in the

1527
Submissions Re: Lost Evidence Application
February 14, 2011

5 circumstances to preserve the
evidence for disclosure. One
circumstance that must be
considered is the relevance that
the evidence was perceived to
have at the time. The police
cannot be expected to preserve
everything that comes into their
10 hands on the off-chance that it
will be relevant in the future.
In addition, even the loss of
relevant evidence will not
result in a breach of the duty
to disclose if the conduct of
15 the police is reasonable. But as
the relevance of the evidence
increases, so does the degree of
care for its preservation that
is expected of the police."

20
So in paragraph 22 we address the
issue of the breach and the abuse of process,
and:

25 "What is the conduct arising
from failure to disclose that

1528

Submissions Re: Lost Evidence Application
February 14, 2011

5 will amount to an abuse of
process? By definition it must
include conduct on the part of
governmental authorities that
violates those fundamental
principles that underlie the
community's sense of decency and
fair play. The deliberate
destruction of material by the
10 police or other officers of the
Crown for the purposes of
defeating the Crown's obligation
to disclose the material will,
typically, fall into this
15 category. An abuse of process,
however, is not limited to
conduct of officers of the Crown
which proceeds from an improper
motive." Then it refers to
20 *O'Connor*.

"Accordingly, other serious
departures from the Crown's duty
to preserve material that is
25 subject to production may also

1529

Submissions Re: Lost Evidence Application

February 14, 2011

5 amount to an abuse of process
notwithstanding that a
deliberate destruction for the
purpose of evading disclosure is
not established. In some cases
an unacceptable degree of
negligent conduct may suffice."

10 "In either case, whether the
Crown's failure to disclose
amounts to an abuse of process
or is otherwise a breach of the
duty to disclose and therefore a
15 breach of s. 7 of the *Charter*, a
stay may be appropriate remedy
if it is one of those rarest of
cases in which a stay may be
imposed."

20 So hopefully that corrects my
error. It's far from needing to establish
deliberate.

25 Interesting question raised about
the relevance of the evidence at the time.
Clearly we have it in evidence that Detective

1530
Submissions Re: Lost Evidence Application
February 14, 2011

5 Scott thought the video was valuable. He
asked someone to go and get it right away.
Even when they watched it on August 28th,
Detective Carbone thought it was valuable and
assisted in the investigation. We spent quite
a bit of time on it. It was one of the first
exhibits filed by the Crown. We went through
and picked out numerous number of unknown
people, potential other suspects, to try and
10 get a feel for what's going on in the street
there. Was it as valuable at the time because
at some point the investigation focused on
the south side of the streetcar? I don't
think anybody suggested that -- oh, we don't
15 need this anymore because clearly we think
something happened on the south side of the
streetcar, but if the value is on the south
side of the streetcar, and we get back to 15E
and the fact that the majority of the blood
20 and the physical evidence suggested bleeding
and blood spatterey [sic] type stains on the
north sidewalk, and the fact that those
evidence placards were all done the first
night and recorded and measured and stuff,
25 suggests that certainly the north side was

1531
Submissions Re: Lost Evidence Application
February 14, 2011

not something to be, ah, ignored.

5 So essentially the principle that
underlines is set out in *Carosella*, where a
stay was granted. It's sort of the hallmark
case. This was not a video, this was notes
from a sexual assault centre that were
deliberately destroyed and obviously the
deliberate destruction weighed heavily in the
Court's mind, but destroyed deliberately or
10 through unacceptable negligence I think I've
addressed that in *La*.

What I want to point you to
though is paragraph 55 and 56 of *Carosella*,
where it reads that it is:

15 "An additional important factor
is the absence of any
alternative remedy that would
cure the prejudice to the
ability of the accused to make
20 full answer and defence. No
alternative remedy was suggested
by the Court of Appeal. This is
one of the two factors mentioned
by L'Heureux-Dube in the portion
25 of her reasons which I have

1532
Submissions Re: Lost Evidence Application
February 14, 2011

referred to. The other factor is
the irreparable prejudice to the
integrity of the justice system
if the prosecution were
continued."

5

And the important part here is
paragraph 56:

"These two factors are
alternatives. The presence of
either one justifies the
exercise of discretion in favour
of a stay."

10

So just to flush out the basic
Carosella principle. And then I wanted to
refer you to as well, and I won't read it all
into the record, is tab 5, *F.C.B.*, at
paragraph -- page 6 I guess in the Quicklaw
printout here. And here it talks about the
approach that the judge should take in
determining whether or not a stay is the
appropriate remedy and the various steps that
you go through.

15

20

25

So is this the clearest of cases?

1533

Submissions Re: Lost Evidence Application

February 14, 2011

I can refer back to the argument section of my original factum which I think says it better than I could right now. My view, in my submission, pretty clear, but I'm going to leave that for Your Honour. If Your Honour finds that this is not the clearest of cases, where does that leave us. And for that I refer to paragraph 60 of my original factum, the last two bullet points where we deal with alternate remedies. When this application began we thought we were having a jury trial so we listed a stay followed by a non-jury trial and then in the event that either of those alternate remedies were unavailable, something akin to an adverse inference. And what I've indicated in the last two bullet points are still in play here, even though we are not working with a jury. At the end of this case, Your Honour has to decide, weigh the evidence and come to a determination, about whether Ms. Kish is guilty of anything, and weighing the evidence, if you had a jury, one of the options available to you under 24(1), which gives you many, many, many options, is to instruct yourself as you would

5

10

15

20

25

1534

Submissions Re: Lost Evidence Application
February 14, 2011

5 a jury that the -- that you be given -- give
yourself strongly worded instructions that
the prosecution is responsible for the
absence of these two surveillance videos,
that the defence cannot be blamed for this
evidence being missing, that the police
failure here has hurt the applicant's ability
to defend herself at this trial, and an
10 explanation of how the applicant's ability to
make full answer and defence may have been
affected. And then as you would instruct
yourself normally from *Lifchus*, but with
emphasis here, about how a reasonable doubt
must be premised in the evidence or in the
15 absence of evidence.

20 So if Your Honour finds that this
problem, this loss of video, in your view,
does not make out what's called the clearest
of cases, you have other options available to
you in how you assess this evidence. To say
there is no remedy available would be wrong,
but Your Honour can instruct yourself by
essentially using an adverse inference may --
may be tantamount to and acquittal, but
25 that's fine with me as well, so I just ask

1535

Submissions Re: Lost Evidence Application
February 14, 2011

you to be creative when you're considering where rely with respect to your various options with respect to 24(1).

Subject to any questions Your Honour may have about anything I've said, those would be my respectful submissions.

THE COURT: Thank you.

MS. MIDDLEKAMP: Your Honour, I'm prepared to make submissions now.

THE COURT: Thank you.

MS. MIDDLEKAMP: If I can just have a brief moment to sort of set up my binders and et cetera.

Your Honour, for the Application Record, what I propose to do is just highlight the portions of the Application Record which I submit are relevant to the determination of the application, but as well, I know Your Honour's had an opportunity to read the Respondent's Factum.

THE COURT: I have.

MS. MIDDLEKAMP: And so I also rely on the facts as outlined in that factum.

My friend took you through Detective Scott's evidence, and that's with

1536

Submissions Re: Lost Evidence Application
February 14, 2011

respect to the supplementary application,
including the transcripts from the
preliminary inquiry. My friend went through
some of the details but there's a few details
I'd like to take you through as well.

On page 576 of his transcript,
and I don't propose to read it verbatim. I
will just give you the page numbers and you
can reference it later if you require that.
On page 57, Detective Scott's impression
before viewing the One of a Kind Pasta video
was that it showed the stabbing of
Mr. Hammond, and I'm indicating that to Your
Honour, that he goes in and he views that
video with that impression, and I think
that's important to highlight because if he's
under the impression that the actual offence
is on the video, I would submit that he would
pay careful attention to what he viewed.

On page 59 of his testimony he
talks about how he went to Mr. To's apartment
with Detective Constable Umbrello. On page 60
he testifies about how Mr. To had the video
cued up, and after he watched it he told Mr.
To to leave it alone and that he would come

1537

Submissions Re: Lost Evidence Application
February 14, 2011

and get an expert to take the data off of the video. He also testified that he watched only one view, and at page 62, that he watched it for one minute, maybe two.

5 Further on page 62 he testifies about what he saw on the video and he said that he described it as a scuffle. There were a group of people that he couldn't identify scurrying around bumping into each other. He
10 does remember a fellow on a bike and a man without a shirt on, and I would just at this point like to submit to Your Honour that we do see a gentleman on a bike and a man without a shirt on on the westbound camera
15 that was recovered. Detective Scott testifies that at the time he believed that it was Jeremy Wooley, but he could not recognize him in the video.

20 At page 63 of his evidence he testified that the non-lost portion of the video in his opinion was way better. You could see Mr. Wooley's face and he testified that, again, that he was able to see Mr. Wooley in the video and that the person on
25 the bike also appeared on that video.

1538

Submissions Re: Lost Evidence Application
February 14, 2011

5 On page 64 he testified that he
did not see Ross Hammond in the video that he
watched in Mr. To's store. He, again, he goes
on to talk about seeing a scuffle, a group of
people moving in and out of the frame, but
you couldn't determine who they were. He
testified that the most consistent person in
the video was the man on the bike and the
shirtless man.

10 On page 65 he testified that
people came in and out of the screen from the
bottom. He testified that he did not see
people on the ground. He said it was people
banging into each other trying to go in
15 different directions at the same time,
bouncing off and moving back out of the
frame. He testified on page 65 that he would
have noted if he saw any weapons, but he
didn't.

20 Page 66, he testifies about not
wanting to delete anything on the system so
he felt that it would be best to have the
expert come and take the data.

25 On page 70, he again indicated
that the video facing westbound is much

1539

Submissions Re: Lost Evidence Application
February 14, 2011

better for identifying who is in the shot and
he also testifies about having seen
Mr. Hammond in the westbound portion of the
video.

5 At this point I just want to sort
of address one of my friend's submissions
regarding sort of the police motive to
subvert or not provide the evidence, or a
fabrication of what they saw, and I'm asking
10 Your Honour to consider that if Detective
Scott was fabricating his evidence about what
he saw on the video, he would have said that
he watched the whole thing on a number of
occasions rather than just one, and I would
15 submit to you he wouldn't have been as candid
with the Court in indicating, I saw a minute,
maybe two. So if there was some motive on his
part to sort of somehow get around the fact
that the video was lost, I would submit he
20 wouldn't have testified in the fashion that
he did.

 The next transcript that I'd like
to take you through briefly, Your Honour, is
Detective Constable Umbrello's evidence.
25 That, his preliminary inquiry transcript, is

1540
Submissions Re: Lost Evidence Application
February 14, 2011

at the defence supplementary application at
Exhibit W.

On pages 62 and 63 of that
transcript, Detective Constable Umbrello
5 testified that on August 9th, he went to Anne
Sportun Jewellery and that he obtained a VHS
tape from that store, and I know my friend
has talked about this earlier, that the
parties were alive to the issue of the Anne
10 Sportun video when we were at the preliminary
hearing stage and as well my friend filed the
notes of Detective Gallant today as well and
highlighted the fact that Detective Gallant's
notes indicate that there was reference to
15 the Anne Sportun video on the briefing of
September 10, 2007, so it's just my
submission that the notes were available and
parties were on notice that the video was
there. And the reason why I highlight that is
20 just to say, for Your Honour to consider the
defence letters regarding Detective Constable
Umbrello, that they weren't clear. There were
other ways that it was noted that they could
have found that out.

25 The one thing I actually forgot

to mention - I apologize - from Detective Scott, he was also asked about the Anne Sportun video at the preliminary page 39, and he talks about taking a VHS tape on page 56.

5 Page 65 of Detective Constable Umbrello's testimony, he testified that he did not watch the VHS tape that was seized from Anne Sportun. He then continues to testify about how he and Detective Scott had received information about the One of a Kind Pasta video.

10 On page 74 he talks about Mr. To having played a portion of the video and that Detective Constable Umbrello stood there to watch it and to determine whether there was anything relevant on it. He testified on page 15 75 that himself and Detective Scott only watched one view and that they were concerned about damaging the video, so they told Mr. To that they would get one of the tech guys to come down and seize the video. He did also testify on page 20 75 that he remembered that the video was facing east towards downtown.

25 On page 76 he describes what he saw in the video. He says in the bottom part

1542

Submissions Re: Lost Evidence Application
February 14, 2011

of the video he saw someone with no shirt. He also saw a guy with a bike and a couple of other people milling around, but he wasn't able to identify who was there. He testified that the people were interacting with each other, there did not appear to him to be a struggle or an altercation. He could tell something had happened because it was more of a chaotic meeting. On page 77 he said there was no pushing and shoving. He saw a guy with no shirt and a guy on a bicycle, that he couldn't identify the people because of the angle. According to Detective Constable Umbrello the behaviour of the people appeared to him that something had already happened by the demeanor of the people and how they were communicating.

On page 78 he testified that the people appeared concerned. When asked about how long the portion was of the video that he watched on page 79, he testified he could not remember how long it was, but that he considered it sufficiently important to seize it and that Tech Crimes or Video Services would provide a technician that would come

1543

Submissions Re: Lost Evidence Application
February 14, 2011

5 down and deal with it. Again, just looking at
the -- I would say that their testimony was
candid with respect to what they saw with
respect to any limitations of what they
observed, and that they can sufficiently
recall what they saw in the video to be able
to advise the Court about that.

10 Next I'd like to take you through
Detective Sergeant Giroux's preliminary
inquiry testimony. That's in the defence
supplementary application at Exhibit V. Page
31 through 32, Detective Sergeant Giroux is
questioned regarding a briefing with
15 Detective Scott and indication of a possible
other victim seen on the One of a Kind Pasta
video with a possible stab wound. Nothing in
notes re: having seen the stabbing on video
or any weapons or anyone on the ground. So
Detective Sergeant Giroux didn't note
20 anything of that but he did note that he was
advised that Detective Scott had seen the
video, everyone's on notice that this video
was out there.

25 Page 41, they speak about
Detective Sergeant Giroux having gone on

vacation as of August 17, 2007, returning on
September 4, 2007.

Regarding the upgrade of the
charges against Ms. Kish, he advised at page
43 that the decision was made after the
interviews of Ms. Stopford and Mr. Paget.

On page 60 he testified that at
the time that the video was given out he
thought that it captured everything that had
come out of that particular camera. He wasn't
aware at the time that there were two
cameras. He also indicated that they have a
unit specifically designed for that purpose
of downloading that type of information.

On page 62 he talks about how he
doesn't completely understand the process in
capturing the material but that Detective
Constable Olver had indicated to him that he
completed the request, gathered the
information and provided it to him.

On page 63 he testifies that he
knows now that it shows -- or he knows that
it shows camera one and camera three but that
when he viewed it he thought that he had
moved to the material time and looked at the

1545
Submissions Re: Lost Evidence Application
February 14, 2011

5 events in and around the stabbing. When asked whether he had an explanation for having seen the memo page and not noting that there might be a problem, he indicated it is not his investigative background, he is not an expert in the area, he directed somebody to do it and reasonably believed that everything was there that was available for capture.

10 He was asked about testifying -- asked about seizing hard drives but he indicated that that was before they had a dedicated section which was the Tech Crime section that we've heard about.

15 As well, at the bail hearing transcript that was provided, Detective Sergeant Giroux's evidence, this is referenced directly in my friend's factum as well, at page 19 he indicates that the police traditionally seize video and that he has had his staff review the video and it only shows the aftermath of the fight. It's not relative to the -- it's not relevant to the narrative but it is helpful in that it shows Ms. Kish being tended to after she received her injury
20 in the incident, but other than that, what he
25

viewed did not show the narrative of what took place. He indicates that that is the video that is helpful.

5 And the reason why I'm highlighting that to Your Honour is that at the bail hearing, Detective Sergeant Giroux was candid about how there was a video available and it had been viewed, and he gave his opinion of what he thought was on the
10 video. There was no attempt by anybody to conceal the fact that there was video that was located at One of a Kind Pasta.

15 As well at page 21 of the bail hearing testimony, he said that he put a great deal of stock into the statements from Mr. Paget and Ms. Stopford that Ms. Kish intervened with a knife in the fight between Mr. Hammond and Mr. Fresh, so he's talking about the investigative steps that he took to
20 learn about what happened, and he placed importance on the witness testimony that he had received, or the witness statements that he had received.

25 My friend also included in his supplementary application materials Exhibit

1547

Submissions Re: Lost Evidence Application
February 14, 2011

5 N, a transcript of the press conference from
Sergeant Giroux on August 17, 2007. On page 1
of that transcript Detective Sergeant Giroux
notes that interviews are being done,
evidence is still being collected from the
area which included videotapes and
photographs. At page 2 he is given a question
by the media about videotapes and photographs
and he indicates that they are looking at
10 surveillance videotape from area stores on
Queen Street. So "stores", plural. On page 2
he notes that he is basing the prosecution on
witnesses who made observations of the event
as it unfolded.

15 If Your Honour does take a look
at the transcript, if you compare it to the
audio which I believe might be -- just a
brief indulgence. It's my position that the
transcript is "area store" on Queen Street
20 but that it actually says "area stores", in
the plural, and --

THE COURT: Detective Giroux is operating on
incorrect information.

MS. MIDDLEKAMP: Regarding?

25 THE COURT: The fact that the Pasta video has

1548

Submissions Re: Lost Evidence Application
February 14, 2011

been reviewed, when it hadn't in fact been reviewed.

MS. MIDDLEKAMP: When he's testifying on September 4th?

5 THE COURT: No. When he's talking about the events in and around the actual killing.

MS. MIDDLEKAMP: Well, he doesn't say that it's been reviewed. He indicates that they are looking at surveillance videotape from area stores, so that they're in the process of collecting information. When he testifies at the bail hearing on September 4th he's advised that it's been viewed.

10 THE COURT: By who?

MS. MIDDLEKAMP: I understand from his preliminary inquiry as well that he had done it, but he also indicates that he had staff view it as well.

15 THE COURT: But no one notices the fact that they've only got the one angle.

MS. MIDDLEKAMP: That's correct. Yes. So the audio file is Exhibit M, and the transcript is Exhibit N.

20 As well, Your Honour, my friend
25 took you through the transcript of the

1549

Submissions Re: Lost Evidence Application
February 14, 2011

statement of Brody Bigold. That was a
statement taken in 2011. As indicated by my
friend, Detective Sergeant Giroux asks Mr.
Bigold questions about cameras that he has
within the store. When he's talking about the
camera at the front, so we can call that
camera one as my friend spoke about on page
3, he talks about how that camera was
probably five feet back from the window,
angled to shoot in a southwest direction. He
also indicated on page 3 that the cameras are
for robbery prevention. Continuing into page
4, predominantly for store protection but
does capture images on the street. On page 4,
as my friend indicated, he said it probably
went ten feet out from the store. On page 5,
when he's asked for a bit more detail about
that, he describes that it went ten feet
south and maybe around five to eight feet
west of the store front onto the sidewalk. On
page 7 he testifies that with the first
camera, that you can see people on the
street. On page 9, he talks about how he
switched over to a digital system about two
years ago and that he would rotate the VHS

5

10

15

20

25

1550

Submissions Re: Lost Evidence Application
February 14, 2011

tapes that were contained in the system until the time that they got worn down, so he would have a tape for Monday, Tuesday, Wednesday, Thursday.

5

On page 11, as my friend took you through, indicating that the pot lights are on at the front at the night and that the reflection does not help the quality of the video. Things get a little blurrier but he did say that you can still make out things. However, he indicated as well that he does not have any infra-red on his camera.

10

Page 13, Mr. Bigold indicated that the equipment was not maintained by a qualified technician very frequently. As well on page 13, he talks about the fact that -- or talks about camera one having shown the front five feet of the store, within of the display cases, but also looking out onto the window and showing the entire sidewalk into the street.

15

20

Page 14 he says the camera would go a couple feet past the streetlights and that when he was specifically asked by Detective Sergeant Giroux, how far west would

25

1551

Submissions Re: Lost Evidence Application

February 14, 2011

the camera go, and this is on page 15, so on the bottom of page 14 into 15, Detective Sergeant Giroux asked the question, this is a preamble:

5 "Do you know how many feet it would have gone in a westerly direction from your door as you walk outside?"

10 Bigold, he says: "I'd say maybe five feet."

15 And then Detective Sergeant Giroux starts asking him about the eastbound direction and he says that it would -- on page 16 that it basically terminates where the store terminates.

20 On page 16 as well he's asked a little bit more about that camera and he says that the camera was predominantly to -- in case somebody breaks the glass in the window and tries to steal something from there.

25 On page 17 he also says that it was oriented to catch a face shot of someone coming in or out of the store, and we can assume from that the doorway of the store.

1552

Submissions Re: Lost Evidence Application
February 14, 2011

5 And Your Honour, my friend also
took you through the preliminary inquiry
testimony of Raymond To. That's in the
Supplementary Application Record at Exhibit
Z. On page 136, Mr. To was asked about the
location of the fight when he saw the man on
the ground. He indicated it was basically
between the garbage bags and the front door,
basically under the hanging sign of One of a
10 Kind Pasta. And that's at page 136.

15 My friend also indicated, and
there are some differences between what
Detective Scott and Detective Constable
Umbrello say regarding the watching of the
video, but again, I ask Your Honour to
consider if they -- I would submit that it's
possible that Mr. To was mistaken regarding
the number of times that they watched it
because, again, if they were trying to
20 increase their -- the level of their evidence
or what they were saying to the Court, I
don't think they would have been so candid in
terms of saying that they watched one view
and they watched it once.

25 And as well, it's possible Mr. To

1553
Submissions Re: Lost Evidence Application
February 14, 2011

is mistaken regarding the expert coming back,
or that it was the same expert on that case.
Detective Constable Umbrello testified that
he dealt with Mr. To before regarding video,
5 so there is a possibility that there was
another situation where somebody came back to
deal with him with respect to video. It is
clear that Detective Constable Olver does go
back about a year later, again, once notified
10 by defence that there was a problem with the
video. He notes at that point in time that
the length that the video is kept for is
approximately 12 days.

And there may be some other parts
15 of the Application Record that are referred
to but if Your Honour is agreeable, I will
refer to it while I'm making my submissions.

What I'd like to turn to now,
Your Honour, is the testimony at the trial,
20 and as indicated by my friend, we have heard
from a number of witnesses regarding the
location of the fight on the north side.
Laura Quigley testified that the fight was in
the middle of the street towards the north
25 sidewalk. She testified that Ms. Kish was

1554
Submissions Re: Lost Evidence Application
February 14, 2011

brought from the middle to the north side
when the fight ended.

Mr. Paget believed that the fight
on the north side was taking place near the
light post. He saw a more well-dressed person
on his back in a turtle position protecting
himself.

Wossen Hailmeraian testified that
the fight was on the north sidewalk and came
into the street. He said the fighting was
near the stores and that the man on the
ground managed to come into the street.

Mr. Patsiopoulos testified there
was an altercation in the intersection. He
said the fighting was a bit on the pavement
near the pole that supports the traffic
light, and he said that was roughly where he
recalled the altercation. So again, an
estimate. And he put it at the east of the
second traffic post, right at the edge of the
sidewalk and into the curb lane.

Melissa Gallately saw the fight
on the north side. She indicated it covered
the two squares of the sidewalk where the
light posts are. Indicated both squares and

1555

Submissions Re: Lost Evidence Application

February 14, 2011

5 said that the gentleman on the ground was on the edge of the sidewalk parallel to the sidewalk on the edge closer to the street, in between the two light standards. She did, however, say that the aggressors were on the sidewalk. The victim was half sidewalk, half road.

10 Taj Desilvia said that the fight on the north side was at the set of lights, had moved from the sidewalk into the street where a cab was parked, and then back to the sidewalk again.

15 Saad Mir pointed out an area a bit north of where the traffic lights are and a little bit west. Then when he was asked to circle it again, he went on the east side.

20 I would submit we can take from that the majority of the witnesses were not precise in the exact location they were using the photos, however, the majority testified that the fight was at the edge of the sidewalk and spilling out into the street.

25 Detective Sergeant Giroux's testimony at the trial was similar to the preliminary. He indicated that he thought

1556
Submissions Re: Lost Evidence Application
February 14, 2011

Detective Constable Olver had captured all the relevant footage. He had gone back to One of a Kind Pasta and had an FIS measure the sidewalk squares. He also did a test video. He measured -- had him -- the distance measured between One of a Kind Pasta and Anne Sportun and he said door-to-door that was 39 feet.

Regarding the Anne Sportun video, again, he testified regarding the practice of turnover, that the VHS tape was placed in a box that was to be turned over and Detective Sergeant Giroux indicated he did not receive that tape. As well he conducted the phone interview with Mr. Bigold. He tried to determine if Mr. Bigold still had a copy and he learned through the phone interview that they had changed their system. He phoned Video Services and the Property Bureau to look for the tape. He detailed Detective Constable Umbrello to look for it and was not successful. My submission is it was an error in the transfers of the file from 14 Division to Homicide.

I'd like to review Exhibit 10 at

1557

Submissions Re: Lost Evidence Application
February 14, 2011

5 this point. If we could look at the westbound
camera? Your Honour, we're going to attempt
our best to start the video at around 12:28.
This is camera one which is facing in a
westbound direction. So just for the record,
we're starting it at 12:27 and 40 seconds.

10 ---VIDEO PLAYING

15 MS. MIDDLEKAMP: At this point, Your Honour,
we can see that there doesn't appear to be
any activity in the screen. We've got the
garbage bags in the left-hand corner of the
image. If we could just pause it at -- here.
And Your Honour, evidence you've heard,
Mr. Hammond appears on the screen at
approximately 28:07. He is coming from south
20 to north and if we just continue until he
disappears from the screen, actually if we
can pause it there? It appears at this point
that he's directing his attention towards
individuals that are on the south side of the
25 street. He may be saying something, and this

1558
Submissions Re: Lost Evidence Application
February 14, 2011

is at 28:-- 12:28 and 11 seconds. We will
continue from there.

5 ---VIDEO PLAYING

MS. MIDDLEKAMP: At 12:28:12 Mr. Hammond
disappears from the screen and he goes to the
10 southeast. We'll continue.

---VIDEO PLAYING

15 MS. MIDDLEKAMP: There doesn't appear to be
anything in the image now.

20 ---VIDEO PLAYING

MS. MIDDLEKAMP: If we can pause it there.
It's my submission that at 28:58 we see a
25 gentleman in a blue jacket running through

1559

Submissions Re: Lost Evidence Application

February 14, 2011

the screen from west to east. I would submit
at that point -- sorry. If we can just keep
going. At 28:58, pause it there, the
gentleman is out of the screen. I would
submit we can assume that there's not a fight
happening directly on the other side of the
camera. The gentleman isn't going to run, we
can assume on common sense, the gentleman's
not going to run right into the fight. At
28:58 on the top of the corner we see there
is a bicycle that's going to come into the
screen.

---VIDEO PLAYING

MS. MIDDLEKAMP: The gentleman at 29:04 has
now stopped his bicycle. He's in the middle
of the view of the camera. He appears to be
looking around. He's looking in a southerly
direction.

---VIDEO PLAYING

1560
Submissions Re: Lost Evidence Application
February 14, 2011

MS. MIDDLEKAMP: Another woman walks through
the screen and in an eastbound direction.

5

---VIDEO PLAYING

MS. MIDDLEKAMP: 29:18, if we can just pause
it? At 29:18 the gentleman on the bike
leaves the screen. He goes west. And then at
29:21 we see the gentleman in the blue jacket
who we saw running through the screen before
coming again in an eastbound through
westbound direction, walking directly on the
sidewalk within the camera range.

10

15

20

---VIDEO PLAYING

MS. MIDDLEKAMP: If we can pause it there.
That's between 29:25 and 29:26 we can see a
shadow near the eastbound sidewalk moving

25

1561
Submissions Re: Lost Evidence Application
February 14, 2011

from east to west near the garbage bags,
which I submit are not visible in the
eastbound camera. If we could continue.

5

---VIDEO PLAYING

10

MS. MIDDLEKAMP: You still see the shadow
right directly beside the garbage bags,
moving a little bit easterly. By 29:33:34,
the individual -- or the shadow is not
visible in the camera. Sorry. If we can pause
it there. Sorry. At 29:36 we also see a
shadow in the second half of the concrete
square near the garbage bags and at 29:41,
that shadow has disappeared.

15

20

---VIDEO PLAYING

25

MS. MIDDLEKAMP: If we can pause it at 29:51.
We see an individual walking through camera
range from east to west directly on the

1562

Submissions Re: Lost Evidence Application

February 14, 2011

5 sidewalk. It's my submission, again, that if
the fight was right on the sidewalk, it's not
a common sense inference that a person would
walk directly through an altercation such as
the one that we have heard described by
witnesses.

10 ---VIDEO PLAYING

15 MS. MIDDLEKAMP: By 29:53 -- sorry, pause it
there. That individual is now just
proceeding out of the camera view in a
westbound direction. At 29:53 we see a
gentleman in blue wearing a baseball hat with
a woman, or sorry, a gentleman with a blue
baseball hat and a woman wearing a blue shirt
20 passing through the camera view again on the
sidewalk passing directly from an east to
west direction. I submit the same inference
is available. As well the individuals appear
to be looking in a southerly direction.

25

1563
Submissions Re: Lost Evidence Application
February 14, 2011

---VIDEO PLAYING

5 MS. MIDDLEKAMP: If we could pause it there.
By 29:58 they are out of the camera view, and
I believe at 29:58 there is a shadow in the
southeast corner, near the garbage bags, and
that shadow disappears in a southerly
10 direction.

---VIDEO PLAYING

15 MS. MIDDLEKAMP: If we could pause it there.
We see the woman in the blue jacket. She is
returning back into the camera range and --
and that's at 30:22, and if we continue, we
see that she looks and turns around and walks
20 in the opposite direction, leaving the screen
at about 30:27. If we can pause it there, and
this is at about 30:31 to 30:32, we see a
shadow standing on the sidewalk near the
garbage bags which I would submit are not
25 included in the eastbound camera, and this

1564
Submissions Re: Lost Evidence Application
February 14, 2011

individual later is shown to be Doug Fresh.
If we can continue with the video?

5 ---VIDEO PLAYING

10 MS. MIDDLEKAMP: We can see that the group of
people on the left-hand portion of the video
closer to the garbage bags is expanding. We
see Mr. Fresh at 30:42 entering into the
screen, and I submit from there on the group
congregates on the north side of the street.
15 It's my submission at that point, Your
Honour, that the altercation is over. So we
can pause the video there, ending it at
30:54.

20 Your Honour, as well, the
testimony on the application today, Detective
Carbone, I would submit it's reasonable that
he didn't notice when he watched the camera
that there were two cameras. He's talked
about that he's not a big computer person,
doesn't know that much about them. He thought
25 that the two views had looked the same and I

1565

Submissions Re: Lost Evidence Application
February 14, 2011

would submit that's reasonable. He's being candid with the Court. He's not an expert in computers.

That's what I want to cover at this point from the application record.

So if I could just take you through some of the caselaw with respect to lost evidence.

My friend read to you from *La*, the Supreme Court of Canada case. It's at his Book of Authorities at tab 4. I submit there's three ways that you can get to a breach of Section 7, or an abuse of process for lost evidence: If the explanation by the Crown for the lost evidence is unsatisfactory, or if the loss of the evidence amounts to an abuse of process, or if the explanation is satisfactory that the evidence is so important that it renders a fair trial problematic.

And I also agree with my friend that *R. v. B. (F.C.)* at the Applicant's Book of Authorities at tab 5 does provide a useful authority for the principles for evaluating a claim of lost evidence, and they took -- a

1566

Submissions Re: Lost Evidence Application

February 14, 2011

summary was taken from *R. v. La*, and if I can use that as a guide I can make my submissions with respect to it.

5 So they have about nine points that are in there, and one of the last points in that table, and that's at -- was at page 6 of 12 in that case of *R. v. B. (F.C.)* [2000] Nova Scotia Judgments, No. 53. That's a Court of Appeal decision. And number ten on
10 that list they talk about the ability to assess the degree of prejudice resulting from the lost evidence. It's preferable to rule on the application after hearing all the evidence, and that's what we've done in this
15 case, so that's not a concern for us in terms of looking at those considerations.

20 THE COURT: Well, it raises the issue that has been coming back and forth to me, and that is whether, when the Supreme Court of Canada refers to hearing all of the evidence, they mean all of the Crown, prosecution's evidence, or all of the evidence. If the defence is going to call evidence, then we haven't heard all of the evidence.

25 MS. MIDDLEKAMP: That's correct, Your Honour,

1567

Submissions Re: Lost Evidence Application
February 14, 2011

and they do talk about that in the caselaw,
that, for example, if Your Honour were to
rule in some fashion now, after hearing the
defence evidence, if that changed your
determination, then the application would be
reopened at that point. But I suppose --

THE COURT: Well, that would be difficult if
I happen to rule that there should be a stay.

MS. MIDDLEKAMP: It would be, yes. On the
basis of the prejudice to the applicant's
claim to full answer and defence, they have
taken the position that they are going to do
that verbally to Your Honour so that's the
manner that they've decided to proceed with
respect to the application. So they're
relying on their verbal submissions as to how
the evidence would have assisted with respect
to the defence, rather than having Your
Honour hear that evidence. And that's a
consideration I would submit that Your Honour
can take on the application.

THE COURT: It still begs the question
whether I should be making any determination
before all of the evidence.

MS. MIDDLEKAMP: Well, it's my position that

at this point, the -- any impairment or any prejudice that has been demonstrated, if at all, does not rise to the level where Your Honour would be inclined to stay the proceedings.

THE COURT: But suppose evidence called by the defence changed that?

MS. MIDDLEKAMP: Then defence would be open to reargue their application in light of the new evidence I suppose.

THE COURT: It still leaves me with the conundrum whether or not the whole application has to await the end of all of the evidence. I note it's probably more frequent than not that the Crown evidence constitutes all of the evidence, but the thought that the Supreme Court of Canada, had they indicated or intended to indicate it was the end of the prosecution's case, I would have thought they could easily have said that.

MS. MIDDLEKAMP: I appreciate that, rather than just saying at the end of the evidence. It may put Your Honour in a difficult position to assess the degree of prejudice,

if any.

THE COURT: All right. Thank you.

MS. MIDDLEKAMP: So it's my submission that
step one is whether the evidence is relevant,
and on this application, at this stage, the
Crown concedes that the footage captured on
the eastward facing camera at One of a Kind
Pasta contained relevant evidence. We have
put it into evidence in this case showing, I
would submit, the aftermath and the parties
who were still in the area after Mr. Hammond
received the fatal injuries. And I would
submit that what we see on the video supports
Detective Constable Umbrello's testimony that
the video shows the aftermath of the fight.
However, I would submit, based on their
evidence, that it would not show when
Mr. Hammond was on the ground on the north
side of the street and that no weapons were
seen on the video, so in my submission, that
is important in assessing the level of
prejudice or the impairment on the right to
make full answer and defence.

So while I agree that the
evidence is relevant, I submit that that must

1570
Submissions Re: Lost Evidence Application
February 14, 2011

be correlated to the ability to make full
answer and defence in this case.

5 The second step indicates that
the Crown has a duty to preserve relevant
evidence. It is my submission to Your Honour
that there is no issue that Detective
Constable Olver failed to preserve the
eastbound facing camera between 12:00 a.m.
and 1:00 a.m. on August 9, 2007.

10 As well, you heard evidence that
there was a loss of the Anne Sportun VHS
tape, but no evidence the tape contained
relevant footage and I submit you cannot
speculate. When you look at Mr. Bigold's
15 statement, he says the camera only goes five
feet from the store from front westbound and
approximately ten feet south. Your Honour has
the measurements of the concrete slabs that
were taken by the FIS officer, and it would
20 not put that camera in the range that is
described by the witnesses. Also highlighting
--

THE COURT: It might have seen someone
walking to or from that area.

25 MS. MIDDLEKAMP: That's a possibility.

1571

Submissions Re: Lost Evidence Application
February 14, 2011

THE COURT: So it just seems to me difficult in either situation to make a categorical statement that there's nothing on that video that would have been of assistance.

5 MS. MIDDLEKAMP: I think the better way to term it, and I understand Your Honour's question, is to say what you'd indicated earlier. It could have assisted, it could not. It could have showed someone on the
10 sidewalk, and when you look at the -- sorry. If I could just have a brief indulgence.

If we look at Exhibit 16, we've taken the blood swabs and attribute them, using the random match probability to certain
15 individuals. When you look at the samples that are contained on the north sidewalk, all of those samples are from Ms. Kish. That corresponds with the witness testimony that after Ms. Kish received her injuries, that
20 she was moving around on the north side of the street, and we also heard about that from Patsiopoulos. You can see Ms. Kish in a westbound camera emerging from the eastbound side coming into the westbound camera, and I
25 believe at that point she might have her hand

1572

Submissions Re: Lost Evidence Application
February 14, 2011

bandaged, but also when you refer back to the
FIS photos, you can see there is blood on the
street on the north side, and I would suggest
that's Ms. Kish's movement after she's
received her injury.

So it's possible that that camera
could have assisted with respect to that
movement but, again, we have the witness who
was there who was assisting her, Mr.
Patsiopoulos.

As well from Mr. Bigold's
evidence, he talks about how the camera is
lined up to get a face shot at the door,
therefore, it needs to be mounted on the wall
in such a way to get a face shot on the door,
so it is going to be coming from up to down,
and I would submit it wouldn't necessarily be
able to cover large distance because of that
downward orientation.

And if we look at Exhibit 7,
which is one of the large size street boards
of the streetcar, you can also see that in
front of Mr. Bigold's store front there is a
set of lights there as well, as well as being
further down the street, so if you take his

1573

Submissions Re: Lost Evidence Application

February 14, 2011

5 testimony that it goes five to eight feet to
the west, it certainly wouldn't extend all
the way down to where the lampposts are at
the intersection where the hash marks are for
the crosswalk, because we have the
measurements of what those sidewalk squares
are.

10 And if I can turn then to step
three in that analysis, if the Crown no
longer has the evidence in its possession, it
must explain the loss. I would submit that
the Crown has explained the loss of the
eastward facing surveillance footage from One
of a Kind Pasta.

15 As the Supreme Court of Canada
stated in *La* at tab 4 of the Applicant's Book
of Authorities at paragraph 20, there is a
quote there:

20 "...despite the best efforts of
the Crown to preserve evidence,
owing to the frailties of human
nature, evidence will
occasionally be lost."

And:

25 "The principle in

1574
Submissions Re: Lost Evidence Application
February 14, 2011

Stinchcombe...recognizes [that]
unfortunate fact."

5 Now, as indicated, Detective
Constable Olver knew the times of the
surveillance video that he was to obtain from
One of a Kind Pasta when he attended on
August 14th. He testified that he satisfied
10 himself that the footage would still be there
when he'd retained it, and for all intents
and purposes it was there on that date. He
had been at the Intelligence division for
about a year and-a-half. He determined that
15 he could record the data on to his flash
drive so that he wouldn't have to take Mr.
To's hard drive from him. He was there for a
couple hours. He tested it out on other
20 computers and ensured that it played, and he
testified that, at that time, he thought that
he had retrieved the information, and that if
he had realized his mistake he would have
made efforts to correct it. He also testified
25 that he did not deliberately omit to obtain
the data or retrieve it, and I would submit
if there was a deliberate effort not to

1575

Submissions Re: Lost Evidence Application
February 14, 2011

5 retrieve data, why would you take one camera
and not the other when there is a significant
overlap between the cameras and they point in
directions where they're going to overlap
with each other. One faces west, one faces
east, to cover the entire store front. If he
was in a deliberate effort not to have this
evidence before the Court, he wouldn't have
taken one camera and not the other.

10 I would submit that the loss of
the eastbound facing camera was a result of
human error. That he made a mistake.

15 THE COURT: Yeah. And the issue becomes
whether that mistake amounts to unacceptable
negligence.

MS. MIDDLEKAMP: That's correct.

20 THE COURT: It's difficult for me to
understand why Detective Constable Olver
didn't just simply mirror the hard drive --

MS. MIDDLEKAMP: Yes.

THE COURT: -- instead of using this
shortcut.

25 MS. MIDDLEKAMP: He indicated that if he'd
done it differently, and Your Honour can give
it what weight that you can, that he wouldn't

1576

Submissions Re: Lost Evidence Application
February 14, 2011

5 have mirrored the hard drive anyway. He would
have been more careful about ensuring that he
recovered the data, and you can see that the
data is recovered from the times that were
requested. It was turning the -- he had to
set both date and time and he made a mistake
with respect to setting the date and that Mr.
To's system defaulted. I mean, you can look
at it and say, Should he have mirrored the
10 hard drive? You could say yes. But could you
then translate that into unacceptable
negligence when what he did transfer was from
-- directly from Mr. To's system to a flash
drive, and what was meant to be recorded,
15 three out of four was done. It was a mistake
with respect to the system resetting.

20 THE COURT: But he's the expert. He's the one
that was brought in. Everybody else is
saying, I don't want to touch this because
I'm afraid I'm going to make a mistake.

Let's go get our expert to come in and do it,
and the expert comes in and does it wrong. I
mean, it would be one thing if a uniformed
officer went in there trying to be helpful
25 and did what Olver did and got it wrong. We'd

1577

Submissions Re: Lost Evidence Application

February 14, 2011

say, Well, yeah, he made his best efforts to
standard of care, if you will. It's
different when the expert comes in and
manages to do it wrong. It becomes a little
5 more difficult to say it was just human
error.

MS. MIDDLEKAMP: Well, I see Your Honour's
point, but in some ways I think, well, he's
the expert. He determined that he could take
10 the data off of that hard drive, he could put
it on to a flash drive, and so the error
wasn't in, it's my submission, the manner in
which he decided to take that data off. It
was in sort of the quality control check when
15 the camera defaulted back to the same date,
and I think that's a product of human error.
I don't think the human error comes from the
actual decision to use a flash drive versus a
hard drive, but I appreciate the decision
20 that had he cloned the hard drive that it
would be there and they could resuscitate it.

THE COURT: It would have been there and then
we wouldn't all be in this state that we're
in.

MS. MIDDLEKAMP: That's correct.

1578

Submissions Re: Lost Evidence Application
February 14, 2011

5 THE COURT: And the other thing is, on
Detective Constable Olver's approach, is he's
sent there to get copies of surveillance
video. He's got some parameters as to time,
but this investigation is in its infancy,
relatively speaking. He doesn't know that
some witness that the investigators interview
a week later isn't going to indicate that
something happened a couple of hours earlier
10 in the day that might have been going on. So
why not just mirror the hard drive and you've
got it all and if something comes up down the
road it's all there for people to go look and
see.

15 MS. MIDDLEKAMP: In fairness to the time
estimate, at that point in time, they did
have the statement from Mr. Dranichak
indicating that the two were out in another
area and that they were walking down Queen
20 West when this happened. So in terms of
having them in the area earlier, I don't
think that was necessarily a possibility
based on the evidence that they had.

25 THE COURT: Maybe not him, but suppose a
witness came along and said that they -- the

1579

Submissions Re: Lost Evidence Application

February 14, 2011

guy that was in the fight with Mr. Hammond, I saw him three hours earlier in a scuffle with someone outside the pasta store. Oops, we don't have the surveillance for that three hours earlier. If you had the hard drive, someone could go and look at that three hours earlier and say whether or not this witness was or wasn't correct about what he saw.

MS. MIDDLEKAMP: No, I --

THE COURT: It just seems to me to be, from my limited experience, fairly common practice when you have a situation that the police do exactly that. They mirror the hard drive so they've got it, and there is no issue down the road. Anything else that needs to be obtained from it, they can obtain it.

MS. MIDDLEKAMP: I can indicate when Detective Sergeant Giroux went back and did the testing that we heard about in front of One of a Kind Pasta, he brought somebody from Tech Crimes with him. He indicated that the gentleman from Tech Crimes who came with him, knowing the parameters and what was required to be taken off the hard drive, used a flash drive system to pull the information off of

1580
Submissions Re: Lost Evidence Application
February 14, 2011

the hard drive and then disclosed it in that fashion.

5 The only other submission I can make to Your Honour is that experts make mistakes on occasions as well, and ultimately it's an issue as to whether or not it rises to unacceptable negligence.

10 THE COURT: I suppose the degree of the mistake too is the fact that no one looked at this stuff for a period of time. Let me put it differently. No one looked at it with care and attention in ensuring that what was supposed to be there was there.

15 MS. MIDDLEKAMP: And he provided his explanation for that in his preliminary transcript saying that he's not there to conduct the investigation himself. He's just there to satisfy that he took the information.

20 And in terms of other people viewing it after, I would say that the members of the Homicide Squad were able to reasonably rely on Detective Constable Olver having downloaded that material properly and
25 that's what Detective Sergeant Giroux

1581

Submissions Re: Lost Evidence Application

February 14, 2011

testified to.

5 THE COURT: Then you're left with the
situation where we've got D.C. Olver saying,
I didn't look at the surveillance video
because it's not my job. I'm not the
investigators. I just make the copies. And
then the investigators come along and say, We
didn't look at the video because it's D.C.
Olver's job to make sure it's there properly.
10 How do you marry those two up? No one's
looked at the video and recognized the
mistake, everybody's pointing their fingers
at the other guy saying, Not my job.

15 MS. MIDDLEKAMP: I don't necessarily think
that that's what's coming from the other
individuals. What they're saying is I viewed
the tape and I looked at it, and without a
degree of familiarity with computers, I
assumed that everything that should have been
20 captured was done, because Detective
Constable Olver had been tasked to go and
grab that information. So it's -- I don't
know if it's necessarily them sort of laying
blame on Olver. They're just saying, from my
25 perspective, from what I know about

1582

Submissions Re: Lost Evidence Application

February 14, 2011

computers, when I view the video, I'm going
to assume that the person from Tech Crimes
has it, again, and it's the converse as well.
He was the expert that went to do it so it's
reasonable that they rely on him.

THE COURT: Well, that only reinforces that
it was important for D.C. Olver to have
checked and made sure that what he thought he
copied, he actually copied.

MS. MIDDLEKAMP: Your Honour, I note the
time.

THE COURT: Okay. Thank you. Sorry. 2:15.

---LUNCHEON RECESS (1:08 p.m.)

---UPON RESUMING (2:19 p.m.)

MS. MIDDLEKAMP: Your Honour, I neglected to
just show you something briefly from the
Trial Application Record, Exhibit 10, the One
of a Kind Pasta video. I just wanted to
briefly put it -- we're not going to play it

1583

Submissions Re: Lost Evidence Application

February 14, 2011

5 but I want to show it on the screen just to
indicate my point that you don't see the
first telephone pole or light standard,
however you want to refer to it. You see the
second one which is in a further easterly
direction and you can't see the garbage bags
at all on the eastbound facing camera, so
that was just what I wanted to show to Your
Honour.

10 THE COURT: Thank you.

15 MS. MIDDLEKAMP: And one other comment I
wanted to make, when I was making submissions
about the Anne Sportun video, and hopefully
Exhibit 7 will assist with that, on -- you
can see the store front of Anne Sportun on
that exhibit. I talked about the camera being
recessed five feet back, according to Mr.
Bigold, from the door but you can also see
that you have an alcove, and so not only is
20 the camera recessed from the door, the door
is recessed from the street, so you've got
the western portion of the alcove in that
area.

25 And before we broke for lunch I
was making submissions on the explanation,

and it's my position that that's, and that's from the caselaw, if the explanation establishes that it hasn't been destroyed or lost owing to unacceptable negligence, the obligation to disclose hasn't been breached, and that's under the analysis. Again, you can have, even though the explanation is satisfactory, if it impairs the right to make full answer and defence in such a way that you can still find a breach of Section 7.

And step five talks about the Court to be considering the relevant circumstances. That includes whether the evidence was perceived to be relevant at the time, and the Crown concedes that it was.

And as well, just taking you through the method that was used in order to record the time, and the Crown's position that it was a mistake that was made and it wasn't discovered until it was too late to correct that mistake.

And step six in the analysis, if the Crown doesn't establish that the loss was not through unacceptable negligence, then there has been a breach of Section 7.

1585

Submissions Re: Lost Evidence Application
February 14, 2011

5 And I -- at this point, there are
some arguments that my friend makes in his
factum in his Application Record, and they're
arguing obviously that the loss amounts to a
finding of unacceptable negligence. My friend
makes submissions regarding the delay in
attending at One of a Kind Pasta and that --
how that contributes to the negligence, but
again, as I submitted earlier, when Detective
10 Constable Olver attended to obtain the
evidence, the evidence was still on the hard
drive, and so it's my submission that any
delay in obtaining the image does not
contribute to a finding of negligence.

15 And my friend pointed to, and
Your Honour brought it up as well, the
failure to take a mirror image, and I would
submit that Detective Constable Olver did
explain in his testimony why he employed the
20 method that he did and that it was a mistake
in the manual resetting of the time and date.

25 And as well, my friend submitted
that the investigators should have noticed
that the video was flawed in time to correct
the mistake, and again, as discussed earlier,

1586
Submissions Re: Lost Evidence Application
February 14, 2011

5 the officers did rely on having sent somebody
to collect it and perhaps not being as
familiar with it, which is fair, it's not
part of their investigative background, they
watched it and assumed that everything was
there. It's an unfortunate mistake that was
made in capturing that time-frame.

10 And John Bradley, we have the
affidavit from him. He indicates best
practices being to clone the mirror image
and, again, I would like to indicate to Your
Honour, Detective Constable Olver did not
agree with that and said that his mistake was
coming from resetting and not the decision to
15 transfer the data on to a flash drive versus
mirroring the hard drive.

20 As well my friend has provided
you with the U.S. Department Electronic Crime
Scene Investigation Guide for First
Responders, and that is from his
supplementary materials. And that's at
Exhibit A2 of the defence supplementary
materials, and I would just ask Your Honour
to briefly take a look at that document. The
25 heading in that document, I believe it's at

1587
Submissions Re: Lost Evidence Application
February 14, 2011

page 2, indicates that:

"The opinions or points of view
expressed in the document
represent a consensus of the
authors and do not necessarily
represent the official position
or policies of the U.S.
Department of Justice."

That's at page 4. Sorry. And as
well, it's my submission to you that that
guide is really geared towards electronic
crime detection and investigation, so it
talks about finding financial and sort of for
internet cases where we might have issues of
child pornography, et cetera. So while -- so
I just submit it's not directly on point with
what we're discussing today in relation to
this particular surveillance video.

At step seven in the analysis, in
that case they discuss that in addition to a
breach, the failure to provide evidence may
also be found to be an abuse of process, and
my friend was arguing that the conduct in
this case demonstrates an abuse of process

1588
Submissions Re: Lost Evidence Application
February 14, 2011

and that's mainly at paragraphs 42 through 44
of his factum.

5 "The applicant submits that the
 evidence on this application
 warrants consideration of
 whether the video evidence was
 deliberately destroyed", and
 it's my submission that there isn't a basis
 to make that finding. The applicant bases the
10 position on the timing of the seizure, it's
 relationship to the upgraded charges, and
 that Detective Constable Giroux had indicated
 that he would block any bail application made
 by Ms. Kish and the absence of any notation
15 that it was viewed prior to upgrading the
 charges.

 As well, they write in their
 factum the repeated efforts to delay
 disclosure. It's my position that it was
20 clear early on in the investigation that the
 surveillance existed. I spoke about it
 earlier, that I think the timing of the
 seizure, Detective Constable Olver attended
 while that evidence was still available and
25 he downloaded -- he had the opportunity to

1589
Submissions Re: Lost Evidence Application
February 14, 2011

download all of it.

5 Detective Constable Giroux talks
about, in his August 16, 2007 press
conference, that he was basing the upgraded
charges on evidence that he heard from
civilian witnesses, and as well, as indicated
on the application and in the officers'
notes, officers involved in the investigation
attempt to identify any surveillance videos
10 available on Queen Street early on in the
investigation. Their memo books were provided
to defence. Detective Constable Giroux
indicated in the press release that they were
collecting video footage from the area along
15 Queen Street West and he testified to the
seizure of the One of a Kind Pasta video at
the bail hearing.

20 So it's my submission that there
was no effort to keep the information
regarding the video from being disclosed.
There was a substantial amount of disclosure
in this case and disclosure was provided on
an ongoing basis. In addition, the camera
facing westbound, which has a substantial
25 overlap with the camera facing eastbound, was

1591

Submissions Re: Lost Evidence Application

February 14, 2011

indicates that he did not see people on the ground and he did not see anyone with a weapon.

5 The respondent submits that the applicant's assertions in the supplemental Statement of Facts and argument that the video could have depicted the stabbing of Ross Hammond, the absence of Ms. Kish's participation and the stabbing of Nicole
10 Kish. However, based on the overlap between the two cameras and the evidence of Detective Scott and Umbrello, I would submit the stabbing of Mr. Hammond was not depicted on the eastbound facing camera. No one was seen
15 on the ground, no weapons were observed and Mr. Hammond was not seen on the eastbound camera.

20 I would submit that both Detective Scott's and Umbrello's testimony is important in this regard. Detective Scott testified he could not identify anyone on the eastbound camera. He felt that the westbound camera was much better in allowing a person to identify who was on the video. Detective
25 Constable Umbrello testified that it appeared

1592

Submissions Re: Lost Evidence Application
February 14, 2011

to him that something had already happened.
People were concerned, it was not a fight, it
was the aftermath of a fight.

5 It's my submission that a stay of
proceedings is only appropriate where no
other remedy can alleviate the degree of harm
caused to the applicant's right to full
answer and defence or the integrity of the
10 justice system would suffer irreparable harm
should the prosecution continue.

15 If I can now direct Your Honour's
attention to *R. v. Bero*. That's at the
Applicant's Book of Authorities at tab 8. In
R. v. Bero, the Crown did not preserve
evidence. The Crown did not turn their mind
to their disclosure obligations and allow a
vehicle that the Crown alleged the accused
was the driver of in an accident to be
20 destroyed prior to defence having an
opportunity to examine the vehicle. The Court
agreed that evidence favourable to the
defence on the sole issue at trial, which was
identity, could have been obtained if they
had tested the vehicle, or it may not have
25 assisted the defence, but even in light of

1593

Submissions Re: Lost Evidence Application

February 14, 2011

those facts, Your Honour, where the -- there was no -- there was no turning the mind to the fact that they have disclosure obligations, the Court did not stay the proceedings, and the Court of Appeal discusses at paragraph 42 that it is a remedy of last resort.

"The prosecution's failure to preserve evidence does not automatically entitle the accused to a stay of proceedings even when [the conduct] amounts to an abuse of process."

And in *Bero*, the Court came to the conclusion that was an abuse of process, and they repeat that it's only appropriate, a stay, where the breach has caused irreparable harm to the ability to make full answer and defence that cannot be remedied or irreparable harm to the integrity of the justice system.

At paragraph 43, the Court speaks about the reluctance to stay criminal proceedings and how it reflects the strong

preference for a verdict on the merits.

THE COURT: We must be looking at two
different cases because it's not the
paragraph numbers I have. Those paragraphs
they're talking about 11(b) delay.

MS. MIDDLEKAMP: Just a brief indulgence.
Sorry. Maybe I was using a different version.

MR. SCARFE: You said tab 8. You meant tab
6.

MS. MIDDLEKAMP: I meant tab 6? Okay. Thank
you. Sorry, Your Honour. It's *Bero* at tab 6.

THE COURT: I have it. Thank you.

MS. MIDDLEKAMP: Great. Thank you. I thank my
friend. So at paragraph 43, that's where the
Court talks about the reluctance to stay
criminal proceedings, and they say that it's
sometimes necessary, but it is an
unsatisfactory result because it denies both
the accused and the community their
legitimate expectation of a true verdict
based on the merits. And they say at
paragraph 44:

"The integrity of the judicial
process will generally be put at
risk where [state conduct]

1595

Submissions Re: Lost Evidence Application

February 14, 2011

involves a deliberate attempt to
compromise an accused's ability
to make full answer and defence
[or where state conduct]
undermines the fairness of the
trial process or deliberately
frustrates the Court's ability
to reach a proper verdict."

It's my submission that that is
not the case on the record before you.

The Court also indicates that:

"The degree of prejudice caused
to an accused" - and this is at
paragraph 48 - "by a failure to
preserve relevant evidence and
the availability of other means
short of a stay to alleviate
that prejudice are the primary
considerations in [determining]
whether a stay is warranted by
virtue of the prejudice caused
to an accused's ability to make
full answer and defence."

And at paragraph 49, they say:

"[The] assessment of prejudice
is [difficult] where...the
relevant information has been
irretrievably lost."

But I would submit in this case
we do have the evidence of the witnesses and
we have the video.

The Court also notes in *Bero* that
the examination of the vehicle may have been
helpful to the defence, but it may not have
been, and I would submit that informs the
Court's ultimate conclusion that a stay of
proceedings is not appropriate.

So in this case, it's possible
that the video was helpful to the accused,
but we do have the westbound camera and we
have the witness testimony on what was
contained on the eastbound camera.

The last case that I want to
refer Your Honour to is on the issue of a
stay as well. I'm just going to check my tab
numbers. So it's at tab 17 in the Applicant's
Book of Authorities, Volume 2, and that's *R*.

5 v. *Dulude*, which is a case of the Ontario
Court of Appeal, and this was a case where a
stay of proceedings had been entered on an
impaired driving charge because a videotape
at the station was destroyed. However, the
video in that case didn't show the entire
breath room all the time. It was different
sequences around the -- around the police
10 division and so the Court ultimately conclude
that had the tape -- it had marginal
relevance. And that was a critical factor
that the Court took in devising the
appropriate remedy for a lost piece of
evidence. And I would submit that the
15 eastbound camera, we have testimony that the
stabbing was not on that tape, that Mr.
Hammond was not on that tape and there
weren't any weapons, and we have the
testimony that the video that was recovered
20 is better for identifying parties and seeing
who was on the sidewalk in the aftermath, so
it's my submission it's not appropriate for a
stay.

25 At paragraph 36, they talk about
a stay as a remedy of last resort, rarely

5 granted, and -- and it's just sort of a
repeat of what the Court of Appeal has said
regarding when a stay should be issued. I
would submit in this case there is a mistake
made regarding copying the file. There was no
ulterior motive. The Crown was alive to its
disclosure obligations but did not properly
record the video. So I would submit that the
prejudice, if there is any, could be remedied
10 by Your Honour considering the loss of
evidence and whether the Crown has
established the case beyond a reasonable
doubt should Your Honour find a breach.

15 I would submit that the prejudice
in this case is not manifest. In order to get
a stay, the applicant must demonstrate that
the loss is so prejudicial that it impairs
the right to a fair trial, and I would submit
that any prejudice in this case is not
20 manifest.

25 And one other case I want to
refer to you -- refer you to. That's *R. v.*
G.S. so that's at the Respondent's Book of
Authorities at tab 2 -- tab 3. And at
paragraph 45, the Court says:

1599

Submissions Re: Lost Evidence Application

February 14, 2011

"Was the trial judge's finding
that the lost evidence was so
prejudicial that it could only
be remedied by a stay [of
proceedings] a reasonable
finding?"

And the Court says at paragraph 45:

"The answer to that question
turns on the extent of the
prejudice to the respondent from
the loss of the evidence, and
the availability of other
remedies short of a stay to
address the prejudice."

So it's my submission, again,
just turning your mind to the fact that we
have witnesses that viewed the tape, we have
a number of civilian witnesses who made
observations of what happened that night and
they've testified to the Court, that it's not
a case where it's appropriate for a stay of
proceedings.

Subject to any questions Your

1600
Submissions Re: Lost Evidence Application
February 14, 2011

Honour may have, those are my submissions.

THE COURT: Thank you. Reply, Mr. Scarfe?

MR. SCARFE: I'll be brief, Your Honour.

My friend played the Pasta
Perfection video. We have had a chance to see
Mr. Hammond come into the video and exit and
I will ask you to watch it again, and you
will notice that he exits onto the sidewalk,
not the street. He would have gone right into
the other camera view.

My friend calls this a mistake
made by the officer. It's more appropriately
referred to as a series of mistakes by
several officers.

She relies heavily on the
testimony of Detective Scott from the
preliminary hearing in which he describes his
recollection of watching the eastbound
camera. Mr. -- or Detective Scott testified
during that portion of the preliminary
hearing, he was asked the question:

"You watched about a minute of
video in Mr. To's store in
August of 2007?

ANSWER: Yes."

1601

Submissions Re: Lost Evidence Application

February 14, 2011

5 But my friend has suggested that somehow it's
all okay because Detective Scott remembers is
preposterous. On the one hand, Mr. To seems
to recall the officers going over it over and
over and over again, but when they get to the
preliminary hearing Detective Scott has never
seen one side, despite what I dealt with in
my submissions earlier, the inconsistency
between Mr. To and Detective Scott, that in
10 fact if you believe Mr. To, Detective Scott
actually watched three or four minute
sections back and forth repeatedly, but if
you believe Detective Scott, all he watched
was a minute. So for my friend to get up and
15 say it's all okay because Detective Scott can
tell us that he didn't see any females, he
didn't see anybody get stabbed, is kind of
preposterous, because obviously if we had
that video we'd all watch it several times
20 and we'd all make great study of it. Not just
some quick ground.

We checked our notes over the
course of lunch and Melissa Gallately did
indicate, according to our notes, that the --
25 what she saw was on the sidewalk left of the

1602
Submissions Re: Lost Evidence Application
February 14, 2011

lights, from her perspective.

5 The *Dulude* case my friend cites
from my Book of Authorities talks about
marginally relevant evidence, and it's,
again, we're back to that whole disaster in
New Market where they used to tape the whole
station with a 16-plex video. It didn't
always show the breath room, there was no
audio. Of course that was marginally
10 relevant. Here, I would submit that it's
substantially different.

15 And finally with respect to her
citing of case from tab 3 of Crown's book of
G.S., this was a case where there was a 1994
investigation and then it all got sort of
closed off until 2005 when one of the
complainants surreptitiously taped a
conversation, which then led to the charges,
defence sought disclosure, and some of the
20 officers' notes were no longer available
because the division had a retention policy
whereby you store the old officers' notes in
the basement for a number of years and then
they're sent away, right? And but what the
25 case really turned on was that there were

1603

Submissions Re: Lost Evidence Application

February 14, 2011

5 records available from the two 1994
investigations, records from the 2005, 2006
investigation, and charges were laid and
information from the complainant's own
evidence substantially diminished any
prejudice to the respondent from the lost
evidence and cumulatively rendered a stay
unreasonable. In that case, Your Honour,
there was lots of evidence, a couple of
10 officers' investigators notes and I think the
essence was, you know, we can replace that
evidence or at least fill in the gaps there,
unlike the situation in the case at bar.

15 Subject to any questions, that's
my reply submission.

THE COURT: Okay. What do you have to say
about the timing of this application?

20 MR. SCARFE: We debated that at lunch as
well, and I guess my position, but I'm
certainly prepared to be flexible, is that if
the defence -- if we made out a stay, then
the defence doesn't have to call evidence. So
obviously if you deny the stay, it's my
position that I'm going to be calling some
25 evidence. I thank my friend for the

5 concession with respect to reopening it, if
anything really material comes out in the
evidence, but I think you have enough. And I
hadn't turned to my mind to it before you
raised it but assuming that the defence is
only required to meet the case that's led, my
interpretation of all of the evidence was the
Crown's case, but I haven't researched the
point. It may be that other -- it is a
10 conundrum.

15 THE COURT: The defence only has to meet the
case that's laid out, but the issue on this
application is whether there has been an
impingement on the defence's right to make
full answer and defence and I would think it
would be difficult to make a determination on
that until I know what the defence evidence
is, coupled with the fact that we have the
Supreme Court of Canada, our Court of Appeal,
20 Nova Scotia Court of Appeal all using the
expression "all of the evidence". And again,
I would have thought one of those courts, had
they meant at the end of the Crown's case,
would have simply said at the end of the
25 Crown's case. They're quite capable of saying

that in any other number of instances. I see no reason not to take the plain words "all of the evidence" to mean exactly that. All of the evidence.

5 Theoretically, I suppose at this stage you could see a potential impingement on the defence's right to make full answer and defence that might disappear once the defence evidence is heard.

10 MR. SCARFE: Or it wouldn't merit any.

 THE COURT: Exactly.

15 MR. SCARFE: I just have never known it to be done that way. I always assumed when they said adjourn this until all the evidence is in, I guess I interpret that to be the Crown's case, and --

 THE COURT: Well, as I say, if that was what the various courts had intended, I would have thought they would use different language than "all of the evidence". They could have even said all of the Crown's evidence or all of the prosecution evidence. They didn't. They just said "all of the evidence".

20 MR. SCARFE: And that's true.

25 THE COURT: And it's been around for a couple

of decades. When was *O'Connor* decided?

MR. SCARFE: I've just never read a judgment that indicated, I've heard all the Crown evidence, we have now heard the defence evidence and now I'm going to rule on the stay. But again --

THE COURT: No, but that may reflect the fact that the vast majority of cases, Crown's evidence is all of the evidence.

MR. SCARFE: Well, Your Honour has the -- it's your court, as you know. But I guess when we talked about this last week and we were scheduling and talking about a ruling, I just assumed that we were all on the same page but I appreciate you get reading and things occur.

THE COURT: It didn't occur to me until today. So as I say, my current inclination is to take the words at their face value.

MR. SCARFE: I wish I had researched the point further. I'd be in a better position to assist you.

MS. MIDDLEKAMP: Your Honour, if I can just make brief submissions in reply. I appreciate what my friend just said, that I made a

1607
Submissions Re: Lost Evidence Application
February 14, 2011

concession that he could reopen his
application later, and I just want to be
clear to the Court that that wasn't what I
was suggesting to the Court. I was taking
5 what I was submitting to you from *R. v. La*
and that's at paragraph 28, where the Court
says:

"...even if the trial judge
rules on the motion at an early
10 stage of the trial and [it's]
unsuccessful...if, subsequent to
the unsuccessful application,
the accused is able to show a
material change in the level of
15 prejudice."

It might be that the application
is argued again. So I just want to be clear
for the Court that I wasn't making a
20 concession that it could reopen at any time.
The decision has been made to argue this
motion now and as I indicated, to use the
oral submissions with respect to the degree
of prejudice to Ms. Kish's ability to make
25 full answer and defence.

1608

Submissions Re: Lost Evidence Application
February 14, 2011

THE COURT: Do counsel want the opportunity to look at this issue and see if they can find anything on it?

5 MS. MIDDLEKAMP: I'm content to proceed as it is. I think that the caselaw leaves it open for the motion to be argued at this point. If counsel wants to make further submissions on that I would submit to you that paragraph 28 of *La* would be the way that I would view this
10 issue.

THE COURT: All right. Thank you.

MR. SCARFE: I'm inclined to agree with my friend at this point in the process. I think there is enough evidence before the Court for
15 proper determination can be made.

THE COURT: All right. I will at least have my bottom line decision by tomorrow morning. Do I assume that if the application is
20 unsuccessful, that defence is ready to proceed?

MR. SCARFE: I'm hoping so. I haven't actually scheduled witnesses for tomorrow. We can spend the rest of the afternoon. There are still a couple of witnesses that require
25 interviews. But if we're all coming here

1609

Submissions Re: Lost Evidence Application
February 14, 2011

anyway I will advise you in the morning if
I've got stuff to go tomorrow afternoon.
Otherwise I may ask for Wednesday morning if
things don't come together as I expected.

5 There was a witness the Crown was
trying to contact, witness isn't getting back
to the Crown. They have provided me with the
number. We just started down this road today
but I will have something to go tomorrow.

10 THE COURT: All right. Well, if we can, if it
turns out that way, on Saturday -- on
Saturday. On Wednesday I have my Special
Assignment Court starting at nine o'clock so
that usually takes at least an hour, if not,
15 longer, and there is another issue about
Wednesday morning which I'm trying to get a
solution to. I haven't so far but I will
advise counsel tomorrow if it's going to
cause a problem. It will just be in the
20 morning.

MR. SCARFE: Thank you.

THE COURT: All right. Thank you.

25 ---COURT ADJOURNED

(2:52 p.m.)

1611
Colloquy
February 15, 2011

no, Your Honour should deliver your ruling
now because we're at the end of the Crown's
case, and after much sleepless consideration
over night, my friend and I have come to, and
5 my colleague Ms. Simpson and I have come to,
the conclusion that we were wrong in
suggesting that that was the correct course
of action and in retrospect we agree with
Your Honour's concerns about the timing. It
10 is a conundrum and I'm sorry to lay that on
you this morning, but it's something that
required some reflection.

So at this point, for the record,
the defence agrees with Your Honour in
15 respect of your inclination to leave this
until the end of the defence evidence.

To that end, we have arranged for
two witnesses to attend this afternoon,
intend to file some materials as well and so
20 our request would be to return at 2:15 to
commence the defence case.

THE COURT: Thank you.

MS. MIDDLEKAMP: Your Honour, based on our
discussions this morning in chambers I don't
25 have anything to add onto the record

1612
Colloquy
February 15, 2011

regarding the pre -- the lost evidence motion
and we'll be prepared at 2:15.

5 THE COURT: All right. Well, I was prepared
to give my ruling this morning in accordance
with what counsel had asked for yesterday,
but given the change of position, we will
leave the matter until the completion of all
of the evidence. I will accord counsel at
that time an opportunity to supplement, not
10 repeat, their submissions of yesterday and
we'll deal with that issue at that time.

MR. SCARFE: Thank you, sir.

15 THE COURT: And I will return at 2:15 for
defence evidence.

---RECESS

(10:04 a.m.)

20 ---UPON RESUMING

(2:14 p.m.)

THE COURT: We're missing Mr. Scarfe.

THE REGISTRAR: Please call Mr. Scarfe.

25 MR. SCARFE: I was just outside in the

hallway looking for my witness.

THE COURT: Your witness isn't here do I take
it from that?

MR. SCARFE: Not yet. I know that she had a
baby 17 days ago. Ah, we also know that she
came to the Crowns' Office and met with both
sides last night, indicated she'd be fine to
be here for 2:15. There is someone else I
think we've asked to come for 3:00 and if we
could have ten minutes?

THE COURT: Well, why don't I take a very
brief recess and you go see.

---RECESS (2:15 p.m.)

---UPON RESUMING (2:27 p.m.)

MR. SCARFE: Sorry about that, Your Honour.

THE COURT: It's all right, Mr. Scarfe.
Defence first witness?

MR. SCARFE: Here he comes. But before we do
that, I'm going to decline to make an opening

1614
C. Bordignon - in-ch. (Simpson)
February 15, 2011

statement and I have one document that is
going in on consent. It's a report from Maxum
Analytics, DNA report. Paragraph 4 is the
important part.

5 THE COURT: Thank you.

MR. SCARFE: Thank you.

THE COURT: That's agreed, Mr. Thompson?

MR. THOMPSON: I'm content, Your Honour.

THE COURT: Exhibit 62.

10

---EXHIBIT 62: Report from Maxum Analytics -
produced and marked for
identification.

15

THE COURT: Yes?

MS. SIMPSON: Thank you, Your Honour. The
first defence witness will be Mr. Cam
Bordignon.

20

---CAMERON BORDIGNON: AFFIRMED

---EXAMINATION IN-CHIEF BY MS. SIMPSON:

25

MS. SIMPSON:

1615
C. Bordignon - in-ch. (Simpson)
February 15, 2011

Q. How old are you?

A. I'm 27.

Q. How do you support yourself?

A. I have a job just down the street as a
5 mortgage underwriter.

Q. You know that you're here to speak about
a particular evening in August, 2007?

A. I do.

Q. And you have spoken to the police about
10 it recently. We spoke about it last week as well?

A. That's correct.

Q. I understand you haven't testified about
these events previously?

A. That is also correct.

Q. And you didn't meet with the police to do
15 an audiotaped interview. You didn't have a camera
set up.

A. I did not.

Q. Is it correct the first time that you
20 spoke with the police in any detail about this event
was just earlier this month, the 4th of February,
2011, is that right?

A. Yes, that's right.

Q. So the evening of August 8th, which is a
25 Thursday, to Friday morning, August 9th. What were

1616
C. Bordignon - in-ch. (Simpson)
February 15, 2011

you doing?

5 A. I was at, ah, a friend's house for some drinks. Stayed there for a few hours, met another friend, and headed off to a bar she had suggested, ah, then we, on the street at Queen Street there, there is a TTC stop.

Q. Can I interrupt you?

A. You certainly can.

10 Q. Just take you through this. Whose house were you at?

A. That was my friend Brittany's.

Q. And where did she live?

15 A. She lives in Toronto, close to, ah, Queen and Niagara. She lives in an apartment building around there.

Q. We have a map of it's Exhibit 2 in this trial. Does that assist you in describing where your friend lived?

20 A. Ah, yeah. I think the 873 there is a 7-11. She's -- I believe she's in a building behind that.

Q. And you said another friend came? Who was that?

A. Her name was Brook.

25 Q. When did you leave your friend's house

1617
C. Bordignon - in-ch. (Simpson)
February 15, 2011

that evening?

A. Ah, I'm not sure of the time. It was dark. You know, time of year it would have been after 9:00 I would say, 10:00, 10:30, 11:00 maybe.

5 Q. And you said you were having a few drinks. How many drinks did you have and over what length of time?

A. I'm not sure how many. We would have been there for a couple hours. Um, I, you know, I know I had a good buzz going to the bar. That's kind of usually the plan, but I couldn't say how many.

10 Q. Can you give us any further description of how drunk or not drunk you were? Your state of sobriety? You said you had "a good buzz". What does that mean to you?

A. I mean I wasn't stumbling down the street or anything. I was, um, I wouldn't be able to drive. Ah, that's...

15 Q. Could you carry on a conversation?

20 A. Yeah.

Q. As you left your friend's apartment, where did you go?

A. Ah, we went I guess down Walnut there, went Queen Street towards Niagara, and then we stopped at the corner of Niagara and Queen there

25

1618
C. Bordignon - in-ch. (Simpson)
February 15, 2011

when we saw the incident.

Q. You said "there". What corner of Queen and Niagara?

5 A. Ah, north would be up, so at the southwest corner.

Q. Do you remember what's at that corner?

A. Ah, there's a coffee shop, there's a TTC stop there, um, that's what I remember.

10 Q. So you remember being around the coffee shop and TTC stop?

A. Yeah, I would have been on the -- just on the sidewalk walking east.

Q. And you said that's where "we saw the incident". What did you see?

15 A. Um, streetcar pulled up, we noticed, um, these two I'll just call them jocks for lack of a better word. These two guys, you know, pretty built I would say. Ah, they were walking across Queen Street coming from the north side, walking southwest to the corner I had mentioned. Um, there was yelling behind them. There were, ah, you know, I'll say street punks or street kids behind them. Ah, a few of them yelling at them. These guys were kind of walking towards the streetcar. Um, you could tell
20 the street guys were kind of looking to get at these
25

1619
C. Bordignon - in-ch. (Simpson)
February 15, 2011

-- the two jock guys. Um, one of --

Q. Can I interrupt you again there?

A. Yeah.

Q. Before we move on? Can you describe the
5 two jock guys for me? In as much detail as you can?

A. Um, I remember, you know, probably, you
know, maybe five eleven I guess. They were built,
um, you know, muscly built kind of dudes, looked
athletic, you know, short dark hair, t-shirt and
10 jeans is really all I remember.

Q. Do you remember the colour of t-shirt?

A. Ah, not really, no. I mean, I would say a
darker coloured t-shirt one of them at least was
wearing but I really can't tell.

15 Q. Does that description apply to both of
them or only one?

A. Again, I can't really remember.

Q. But as you were giving the Court that
description, were you trying to speak about only one
20 person or were you speaking about more than one
person?

A. Ah, I remember one person wearing a --
like a darker coloured shirt. I'm not sure if they
both were.

25 Q. And you said there were other people that

1620
C. Bordignon - in-ch. (Simpson)
February 15, 2011

you also noticed moving across Queen, is that correct?

A. Yeah.

5 Q. Who do you also notice moving across Queen?

A. Ah, there was a group, maybe, you know, three or four street kids I'll say again for lack of better terms, moving in the same direction after the two jocks it looked like. Um, they were yelling. It
10 seemed like there was some aggression involved, um...

Q. Do you remember what they were yelling?

A. I don't remember what they were -- I just remember loud yelling and then sort of that brought
15 my attention to the whole thing. I don't remember any words they were saying. I just remember that they were kind of going back and forth, um, and walking towards the TTC car.

20 Q. And can you assist the Court with the descriptions of the street kids? What did they look like?

A. Um, you know, kind of had that, you know, street punk look, you know, kind of worn-ish
25 clothes, ah, I remember there being maybe three or four of them. I remember, um, one of the street

1621
C. Bordignon - in-ch. (Simpson)
February 15, 2011

kids, ah, that I remember was a male that initially
he went to fight one of the jock guys. Um, I --

Q. He --

A. Sorry. Go ahead.

5 Q. Can you describe him for us? One of the
street kids?

A. Ah, I would say he was tall, um, taller
kind of, you know, little bit thinner, um, yeah,
tall, skinny street kid, shaved hair. That's what I
10 remember.

Q. Do you remember the colour of his hair?

A. Of his -- I would say it was dark. It
wasn't, you know, brown I would say.

15 Q. And do you remember anything about his
clothing?

A. Ah, I mean, you know, the typical kind
of, you know, street punk kind of thing. Worn
clothes. I can't remember what he was wearing. It
would have been a t-shirt, I'm not sure of the
20 colour.

Q. That's one of the street kids that
crosses the street.

A. Mm-hm.

25 Q. Do you remember any other street -- any
other of those street kids or any other street kids

1622

C. Bordignon - in-ch. (Simpson)

February 15, 2011

that you saw that night?

5 A. Ah, I do remember a bigger guy. Um, when I say "bigger", not built like the jock guys. He was a little more husky I would say, probably again around five eleven. Um, I mean, as soon as the street kid I just mentioned had walked up, he started fighting with one of the jock guys and I immediately, you know, started looking at that. I didn't pay much attention to who else was coming
10 across the street. I do know there was a group of them. That's what I remember.

Q. Focusing then on husky person, five foot eleven, can you estimate that person's weight?

15 A. I don't know. Maybe, ah, maybe closer to 200.

Q. Do you recall that person having facial hair or not?

20 A. Ah, kind of the scruffy not shaven look, sort of looked like maybe like a, you know, longer side burns and, ah, kind of like a chin strap but not on purpose sort of thing. Just didn't have a razor.

Q. What colour was his hair? Do you recall?

A. I couldn't say, no. I can't remember.

25 Q. And do you recall anything about his

1623
C. Bordignon - in-ch. (Simpson)
February 15, 2011

clothing?

A. Again, just the worn sort of look.

Nothing specific.

Q. So we've described two male street kids
crossing the street?

A. Yeah.

Q. Do you remember anyone else crossing the
street amongst the street kid group heading south
across Queen?

A. Ah, I remember there, like I said, were
around three or four of them. I remember those two
specifically because of, um, you know, the fights
that I saw. Again, as soon as, you know, the tall
skinny street kids started fighting with one of the
jocks, I mean, I'm not inventorying the other people
crossing the street. I'm looking at what's going on
there.

Q. You've described two men. Are any of the
people crossing the street to the south with the
street kids women? Or do you remember?

A. Ah, I don't remember. I know there were a
group of three or four of them. I couldn't say if
the other two or one was male or female.

Q. I interrupt you a lot. You keep referring
to a fight involving a skinny street kid. Can you

1624
C. Bordignon - in-ch. (Simpson)
February 15, 2011

tell us what that's about?

5 A. Yeah. Um, again, the two jock guys come
across the street, they're heading towards the
streetcar, um, one of the -- the taller street kid,
um, comes towards one of the jocks like he's gonna
fight him. The jock guy turns around, ah, they
start fighting. The jock gets the street kid on the
ground, he's kind of getting the better of him, hits
10 him in the face a few times, hit his head off the
ground and, ah, that fight was over. He got up --
the jock got up at that point and was pretty, ah,
pretty, I guess his adrenalin was going. I remember
him, you know, saying if there was, you know, If you
guys want to fight, like, Let's do this. Kind of
15 like, I'm ready to go. Like, Who's next sort of
thing. I wouldn't say it was in a -- again, I would
say that the jock was defending the attack on the --
from the street kid, and that that fight ended
pretty quickly.

20 Q. Where exactly did that fight happen? Do
you recall?

25 A. Yeah. Same corner of Niagara, the
southwest, ah, between the sidewalk there and the
streetcar. The streetcar was still there at that
time. It would have been right in front of the

1625
C. Bordignon - in-ch. (Simpson)
February 15, 2011

streetcar stop there.

Q. Was it on the sidewalk or on the street?

A. Ah, it was on the street.

Q. How many people were involved in that
5 fight?

A. Ah, I remember the jock guy and the
street kid. I mean, there were a lot of people
around, again, there was, you know, a lot of yelling
going on. I remember the jock getting the better of
10 the street kid.

Q. How did that fight end?

A. Ah, the street kid wasn't really fighting
back anymore. Um, he seemed a little dinged up from
his head getting hit on the ground there and then
15 the jock guy got up, ah, and was, you know, looking
for -- I would say he was looking to see if anyone
else was coming after him sort of thing.

Q. After this fight, they're on the south
side near the bus stop?

A. Yeah.

Q. Where did you see that man go, if you
did?

A. Um, there was two of them, so -- I
wouldn't be able to say. I mean, I did see the
25 other street kids come, like, they were coming

1626

C. Bordignon - in-ch. (Simpson)

February 15, 2011

closer. At that point another fight started. I can't remember exactly if it's the same guy that fought the one street kid or if it was his buddy. I remember them being in front of the streetcar and it's where the, you know, the one jock was trying to avoid a, you know, fighting these other street kids, that went across the street, across Queen Street north, on the other side. That's when they started hittin' the jock guy.

5

10

Q. Can I interrupt you again there?

A. Yeah.

15


Q. Where did you see the skinnier street kid go, if you saw him at the end of that south side fight? You've described the one jock guy heading in front of the streetcar north and that's where he departed to. Where did the skinnier street kid go to, if you saw him?

20

A. He was on the ground for a bit. Um, I can't remember him getting up or if he was helped up. I remember him being on the sidewalk on the south side by the TTC shelter there. He was with a girl. Um, and my friend Brit was there trying to help him as well. So I'm kind of going between what's happening on the other side and my friends Brit and Brook were over there, so I'm sort of going

25

1627
C. Bordignon - in-ch. (Simpson)
February 15, 2011



back and forth and I want to make sure that they're okay as well. So I'm not sure if he got up himself or if he was helped. Um, I didn't see him get up.

5 Q. You said he's with a girl as well as your friend Brit. That's Brittany?

A. Brittany. Yeah. Yeah.

Q. Can you describe that girl that he's with?

10 A. I can't remember her at all. I remembered there being my two friends, Brittany and Brook, the street kid that got beat up and another girl that I can't recall what she looks like.

15 Q. Can you recall her style of dress? You've described some people as street kids and some people as more athletic. Can you describe the style of the girl?

20 A. She seemed to be with the street kids. Um, she seemed to be acquainted with the guy that got beat up. I don't remember what she was wearing. You know, I would say by association it was similar to their style but I can't remember. It seemed like she was with them, um, I would say that.

25 Q. So we've described where the one athletic gentleman went, we've described where the skinny guy went. Where did the bigger, huskier street kid go,

1628
C. Bordignon - in-ch. (Simpson)
February 15, 2011

if you saw, at the end of that fight?

5 A. Um, I really noticed him when the fight
moved across the street north. Um, again, I'm not
sure if that was the same jock that got into the
fight or if it was his buddy, but there was an
altercation that moved north across the street. I
remember two or three street guys beating on the
jock guy. At that point a cab had rolled up, um, and
was blocking my view of the fight. The fight was
10 going on on the north side of the cab, I was on the
south side so I can't see clearly, but they had the
jock on the ground, were punching and kicking him. I
remembered the huskier street kid saying, You die
tonight. Um, that stood out in my mind a lot and I
15 felt it was pretty intense. I think that's why I may
not remember the other people involved. I remember
that guy, him saying that. Um, at that point, the
jock guy kind of stumbles up, he gets on to the hood
of the cab, his face is bloody, he seems, you know,
20 kind of punch drunk and he's stumbling around. He
looks hurt. At that point we, ah, Brit and Brook and
I, um, left. I felt -- I heard someone say that they
called the police. I wasn't about to get involved
and we sort of moved on to the bar there.

25 Q. Where was this fight on the north side

1629
C. Bordignon - in-ch. (Simpson)
February 15, 2011

that you've mentioned?

5 A. Almost directly across from the TTC
shelter. Um, I would say at 746 there there's I
guess a street pole or something. I would say it was
close to that. Again, the cab pulled up and it would
have been, ah, it would have been right in that area
on either the sidewalk or this street just in front
of the sidewalk.

 Q. You said the cab blocked your view?

10 A. Ah, yeah. I would say my view was
obstructed from, you know, kind of mid-torso down.

 Q. Do you recall which lane the taxi was in?

 A. The taxi would have been in the curb side
lane heading west.

15 Q. And the fight is just past the taxi in
that curb side lane?

 A. Just north of the taxi in the curb side
lane. So it's either really close to the, you know,
on the street or right on the sidewalk.

20 Q. And the closest address that you saw
there is 746.

 A. Yeah. I would say it's in the block of
750, 744, probably more towards the middle 746
there.

25 Q. Who's involved in that fight?

1630
C. Bordignon - in-ch. (Simpson)
February 15, 2011

5 A. Ah, there were three or four street kids. The huskier street kid that I mentioned and the one jock. Again, my attention was really drawn to what the -- that one huskier street kid said. I don't remember the other three to be either male or female. I just remember there were more of them there than him and they were getting the better of him.

10 Q. Was the one jock that was losing the fight on the north side the same as the jock that had been winning the fight on the south side? Or do you know.

15 A. Originally when I was going through it in my head I thought he might be. I mean, I can't -- I can't remember now if that was the same guy or if it was a different guy. I know when the fight on the north side of the street was going on, the other jock counterpart seemed, you know, was really worried, he was really scared, he was trying to get his buddy to leave, um, he seemed to be looking for a cab, looking for a way out. Ah, again, I'm going
20 back and forth between what's going on in the north and my other two friends. So I -- I can't -- I didn't see or I can't remember if it's the same guy
25 or if it's the other guy.

1631
C. Bordignon - in-ch. (Simpson)
February 15, 2011

Q. You just mentioned someone trying to get his buddy to leave. Where was that?

A. Ah, the jock that was involved on the north side was, ah, I would say, like, in the middle of Niagara Street, um, not out on Queen Street yet. Again, he was yelling at his buddy, um, and he was trying to get into a cab so yeah, he would have been right in the middle of Niagara there. Just up from -- or just south of Queen Street is where I remember seeing him.

Q. You mentioned you heard the words, You die tonight, from the fight on the north side, is that right?

A. Yeah, I heard that.

Q. When did you hear that?

A. When they were beating the guy on the ground. Beating on the jock on the ground.

Q. Was the taxi already there --

A. Yeah, the taxi was there. Yeah.

Q. If I could just finish.

A. Sorry. Go ahead.

Q. It's not at all a problem but we will both get in trouble if we speak at the same time.

A. Okay.

Q. Which direction was the taxi going that

1632
C. Bordignon - in-ch. (Simpson)
February 15, 2011

you saw close to the fight?

A. Ah, it was heading west.

Q. Was it already there when you heard the words, You die tonight?

5 A. Um, I can't quite remember. I -- I want to say yes, just because, you know, I only really remember the cab being there, him on the ground being beaten and him, the street kid, saying, You die tonight. I would, you know, going through that
10 in my mind, I would say that the cab would have been there while he was on the ground for the whole time.

Q. Did you see any injuries to any people around Queen and Niagara that night?

15 A. Ah, the guy that got beat up, the street kid that had got beat up originally, um, and then the -- the -- you know, I remember the jock guy getting beat up on the north side, him being hurt. Um, I don't really remember anyone else in the area so I can't -- again, I only remember the fight on
20 the -- by the streetcar and the fight on the north side. What happens in between, I didn't really pay much attention to.

25 Q. You mentioned the street kid that you got -- that you saw getting beaten up at first near the streetcar, you saw an injury to him. What did you

1633
C. Bordignon - in-ch. (Simpson)
February 15, 2011

see?

5 A. His head was bleeding from where he got hit on the ground, um, you know, his nose may have been bleeding, he got punched in the face a couple of times.

Q. And --

A. Yeah.

10 Q. And you mentioned that you saw some kind of injury also to the jock who had been -- who was on the fight on the north side. What sort of injury did you see to him?

15 A. I remember his face being bloody, um, I can't really recall much. He, you know, he looked in distress. I mean, I don't know if they were beating on him for that long for him to be, you know, that stumbley [sic] about it. I mean, it's hard to say. You know, I remember his face being bloody.

Q. Did you see any weapons that evening?

A. No, I didn't see any.

20 Q. What do you recall seeing a woman do?

25 A. Um, I can only -- I only remember that a woman was at one point with the skinny street kid that got beat up first. She was with him. She seemed to be kind of with him. I have no idea if she stayed there or if she went to the other side. I can't

1634
C. Bordignon - in-ch. (Simpson)
February 15, 2011

remember, you know, much about the transition
between the south and the north side of the street.

Q. Was a woman involved in any of the
fighting that you saw?

5 A. Um, again, I can't -- I remember the
street kid on the other side of the street, the
huskier guy. I know there were other people there
fighting the jock. I couldn't say if they were male
or female.

10 Q. Do you think that that's something that
you would remember? Or is it something that you
would dismiss, if there had been a woman involved?

15 A. I mean, I think normally if you see a
fight with a woman in it it sticks out in your mind,
and if this was a guy fighting a woman, straight up
I think I'd remember that. I mean, again, the words
that I heard really stuck out in my mind and that's
-- that's what I remember. I mean, it was -- there
was a lot to take in. There was a lot of people
20 going on. If it was one on one, you know, I think
that would jump out in my mind.

Q. I think I might be done. Hold on just one
second if I might, Your Honour. Thank you, sir.
Thank you for coming down this afternoon.

25 A. Thanks.

1635
C. Bordignon - cr-ex. (Thompson)
February 15, 2011

THE COURT: Cross-examination?

---CROSS-EXAMINATION BY MR. THOMPSON:

5 MR. THOMPSON:

Q. Good afternoon, Mr. Bordignon. You recognize me? You had an interview with me?

A. That's right.

Q. Do you mind if I call you Cam?

10 A. Not at all.

Q. Just a couple things. First of all, you were there with Brittany and another woman Brook?

A. Correct.

Q. And you had been drinking that night?

15 A. That is also correct.

Q. Okay. You provided an audio statement to Officer Giroux back in February 4th of 2011, just a couple weeks ago?

A. Yes, that's right.

20 Q. You mentioned the first thing you see when you walk down there is that you see a group of people following, as you referred to, as two jock heads? Or two jock men? Guys that looked like jocks.

25 A. Yeah.

1636

C. Bordignon - cr-ex. (Thompson)

February 15, 2011

Q. And that you say that the one guy came forward and came towards the jock and looked like he wanted to get in a fight. Did it look like, to you, at the end of the day, like the two jocks were trying to get away from these guys?

A. Ah, yeah, I would say so.

Q. So they were rushing towards the streetcar, wanting to get on the streetcar. Could they get on the streetcar?

A. Ah, the first fight that I mentioned happened before they got on the streetcar. I don't remember them being pulled off or anything like that.

Q. Okay. But I mean, having said that, they were running toward -- the streetcar was there at the time, right?

A. The streetcar was there, they were walking towards the streetcar, yeah.

Q. And were they looking behind them at all concerned?

A. Ah, yeah. The street kids were yelling, ah, they were yelling back, you know, it was obvious that, um, you know, there was a bit of aggression between the two groups.

Q. Okay. I'm just going to throw up a little

1637
C. Bordignon - cr-ex. (Thompson)
February 15, 2011

-- you've seen some of these pictures before but I'm going to throw up a couple exhibits for you. You have seen this one here, but there's also a scene of the street. Can you just cue that up then? And so when my friend asked you, you were on the southwest corner of Niagara and Queen?

A. Mm-hm.

Q. This has been identified as the southwest corner of Niagara and Queen, right?

A. Okay.

Q. Can you, just with that laser pointer, indicate to me where it was you were? Or does that picture show?

A. Yeah, I would have been here-ish.

Q. And for the record, you are just east of the shelter and you're about in parallel with the -- or actually directly to the side of the shelter.

A. Yeah. That's right.

Q. Where are the guys coming from? The two jocks?

A. They were walkin' across this way, so would have started here walkin' this way.

Q. So what I want to get out of you at the end of the day is were they walking towards the streetcar? Were they trying to get on the streetcar

1638
C. Bordignon - cr-ex. (Thompson)
February 15, 2011

or were they walking towards the shelter or what
were they doing?

5 A. They were walking towards the streetcar,
they stopped when the first altercation began around
here.

 Q. Okay?

 A. So, I mean, it looks like they were
heading that way.

10 Q. Okay. So they just weren't able to get on
the streetcar.

 A. Yeah. That happened before they got on.
Yeah.

 Q. And that altercation, you say -- where
did that actual altercation take place though?

15 A. The first one?

 Q. The first altercation. Let's deal with
the one that's right there you are talking about at
the streetcar.

20 A. Sure. It would have been right here
between the front doors of the streetcar and the
side doors. Um, the street kid was before the rest
of the group, came up to the jock and, ah, and the
jock got the better of him like I described.

25 Q. Okay. Fair enough. Does the jock get the
better of him further down the streetcar? I'm going

1639
C. Bordignon - cr-ex. (Thompson)
February 15, 2011

to suggest it happened a little further back behind there.

5 A. Ah, yeah, I mean, I would have said they met around here, maybe some pushing and shoving brought him down. I remember it being at the -- the side -- they were pretty close to the streetcar so it would have been at the side.

Q. Okay. You actually see all the blows or do they eventually go onto the sidewalk?

10 A. Um, I remember the majority of it happening between, ah, like, on the street. I don't remember much of it happening on the sidewalk. I think what I remember most is, um, you know, the jock having the street kid on the ground, he hit him in the face, smashed his head on the ground.

Q. Okay?

A. I remember that. That was on the street.

20 Q. Do you watch anybody else while that's going on? Do you see anybody else trying to interfere with the jock?

A. Ah, there's a lot of people around, there was yelling, um...

25 Q. Well, a lot of those people around, are they interfering with your view right here, sir? I mean, right here, are all these people huddling

1640
C. Bordignon - cr-ex. (Thompson)
February 15, 2011

around here?

A. No, I remember seeing the fight pretty clearly.

5 Q. Okay. Were you able to see whether or not, and I'm going to ask the question again, were you able to see anybody who was interfering with the jock in terms of getting --

A. Not that I can remember.

Q. Okay. The street kid?

10 A. Yeah?

Q. Is he dragged away?

A. After the fight's over?

Q. Yes.

15 A. Um, again, can't remember after he was on the -- I know he was on the ground he couldn't move. You know, he was unconscious or whatever. Um, I remember him later being on the sidewalk standing by the girl that I'd mentioned.

20 Q. Okay. Let's just deal with that in a second.

A. Sure.

Q. But doesn't Brittany go and help him?

25 A. I remember Brittany being with him and me being concerned that, you know, she's getting a little too involved. I don't remember Brit picking

1641
C. Bordignon - cr-ex. (Thompson)
February 15, 2011

him up or dragging him to the sidewalk. I can't --

Q. So where was Brittany with him?

A. I remember seeing Brittany with him when he was standing again closer to the sidewalk.

5 Q. All right. And at that time, you say there was another woman who you haven't been able to identify that was with Brittany and him as well at the same time.

A. Yeah.

10 Q. All right. Do you know what that other woman is doing at least?

A. Ah, she appears, I mean, it seems like she may be checking to see if he's okay. Um, I don't remember any specific actions that she would have been doing.

15 Q. Well, I think you mentioned in your examination in-chief that you felt that there was some kind of relationship between the two of them?

A. Yeah, that's right.

20 Q. And what made you think that?

A. Um, just the proximity and the comfort and how they were conversing. They seemed to be, you know, close, like they knew each other.

25 Q. The term you used was "acquainted with the guy [who was] beat up".

1642
C. Bordignon - cr-ex. (Thompson)
February 15, 2011

A. Yeah. Yeah.

Q. Anything other than the proximity and that that would give you that suggestion? That, I mean, do you think that they knew each other or were they boyfriend, girlfriend? Or --

A. Um, well, she was a female seeming to be, you know, really concerned about the male. I guess you could distinguish that as a girlfriend, boyfriend-type scenario.

Q. Okay. But Brittany was there, too. She wasn't his girlfriend.

A. No.

Q. Okay. So there was a much more intimate relationship.

A. Sure. Yeah.

Q. All right. Fair enough. So at that point then you're watching that, you say that there's another fight going on on the north side?

A. Ah, I remember that one happening first and --

Q. Okay?

A. -- the north side fight happening after. I don't believe they have -- I mean, there may have been a bit of overlap. Um, maybe that's why I don't remember how they got across the street exactly or

1643
C. Bordignon - cr-ex. (Thompson)
February 15, 2011

if it was the same jock.

Q. Okay. So and help us out a little bit here, because we weren't there.

A. Yeah.

5 Q. You see, um, when you're looking at Brittany and this other woman with the street person who's been identified --

A. Yeah.

10 Q. -- your view is there. When is it that your view goes to the north side?

A. Um, I would say when they're midway across Queen Street, um, the other street kids had caught up to the rest of them and were looking to fight the jocks. Um, I remember them moving over to the north side.

15 Q. Okay. Just a second, please. Thanks for the Court's indulgence, Your Honour. You got a transition. Do you see the people that go over to the north side?

20 A. Um, I see the group moving to the north side. Um, I can't remember much about them moving to the north side, whether, I mean, they seemed to have, you know, been sort of ganging up on this guy. I can't remember getting to the north side. I
25 remember them being there really is what I remember

1644
C. Bordignon - cr-ex. (Thompson)
February 15, 2011

of it.

Q. Okay. So let me ask you this: Do they go on the front of the streetcar, to the rear of the streetcar or --

5 A. I would have said it would be towards the front.

Q. So they go over to the front of the streetcar to the north side.

A. Yeah.

10 Q. And just so it's clear on this diagram, if you roughly point out where you think you saw them, where the fight starts over there.

A. Um, I would -- like, the majority of the fight happened in this area.

15 Q. Okay? So you've indicated, for the record, at the two light standards near the One of a Kind Pasta. You did a fairly large circle here. Is it on the sidewalk or is it on the road? Or could you -- I mean, at that vantage point you just see a group of kids there or could you actually tell it wasn't on the road?

20 A. I would say it was closer to the sidewalk with the maj -- where the majority of the beating took place.

25 Q. I'm going to suggest to you, sir, look --

1645

C. Bordignon - cr-ex. (Thompson)

February 15, 2011

there's the poles here. Were they banging anybody's head against the pole?

A. I couldn't see that. The car -- I remember the car being there. I know the jock was on the ground at one point.

Q. Okay.

A. I'm not sure if --

Q. When you say "the car", is that the car that's blocking your view?

A. That's the taxi.

Q. So in reality, the fight could have been more in the centre of the street, you wouldn't have known.

A. That's correct.

Q. Okay. You've got this fight happening, the group of people, you just see your friend there on the south side, right? Your friend along with - sorry - Brittany along with this other woman and the street person. They're on the south side; they're tending to him, right?

A. Yeah.

Q. The street person is engaged with this other woman, she's tending after him?

A. I would, yeah, I would say so.

Q. Did it look like there was a lot to tend

1646

C. Bordignon - cr-ex. (Thompson)

February 15, 2011

after? In other words, did he have a lot of damage?

A lot of injuries?

A. Ah, I would say, well, his -- he got hit pretty good. Um...

5 Q. Okay. So she's going to spend some time with him there, isn't she.

A. I would say so.

10 Q. All right. So she's spending time with him, so when you look over to the north side you don't see her over here, do you?

A. I can't recall seeing --

15 Q. No, but you just looked here a second ago and over here there is a group of people now on the north side.

A. Yeah.

20 Q. You don't see her there, do you?

A. Yeah, wouldn't -- no.

25 Q. Because she's still tending to him on the south side, isn't she.

A. Yeah. Yeah.

Q. So the woman who was on the south side tending to the street person, she's not on the north side. Can't be.

30 A. Again, I remember the guy on the north side, a group of people, the jock. I mean, logic

1647
C. Bordignon - cr-ex. (Thompson)
February 15, 2011

would dictate, you know, unless she's Superwoman, she probably couldn't get there that fast.

5 Q. Fair enough. Now, let's deal with what you see on the north side. You've got a cab in front of you. And when you say the cab's in front of you, just so it's clear, is the rest of the traffic heavy there at that point in time? In other words, is it just the one cab or is there traffic up and down the entire street?

10 A. I don't remember there being a lot of traffic.

Q. Where's the cab?

A. The cab is, ah, here-ish.

15 Q. Okay. You've got an area that basically is in the intersection just west of the intersection of Niagara and Queen, just -- would be just due south of where you said the fight was, so is the fight just right beside the cab? Like, you've sort of got the cab and fight almost in the exact same spot.

20 A. Yeah, I mean, like I said, the cab had pulled up and it blocked my view, so they would have been in close proximity to each other. The cab -- the cab was blocking my view of the fight. The fight, like I said, would have been here-ish, the

25

1648
C. Bordignon - cr-ex. (Thompson)
February 15, 2011

cab would have been, you know, in front of my view
of that.

5 Q. All right. So you do have, in any event,
a couple of guys -- you said in your statement that
they're really having a really good -- beating up
the guy quite heavily?

A. Yeah, they're getting the better of him.

10 Q. Okay. So what are they doing, these two
guys, do you see?

A. Um, they are -- I see, you know, punching
and kicking motions towards the ground where the
jock --

15 Q. Hold on. Okay. You see punching and
kicking motions, but let's -- realistically, at that
distance, are you going to see from the waste up is
all you're going to see of those guys?

A. Yeah.

20 Q. They're beside the cab, your view is
totally blocked except probably from the waste up?

A. That's right.

25 Q. So when you say they're bent over
punching and kicking, you're going to see them bent
over but you're going to see only the tops of their
backs and you're going to see their fists going
over, right?

1649
C. Bordignon - cr-ex. (Thompson)
February 15, 2011

A. Yeah.

Q. So in terms of also the kicking, you're going to see some kind of movement but you're not actually going to see where those blows hit, are you.

5

A. No.

Q. All right. And also, you have no idea if there's two other people laying on the ground beating him up at the same time or there's a woman right there beside him wailing away on him, do you.

10

A. No. I can't see.

Q. And as far as you know, you hear this, You die tonight, that comment, You die tonight, could have very well have come from which gentleman?

15

A. I remember hearing it from the huskier -- the huskier.

Q. Is that the guy with the hat?

A. Ah, he may have been wearing a hat.

Again, I remember him being huskier than the rest of them noticeably.

20

Q. Did you give a statement in which you indicated he had a hat on? You think he had a hat?

A. Yeah, I think he may have had a hat.

Q. Okay. So that's the gentleman with the hat on and he's yelling that and these people are

25

1650
C. Bordignon - cr-ex. (Thompson)
February 15, 2011

continually moving, punching down towards him, is that your evidence?

A. Yeah. That's what I said.

5 Q. So while this is going on, how long after the punching, or how long after the, You will die, or, You will -- what's the term you used? You will die tonight?

A. You die tonight, yeah.

10 Q. You die tonight. How much longer after that did the guy get up and leave? That's our jock guy. Did he get up and leave.

A. I wouldn't say -- I would -- probably a minute.

15 Q. Would it have been more than a minute?

A. I don't think it would have been -- I mean, I didn't see him leave. The last thing I saw of him was stumbling over the cab, um, on the hood of the cab. I would say the entire on the ground beating would have been under a minute.

20 Q. Okay. What I'm saying under a minute, closer to 50 seconds? Like, I'm trying to get an idea, just so you know, you hear this statement from a guy wearing a cap saying, You die tonight.

A. Right.

25 Q. All right? There's a bunch of people

1651
C. Bordignon - re-ex. (Simpson)
February 15, 2011

hitting away at him.

A. Yeah.

Q. You're -- while you're here on the south side you can hear that way down here.

5 A. Yeah.

Q. You think those people there could hear it when he was saying, You die tonight?

A. I would think so.

10 Q. So if they can hear that, how long after he said that did they -- did you see the guy, the jock, leave?

A. May -- maybe 30, 40 seconds?

15 Q. All right. Do you know if they're continually punching at him while they're saying it?

A. Yeah, it was -- it was, like, mid-brawl I would say.

20 Q. All right. And you don't know if the person that may have been on the ground was continually wailing away at that time, do you.

A. I can't see him at all.

Q. All right, sir. Thank you.

THE COURT: Re-examination?

25 ---RE-EXAMINATION BY MS. SIMPSON:

1652
C. Bordignon - re-ex. (Simpson)
February 15, 2011

MS. SIMPSON:

Q. You recall being asked some questions about seeing the first two gentlemen heading towards the streetcar. Do you recall those?

5 A. Do I recall the first two gentlemen?

Q. Do you recall being asked those questions?

A. Oh yeah. Yeah. Yeah.

10 Q. It seemed to me that you and my friend might have used different language, so I'm wondering if you could just describe for us the speed at which those two gentlemen headed towards the streetcar.

15 A. Ah, I wouldn't say they were running. I would say, you know, they're not being leisurely about it. They're, you know, walking quickly to the streetcar.

Q. And as they head towards the streetcar, do you make any observations of them in terms of their interaction with the people behind them?

20 A. Ah, yeah. They look back, say a few things, um, you know, to me it's obvious that they're -- they're looking to get away from the street kids behind them. You know, just judging by their proximity and, you know, the heckling that was
25 going on between them that, you know, they were

1653
C. Bordignon - re-ex. (Simpson)
February 15, 2011

trying to get away from him.

Q. You said they say a few things. Do you recall what they said?

A. No, I don't.

5 Q. My friend also asked you some questions about whether the fight on the north side was on the street or on the sidewalk and had you draw circles on this diagram, or on the photograph that's up. Where was the taxi?

10 A. Ah, again, taxi would have been -- it was between -- I would have been here along this side, the fight and the taxi were on the north side of the street, um, the taxi was in the front of, like, blocking my view of the fight. The taxi could have
15 been, um, you know, could have been in either one of these lanes or in the middle of both. It was somewhere in this area. I don't remember exactly. I remember it was in front of my view of them. I'm not
20 sure if it was in the far left lane or the curb lane. I -- I mean, I would -- I pictured it being more towards the sidewalk. Um, again, all I remember really, like, for sure is that it was definitely blocking my view. I can't really place the exact location.

25 Q. And finally, my friend asked you some

1654
C. Bordignon - re-ex. (Simpson)
February 15, 2011

questions with respect to the woman tending to the street kid on the south side. Did you ever see a woman cross the street towards the north? Towards where that fight was?

5 A. I don't remember that. Um, again, my memory of the events is, um, other than what I've described, is pretty vague. I'm going back and forth between looking at, you know, my two lady friends and what's going on in the north. I don't recall
10 specifically, you know, I can't really say what happened between that other than what I've described, you know, the, You die tonight, the beating. I don't really see the -- them going over there. I just remember for sure that there was a
15 fight over there, the cab was blocking me, um, at one point a woman was tending to the original, you know, the taller street kid that got in the first fight. I can't comment on what happened in between.

Q. Thank you, sir. Those are my questions.

20 THE COURT: Thank you, sir. You may step down.

THE WITNESS: Thank you.

THE COURT: Defence's next witness?

MR. SCARFE: I'm hoping Ms. Lindsey Williams
25 will be here.

1655
L. Williams - in-ch. (Scarfe)
February 15, 2011

THE REGISTRAR: Lindsey Williams, please.

---LINDSEY WILLIAMS: AFFIRMED

---EXAMINATION IN-CHIEF BY MR. SCARFE:

MR. SCARFE:

Q. Ms. Williams, thank you for coming. Sorry about the mix up.

A. Oh, no problem.

Q. But we all understand you have a young child at home, 17 days?

A. Mm-hm.

Q. And we'll try and get you done as quickly as you can so you can return.

A. Okay.

Q. We are here to talk about something that happened one night near Queen and Niagara, ah, August 8th over midnight into August 9th of 2007.

A. Mm-hm.

Q. And I understand that you may have been in the area at the time.

A. Yes.

Q. All right. So can you start by telling us what it is you were doing that night?

A. I was at a girlfriend's house watching

1656
L. Williams - in-ch. (Scarfe)
February 15, 2011

movies.

Q. Okay. We've put a map up here on the easel which we call Exhibit 2, and, oh, it's also here on the TV, and you see where Niagara Street is?

5 A. Yes.

Q. And you see where Queen Street is?

A. Mm-hm.

Q. You see this little icon here that says north is that way?

10 A. Yeah.

Q. Does that help orient you?

A. Yes.

Q. All right. Your girlfriend lives where?

15 A. Ah, approximately where it says the scale 1 to 200, there's an apartment building there.

Q. An apartment building. Does it span the whole block from Walnut to --

A. Yes.

Q. -- Niagara Street?

20 A. Yes.

Q. So it could be this little dark section down here?

A. Yeah.

25 Q. The main front entrance to that building is on which street?

1657
L. Williams - in-ch. (Scarfe)
February 15, 2011

A. On Richmond, which is not shown on this map.

Q. And you got there, ah, how long did you spend there that night?

5 A. Three, four hours?

Q. Three, four hours? Purpose of your visit?

A. Just to hang out and watch movies. Yeah.

Q. Watch movies?

10 A. Yeah.

Q. Okay. Alcohol involved?

A. I had a couple glasses of wine but nothing excessive. No.

15 Q. Mm-hm. And did you leave for a particular reason? Or just --

A. Just to go home.

Q. Just to go home?

A. Yeah.

Q. Do you remember what time it was?

20 A. Approximately 12:30 a.m.

Q. Okay. And I don't want to know exactly where you live but where did you sort of live near?

A. I lived near College and Bathurst. College and Euclid.

25 Q. And you were going to get home how?

1658

L. Williams - in-ch. (Scarfe)

February 15, 2011

A. Walk.

Q. It was a nice night?

A. Mm-hm.

5 Q. Okay. So when you left your friend's
apartment, were you by yourself?

A. Yes.

Q. And did you use the Richmond Street exit?

A. No, I used an exit, smaller exit on --
the exit's on to Niagara Street.

10 Q. So instead of the front of the building
on Richmond, the side of the building?

A. The side of the building, yes.

Q. All right. And tell us what happened when
you came out of that exit?

15 A. Um, I heard loud voices, um, out
screaming, yelling. Ah, I thought it was just some
people being rowdy at first until the actual
altercation came into my side as I walked up the
street.

20 Q. Okay. So you came out of the exit, and
did you stop or did you start walking?

A. No, I started walking north towards Queen
Street. That would be my way home.

25 Q. Do you recall which side of Niagara
Street?

1659
L. Williams - in-ch. (Scarfe)
February 15, 2011

A. I was on the west side of Niagara.

Q. West side heading north?

A. Yes.

Q. And as you -- you know there's a Coffee
5 Time there?

A. Yes.

Q. So when you came out and turned on to
Niagara, how far south of the Coffee Time were you?

A. Ah, maybe ten meters? It's not that far
10 up.

Q. Okay. And as you're walking north, you
hear loud things. What's the first thing you can
make out?

A. Ah, the first thing that I made out was,
15 um, a man screaming, or yelling at another man
saying, You hit a woman.

Q. Okay. And you're still on the west side
of Niagara?

A. Still on the west side of Niagara, yes.

Q. Had you reached Queen yet when you heard
20 that?

A. No, not quite.

Q. At the point that you heard it --

A. Mm-hm.

Q. -- could you see which person was saying
25

1660
L. Williams - in-ch. (Scarfe)
February 15, 2011

all that?

A. No. Ah, the -- the altercation was actually across the street on the north side of Queen, so my sight of the actual people and what they looked like was not good.

Q. Okay. But you heard a man say to somebody --

A. Mm-hm.

Q. -- You hit a woman.

A. Yes.

Q. And then what's the next thing you hear?

A. I heard a woman say, ah, Not him, him, basically pointing out saying it wasn't him that did it, it was this guy.

Q. You heard that.

A. Yes.

Q. Did you see that woman?

A. No.

Q. Did you ever see that woman?

A. No.

Q. Okay.

A. No. I never made out a woman.

Q. And when she said that, had you reached Queen yet or were you still approaching Queen?

A. I was at Queen at that point.

1661
L. Williams - in-ch. (Scarfe)
February 15, 2011

Q. You were at Queen.

A. Yeah.

Q. And do you have a sense as to where in
relation to the Niagara and Queen intersection,
5 where the voices were coming from?

A. It was west of Niagara and Queen
intersection.

Q. Mm-hm?

A. Um, not too far west of a restaurant
10 there called One of a Kind Pasta, but it was -- it
was between there and Bellwoods Avenue.

Q. So somewhere between One of a Kind Pasta
and Bellwoods is the direction you heard the voices
coming from.

A. Yes.

Q. Okay. Both the female and the male?

A. Yes.

Q. Okay. So, um, when you get to Queen and
Niagara, what do you see?

A. I saw an altercation. There was a bit of
20 a -- just an argument going on and it escalated, um,
into a fight. A full on fight. Ah, there was two
additional people that -- males that ran across the
street. They came from the south side of Queen,
25 running diagonally across.

1662
L. Williams - in-ch. (Scarfe)
February 15, 2011

Q. Okay. Before we get to them, first you said you saw an altercation and I have here a laser pointer?

A. Mm-hm.

5 Q. I don't want to put it in anybody's eyes, but -- oh. You just hold the button down there, and so you're standing where?

A. I was standing right by unit 839, so on the corner of Niagara and Queen there. Yeah.

10 Q. Are you more on Queen or Niagara?

A. On Queen.

Q. On Queen. So in front of 839?

A. Yes.

15 Q. On the southwest corner on the sidewalk to east of the bus shelter.

A. Mm-hm.

Q. And you see an altercation?

A. Mm-hm.

Q. Where's that?

20 A. Um, it's happening I would say probably somewhere in and around this area here.

Q. So you're pointing to somewhere in the 756?

A. Yeah.

25 Q. 754 to 758?

1663
L. Williams - in-ch. (Scarfe)
February 15, 2011

A. Yeah, because I think at that point in time I was looking diagonally across the street at it.

Q. Do you remember looking across the street but slightly to your left.

A. Slightly to the left, yeah.

Q. And what did you see in the altercation?

A. Um, it was more the voices that stand out. Um, I don't remember anything prior to the two gentlemen running across the street. Once that happened, a full on fight broke out and that's when it became clear to me that it was a group of people beating on one individual.

Q. Okay. The two men that you saw coming across the street, can you sort of with the laser pointer point out their path?

A. Um, they were probably somewhere in and around this area and they ran diagonally this direction across the street right here.

Q. So you're indicating somewhere around 861.

A. I didn't see obviously exactly where they came from. They came into my sight once they sort of had hit the roadway, but it seemed to me that they were running on an angle towards --

1664

L. Williams - in-ch. (Scarfe)

February 15, 2011

Q. All right. So you're describing an angle that sort of starts around 861?

A. Yeah.

Q. Although you say you're not exactly sure?

5

A. Not exactly sure. I know it definitely wasn't as far as the 7-11, which is here.

Q. Right. And then the path that they take extends diagonally northeast over to somewhere on the north side?

10

A. Somewhere in that area where this is taking place.

Q. Near the One of a Kind Pasta? Or --

A. Yeah. Slightly west of the One of a Kind Pasta.

15

Q. Slightly west. Okay. And can you tell us anything about these two fellows that you saw running?

20

A. I don't, ah, I don't really recall too much about what they looked like. I just know that one gentleman was, ah, he was dressed in all black, shorts, he was wearing shorts. This came to his knee. I believe I said that they were, um, probably like a cutoff denim.

Q. Mm-hm?

25

A. And he was wearing, ah, again, eight hole

1665
L. Williams - in-ch. (Scarfe)
February 15, 2011

style Doc Martin boots and a black t-shirt.

Q. And you say "eight hole style". Do you mean the eyelets on the laces?

A. Yes.

5 Q. It's something that comes up above the ankle?

A. Correct.

Q. Okay. And so -- and what did he have on top?

10 A. I believe a black t-shirt.

Q. And do you remember anything about the other fellow?

A. No.

Q. Do you remember their skin colour?

15 A. They were both white.

Q. Both white.

A. Yeah.

Q. And when they arrived at their destination, what did you see at that destination?

20 A. When they arrived at their destination?

Q. You had them running across north --

A. I had them running across the street, um, I just know that a fight broke out. I can't remember exactly at what point or who started it, but it just
25 all seemed to happen so fast.

1666
L. Williams - in-ch. (Scarfe)
February 15, 2011

Q. And did you see any women in the area of the fight?

A. No.

Q. No.

5

A. No.

Q. And were you ever able to identify the woman that you had heard earlier, coming up Niagara?

A. No. Um, there was so much commotion going on, um, there was no woman that I could see directly involved in the fight itself. Um, I just heard the woman's voice.

10

Q. Mm-hm. You heard a woman's voice. Are you able to say whether it was one woman or more?

A. At the time it seemed that it was just the one. I wouldn't be able to differentiate between the voices.

15

Q. Okay. So do you have any sense for how long you stayed in one -- did you stay in one position and watch this for a bit?

20

A. Um, I was standing watching it there for maybe a couple of minutes, um, at which point I saw a friend of mine who was stopped in a taxi at the lights as traffic had backed up at this point, so I walked over to stand with him for a minute before leaving to go home.

25

1667
L. Williams - in-ch. (Scarfe)
February 15, 2011

Q. Okay. Can you point out to us where the
-- where your friend in the cab was?

A. Um, he was stopped at the lights, um, and
he was east of Niagara Street going westbound on
Queen.

Q. And stopped at the lights at Queen and
Niagara?

A. Yes.

Q. Okay. East of Niagara?

A. Yes.

Q. And do you remember if the taxi was in
the curb lane? The middle lane?

A. It was in the middle lane.

Q. Okay. And where was your friend?

A. Um, him and his friend had both gotten
out of the rear seat of the taxi and were just
standing behind the doors of the cab watching what
was going on.

Q. And was your friend by the rear passenger
door or the rear driver door?

A. The rear driver door.

Q. All right. So you walked over to him?

A. Mm-hm.

Q. How come?

A. I saw him and, ah, I thought I would walk

1668
L. Williams - in-ch. (Scarfe)
February 15, 2011

over and kind of discuss what was going on, but he seemed quite distracted by the situation.

Q. So did you go over?

A. I did go over and it was very brief.

5 Q. Did you speak to him?

A. Just said hello and asked if everything was okay, and he said yes, but seemed very, ah, intent on watching what was going on and we didn't really make eye contact, at which point I patted him on the back and said, Well, I'm gonna go.

10

Q. At that point, can you recall if the fight was still going on?

A. Um, I believe in my statement, although I can't recall now, that I did say that I had thought that the fight had come to an end.

15

Q. Mm-hm?

A. So that's why I decided to make my way home at that point.

Q. And where did you go?

20

A. Um, I walked eastbound on Queen Street.

Q. Which side of the street?

A. Ah, I was on the, ah, I can't recall. I believe I was on the south side but I can't remember for sure.

25

Q. So you were sort of in the middle of the

1669
L. Williams - in-ch. (Scarfe)
February 15, 2011

street when you talk to your friend?

A. In the middle of the street and I walk
back over to the -- yeah.

Q. South side?

5 A. The south side to continue walking
eastbound.

Q. Okay. Did you hear anything else?

10 A. As I was walking away, ah, once I hit
around Claremont Street, which was only about a
block away, um, a woman started screaming
hysterically for them to stop whatever was going on
and asking for help.

Q. Screaming -- do you recall the words that
she was --

15 A. She was saying, Stop, stop.

Q. Repeating the words, Stop?

A. Repeating the word, Stop, stop, and
asking for somebody to help.

20 Q. Okay. So you heard the word "stop" more
than once?

A. Mm-hm.

Q. And you heard the word "help".

A. Mm-hm.

Q. Anything else?

25 A. Not that I can recall, no.

1670

L. Williams - in-ch. (Scarfe)

February 15, 2011

Q. Anything that sticks in your mind about the sound of the voice or the --

A. Just panic, like sheer panic and like a really, really high pitched, shrill scream.

5 Q. Mm-hm. And you said you were maybe in the area of Claremont?

A. Yes.

Q. You're familiar with the area?

A. Yeah.

10 Q. You know where the Starbucks is?

A. So I left my friend here and by the time I was just past Claremont area is when I started to hear the screaming.

15 Q. You're indicating somewhere around just --

A. Yeah, it might be slightly off the map but I know that it was definitely past Claremont.

20 Q. Do you have any sense for how much time went by between I take it the first thing, two statements that you heard were close together, You hit a woman, followed by, Not him, but him.

A. Correct.

Q. Or words to that effect.

A. Yes.

25 Q. You were sort of coming to the top of

1671
L. Williams - in-ch. (Scarfe)
February 15, 2011

Niagara when you heard that.

A. Yes.

Q. Do you have a sense as to how much time went by between that moment and when you heard the girl screaming, Stop, stop, help?

A. It was no more than a five minute total between the time I was standing on the corner and the time that I spent with my friend before I turned to walk.

Q. And I take it you -- is that an estimate?

A. That's an estimate. It was quite a while ago so...

Q. Were you able to tell whether the voice of the female you heard the second time was the same voice that you heard the first time?

A. No, I wouldn't be able to tell you.

Q. Sorry?

A. I would not be able to tell you that, no.

Q. Thank you, ma'am. Those are my questions.

MR. THOMPSON: You know, Your Honour, I can proceed. I don't have a lot of questions for this witness.

THE COURT: I was just going to say if you're not going to be long we'll just continue, Mr. Thompson. Thank you.

1672
L. Williams - cr-ex. (Thompson)
February 15, 2011

---CROSS-EXAMINATION BY MR. THOMPSON:

MR. THOMPSON:

5 Q. Just a couple things.

A. Mm-hm.

Q. Do you mind me calling you Lindsey?

A. Not at all.

Q. You know me. We've met before?

10 A. Yes.

Q. Lindsey, you never actually ever see a woman, do you?

A. No.

15 Q. All right. So even when you're on the corner of Niagara and Queen, Queen Street, you don't see anybody, do you. Like, you don't see a woman who made that comment with respect to --

20 A. No, all I saw was a number of males involved in the altercation. I never actually saw a woman. Just heard her.

25 Q. Okay. And so at the end of the day as well, when you're looking at this fight, you've marked it somewhere up around 7 -- I mean, that's almost a block away. I mean, you really -- in all fairness, you don't really see anything, do you.

1673

L. Williams - cr-ex. (Thompson)

February 15, 2011

5 A. No, I -- I mean, I didn't want to get much closer than that for fear of my safety obviously but, you know, mostly just a bunch of bodies being thrown, yeah, just moving around and definitely -- I definitely could make out that it was a fight but could not make out faces.

Q. All right. And the comment that you didn't see any women, was there any women on the street at all that night?

10 A. Yes, there were.

Q. And where were those women?

A. Well, there was about 25 to 30 people I would guesstimate just within the one block radius.

15 Q. So at that distance, would you ever really be able to tell whether there was a woman involved or around the fight or even near the fight?

A. No. No. The only reason why I assumed that there was a woman involved is just because of the comment I had heard: Not him, him.

20 Q. Okay. But I'm talking about the actual fight on the north side. Just so it's clear, you hear something that's happening on the south side.

A. Mm-hm.

25 Q. But in terms of the north side, the actual fight, that's a long distance away. All

1674

L. Williams - cr-ex. (Thompson)

February 15, 2011

right. And you really don't know that the individuals that were there, you can't identify them.

A. No.

5 Q. And as far as whether it was a female involved, you have no idea.

A. No.

10 Q. And just to sort of add a little bit, and don't take this wrongly and add insult to injury, but when you're sitting there talking to a friend in the cab, I mean, you're talking to your friend and you're not really paying attention to, number one, how long you're there. Your cab is right around here, right?

15 A. Yeah, a little bit further west.

Q. Almost right at Claremont?

A. No, at Niagara Street.

Q. Okay.

20 A. So he was at the lights there but my conversation with him was very short. I was standing on the corner watching it prior to.

Q. But while you're talking to him, are you looking at him or the fight?

25 A. We were both looking at the fight and had a few short words and then I decided that I was

1675
L. Williams - cr-ex. (Thompson)
February 15, 2011

going to leave.

Q. And just so it's clear, when you turn your back and go away, you start leaving, you hear a woman yell, Help, help, and then -- or, Help me? Help me or help?

A. I don't recall.

Q. Okay. So somebody could have been saying, Help me, because they're injured, and you don't know if they said, Help me, first or, Stop, first or anything, do you.

A. Ah, no, I couldn't recall.

Q. And in terms of, Stop, it could have easily been somebody in one of the buildings telling them stop fighting, right?

A. It could very well have been, yes. Like I said, I didn't see a woman, so...

Q. Okay. So it's a woman's voice but somebody's yelling, Stop, so it could have been somebody in one of the apartment buildings telling them to stop, stop the fight, and then somebody could be yelling, Help. It's not really an identifier, is it.

A. No.

Q. It's somebody yelling at a fight. You think somebody's going to yell, Help, right? That's

1676
L. Williams - re-ex. (Scarfe)
February 15, 2011

a normal thing to come out of a fight.

A. Yeah. I think it just stood out because
it was so intense. It was such an intense scream
that I just assumed it was involved in the
situation.

Q. But to be clear, your back is to them at
the time.

A. Correct. Yes.

Q. And just so it's clear, you were there
for that period of time and you hear this, Help,
and, Stop, stop?

A. Mm-hm.

Q. Ever hear a woman say, I'm stabbed?

A. No.

Q. The same female voice never goes, I'm
stabbed?

A. No, not that I heard.

Q. Thank you.

THE COURT: Re-examination?

MR. SCARFE: Just very quickly.

---RE-EXAMINATION BY MR. SCARFE:

MR. SCARFE:

Q. My friend Mr. Thompson asked you about

1677
L. Williams - re-ex. (Scarfe)
February 15, 2011

when you were walking away and you heard the woman,
the intense scream and the --

A. Mm-hm.

Q. -- the, Stop and the, Help, comment.

5 Were you able to tell what direction that sound came
from?

A. It was behind me.

Q. Mm-hm? Can you be anymore specific?

10 A. Ah, not -- not really. I mean, to me, I
just assumed that it was coming from the same place.
It did go on for a while. I could hear her for,
like, longer than, well, basically for a couple
blocks down Queen.

15 Q. It's your sense it came from the same
place?

A. My sense was that it was a person that
was panicked and that, you know, as that was the
only thing that, ah, was happening on the street --

Q. Mm-hm?

20 A. -- I assumed that it was involved in that
situation.

Q. And what you had seen was on the north
side.

A. Correct, yes.

25 Q. Okay. Thank you. Thank you for coming.

1678
L. Williams - re-ex. (Scarfe)
February 15, 2011

A. Thank you.

THE COURT: Thank you, ma'am. You may step down.

THE WITNESS: Thank you.

5 THE COURT: Do you have another witness, Mr. Scarfe? Or not.

MR. SCARFE: We do not have another witness at this time. We have been working all day on witnesses. Um, there's one witness who I
10 think we have to confirm that is available to come here at 2:15 tomorrow. There is another witness whose business number I had obviously from the phone book earlier this morning but I just obtained his, ah, other or personal
15 number and I wondered if, ah, oh. Sorry. This note says February 16th at 2:15.

THE COURT: Tomorrow is the 16th.

MR. SCARFE: I had a little note passed to me. Sorry. So we have someone who can come at
20 2:15 and if I would be permitted to make a phone call I can determine whether I can have someone here or not at 10:00. But --

THE COURT: All right. Well, let's see if we can.

25

1679
L. Williams - re-ex. (Scarfe)
February 15, 2011

---RECESS (3:45 p.m.)

5

---UPON RESUMING (4:03 p.m.)

10

MR. SCARFE: With the helpful Detective
Sergeant Giroux, Mr. To has confirmed that he
is available to come tomorrow or Thursday.
With the help of Mr. Murphy our registrar,
we've learned from the interpreter
coordinator that the answer is maybe. Maybe
-- I guess he's going to check. I'm hesitant
to bring Mr. To twice. Certainly our chance
of getting an interpreter will probably be
better for Thursday morning but I'm in Your
Honour's hands. You've dealt with this
before.

15

20

THE COURT: How far is Mr. To from the
courthouse?

MR. SCARFE: He lives above 746 Queen. One of
a Kind Pasta. He's the owner.

25

THE COURT: Can I suggest that we come back

1680

L. Williams - re-ex. (Scarfe)

February 15, 2011

for tomorrow at 10:00, see if a Cantonese
interpreter is available. If the interpreter
is available, we can then call Mr. To and ask
him to come down. I assume his evidence isn't
5 going to be terribly lengthy so we could
start on it by eleven o'clock and get him
done in the morning and if a Cantonese
interpreter is not available then we can try
for Thursday.

10 MR. SCARFE: Yes.

MR. THOMPSON: I think that's a good
suggestion, Your Honour. I understand that
this court is not going to be able to sit
tomorrow at ten o'clock in any event.

15 THE COURT: Well, I have Special Assignment
Court. It's a rather short list, so depending
whether the counsel and people in custody
arrive on time, which is always one of the
main issues, I expect to be done by ten
20 o'clock, but I'm sort of in the hands of
prisoner transportation.

MR. THOMPSON: Well, if I can make the
suggestion as well, Your Honour, at the
pretrial there was certain items that were
25 going to go in by way of consent, one of

1681
L. Williams - re-ex. (Scarfe)
February 15, 2011

5 which is about an hour and-a-half long video
of Ms. Watts, and the Crown consents that
that can go in, so even if we can't get the
interpreter tomorrow, perhaps we can use the
time in the morning to put that in and I'm
sorry -- I think we can probably use tomorrow
afternoon as well. It just may not start at
exactly 2:15.

THE COURT: That's fine.

10 MR. THOMPSON: So at least the day will be
productive and if we have to Thursday, you
know, we will know if we can get an
interpreter by then.

THE COURT: So should we do it that way then?

15 MR. THOMPSON: I'm suggesting it's a good
idea, unless my friend says otherwise.

MR. SCARFE: No, that's fine. That's fine.
Thank you.

20 THE COURT: All right. So we'll see if we can
get a Cantonese interpreter for tomorrow
then, Mr. Registrar.

THE REGISTRAR: Thank you, Your Honour.

THE COURT: Anything else?

MR. THOMPSON: No. No.

25 THE COURT: Thank you.

1682
Colloquy
February 16, 2011

---COURT ADJOURNED

5

---WEDNESDAY, FEBRUARY 16, 2011

10

---UPON RESUMING

(10:02 a.m.)

MR. THOMPSON: Good morning, Your Honour.

15

THE COURT: Good morning.

MR. THOMPSON: I can indicate, Your Honour,
just in terms of, and I'm sure Your Honour's
aware of the availability of the interpreter.
There was one here. Apparently there is an
accredited interpreter here as well so I've
asked the interpreter to see if she can find
that person so we don't get into those issue
at all.

20

THE COURT: All right. Thank you.

25

MR. THOMPSON: And I understand my friend is

1683
Colloquy
February 16, 2011

going to be calling Mr. To eventually, but we have the video.

5 MR. SCARFE: Yes, Your Honour. There may be a little bit of shuffling around. I found out about seven minutes to ten that we had an interpreter, so I went immediately and phoned Mr. To and Mr. To will arrive at this courtroom at some point hopefully in the next half hour. In our office down the hall we are currently printing the 41 pages from the preliminary hearing transcript and I was going to ask the interpreter to sit in the hallway with him and go over it with him. So we may need to interrupt here or there just to get him all set up.

15 And then we have Mr. Gallately coming at 2:00, I believe it was confirmed, and he's been sent, last night, a copy of his preliminary hearing transcript and a copy of the memo book statement that was originally taken. So if -- we may have to interrupt the video just once or twice, but it may be that we can get all of the defence evidence done today.

25 THE COURT: All right. The only issue, I need

about half-an-hour around 11:30, 11:45 to deal with an urgent matter that has come up, but other than that, that's my only issue today.

5 MR. SCARFE: Absolutely. Thank you.

THE COURT: Thank you.

MR. SCARFE: So on consent, I have provided the -- there's been a few minor edits made to Ms. Watts' linked testimony just simply to remove items of hearsay and other things that don't really go to the heart of the case. It was edited in anticipation of a jury, but I think we both stand by the edits. And how long is it? An hour and -- somewhere between an hour and an hour and-a-half. So...

15 THE COURT: Just so I understand it, this is evidence that Ms. Watts gave by video link at the preliminary which is going on as defence evidence with the consent of the Crown.

20 MR. THOMPSON: It is. And just so it's clear, I mean, there is going to be lots of hearsay evidence in there. We haven't removed that. We removed any evidence that would be, in front of a jury, be prejudicial to my friend's client.

25

1685
Colloquy
February 16, 2011

THE COURT: All right.

MR. SCARFE: That's probably a fair way to
state it. So with the assistance of Ms.
Fineberg, perhaps we can start with that and
I just ask if the commissioner could notify
me when Mr. To gets here and we'll take a
moment and get him set up.

THE COURT: Thank you.

---VIDEO PLAYING

MR. SCARFE: I just didn't want Mr. To to be
sitting outside. I was going to check and
make sure I could set him up with the
transcript if he's here.

THE COURT: All right.

MR. SCARFE: If he's not here I will have
someone else do it.

MR. THOMPSON: Your Honour, if I just may be
excused briefly for a moment, and the reason
being is the interpreter that's here is not
the one that I assume is going to be the
accredited interpreter and I just want to

1686
Colloquy
February 16, 2011

check that.

THE COURT: Go ahead.

MR. SCARFE: Your Honour, thank you for your
patience. He is not here yet but we expect
5 him shortly. My student Ms. Santara may
quietly get up and check every five or ten
minutes. The current reporter [sic] that we
have for the moment, I think we're content
that she review his transcript with him and
10 so I don't think I'll need to interrupt
again.

THE COURT: All right. Thank you.

15 ---VIDEO PLAYING

THE COURT: We'll take the morning recess.

20 ---RECESS (11:28 a.m.)

---UPON RESUMING (12:00 p.m.)

25

1687
Colloquy
February 16, 2011

THE COURT: Thank you for the additional
time.

MR. SCARFE: Are we ready to --

5 THE COURT: Do counsel want to continue with
Ms. Watts? Or deal with Mr. To?

MR. SCARFE: I think we only have ten minutes
left in the video.

10 MR. THOMPSON: Well, there's probably -- no,
more than that, but...

MR. SCARFE: Mr. To is still reviewing his
statement and we haven't sorted out the
accredited versus not accredited issue yet.

15 THE COURT: All right. Then let's continue
with the video.

---VIDEO PLAYING

20 MR. THOMPSON: Just so the record's clear,
Your Honour, there was cross-examination at
that day. The Crown has consented to allow
this to go in as an exhibit. There was to be
25 further cross-examination, however, that

1688
Colloquy
February 16, 2011

never did take place for a number of reasons
and we thought this would be the best and the
best evidence before the Court of that
witness's evidence, however, so that's where
it ends. The remainder of the tape just deals
with scheduling.

MR. SCARFE: That is correct.

THE COURT: Well, I stand to be corrected,
counsel, but I would not have thought that
normally, videotape or disk or recording of a
witnesses evidence at trial would be put in
as an exhibit.

MR. SCARFE: I have just provided the disk to
--

THE COURT: I said it would not normally go
in as an exhibit because exhibits go to the
jury and a jury wouldn't normally have a
witness -- the evidence of one witness in
preference to the evidence of any other
witness.

MR. THOMPSON: I don't disagree, Your Honour.
In terms of --

THE COURT: I'm prepared to have it filed as
a lettered exhibit --

MR. THOMPSON: Yes.

1689
Colloquy
February 16, 2011

THE COURT: -- for identification, but --

MR. SCARFE: That's fine, and if Your Honour
at any point wants to go back and review it,
obviously, that's available to you.

5 THE COURT: It will be I think Exhibit E?

THE REGISTRAR: I believe it's E, Your
Honour. Thank you.

10 ---**EXHIBIT E**: Videotaped evidence of Faith Watts -
produced and marked for
identification.

15 MR. THOMPSON: I think it goes in as an
exhibit but I don't believe it's available to
go back to the Court and watch it over and
over.

20 THE COURT: I will rely on my notes, Mr.
Thompson.

25 MR. SCARFE: Certainly. Of course not to
belabour the point, but if you had a jury
here and a jury came back in the middle of
deliberations and asked to hear it again, you
would have to consider whether or not

1690
Colloquy
February 16, 2011

portions would be played.

THE COURT: That's true.

MR. SCARFE: The next witness for the
defence, Your Honour, is Mr. To. I understand
5 that we have a second interpreter that has
arrived and, ma'am, have you had a chance to
speak with Mr. To in the hallway?

THE INTERPRETER: No.

THE COURT: Can you just take a moment and
10 ensure that you can understand each other?
Thank you.

THE REGISTRAR: Mr. To, please.

MR. SCARFE: Perhaps we should start with the
interpreter, Mr. Murphy?

15 THE REGISTRAR: Your Honour?

THE COURT: Start with the interpreter,
please.

THE REGISTRAR: Thank you.

20 ---EPPIE CHEUNG: Sworn to interpret in the
Cantonese language.

25 MR. SCARFE: Just for the record, I

1691
R. To - in-ch. (Scarfe)
February 16, 2011

understand that, through the efforts of our registrar, that this lady is an accredited interpreter?

THE COURT: That's what I understand.

MR. SCARFE: Thank you.

---RAYMOND TO: SWORN THROUGH INTERPRETER

---EXAMINATION IN-CHIEF BY MR. SCARFE:

THE COURT: Mr. Scarfe, can I clarify, I take it Mr. To would prefer to give his evidence through the interpreter?

MR. SCARFE: I was just going to ask him that.

THE COURT: Thank you.

MR. SCARFE:

Q. Mr. To, what is your first language?

A. Cantonese.

Q. And how long have you lived in Canada?

A. Is about 28 years.

Q. And how is your English?

A. So I work in a restaurant, so in that place I can speak English.

Q. Mm-hm? Can you read English?

A. No, I don't.

1692

R. To - in-ch. (Scarfe)

February 16, 2011

Q. Okay. What language would you prefer to give your testimony in today?

A. Cantonese.

Q. All right. Where were you born?

5 A. Hong Kong.

Q. And how old are you now?

A. 54.

Q. And what do you do for a living?

A. I am a chef.

10 Q. Mm-hm. Do you own a business?

A. I'm looking after it for a younger sister.

Q. You're looking after a business. And what is that business?

15 A. Restaurant.

Q. What's the name of the restaurant?

A. One of a Kind Pasta Inc. Grill.

Q. And what is the address?

A. 746, Queen Street West.

20 Q. Mm-hm. We have a poster which we call Exhibit 2 in these proceedings. It is a map of Queen Street West. Are you able to look at that map and see where your -- where the restaurant is?

A. Yes.

25 Q. I don't know what happened to it either.

1693
R. To - in-ch. (Scarfe)
February 16, 2011

And perhaps -- we had a pointer, Your Honour. I'm sorry. It seems to have disappeared. Ah. And it has reappeared. Thank you.

5 This is a pointer that assists us and you can either point at the TV screen or the poster, but if you could push that button and show us where your restaurant is. Indicating 746 Queen.

Where do you live, sir?

A. So I live on the second floor of 746.

10 Q. And on August 8th, 9th, of 2007, is that where you lived?

A. Yes.

Q. All right. And I understand you saw something from your apartment that night?

15 A. Yes.

Q. Yes. Could you tell us what -- what you recall happening that night first? That caused you to look out the window?

20 A. Someone in downstairs in the restaurant -- out on the street, someone outside by the window was, ah, arguing and then somehow they make noise on the window.

Q. Mm-hm? And what happened next?

25 A. Then from the second floor I opened the window and look outside.

1694

R. To - in-ch. (Scarfe)

February 16, 2011

Q. Okay. Before you heard this, what were you doing?

A. I was trying to get to sleep.

Q. Were you in bed?

A. Yes.

Q. And how far was your bed from the window?

A. So, like, how far from here? Probably two, three feet.

Q. Sorry. In your apartment, on August 8th and 9th, that evening, how far was your bed from your window?

A. Not far. It's like this. About two to three feet.

Q. Thank you for clarifying that. So you heard this noise and you went to the window, and you said you opened the window?

A. Yes.

Q. And what did you see?

A. So I saw some people down there arguing.

Q. Mm-hm? And how many people did you see?

A. Three.

Q. And in relation to the front of the restaurant, exactly where were the three people?

A. In the -- in the place where the window was.

1695

R. To - in-ch. (Scarfe)

February 16, 2011

Q. Were they, ah, on the sidewalk?

A. Yes.

Q. And when you looked out your window, did you have to look left or right to see these people?

5 A. So from window I looked down and saw them.

Q. They were directly below the window.

A. Yes.

Q. How many windows do you have -- well, first of all, the place where you live, you have the pasta restaurant on the main floor and your apartment above, correct?

10 A. Yes.

Q. How many floors is your apartment?

15 A. Three.

Q. Three. So your bedroom is on which floor?

A. Second floor.

Q. Second floor. And what's on the third floor?

20 A. Another person stayed there.

Q. I see. And when you look out the window on the second floor towards Queen Street, how many windows are there?

25 A. So there are three but the one in the middle cannot be opened. You can only open the two

1696

R. To - in-ch. (Scarfe)

February 16, 2011

smaller ones on the side.

Q. I see. And how big are those windows?
Approximately. Holding up your hand indicating
something in the area of two and-a-half feet wide?

5 A. About.

Q. Right? And how tall are the windows?
Again, you're indicating about two feet tall?

A. Yes.

10 Q. And does that whole area open? Or only
part of it?

A. So they're window and then the screen
both can be opened.

15 Q. Okay. And does that take up the whole two
and-a-half feet by two feet area?

A. Yes.

Q. And do the windows open -- do you have to
slide them? Or do you have to push them in or out?

A. Slide up.

20 Q. Okay. And does the screen open the same
way or a different way?

A. Yes.

Q. Yes, it opens the same way?

A. Yes.

Q. You slide it up.

25 A. Yes.

1697
R. To - in-ch. (Scarfe)
February 16, 2011

5 Q. All right. The window that you opened that night, if you -- if you're standing in the middle of the second floor and you're looking out at Queen Street, you've already told us the window in the middle doesn't open, right? So was it the window towards the east going downtown? Or was it the window going west towards Mississauga?

A. I opened the one on that side.

10 Q. East or west?

A. That -- that means it should be east because the other side is west.

Q. Okay. So you opened the window closest to downtown Toronto?

A. Yes.

15 Q. Okay. And when you looked out, how was your body positioned? The witness, for the record, has stood up and taken himself to the edge of the witness box and bent his body forward at the waist, ah, to appear to look out and down. Is that okay?

20 MR. THOMPSON: Sure.

MR. SCARFE:

Q. All right. So when you first look out, you've already told us that you see three people arguing on the sidewalk?

25 A. Yes.

1698

R. To - in-ch. (Scarfe)

February 16, 2011

Q. What happened next?

A. Then one being pushed on the ground and the three of them fighting.

Q. So you saw somebody push somebody on the ground.

A. Yes.

Q. Okay. So let's start with him, sir, and do you remember anything about that man? What he looked like? The person who got pushed to the ground?

A. It's a fat -- is big.

Q. Mm-hm? Anything about how he's dressed?

A. So something like army, like something like that.

Q. Okay. And this was the man on the ground?

A. Yes.

Q. What about the other two people?

A. So one is flying up and use the knee to hit the person.

Q. One is standing up you said?

THE INTERPRETER: Flying up.

MR. SCARFE:

Q. Flying up? Can you just clarify what you mean sorry? Again?

THE WITNESS (answering without interpreter):

1699

R. To - in-ch. (Scarfe)
February 16, 2011

Knees to...

MR. SCARFE:

5 Q. Oh, I see. So you stepped out of the
witness box and you sort of crouched down on one
knee and made a motion with your left hand like a
punching motion?

A. Yes. And the other one kicked him.

10 Q. All right. So starting with the person
who went down on one knee and was punching, what did
that person look like?

A. Is a male.

Q. Mm-hm?

15 A. So what do you mean by that -- how to
describe?

Q. Well, start with the person's skin. Was
that a black man or a white man?

A. If I look from up above, I can't see
clearly.

Q. You can't see clearly. Okay.

20 A. He's not black, but I can't see what kind
of person he is.

Q. Okay. That's the person who's doing the
punching. Could you tell whether the person was male
or female?

25 A. Male.

1700

R. To - in-ch. (Scarfe)

February 16, 2011

Q. Are you sure?

A. Yes.

Q. Okay. The other person who was doing the kicking, was that person male or female?

5

A. Male.

Q. Okay. Are you sure?

A. Yes.

Q. Can you tell us anything about that person, the kicking person? Whether they were -- the person's skin? What colour the person's skin was?

10

A. Not black.

Q. Not black? Okay. And can you remember anything about that person's clothing? Or how they were dressed?

15

A. All three of them is about the same kind of clothing.

Q. Okay. So how long did the kicking and punching go on for?

20

A. Not for long.

Q. Not for long? Um, would you say it was more or less than a minute?

A. Less than a minute.

Q. Mm-hm. And could you help us out, if I ask you whether it was more or less than 30 seconds?

25

1701

R. To - in-ch. (Scarfe)

February 16, 2011

A. Should be, yes.

Q. Should be what?

A. 30 seconds. So there is in one minute
there's 60 seconds.

5 Q. About 30 seconds?

A. Yes.

Q. Okay. And what happened at the end of
those 30 seconds?

A. So the fat man struggle and get up.

10 Q. Mm-hm? And which direction did he go?

A. He wants to cross the street.

Q. Mm-hm? And did you watch as they went --
did he -- did he start to cross the street?

15 A. So when he tried to cross the street
there was a taxi coming.

Q. Yes? What did the man do?

A. So the man wants to talk to the taxi
driver so he ran from the back of the taxi and go up
to the driver's side.

20 Q. Yes? What happened next?

A. The taxi driver didn't do anything and
went off.

Q. Okay. Did you see what happened to the
two men that were beating the man?

25 A. So they're still arguing and then someone

1702
R. To - in-ch. (Scarfe)
February 16, 2011

say, Call the police.

Q. And the two men -- so after the fatter man left and went to the taxi, where -- the other two men were still arguing?

5 A. So when the taxi ran off, the three men still on the street.

THE COURT: Mr. Scarfe, lunch?

MR. SCARFE: Thank you, Your Honour. I should indicate that we -- with the assistance of
10 Ms. Middlekamp, I have contacted the next witness and we had asked, or asked if he could come a little before 2:15 and he couldn't. So I was kind of stretching it a little bit but clearly we have lots to do
15 here, so 2:15.

THE COURT: All right. Just before we rise, I will address this when I get back. I have had a request from the media. One for a copy of
20 Ms. Watts' photo from the photo line-up which is Exhibit 42B, I believe. I have also had a request from the media for access to the video that we just watched of Ms. Watts. So I will address those when we return.

25

1703
R. To - in-ch. (Scarfe)
February 16, 2011

---LUNCHEON RECESS (1:05 p.m.)

---UPON RESUMING (2:18 p.m.)

5

THE COURT: Do counsel want to address the issue of the media request or do you want to leave that until later.

10

MR. SCARFE: Um, no, I can address it now quite quickly. The photograph that was requested is an exhibit in these proceedings and I see no reason why it can't be provided to the media.

15

With respect to the lettered exhibit, which is really kind of like evidence that was called in this case, I am in Your Honour's hands as to whether it is appropriate to give that out and I take no position.

20

THE COURT: Mr. Thompson?

MR. THOMPSON: Yes. I concur with my friend with respect to the picture. However, I once again reach back to the case, *The Canadian Broadcasting Corporation*, and it seems to

25

1704
R. To - in-ch. (Scarfe)
February 16, 2011

address that issue on the basis of evidence,
lettered exhibit, and exhibits filed as a
letter is not considered evidence in the
trial. So I'm -- respectfully, at least on
5 behalf of that decision in any event, I think
that the Crown's position would be that that
not be released based on that argument alone.
THE COURT: Mr. Registrar, will you make a
copy of the -- Ms. Watt's photograph from the
10 photo line-up to the media representative who
requested it. At the moment I'm not satisfied
that the video of the interview or evidence
of Ms. Watts is properly accessible by the
media. I'm not going to order it released at
15 this stage. If the media wishes to bring an
application with respect to that issue they
are of course welcome to do so.

THE REGISTRAR: Thank you.

MR. SCARFE: May I continue?

20 THE COURT: Yes.

MR. SCARFE:

Q. Thank you for waiting, Mr. To. When we
left off you had just described looking out your
window and seeing three men fighting on the sidewalk
25 below, is that right?

1705
R. To - in-ch. (Scarfe)
February 16, 2011

A. Yes.

Q. And then I think you had described the man who was being beat up who you described as the fatter man.

5 THE WITNESS (answering without interpreter):
Yes.

Q. Got up and walked out to a cab?

A. Yes.

10 Q. All right. And so I was asking you about that point, whether -- when the man walked over and he got to the driver's side of the cab, at that point, what were the -- the two men that were beating him up, did you see where they were?

A. So they follow.

15 Q. They follow. And did they speak to the cab driver as well?

A. No.

Q. And then I understand, well, what happened next?

20 A. The taxi driver ran off.

Q. Right? And after that?

A. So opposite side on the TTC station, there are a lot of people there. They were watching and somebody called the police.

25 Q. You saw somebody with a telephone calling

1706
R. To - in-ch. (Scarfe)
February 16, 2011

the police?

A. Yes.

Q. Okay. And what's the next thing you remember doing or seeing?

5 A. Then I saw the police came.

Q. Okay. Do you have a sense for how long that took before the police came?

A. It wasn't a long time.

Q. Okay. Did you ever go outside that night?

10 THE INTERPRETER: That night? Sorry?

MR. SCARFE:

Q. Did you ever leave your apartment?

A. So when I saw the police I go to get changed and ready to go down.

15 Q. Mm-hm? So you got changed and did you in fact go down?

A. Yes.

Q. And when you came out of your apartment, what did you see at that point?

20 A. So I saw lots of people on the street, including the police.

Q. Mm-hm? Did you see any females at this point?

25 A. Then I walked towards west, so then I saw a female injured and also with a paramedic, because

1707

R. To - in-ch. (Scarfe)

February 16, 2011

at that time the ambulance there already.

Q. You saw a female injured, and what did you say after that?

A. She told the paramedic she was injured.

5 Q. She told the paramedics. And where was it that you saw her?

A. So I walked downstairs and then I walked on the left, which is towards -- on the right -- towards the west.

10 Q. Mm-hm? And how far down did you walk down before you saw the woman talking to the paramedics?

A. So I walked down there towards church and there was 7-11 opposite to it.

15 Q. The church across from the 7-11?

A. Yes.

Q. And that's where you saw the woman talking to the paramedics?

20 A. Yes. I was on the corner of Bellwood and I saw them.

Q. Okay. So you were on the west corner or the east corner of Bellwood? You're going to use the pointer.

A. Right here.

25 Q. Sorry? Oh. Sorry. So you're pointing to

1708
R. To - in-ch. (Scarfe)
February 16, 2011

the middle of Bellwood Avenue. Which corner were you
on? In the middle of the street?

THE WITNESS (answering without interpreter):
It's right here.

5 Q. So you didn't get quite to the sidewalk.

THE WITNESS (answering without interpreter):
No. No.

10 Q. Okay. And where was the woman talking to
the paramedics? You're indicating the middle of
Queen Street, ah, a little bit west of Bellwoods and
basically right across from the 7-11?

THE WITNESS (answering without interpreter):
Yeah.

15 Q. Okay. Could you tell why the lady was
talking to the paramedics?

A. I don't know.

Q. Did you see any injury on that woman?

A. Can't see.

20 Q. Couldn't see. All right. And then just
going back to before you left your apartment, right?
And you were looking down and you were watching the
two men beating up the one fellow who was a little
bit fatter?

A. Yes.

25 Q. Were there any females nearby?

1709
R. To - cr-ex. (Thompson)
February 16, 2011

A. No.

Q. No. And when you first looked out your window, had the physical part of the fight started yet?

5

A. No.

Q. No. So when you first looked out your window, what did you see?

A. The three arguing.

10

Q. Arguing. Could you hear -- make out any of the words that any of them were saying?

A. Cannot hear because it's so noisy.

Q. Thank you, sir. Those are my questions.

Mr. Thompson may have some questions.

THE COURT: Cross-examination?

15

---CROSS-EXAMINATION BY MR. THOMPSON:

MR. THOMPSON:

Q. Mr. To, how are you today.

20

THE WITNESS (answering without interpreter):

Good.

Q. We haven't met. I'm the Crown Attorney on this matter. You dealt with a different Crown Attorney at the preliminary hearing.

25

A. Yes.