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R. To - cr-ex. (Thompson)
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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.

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Q. Okay. Do you remember it was back in
January of two -- January 27, 2008 -- 2009 when you
gave your testimony?

A. Yes.

5 Q. Okay. And you were called by the defence?
This gentleman here called you as a witness.

A. You mean the defence?

Q. This gentleman here who just called you
as a witness.

10 A. Yes.

Q. Okay. Did you have any difficulty at the
preliminary hearing understanding anything that was
said?

A. I have an interpreter.

15 Q. Okay. So you had no difficulty.

A. Yes.

Q. What I'd like to talk to you about is
just a little bit about the man that was fighting --
I'd better stand over there. The man who was
20 standing -- or sorry, the man who was in the fight
and then got up afterwards.

A. The fat one?

Q. Okay. The fat one. Yes. At your
preliminary inquiry, sir, you said he was fat. Do
25 you remember that?

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A. Yes.

Q. Do you remember you saying that he was white?

A. I say that he's not black and he is not Asian.

Q. You read your -- you had an interpreter read your transcript back to you, did you not? Outside before you came and testified?

A. Yes.

Q. Okay. Do you remember her -- did you have an opportunity to go through your transcript outside?

A. Yes.

Q. Okay. So do you remember saying that he had the hair that was frizzy and it was collar length?

A. Yes.

Q. So you remember that portion. He had hair -- hair down to his collar. I'm putting -- motioning to my collar. Is that what you meant by the collar? And for the record, I'm touching my collar.

A. About it.

Q. Okay. And it was frizzy.

A. Yes.

Q. And you said he had an army outfit on?

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A. Yes.

Q. All right. And you also said, just so it's clear, that he was wearing a shirt, it was long sleeve and buttons on the front.

5

A. Yes.

Q. Okay. And in that transcript you said that that gentleman who had been fighting with the other two men --

A. No. The two men hit him.

10

Q. Okay. So he was being beaten up by the two men. Sorry for my choice of words.

A. Yes.

Q. Okay. He got up and approached a cab.

A. No, it was a taxi coming.

15

Q. Okay. So when the taxi came, did he -- did he approach -- he approached the cab, didn't he? The taxi.

A. Yes.

20

Q. Okay. And so you said at that time, sir, that he rests his hand on the roof and was speaking to the driver.

A. Yes, but the taxi driver didn't do anything.

25

Q. Okay. And that time also you were asked the question if you saw anything in his right hand?

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And you didn't see anything in his right hand.

A. No.

Q. Okay. And that cab, the cab left. The taxi left.

5

A. Yes.

Q. But you also said that that man then was calling to -- asking for the police to be called.

A. What the -- lots of people on the street, they all saying, Call the police.

10

Q. Yeah, but you also said that man was asking for the police.

A. Yes. He say, Call the police.

Q. Okay. And he actually -- you said he yelled it many times.

15

A. Yes.

Q. And you got -- he's still in the middle of the road, is that right?

A. Yes.

20

Q. And he's still in the middle of the road when the two other men that were fighting with him are in the middle of the road with him.

A. Yes.

Q. Yes? And he's still in the middle of the road when the police arrive.

25

A. Yes.

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Q. This was the guy who was getting beaten up.

A. So the whole group running towards the west.

5

Q. Okay. But he's talking to the police in the centre of the street, right? That's the guy that got beat up.

A. Yes. He was walking towards that.

10

Q. Fair enough. And you also indicated that he was talking to the officer at that time.

A. When the police arrive, then he start talking.

15

Q. Okay. So this is the man who was getting beaten up that was in front of your -- in front of your apartment and who went up to the cab. Just so I'm clear we have the same guy.

A. Well, because in the middle I went to get changed so I'm not sure, but then the whole group still there.

20

Q. The whole group is still there. Sir, while the whole group is there, sir, do you ever hear a woman yelling, I've been stabbed, I've been stabbed?

A. When I went down to the -- on Bellwood.

25

Q. Okay. Sir, but let me ask you, when

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5 you're in your apartment watching this fight and the gentleman's out talking to the police in the middle of the street, at that location, just let me finish my question, at that location when you were in your room looking out the window, did you hear a woman yelling, I've been stabbed.

A. No.

10 Q. Okay. But you do hear that woman when you walk down the street to where the ambulance is, down near Bellwoods here, right?

A. Yes, I hear her saying and telling the paramedic that I'm injured.

15 Q. And not only that, when you go down there, the three men in the fight, you see them right there beside the ambulance, don't you. The three men in the fight.

A. So I have to clarify. So after the fight, the taxi driver left, and then the police came, then in there --

20 Q. Indicating, for the record --

A. The --

Q. -- west of --

A. The area --

25 Q. -- west of Bellwoods, yes? Those three men, is that where they are?

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A. The whole group.

Q. I know. Let me ask you --

A. Because there are so many people.

Q. The three men in the fight, are they
5 standing?

A. They are still on the street.

Q. Okay. But are they standing.

A. Yes.

Q. There's a man over laying on the ground.
10 Do you know who he is?

A. I don't know.

Q. You don't know. I just want to make it
clear. Your evidence, three men involved in a fight
go to the middle of the street, call for police,
15 walk down the street, are met down there and you see
them standing and then the man on the side you don't
know who he is. Laying on the ground.

A. Because I -- in the middle I went to get
changed so that I don't know what's in between. I
20 don't know, like, the three men or who was lying
there.

Q. Okay. And that's fine, sir. And I'll go a
little slower because I'm being perhaps a little
quick. Let's do this one step at a time. The three
25 men fighting in front of your store?

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A. Yes.

Q. The one man goes out on -- gets the cab.

A. Yes.

Q. All right? He -- he's yelling for
5 police?

A. Yes. And also other people on opposite
side of the street.

Q. Sure. But he's yelling too.

A. Yes.

10 Q. The other two men in the fight at some
point join up with him.

A. Walking towards the same direction.

Q. Okay. But we'll stop there. But all three
of them are here, when I'm indicating just south of
15 your store?

A. So the west side means the sidewalk on
that side.

Q. Okay. Just -- all right. You're having
some confusion. Sir, south of your store would be
20 down. I'm pointing down. The south of your store.

A. There.

Q. Okay. That's where they argue, you've got
in the middle of the street, and that is, just so
it's clear, that's south of your store. Your store's
25 here, and you're south -- and where you pointed is

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south. I just have to put that on the record.

A. Because I'm not sure about the direction,
but I can say that's where it is.

Q. Okay.

5 A. And that's how they walked.

Q. And just take my word, sir, that that
direction where you pointed is south of your store,
all right? And you've now pointed that they move in
a westerly direction towards Mississauga.

10 THE WITNESS (answering without interpreter):

Yeah.

Q. Okay. Those three men though you later
see all standing up down here beside the -- down
near the ambulance.

15 A. So I saw them walk towards this direction
and then I went to get changed.

Q. Yes? And then when you got changed and
you went down there, sir, you saw them there?

20 A. A group -- a group of people were there,
but if you ask me, for sure, like, who is who, then
I can't recognize them.

Q. Okay. Well then, sir, you remember
testifying at the preliminary inquiry, sir?

A. Yes.

25 Q. And just so it's clear, sir, I'm going to

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start a little bit, and I'm just referring now to
page 117 about line 24, actually line 22, I'm going
to read it out to you, sir. Don't worry. I'm reading
it out to you. Okay?

5 THE COURT: Just do it slowly for the benefit
of the interpreter.

MR. THOMPSON: I am, Your Honour.

Q.

10 "And what did you see at the
church?", was the question.

You answer: "I saw an ambulance
coming.

QUESTION: Did you see a man
lying on the ground injured?

15 ANSWER: Yes.

QUESTION: And did you get a
good look at him?

ANSWER: I couldn't. The police
wouldn't let me.

20 QUESTION: You could not look so
you had to look from a distance.

ANSWER: Yes.

QUESTION: How close were you
able to get?

25 ANSWER: About four car lengths.

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5 QUESTION: Were you able to tell
if the man on the ground was the
same -- was any of the men you
saw earlier in front of your
store?

ANSWER: Absolutely not.

QUESTION: It was not the same
person or you couldn't tell?

10 ANSWER: Because they were all
standing and none of them --
then none of them were -- were
lying down.

15 QUESTION: Oh, I see. So the
people that you saw in the front
of your store, those three
people in the fight, did you see
those people down by the
church?"

20 And your answer was: "They were
walking and they were talking to
the police.

QUESTION: All three?

ANSWER: Yes."

25 And the further question, I'll
just go further so there is no

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issue: "And the man who was on
the ground who was injured who
the ambulance was there for, had
you seen him before?

5

ANSWER: No. I actually didn't
see his face. I didn't know who
he was."

10

So sir, in terms of when you provided
that evidence, first of all, does that change your
mind as to whether you're able to tell that three
people were down there by the church?

A. I didn't change.

15

Q. Okay. So your evidence -- okay. Maybe you
didn't -- maybe I misunderstood. But you're telling
me the three people in the fight in front of your
store were the three people you're referring to down
here in front of the church where the ambulance is.

20

A. Well, earlier you didn't ask me if I see
anyone lying there.

25

Q. Okay. Sir, I'm trying to be observant of
the fact that you're going through an interpreter,
but forget about the person lying there, okay? The
three people in the fight, do you see them down here
in front of the church?

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A. I saw the group of people in the church. So the group was there, but it's a different way to say it. So probably the interpretation or the explanation is different.

5 Q. So are you saying the interpreter was wrong then or the interpreter's wrong now?

A. So the meaning is the same. I say that the three men were there because they walk there.

10 Q. Okay. Well, that's fine, but you said specifically they were walking and they were talking to the police.

A. So the police arrive and talk to them, so that's the same.

15 Q. Let me ask you this: The three people that you saw up here, it wasn't the guy laying down on the ground. Any of them.

A. I already explain I couldn't see the man lying there.

20 Q. Okay. But you did say they're walking and talking, three people.

A. When I go to get changed, the three men walking towards this way. After I --

25 Q. Just stop here. The three men involved in the fight, just so I'm clear, are walking west. Is that what you said?

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A. Yes.

Q. Okay. So those three men in the fight walking west.

A. Yes.

Q. Thank you. I have no further questions.

THE COURT: Re-examination?

MR. SCARFE: Court's indulgence, Your Honour. Just very briefly, Your Honour, and thank you for your patience, Mr. To.

---RE-EXAMINATION BY MR. SCARFE:

MR. SCARFE:

Q. Sir, Mr. Thompson here asked you about the man who was being beat up, and how he went -- after he was with the cab, the taxi that left, he asked you if the man was asking for the police to be called?

A. Yes.

Q. And you answered that there's lots of people on the street asking for the police.

A. Yes.

Q. Are you certain that the man who was being beaten up --

MR. THOMPSON: Okay. You know, I haven't

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5 objected yet to my friend's re-examination
but I carefully went into that a number of
times. It doesn't give him a second chance of
going into evidence that he should have led
in his chief. We had no question that the
individual who was involved in the fight, I
went over it a number of times, now came out
to the centre and I specifically asked, he
said a number of people, and I said, About
10 the man who was beaten up? And he says, Yes,
because we got into the issue of whether it
was a fight or he was being beaten up, so I
think that's been covered, again, and I don't
know if it's proper re-examination to go into
15 the area when it is that clear. It's nothing
new, it was brought up in-chief and the
clarity has gone -- been gone into a number
of times.

THE COURT: Mr. Scarfe?

20 MR. SCARFE: Mr. Thompson had asked him about
the man and he responded and started talking
about the other people, so I thought that was
kind of -- other people were calling the
police. That's what I want to put to him.

25 THE COURT: I don't recollect, Mr. Thompson,

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5 and you can correct me if I'm wrong, that Mr. Scarfe got into anything about the man being beaten up and whether he did or didn't call the police in his examination in-chief. You got into that area in your cross-examination. If it was raised for the first time in cross-examination, normally counsel is entitled to come back and do re-examination on just that narrow point, which I anticipate is all Mr. Scarfe is asking about.

10 MR. THOMPSON: All right.

THE COURT: Correct?

MR. SCARFE: Correct.

THE COURT: Go ahead.

15 MR. SCARFE:

Q. Did you hear other people calling for the police?

A. Yes.

20 Q. And were those other people anywhere near your restaurant?

A. Opposite side.

Q. Opposite side of the street.

MR. THOMPSON: Well...

MR. SCARFE:

25 Q. Were those people on the opposite side of

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the street calling for the police?

MR. THOMPSON: Well, I didn't -- he just said the opposite side. I don't know what the "opposite side" is, and I'm not trying to be nitpicky but, you know, he said it and now he's putting it back to him as to his editorialization of this witness's evidence. All he said was the "opposite side", end of story.

MR. SCARFE: That's what he said. "Opposite side".

THE COURT: You did cover that in your examination in-chief. He said the opposite side of the TTC station, a lot of people there and someone called the police.

MR. SCARFE: Right. So now I want to ask if that's going on at the same time, because Mr. Thompson's raised this man --

THE COURT: Go ahead.

MR. SCARFE:

Q. The people who were calling for the police on the opposite side of the street, were they calling for the police at the same time that the man that you saw being beaten up was calling for the police?

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A. Yes.

Q. Could you tell if any of the people who were calling -- could you -- I'll put it in a different way. Of all the people that were calling for the police, did you hear any female voices?

A. So those people across the street were yelling, they are male and female there.

Q. So the people across the street that were yelling, you could -- some of them were male and some of them were female?

A. Yes.

Q. And they were calling for the police.

A. Yes.

Q. Those are my questions in re-examination.

Thank you.

THE COURT: Thank you, sir. You may step down.

MR. SCARFE: The next witness for the defence is Mr. Paul Gallately.

THE REGISTRAR: Paul Gallately, please.

---PAUL GALLATELY: AFFIRMED

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

MR. SCARFE:

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Q. It's not Gallately, it's Gallately.

A. It's Gallately.

Q. Thank you. I should have known that by
now. Mr. Gallately, we've already heard from a
5 person in this trial with the same last name as you
named Melissa.

A. Yes.

Q. Do you know Melissa Gallately?

A. Yes, I do. That's my wife.

10 Q. She's your wife. And on the evening of
August 8th carrying over into the early morning
hours of August 9th of 2007, was she your wife?

A. Yes, she was.

Q. And where did you live?

15 A. We lived at 843 Queen Street West,
apartment A.

Q. And is that on the south side or the
north side of Queen Street?

A. South side of Queen Street.

20 Q. As you can see here, we have a -- what we
call Exhibit 2 in these proceedings is a map that
shows Queen Street on the horizontal, Walnut Avenue,
and then to the right Niagara Street, Claremont,
Bellwoods and Gore Vale. Does that help orient you
25 to the area?

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A. Yes.

Q. In front of you is a laser pointer just by your glass of water. If you could just point out for us 843.

5 A. It is that.

Q. Where it says "Z"?

A. Yes. That's correct.

10 Q. Do you recall looking at this photo or this board when you testified at the preliminary hearing?

A. Yes, I do.

Q. Okay. So there's a legend there and Z corresponds to something called Select Mart.

A. Yes.

15 Q. Right. Where was your apartment in relation to the Select Mart?

A. Ah, directly above the Select Mart on the second and third floor.

Q. The second and third floor.

20 A. Yes.

25 Q. All right. You anticipated my next question. I'm going to show two photos and just ask you to identify, and I'll take the map off the overhead projector here, give it back to Ms. Fineberg, and put up the first of the two photos.

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See if I can get it. Okay. On the very left side of the photo we see a sign in yellow that says "Time".

A. Yes.

Q. Can you identify that?

5

A. That's the Coffee Time coffee shop.

Q. Is that on the corner of Queen and Niagara?

A. Yes, it is.

Q. Southwest?

10

A. Yes.

Q. And then the next thing we see is a video store, correct?

A. Yes.

Q. And then the Select Mart.

15

A. Yes.

Q. And at the street level, you see that sort of the left three quarters of the Select Mart, ah, appears to be a glassed area behind which you can see what looks like a convenience store.

20

A. Yes.

Q. And then to the right of the -- what appears to be the entrance is sort of a black door that has some graffiti on it?

25

A. Yes, there's two doors in there. My door and the door to 845.

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Q. So that's a shared entrance way for your building and the one next door?

A. Well, it's not shared entrance way. It's two separate doors divided by a concrete block wall.

5 One door goes to 843, one door goes to 845.

Q. I see. And then just to the right of that at the very side of the picture looks to be something sort of round and gray?

A. To the right-hand side?

10 Q. Just above the garbage bags.

A. Oh. The garbage? Yeah, it looks like another door. Actually I think that's their door. It's two graffiti doors.

15 Q. So the concrete block is just to the left of the garbage bag where I'm pointing?

A. Yes.

20 Q. And above the Select Mart we see sort of nine panes of glass and in the middle pane is a living -- looks like a, Real Estate for the East Side, or something.

A. Yes.

Q. Do you see that?

A. Yes.

Q. Is that part of your apartment?

25 A. Yes, it is. That's the sunroom.

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Q. That's the sunroom.

A. Yeah.

Q. Okay. And just so I'm clear, at the
bottom, the bottom row of glass, right? If you were
to be standing in the sunroom?

A. Yes.

Q. Would that go all the way to the floor?

A. Yes.

Q. To your knee?

A. All the way to the floor.

Q. All the way to the floor. So if I was
standing in that apartment right in the photo you'd
be able to see my feet and ankles.

A. Yes. Yes.

Q. Okay. If this could be 64A?

THE COURT: 63 I believe.

THE REGISTRAR: I believe, Your Honour.

MR. SCARFE: 63A?

THE REGISTRAR: 63A.

MR. SCARFE: Okay. Wait. The Maxum Report was
62 -- oh. But we've made the video a lettered
exhibit. That's right. Thank you. So that's
63A.

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---**EXHIBIT 63A:** Photograph - produced and marked
for identification.

5 MS. SCARFE:

Q. The second photo that I wanted to show
you was from a slightly different angle and, in
fairness, taken not that night or -- it was taken
quite a bit later, but it does give us an idea of
10 the building. So you see on the left the Coffee
Time, the video and then partly obscured by the bus
shelter roof is the sign for the Select Mart.

A. Yes.

Q. Correct? And then just above that you've
15 got the nine panes of glass which is the sunroom?

A. Yes.

Q. And then just above that, ah, appears to
be just a tiny bit of a balcony.

A. Yes, the balcony for 845, which you can
20 see in the picture above The Apple Tree, it's
identical to what we had as a setup.

Q. What's The Apple Tree?

A. It's the store above 845.

Q. Okay. So just the next door west.

25 A. Yes.

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Q. And do you have a clear idea of -- they have the same panes of glass on the second floor and then you get a balcony above it. Is that how yours was as well?

5 A. Yes, it is.

Q. Okay. And again, if you're standing on the balcony, well, if a person was standing on the balcony in this photo, is it sort of floor to ceiling? Or --

10 A. Yeah. It's a railing to the floor. There's no solid walls or anything in front of it. If you were 20 feet high you could see my feet.

Q. All right. That's great. Something --

15 THE COURT: 63B.

MR. SCARFE: Thank you.

---EXHIBIT 63B: Photograph - produced and marked
for identification.

20

MR. SCARFE:

Q. On the early morning hours of August the 9th, 2007, did something draw your attention to the street?

25

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A. Ah, yes, it did.

Q. Okay. What were you doing just before that happened?

A. I was in my living room watching TV.

5 Q. Okay. What floor is the living room on?

A. On the second floor.

Q. Second floor, the same as the sunroom.

A. Yes.

10 Q. Okay. Is the sunroom and the living room the same thing, or are they different?

A. They're basically the same. You walk straight to it. It's set up like a converted balcony so there's glass doors, sliding doors that lead to the sunroom, but it's the same floor and --

15 Q. Okay. What we see at the street?

A. Yeah.

Q. The very north end of your apartment is the sunroom.

A. Yes.

20 Q. You say there was a separation between that and the living room?

A. Yes. There's glass walls.

Q. Glass walls that open?

A. Yes. Patio doors.

25 Q. So you were behind the glass walls, you

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heard something and did you go to the sunroom?

A. I did. I heard, ah, I heard banging at my front door. I didn't go to the sunroom, I went to a window that is at the bottom of my stairs that is to the side of my sunroom that looks out my front door.

Q. Okay. And your front door at that time was solid or glass?

A. Solid steel.

Q. Solid. So why did you go there?

A. Ah, well, sometimes I hear people at that door, it is Queen Street, it is quite busy, so I can always tell who's coming to knock on the door, who's trying to, you know, get into that area from that window.

Q. And how can you see if the door is solid from the top of the stairs?

A. Oh no, no. I wasn't at the top of the stairs. I was at the window on the second floor that looks directly above my door outside. So I was looking at the little indent at 843, between 843 and 845. My window looks over top of that indent.

Q. Can I just see 62A?

THE REGISTRAR: Sorry.

MR. SCARFE: That's it.

Q. If you just help us out on the photo

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where it is the window that you looked out was.

A. You can't really see it in this picture. It would be about there.

Q. So above the "T" in "Select Mart"?

5 A. Basically. It's actually to the side of the sign but on the angle of this picture you can't actually see it, but if my door is here, my window is here.

10 Q. And you can get a view of the area outside the solid door from there?

A. Yes. Yes.

Q. And what did you see?

A. Ah, I saw two men beating up on another man who was on the ground.

15 Q. Okay. So two men beating up another man.

A. Yes.

Q. And we'll just go through it slowly. Can you remember anything that would help describe the man who was being beat up?

20 A. I didn't really get that good of a look at the man on the ground. He was covered by the two men being beaten, so I don't --

Q. Could you tell if he was a white man? A black man? An Asian man?

25 A. Ah, as far as I recall he was a white

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man.

Q. Okay. Anything about his clothes or footwear?

A. I don't recall anything of that, no.

5 Q. Okay. Then you say there were two men beating him up.

A. Yes.

Q. Which stands out in your mind the most of the two men?

10 A. Ah, I don't know that either really stand out most. They were both dressed similarly, both white males, um, you know, relatively the same size and height as -- one was slightly bigger but nothing -- nothing that was distinguishable between the two that I recall.

15 Q. And when you say they were dressed similarly, can you help us out a little bit by what you mean?

20 A. Sure. What I recall is boots, black boots, khaki, dark clothing, cut off shirts or t-shirts. Things like that.

Q. Okay. And the particular genre of the style of dress? How would you describe it?

25 A. Ah, I don't know. A punk I suppose? I mean, to be honest, I mean, if --

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Q. You mean like punk rock? That kind of goth look or --

A. Yeah, punk -- I suppose it would be punk rock. I mean, the people that I saw I would refer to not as like, you know, street people or panhandlers. We used to just call them street punks. It was just punks that hung out on the street and asked you for money.

Q. Okay. And when you talk about boots, can you be a little more specific as to the style of boot?

A. Sure. Um, I guess you would call them army boots? Or army style-type boots? Rangers, ah, tall, black boots. Thick sole.

Q. Did you ever own a pair of boots like that?

A. I have, yes.

Q. Is there a brand name that comes to mind?

A. Um, I mean, most common would be Docs but I don't recall them being Docs, but they could have been.

Q. Docs?

A. Doc Martin's. I don't recall them being that but they looked to me just more army surplus store boots.

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Q. Do you remember the colour of the boots?

A. Black.

Q. Black? And how far up -- how far up
would they go?

5

A. Ah, I mean, my memory is a bit vague at
this point but I would say probably ten or twelve
holes? Which I don't know what you would call that?
Halfway up the shin?

Q. Halfway up the shin? That's perfect.

10

Thank you. So and you said -- was there anything
else that you could say besides the sort of green
khaki look of the clothing on the body? Was there
any differences between either of the two men?

A. Nothing distinguishable that I recall.

15

Q. Nothing that stands out now?

A. No.

Q. Anything on the head?

A. Not that I recall.

20

Q. Okay. You do recall that one was slightly
bigger than the other.

A. Yes.

25

Q. All right. Starting with the bigger one,
well, first of all, how long -- you said you saw
these two men beating up the other fellow. How long
did you watch that for?

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A. Ah, I don't really recall but I would guess somewhere, if I were to hazard a guess, I would say 15 to 30 seconds. Something like that.

Q. 15 to 30 seconds?

A. Yeah.

Q. And was the gentleman who was being beat up fighting back?

A. Not that I could see. No. He was on the ground so it wasn't much that he could be doing apart from protecting himself.

Q. All right. And the slightly bigger of the two guys doing the beating, right? Do you recall specifically how it was that the larger guy was beating the guy on the ground?

A. Ah, I don't recall specifically. Um, I mean, he was on the ground. I remember them hovering over him. I don't remember seeing punching. I do vaguely remember seeing kicking, but --

Q. Okay?

A. -- it's difficult to remember.

Q. You recall some kicking, and you say you don't remember seeing punching. Does that mean they weren't punching or --

A. No.

Q. -- you just don't remember?

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A. It doesn't mean that they weren't. I just don't remember.

Q. Okay. And the other fellow, was he doing anything different than the slightly larger guy?

5

A. No.

Q. No? And can you give us a location in relation to the man from where you're watching? Was one sort of closer to the street, closer to the store, more to the left, more to the right?

10

A. Um, as far as I recall they were side-by-side. The man on the ground had his head at my door and I don't remember which was on which side specifically.

15

Q. Okay. And during those 15 to 30 seconds, besides those three people, well, just before we get to that, can you give us an indication, I think you said that this was happening in front of the door to go up to your apartment.

20

A. It's at the bottom of the stairs where the window is on my main floor that looks over top of my front door.

Q. So as you pointed out, above the "T" in "Mart"?

A. Yes. Exactly.

25

Q. Okay. And it was right below the "T" in

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"Mart" that these three people --

A. Well, no. Like I said before, the angle of this picture makes it look like the sign goes past where my door is, whereas in fact it stops right at the edge of this door here.

Q. Yeah?

A. Which is the door to the convenience store, at which time the wall takes a 90 degree turn in towards the indent of my door, so I was -- in this picture, yes, it's above the "T", but in reality it's past the sign and open to the space.

Q. Okay. And so is the location where the two guys are beating up the one guy, again, past the sign?

A. Yes.

Q. A little closer to the garbage bags? Do you see the garbage bags on the street?

A. Yes, I do see it. Um, yes. I suppose you could say that, although it wasn't that close to the street. It was literally in the indent here between 843 and 845.

Q. Okay. So far -- farthest away from the curb as you could get?

A. Yes.

Q. Without actually coming into your

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apartment?

A. Which is why I heard them fighting,
because they banged my door.

5 MR. THOMPSON: I don't really want to
interfere with my friend's examination
in-chief but I would ask that he would sort
of let the witness give the evidence. It
would be much more appropriate.

10 MR. SCARFE: My friend's absolutely right.
Sorry about that.

Q. Did you see anybody else besides those
three guys that you took note of?

15 A. I did afterwards. After I saw them
fighting, I went into my sunroom, ah, which is, like
you said, the nine panel glass room, and I saw
another man lying on the ground who was dressed
similarly to the people doing the beating.

Q. Where was he?

20 A. He was on the ground on the sidewalk
perpendicular to Queen Street, so head toward the
door, feet near the street lying down, appeared to
be hurt. I believe I saw some blood, so it looked
like he'd been involved in something.

Q. So on the sidewalk or the street?

25 A. On the sidewalk.

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Q. And closer to the store or closer to the curb?

A. He was probably somewhere -- oh. Well, he was across, head toward the store here and then feet towards the street here. I don't recall the exact placement, but it was --

Q. Okay. And where in relation to the -- you've already pointed somewhere, but if you could pick something, either the video sign or the Select Mart sign, that would help us approximate where he was lying.

A. It's difficult to remember. Um, but he was -- he was definitely in view from my sunroom. I would say somewhere almost right in the middle, if anything, slightly closer to the Select Mart, if I recall correct, but I can't be certain.

Q. So where you've indicated where the pointer seems to be sort of under the "E" and "L" in "Select".

A. That's my best recollection.

Q. All right. So first you were watching from the glass area that looks down the stairs to the front entrance?

A. Yeah.

Q. And you said then you moved to the

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sunroom. How long did it take you to get from where you first were until you were able to look out the sunroom?

5 A. Probably a second. Two seconds. It's right beside.

Q. You don't have to go to the back of the apartment or anything? Okay.

10 And when you got here, you told us that you see this we'll call him the fourth guy who's lying on the ground. The first three guys you told us about, are they still there at this point?

A. Yes.

15 Q. And is there any interaction between the one guy on his own and the other three?

A. No.

Q. Okay. And the fellow who's on his own, what's he doing?

A. The one on the ground?

Q. Yeah.

20 A. He was lying down looking hurt.

Q. Was anybody with him?

A. Not at that point I don't believe so, no.

Q. Okay. How long do you spend in the sunroom?

25 A. I don't really recall. Ah, not long. Um,

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half a minute to a minute, something like that.

Q. Half a minute to a minute?

A. Somewhere around there.

Q. Okay. And then what do you do?

5 A. And then I went upstairs to see if my
wife had woken up.

Q. Okay. And had she?

A. Yes, she had.

10 Q. Um, and so you go upstairs, your wife's
awake, what do you do next?

A. Ah, we went to the balcony, or I went to
the balcony.

15 Q. Okay. So from the time you leave your
sunroom until you're out observing on the balcony
again, how long did that take?

A. From the sunroom to the balcony, 15
seconds maybe? By the time I got to my room.

Q. Okay. And but until the time you got to
--

20 A. To my bedroom. The balcony is off of my
bedroom.

Q. I guess what I'm getting at is how much
of the stuff on the street did you miss.

A. Oh.

25 Q. How many seconds.

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A. If I were to hazard a guess I would probably say about a minute. Two minutes tops type thing.

5 Q. Okay. And when you get to the balcony, what do you see next?

A. Ah, I remember seeing one of the two that were beating on the person on the ground go across the street, and I remember bystanders trying to help the person that was on the ground.

10 Q. Okay. So the person who was on his own on the ground, when you get to the balcony, he's not alone anymore.

A. No.

Q. No. Somebody's come to help him.

15 A. Yes.

Q. Do you remember that person as male, female or how many people there were?

20 A. I remember that there was somebody who appeared to be a friend of his. I don't know if they were actually friends but they were dressed similarly.

Q. Yes?

A. And that was a male.

Q. Mm-hm?

25 A. The bystanders, I don't recall their sex.

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Q. And with respect to the three guys where there were two guys beating up one guy, was there anybody in that same location when you got to the balcony?

5 A. The person that was on the ground, ah, I didn't see that person anymore.

Q. You didn't see him? Did you look around to see if you could spot that person?

10 A. I don't recall looking specifically for him. Just that the fight seemed to have stopped I suppose and then the two weren't beating up on the one person anymore, and I didn't see the person.

Q. Okay. Were the two people that were doing the beating still there?

15 A. Ah, the one that ran across the street?

Q. No, no. But when you first get to the balcony and you look over?

A. Yes.

20 Q. Were the two people still there or had this fellow already crossed the street?

25 A. That was when the one of the two went across the street and then the other person, um, I couldn't say for certain, but I would think that he was probably the person helping the person on the ground.

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Q. Okay. So you see a person run across the street.

A. Yes.

5 Q. Whereabouts? Did he go slightly to the left, slightly to the right or straight across?

A. Ah, he went slightly to the right, if I could use the pointer again. If he was in this area here, ran across Queen Street, slightly to the east to where Niagara and Queen Street meet on the north side.

10 Q. Okay. And you had indicated with your pointer somewhere around 744?

A. Somewhere around that general area.

15 Q. And did you stop at any time or were you able to watch him go all the way across?

A. No, he went straight across.

Q. Is he walking? Running?

A. Light jog.

Q. A light jog.

20 A. Yeah, I mean, he didn't sprint but he certainly didn't walk.

Q. And then what did you see next?

A. I just remember there was a group of people on the opposite side of the street.

25 Q. How many people?

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A. Ah, I don't know specifically. Ah, I would hazard a guess somewhere between six to maybe eight. It was a fairly small group.

5 Q. Group of six to eight. Do you remember anything about any of the individuals? How they were dressed?

A. Ah, they were all dressed pretty similarly. Um, you know, lots of dark, black boots, um, you know, shorts, khaki shorts, ah, lots of
10 t-shirts, some cut-offs, something like that, but nothing that varied significantly.

Q. So the man who jogged across the street, did he appear to join these people?

A. Yes.

15 Q. And what happened next?

A. Um, I remember that one girl that was there grabbed the arm of another man and they went down Niagara Street, at least as far as I could see from my viewpoint, and other than that, the only
20 other things that I saw were the one -- a different girl, a separate girl, screaming that she had been stabbed.

Q. All right. So the fellow that was in front of your apartment jogged across the street to
25 join the group of six or eight?

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A. Yes.

Q. And how long goes by before the girl
grabs the guy and goes down Niagara -- in the
direction of Niagara Street?

5 A. Very shortly after, if not immediately.

Q. Okay. And were you able to tell if the
guy that she grabbed was the same guy that jogged
across the street or a different guy?

A. It was a different guy.

10 Q. It was a different guy. And do you recall
anything about the dress of either of those people?

A. Ah --

Q. The two people that ran? Or --

A. Yes.

15 Q. You didn't say "run", but the two people
who left?

A. No, they ran. They did run.

Q. They did run?

A. Yes.

20 Q. Would you say they ran, like --

A. Quickly.

Q. -- light jog or was it faster?

A. No, it was quickly. It was more than a
jog.

25 Q. Mm-hm.

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5 A. They were dressed, well, the man was certainly dressed similarly in khakis and black boots. Ah, the woman, I believe she had darker clothing, slightly longer dark hair, slightly shorter than the man.

 Q. And on the map, if you could just use the pointer and show us where they started running and then when you think they went out of your view.

10 A. Well, um, so the first man that I saw running across the street started here, ran across to here to the group of people kind of in this general area I would say between 740 and 744, in that general area, and then when he did, the woman grabbed the arm of another man and they ran straight
15 down Niagara this way. I would say they probably went out of my viewpoint about here, but the edge of the sidewalk or so. It's at Queen and Niagara from what I could see. It's kind of hard to see that area from my balcony.

20 Q. Right. When you're standing on your balcony and you look right, can you see the Coffee Time sign?

 A. Yes.

 Q. Okay. So they ran directly south.

25 A. Yes.

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Q. And then you talked about a woman?

Another woman.

A. Yes.

Q. Where was she?

5

A. Ah, the woman that was screaming? I assume that's what you're referring to? She was within the group here except she was standing in the curb lane on Queen Street, ah, shouting out that she had been stabbed and it was her birthday.

10

Q. Okay. And how long did you watch for?

A. I don't really recall how long that went on. Ten or fifteen minutes. I'm not really sure.

Q. Okay. When you move from the sunroom and you went upstairs to your bedroom --

15

A. Yes.

Q. -- and then out on the balcony, where was your wife?

A. Ah, when I got up, she -- I'm trying to recall. I think she was already on the balcony.

20

Q. Are you sure?

A. No.

MR. THOMPSON: Well --

THE WITNESS: No, I'm not.

THE COURT: This is your witness, Mr. Scarfe.

25

MR. SCARFE: He said --

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MR. THOMPSON: No. No.

MR. SCARFE: All right.

5 Q. And there was a period of time that you estimated to be a minute or two that you weren't watching the street, or you moved from the second or the third floor?

A. Yes.

Q. Okay. And do you recall you testified at a preliminary inquiry in this matter?

10 A. Yes.

Q. Back in 2009?

A. Yes.

15 Q. And what I'd like to do with respect to this issue of how much you missed is I'd like you to read a little passage from the preliminary hearing to yourself and then let me know if it refreshes your memory. And I'm referring to page 135 from March 25, 2009, starting around line 7, and I've just sort of circled the section for you, so if
20 you'd just review that and tell me if that assists in refreshing your memory.

A. Sorry. The highlighted lines?

25 Q. The ones I sort of just drew a square around. Does that refresh your memory as to how long it took to get to the balcony on the third floor?

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A. That would make more sense.

Q. What would?

5 A. My statement of approximately 30 seconds, by the time that it would take me physically to go up my stairs, my wife was -- was already on the balcony, or at least at the edge of the balcony in our bedroom. It would be closer to 30 seconds or under a minute anyways.

10 Q. Okay. Thank you. And does that portion also assist you with where your wife was when you got there?

A. Unfortunately, no.

15 Q. No. Thank you very much. Those are my questions.

THE COURT: Cross-examination?

---CROSS-EXAMINATION BY MR. THOMPSON:

MR. THOMPSON:

20 Q. We haven't met formally. I'm the Crown on this matter. I know you had a different Crown at the preliminary inquiry?

A. Yes.

25 Q. I have had the privilege of meeting your wife and she's been a witness in this matter. You

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did testify on behalf of the defence at the preliminary inquiry?

A. Yes.

Q. And just I'd like to sort of set just a couple things up. This is approximately 12:30 at night?

A. Approximately.

Q. And you've just had a new baby at that point in time?

A. Yes.

Q. And your wife's breastfeeding?

A. Yes, she is.

Q. And at 12:30 at night, this is a school night, so to speak, you're a little bit annoyed that there's a lot of noise downstairs? Or not.

A. Yes. Yeah. When I lived at that apartment, ah, which is why I recollect looking over my door very clearly because I did that quite often when people on the street either made noise, or a lot of people spray painted my door and the fumes would come up, so yes, I was quite annoyed.

Q. And having a new baby as well --

A. Yes.

Q. -- you're low on sleep, aren't you.

A. I also had pasted a sign on my door

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asking people not to tag it because I had a baby
upstairs.

Q. What's "tag"?

A. Oh. Spray paint it, on my front door,
5 because the fumes would go into my apartment.

Q. Oh. All right. Now, in all fairness, that
evening, did you get a lot of sleep the night
before? Were you tired?

A. It's unlikely. I don't recall being
10 exceptionally tired but, I mean, yes, they don't
sleep all that well at three weeks old. No.

Q. And this is no insult towards you, but
probably while you're -- that evening, you're not
that alert at what's going on.

A. Not at 12:30.

Q. Okay. Fair enough. So a couple of things
that sort of jump out in mind, which you wouldn't
know that it's important at this trial, but you
don't see an altercation on the north side of the
20 street at all, do you.

A. That night? No.

Q. So in terms of what you observed that
night and maybe what your wife observed, you ever,
well, let's do it this way: In terms of what you
25 observe and what was important to you that night,

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you had no idea that the fight on the north side's
important in this trial, right?

A. No.

Q. And when you looked out there, as a
5 matter of fact, you're not even aware if there's a
streetcar.

A. No.

Q. And yet I can tell you right now a
streetcar has been very important in this trial, but
10 you're looking out there all the time, and you don't
even see a streetcar.

A. No.

Q. And it's no insult towards you. You're
tired. It's a late evening and you've got a young
15 baby. But no fight on the north side, you don't see
a streetcar.

A. I didn't. No.

Q. And I'm not sure what it is you saw in
the fight, but it would appear that you're saying
20 that you saw two fights down -- basically, and I'm
just going to -- we have another exhibit. Can I just
pull up another exhibit? I'm just going to put this
Exhibit Number 9 up on the screen here for you. So
this probably helps you in terms of where your
25 apartment is, right?

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A. Yes.

Q. So you're, just so it's clear again,
you're right above the "Select"?

A. Yes, that's correct.

5 Q. All right. And you can see if you're on
the second floor, if there was a streetcar there,
how much it would block your view, number one.

A. Yes.

10 Q. Number two, you see -- I just want to
know how it is you can see the fight down here.
That's all.

A. Sure.

15 Q. And how you can tell there's two separate
fights directly below the Select Mart when you're in
-- in this space here.

A. Well, when you say "two separate fights",
I know that in the preliminary hearing and in my
statement it's, ah, I don't know if I made
statements towards there being two separate fights.
20 I only saw one actual fight.

Q. Okay?

25 A. And I presumed that the person lying on
the ground was involved in a fight because he looked
like he was lying on the ground quite hurt, but I
didn't see two separate fights. I saw one fight of

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two men on one man directly in front of my door.

Q. Okay. When you say -- and that's fine. This Select Mart, that canopy appears like it sort of would be blocking somebody that's looking out over the window.

A. It's -- it protrudes by about a foot and-a-half, two feet maybe.

Q. And I'm not making any criticism, but you wouldn't be able to see, let's say, directly underneath there what was going on.

A. Not directly underneath the sign, no.

Q. And frankly, just in terms of what was transpired -- would you have known the difference if somebody was actually beating up on somebody on the one occasion or there was a bunch of people pulling somebody towards -- away from the streetcar -- well, you didn't see the streetcar, but pulling somebody on the -- to the sidewalk. Could you tell if they were actually pulling somebody off the street or beating up on him?

A. As far as the altercation in front of my door?

Q. Yeah.

A. As far as I recollect, it looked like a beating.

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Q. Okay. And what about the one you said you got up on top of the balcony and then you're looking over. Do you actually see fighting over there?

A. No.

5 Q. Or you just saw a body?

A. I just saw a man lying on the ground. When I got to the balcony, I don't recall a fight continuing after that.

10 Q. Okay. Your Honour, I'm not going to be very much longer with this witness if I can have the time.

THE COURT: Yes?

MR. THOMPSON:

15 Q. There is just one thing I wanted to clear up. If you are up on the third balcony -- the third --

A. Third floor.

Q. -- third floor here and you've been out there I assume on a number of occasions?

20 A. Yes.

Q. And when you look across to this north side of the street, what's your -- even with the streetcar there, what's your view of the street over there?

25 A. You mean which store? Or --

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Q. Well, no. Let me ask you, do you have a clear view of the north --

A. Yes.

Q. -- side of the street if you're up on the third floor?

A. Yes, I do.

Q. And would you be able to see over top the streetcar?

A. I would be able to see probably some of the sidewalk across the street. I don't know how much though.

Q. Okay. Brief indulgence. And I just want to be 100 percent sure, you've got a view over the north side when you're on your balcony, but I want to confirm what you said. You said it once, but you did not see a fight, when you're up on the third floor of your balcony, on the north side of the street.

A. No, I did not.

Q. And you did have a clear view once you're up on your balcony.

A. Yes.

Q. Thank you. I have no further questions.

THE COURT: Re-examination?

MR. SCARFE: No re-examination, sir.

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THE COURT: Thank you, sir. You may step
down.

THE WITNESS: Thank you.

THE COURT: We'll take the afternoon recess?

5 MR. SCARFE: Actually, if I may?

THE COURT: Yes.

MR. SCARFE: That's the case for the defence.

10 THE COURT: All right. Thank you. Mr.
Thompson, does the Crown intend to call any
reply evidence?

MR. THOMPSON: The Crown is not calling any
reply evidence, Your Honour.

THE COURT: Thank you.

15 MR. SCARFE: We have discussed the timing of
closing submissions and have agreed, subject
to Your Honour, if we could come back on
Tuesday morning and do that then? It's a lot
of evidence to review and we want to do a
good job.

20 THE COURT: I accept that.

MR. THOMPSON: It was predicated on the fact
that Monday was a holiday.

THE COURT: Oh. Thank you for reminding me,
Mr. Thompson.

25 MR. SCARFE: Oh, you didn't realize Monday

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was Family Day.

THE COURT: I drew a blank on that for the moment. Yes. No. Submissions are going to be important so Tuesday is fine.

5 MR. SCARFE: Thank you, sir.

THE COURT: Thank you.

---COURT ADJOURNED

(3:40 p.m.)

10

---TUESDAY, FEBRUARY 22, 2011

15

---UPON RESUMING

(10:07 a.m.)

20

THE COURT: Before we start with the closing submissions, I didn't want to lose track of the stay application so I was going to first ask if there were any further submissions to be made on that application.

25

MR. SCARFE: I had about two paragraphs at

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the end of my submissions. I had sort of
blended them together. Referring to the
evidence of Mr. To. But I know you didn't
want a repeat and I had assumed when we left
it all to the end, we were just going to
blend it all together.

MS. MIDDLEKAMP: Your Honour, the Crown's
content to proceed on that basis. If there is
anything that arises from Mr. Scarfe's
submissions in the course of his closing then
we can add that on to our submissions in our
closing.

THE COURT: All right.

MS. MIDDLEKAMP: Your Honour, if I can just
very briefly address you on Exhibit 59, and
that was the collection of photos that were
entered as an exhibit from the Centre of
Forensic Sciences.

THE COURT: Yes?

MS. MIDDLEKAMP: I've spoken to my friend
about this. I've made a CD that I propose to
enter as the exhibit now. As well, we had put
together a guide with the photos that
described what was on each photograph, and
when I made this CD of Exhibit 59, the photos

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5 from the Centre of Forensic Sciences are
actually secured in the Adobe document that
was provided to us, so the bottom line is I
was unable to delete any pages and so all of
the photographs that were provided are on
this CD, but the accompanying document will
show the photographs that were actually put
in to -- or were actually shown to the
witness in the course of her examination.

10 THE COURT: All right. Thank you.

THE REGISTRAR: 59, Your Honour?

THE COURT: Yes.

15 MS. MIDDLEKAMP: I have an extra copy of the
guide that I made for Your Honour but maybe
it could be 59A, would be the CD, 59B would
be the guide of the photographs that were
shown to the witness.

THE COURT: Yes.

20 ---EXHIBIT 59A: CD containing photographs -
produced and marked for
identification.

25

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---**EXHIBIT 59B**: Guide for photographs - produced
and marked for identification.

5 THE COURT: All right.

MS. SIMPSON: Good morning, Your Honour.

THE COURT: Good morning.

MS. SIMPSON: This is not a case of legal
controversy. Of course the Court of Appeal
10 says it better than I do. I know my friends
later this morning will be referring to the
Simon case and the Court opens this way:

15 The controlling legal principles
spark little controversy between
the parties. The result of the
application of those principles
to the circumstances is another
matter.

20 That precisely applies to Ms.
Kish's case as well. The legal principles
which apply are well-settled. They are
well-known. There is no debate here about the
definition of murder, what essential elements
25 there are, the definitions that apply. This

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5 is a case about what factual findings Your Honour can make and what inferences Your Honour can draw from the often conflicting, almost all conflicting evidence that's before you. That evidence will be dealt with in some detail by my colleague, Mr. Scarfe.

10 Before he begins, my role before you today is just to outline briefly those legal principles, so we can establish the framework for the submissions that will follow later from Mr. Scarfe.

15 I'd like to highlight certain factors which, particularly in the area of party liability law, require particular attention, some factual findings and some inferences that the Crown will ask you to draw and we will ask you to draw others. I'll then turn at the conclusion of my submissions to the law related to the special scrutiny and care required in assessing eyewitness
20 identification.

I have a slim casebook I have provided to my friend and I have given to the Court this morning.

25 THE COURT: Thank you.

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MS. SIMPSON: I have not provided a further
Book of Authorities with all those classics
compiled with respect to the murder and
manslaughter and party liability law. I
5 haven't given you *Martineau* (ph), I haven't
given you *Logan* (ph). They are cases that we
all know. I know my friend has some. What
I'll do is start with the most
straightforward form of criminal liability
10 here. The most direct and serious criminal
participation that could be alleged, that is,
second degree murder as a principal or
co-principal.

This is liability under Section
15 229(a) of the *Code* where a person causes the
death of another, meaning to cause his death,
or meaning to cause him bodily harm which he,
or, of course, in this case, she, knows is
likely to cause his death and is reckless
20 whether death ensues. The *mens rea* here is
subject to foreseeability of death. We know
this is a constitutional principle, and the
actus reus is that the conduct of the accused
must be a significant contributing cause. I'm
25 drawing that language from the *Nette* case,

reinterpreting *Smithers*. Reinterpreting
Smithers, not to change the content of the
test, the Supreme Court said, but to avoid
both the Latin beyond *de minimis* and the
double negative in not insignificant.

So the conduct has to be a
significant contributing cause of the death.
In our submissions, the multiple stab wounds
to Mr. Hammond's chest make it clear he was
murdered. It is the person who stabbed
Mr. Hammond in the heart who is the murderer,
and the question before you is whether Nicole
Kish can be proven beyond a reasonable doubt
to be that person.

Our submission, it's clear, she
cannot. There is no evidence on which you
could find Ms. Kish was that person. That you
could find that she had either the *mens rea*
or that her *actus* -- her actions amounted to
the *actus reus* for murder as a principled
approach in this case.

Turning then to party liability,
the first form of party liability is aiding.
This is under Section 24(1)(b) of the *Code*. A
person is a party when they do or omit to do,

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5 and in my submission that's completely
inapplicable to the case before you. There's
no legal duty to act here so it's a question
of action, not inaction. If they do or omit
to do anything for the purpose of aiding any
person to commit the offence. Aiding is
assisting or helping the principal to commit
the offence, and for murder, again, it
requires, as to party, the same subjective
10 foresight of death.

The *Almoralez* (ph) case from our
Court of Appeal has broken down that
essential element into two categories. A
different way of looking at the same issues.
15 The first is the conduct. It must be proven
that the act in fact assists the principal in
committing murder. It's the conduct
requirement. And second is the fault
requirement, that the person intended to
20 assist the principal to commit the offence.
That fault requirement imports both knowledge
and purpose. They must know there was an
intention to murder, and a purpose or an
intent to aid that murder.

25 In this case, with respect to

5 aiding liability, we submit that Your Honour would struggle with both essential elements and the proof is simply not there. I submit that there's no evidence that the conduct of Ms. Kish had the effect of aiding principals to commit the murder. What did she do? How did she assist? Neither of those questions can be established beyond a reasonable doubt.

10 We also submit that there's no evidence of her knowledge that the principals intended to murder Mr. Hammond, nor her intention to help them in that murder. In our submission, the essential elements for aiding a murder, to make her liability as a party to murder, cannot be established beyond a
15 reasonable doubt.

20 The next form of party liability is abetting. This is under the *Code*, Section 21(1)(c), is a person is a party who abets another in the commission of an offence. We know in common legal parlance we often speak of aiding and abetting as a category that is unified as one item together. They are clearly separate and distinct forms of party
25 liability. Abetting is encouraging or

inciting the principal to commit the offence.
Again, to be liable as a party to murder,
that requires the same subjective foresight
of death, and *Almoralez* sets out the same two
categories of the essential elements.

5
10
15
20
25
First of all, the conduct and
then the fault. The conduct must be an act
which in fact encouraged the principal, and
then the fault intended to encourage. That
fault element can further be broken down into
both the knowledge and the purpose. That is,
Ms. Kish would have had to know that the
murder was intended by the principals and her
purpose in the acts or words that she -- acts
she did or words she spoke had to have been
intended to encourage that murder. In my
submission, on this area, the latter factors
especially cannot be established by the
Crown. You can't abet by accident. The
conduct must have both the effect of
encouraging the principal, and yet the person
is also not criminally liable unless they
intended their effect would be to encourage
the offence.

In my submission, the Crown can't

5 establish both the knowledge on the part of
Ms. Kish that the principals intended to kill
Mr. Hammond, and that her purpose in -- or
her goal in whatever words she uttered or
actions she took was to encourage the
principals to take that step.

10 The last form of party liability
is the more complex common intention form of
party liability under 21(2) of the *Code*. The
stereotypical or easy example is when you
have a robbery gone wrong. Where two or more
persons form the intention in common to carry
out an unlawful purpose and to assist each
other therein, and one commits the offence,
15 each who knew that that offence was a
probable consequence of carrying out the
common purpose, is liable as a party to that
offence.

20 That section of the *Code* raises a
number of difficult questions and, again, our
submission is the Crown cannot establish the
series of essential elements that they need
to establish party liability for murder under
this form, 21(2). Your Honour might ask what
25 was the common unlawful purpose that Ms. Kish

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5 formed? What was the common intention that
she had with others? And it's a common
purpose that they had to agree to assist one
another in acting. There's no evidence of
this kind of meeting of the minds between Ms.
Kish and the others. And then whatever that
common unlawful purpose, was the killing of
Mr. Hammond a probable consequence of that
act? In my submission, there is no evidence
10 of this either. All of the evidence suggests
that this death was sudden, it was awful, it
was unplanned, it was a spontaneous event, an
eruption on the street. The subjective
foresight of death as a probable consequence
15 simply cannot be established.

Even objectively, a death as a
probable consequence of a street fight, in my
submission, is a stretch, and here you might
look to the evidence, strangely, of Melissa
20 Gallately. She said that there are so many
fights here on Queen Street she didn't pay
attention. She didn't think that anybody
died. Is it even, objectively, of probable
consequence of a street fight over rude words
25 that a death would result?

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Also here one might bear in mind that there are no weapons seen as the group proceeds along Queen Street until they arrive on the streetcar. And then once this fight moves from the south side to the north side, the knife is in Mr. Hammond's hand.

I'm starting to step on my friend's toes with respect to facts. I will move off those factual toes.

With respect to murder or murder liability as a party, I will move on now to manslaughter. This is the lesser included offence.

The distinction between murder and manslaughter is found in the *mens rea*. All of those comments about subjective foresight of death do not apply to what was action liability here. Each of the modes of participation, however, is equivalent. We know from the *Nette* case, N-E-T-T-E, I never know if I should pronounce that last E, from the Supreme Court that the same standards of causation apply to murder and to manslaughter.

So the focus here shifts if Your

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Honour cannot be satisfied of subjective
foresight of death, in my submission, to the
actions that can be proven to be those of Ms.
Kish. And in my submission, there cannot be,
5 and is not proved, beyond a reasonable doubt
that she in fact aided, she was a significant
contributing cause, or purposefully abetted
principals in the death of Mr. Hammond in the
attack that led to his death.

10 That leads to my next set of
submissions with respect to eyewitness
identification. This is why we can stand
before you with confidence and say there is
not the evidence that should satisfy Your
15 Honour that Ms. Kish is responsible, even for
the lesser included offences.

THE COURT: So we could agree, Ms. Simpson,
that if there was evidence that Ms. Kish
stabbed Mr. Hammond, that would constitute
20 the principal requirement of a party.

MS. SIMPSON: In the chest, yes.

THE COURT: I would assume we could also
agree that if Ms. Kish passed the knife to
Mr. Fresh or Mr. Wally and they committed the
25 stabbing, that would constitute her as an

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aider.

MS. SIMPSON: She would be an aider. Yes.

THE COURT: Thank you.

MS. SIMPSON: The necessity to scrutinize
5 with great care eyewitness evidence is
well-known. A convinced witness is often
convincing and nonetheless may be simply
wrong. There have been many cases of wrongful
conviction where the purported eyewitness
10 identification of the accused, we now know,
were simply erroneous. We trust that Your
Honour will examine the weaknesses and the
dangers of the eyewitness evidence carefully.

The general principles will be
15 the focus and the specific application to
individual witnesses, again, will be Mr.
Scarfe's area.

What's important here is that we
be clear from the outset, these witnesses are
20 honest. All of them. They were trying their
best. I should say perhaps George Dranichak
for portions of his evidence, but the rest of
them there is not a credibility issue. There
is a reliability issue. There are tremendous
25 frailties in human observation and

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recollection and our overarching submission here is that it would simply be unsafe to convict Ms. Kish of any offence based on the eyewitness evidence that you have heard in this case.

I might slip up and say eyewitness identification and it's actually not that. There was no identification here of Ms. Kish. You'll recall all of the photo line-ups that you heard evidence of, she had not been picked out by a single one of these witnesses. However, the woman with the stab wound at the end of this melee was clearly Ms. Kish. So insofar as an eyewitness describes a woman with a stab wound, being the same person as the person who earlier does something, that's tantamount to an identification -- or tantamount to an eyewitness identification. Why I'm focused on this area, this is most clearly Mr. Paget's evidence, when he says that the woman who he saw later with the stab wound was earlier the woman with the knife. And he is so sure. He can't provide any description at all, but he is sure and he is certain that the woman with

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the knife is the woman with the stab wound
later.

5 That brings us to start with the
Smith case at tab 1 of the authorities that
I've given you. It's an old case. 1952 from
our Court of Appeal. I'm certainly not
breaking any new ground here, nor are we
asking Your Honour to. I'm citing this case
because in 1952 people still had a way with
10 words that was quite impressive. I'd ask you
to turn up page 307, second last paragraph on
that page:

15 If the identification of an
accused depends upon unreliable
and shadowy mental operations,
without reference to any
characteristic which can be
described by the witness, and he
is totally unable to testify
20 what impression moved his senses
or stirred and clarified his
memory, such identification,
unsupported and alone, amounts
to little more than speculative
25 opinion or unsubstantial

conjecture and, at its
strongest, is a most insecure
basis upon which to found that
abiding and moral assurance of
guilt necessary to eliminate
reasonable doubt.

Your Honour, in my submission,
that paragraph describes Mr. Paget's evidence
for you. He could not explain in any way what
it was that led him to be certain that the
woman with the knife at the outset was also
the woman with the stab wound later. He could
provide no descriptions at all. We are left
with unreliable and shadowy mental
operations.

Turning to the next page at 308,
the second paragraph --
THE COURT: I'm not sure that I entirely
accept that, Ms. Simpson. I mean, one of the
things Mr. Paget said is one of the reasons
why he drew the connection between the female
he saw with the knife and the female he
subsequently saw with the stab wound was
because he had been told in the past, Be

careful about bringing a weapon to a fight because it might be used against you, and he thought, Gee, that's exactly what's happened to this lady.

5 MS. SIMPSON: Mr. Paget's irony. Yes.

THE COURT: Yes.

MS. SIMPSON: It is not description that can assist in identifying these people as the same people. Mr. Paget's opinion that if you bring a knife, you might be stabbed, is not the description that is discussed in the *Smith* case or any others.

15 THE COURT: No, but Justice McKinney says he is totally unable to testify what impression moved his senses or stirred and clarified his memory.

MS. SIMPSON: That's right.

THE COURT: Well, Mr. Paget had a reason why.

MS. SIMPSON: Yes. He had that reason. He did not have a reason that's a description that I submit that you can rely on, but he did -- he was able to explain at least that basis for thinking that. That is true.

25 Page 308, the second paragraph,
the Court observes that:

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A great deal of the value of
direct evidence of
identification must depend on
the personal appearance of the
subject of the identification.
There are so many peculiarities
and characteristics so
pronounced that even a casual
observer could not easily be
wrong. But by far, the greater
number of the wrong to the class
whose features and
characteristics are of the
commonest types and are not
easily distinguishable from
hundreds of those which in a
large city are seen every day.
Distinguishing features of the
subject of identification may be
one of one way or the other, or
may belong to any of the
infinite gradations between
those two extremes.

I draw your attention to that

5 passage because, not particularly applicable
to Mr. Paget, but here particularly
applicable to Ms. Stopford. The distinctions
that can be drawn and the particularities
that can be identified are particularly
important, in my submission, when you have
two women who are so very similar, and it was
Ms. Stopford who told us that she couldn't
clearly distinguish between the women and she
10 may be interposing them in her memory. The
only way she was able to distinguish between
the two women was not in anything in
particular in their descriptions, but in
their actions. So when there were also two
15 women that were later on the other side of
the street, she was relying on actions to
distinguish them. The actions she recalled
from before, remember, than anything
particularly characteristic or pronounced,
20 and that paragraph points us to that being an
area of some concern, in my submission.

25 The last paragraph I'd like to
highlight in this case is over on page 312,
and here the Court is considering the
evidence of the eyewitness in that case, Mr.

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Twinham (ph).

5 Doubtless, the evidence of
Twinham was given in good faith,
but that is not the vetted
question. The real question is:
Has the Crown proved the case
against the appellant with that
moral certainty which is
necessary in order to justify a
10 finding of guilt.

15 Of course, we know since then we
don't, and should not, use the language of
moral certainty anymore, but leaving that
aside, the Court continues:

20 The inherent tendency towards
honest mistake and
self-deception which pervades the
human senses is fraught with
deception. Pardon me. I missed
my line.

25 Is fraught with the gravest
dangers in as much as in
substance when weighed
objectively may be and indeed

often is of slender value.

5 The caution that Your Honour
needs to apply in assessing the eyewitness
evidence is not a caution we have recently
discovered. It goes back to the early 50s, at
least, from our Court of Appeal.

10 The next case that I have
included is *Sophonow*, and here again is
another example of Mr. Paget's irony. Mr.
Sophonow, we know now, is completely innocent
of the murder of which he was convicted. We
know this from the subsequent inquiry in
Manitoba. He was acquitted as a result of
15 this case. This was his third prosecution.
The eyewitnesses in his case were simply
wrong.

20 And what the Court of Appeal in
Manitoba did, and the Supreme Court refused
leave in this case, is set out a number of
guidelines which should be applied in terms
of the jury instructions but also the way in
which Your Honour might instruct yourself
when eyewitness identification is at issue.
25 Those guidelines are set out at page 438 and

439.

5 The Manitoba Court of Appeal
draws from the earlier *Turnbull* (ph) case
from Britain and he sets out the five points
that are necessary in a jury instruction,
certainly also the way in which Your Honour
will instruct yourself.

10 At the next page, 440, Justice
Twaddle (ph), writing for the majority on
this point, points out an error that the
trial judge committed in that case. He says,
and this is the first non-indented portion at
page 440:

15 The learned trial judge at no
time pointed out the reason for
the danger of mistaken
identification which, to use the
language of Justice Belzeal (ph)
in *Afield* (ph) lies in the fact
20 that the identification comes
from witnesses who are honest
and convinced, absolutely sure
of their identification and
getting surer over time.

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To conclude the *Afield* quote:

But nonetheless, mistaken --

Justice Twaddle continues:

Nor did he point out that the
warning is given because of the
experience of a legal system
that in some cases a number of
honest witnesses have identified
someone only to be proven later
have been mistaken.

Excuse me. Your Honour, this cold
was supposed to arrive two days from now. I
have it arriving two days early. I do
apologize.

I'd like to turn to the more
recent history now. Tab 3 is the *Corcea* (ph)
case from our Court of Appeal, and there are
a number of cases I'm going to address now
which are all unreasonable or unsafe verdict
cases. Of course the standard being applied
there is a higher threshold than that which
Your Honour is applying as a trial judge now,
so bear in mind that the standard of the
Court of Appeal we find in these cases is far

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more demanding than that Your Honour needs to find proof beyond a reasonable doubt.

I'd like to start at page 383.

5 The Court finds that the identification was unreasonable. And this is Justice Doherty writing for the Court. And he says, and this is the last full paragraph on the page:

10 The third ground of appeal, that is, the unreasonable verdict ground of appeal, raises a much more difficult problem. This is a case in which the conviction of the appellant depends entirely on the identification of him by the victim. Where the Crown's case rests on eye
15 witness identification one is always very concerned about the reliability of a finding of
20 guilt. Legal history and data compiled by behavioral scientists demonstrate the validity of that concern. The specter of erroneous convictions
25 based on honest and convincing

but mistaken eyewitness
identification haunts the
criminal wall. That ghost hovers
over this case.

5

In my submission, it hovers over
Ms. Kish's case also.

On the next page, page 384, at
about point F, Justice Doherty says:

10

I begin by acknowledging that
the victim was, in every
respect, an honest witness.
Honesty cannot, however, be
equated with reliability where
identification evidence is
concerned.

15

Again, that applies to all, with
the possible exception of Mr. Dranichak, all
of the witnesses here. They are clearly all
honest. They are trying their best.

20

At page 386, the Court considers
the application of *Chartier* and I will return
to this momentarily, but at the about point D
the Court observes:

25

5 It is evident that the victim's
initial description of her
attacker was consistent with the
appearance of the appellant in
many respects, one of which
could be described as
distinctive. It is equally
evident...was completely at odds
with the appearance of the
10 appellant. These descriptions
give considerable cause for
concern in assessing the
reliability of her
identification.

15 *Chartier* is quoted, and in the
Boucher decision, which I will return to
later and consider further how *Chartier* might
apply in a criminal case.

20 The next case I'd like to turn to
is *Burke* (ph) at tab 4. Again, an
unreasonable verdict case. This is a sexual
assault, not a murder. It's a historical
25 sexual assault. And here I'd just like to

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draw your attention, Your Honour, to comments
at page 224, just at the conclusion of the
case. Paragraph 52:

5 The cases are replete with
 warnings about the casual
 acceptance of identification
 evidence, even when such
 identification is made by direct
 visual confrontation of the
10 accused. By reason of the many
 instances in which
 identification is proved
 erroneous, the trier of fact
 must be cognizant of the
15 inherent frailties of
 identification arising from the
 psychological facts of
 unreliability...and
 recollection.

20 The Court then continues to quote
 Spatala (ph) from our Court of Appeal:

 Errors of recognition have a
 long documented history.
25 Identification...have underlined

5 the frailty of memory and
fallibility of the powers of
observation. Studies have shown
that the progressive assurance
that build upon an original
10 identification that may be
erroneous, the very question of
admissibility of identification
evidence in some of its aspects
has caused sufficient
apprehension in some
jurisdictions to give pause to
critical reliance on such
15 evidence when admitted as the
basis of conviction.

20 At tab 5 I have *Miaponoose*.
Again, an unreasonable or unsafe verdict
case. And this is perhaps the most detailed
consideration of the difficulties with the
frailties of eyewitness identification that
our Court of Appeal has yet undertaken. The
discussion starts at page 450 and I'm not
going to bring you all the way through it.
25 All of this subsection is particularly

relevant in this case.

The Court notes and quotes a study by the Law Reform Commission of Canada, their 1983 study paper, and it's quoted in depth at page 451. What it talks about here is the phenomenon of filling in. We saw a very clear example of that in this case when Mr. Mir, you will recall that Mr. Mir saw the gentleman beforehand in the black t-shirt and he saw blood later on his taxi. He then recalled that he saw blood on a black t-shirt at night. That's an absolute example of filling in. Mr. Mir's inferences were logical. That could not be what he saw, and I think he was sure in his direct examination that confronted him with those facts, he agreed. That is not a worrisome or alarming filling in. It's an understandable one. Where the risks of filling in here are are that which you saw, for example, from Mr. Paget, which Your Honour referenced earlier. That whoever it was that was acting earlier must have been the person with the cut later. Whoever was acting must have been the vocal person. Those risks of filling in are

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precisely what the Court of Appeal in this case, certainly the Law Reform Commission that it adopts, speak of as a particular frailty or a difficulty with eyewitness identification. It's a real risk here.

Finally the *Boucher* decision from our Court of Appeal in 2000. This is the famous robbery case involving the tear away pants and the stripe. And the tear away pants were seen by the witness but the stripe could not be and was not.

At page 86, the Court applies the *Chartier* decision, although that had been a civil case, it applies it here in a criminal law context. The Court sets out, quoting from Justice Pigeon in *Chartier* and in the underlined portions of the top right of page 86:

"Regardless of the number of similar characteristics, if there is one dissimilar feature there is no identification.... This witness therefore did not identify him; he merely noted a resemblance."

At paragraph 19, I believe it's
Justice Rosenberg. Yes, Justice Rosenberg
for the Court, he says:

5 "We are not here dealing with a
police officer's civil liability
or the question of reasonable
and probable grounds.

10 Nevertheless, it seems to me
that the principles set out in
these passages apply in this
case. In view of the dissimilar
feature of the pants, there was
no identification, merely a
15 resemblance. In the absence of
some other inculpatory evidence,
a resemblance is no evidence."

20 The Court continues at the end:
"...at worst [this] renders the
resemblance of no probative
value and possibly stands as an
exculpatory feature."

25 And here the witness to which

5 this applies most directly, and again I'm
leaving aside the issue of combining it with
other evidence, but considering the witness
exclusively, is Mr. Hailmeraian. He saw a
person in a black dress, you will recall, and
it turns out what that black dress means is
black attire, and when he described black
attire, it was black pants, and more
10 importantly, black shirt or jacket. He saw no
skin. The shoulders and arms were covered.
That is the sort of dissimilarity that
renders any resemblance of no probative
value, or possibly stands as exculpatory of
Ms. Kish. We know from the other evidence she
15 was in a tank top and a long skirt. If Mr.
Hailmeraian could be sure he saw no skin, and
he had saw long sleeves, and he saw pants,
not a skirt, he did not see Ms. Kish.

20 At the last tab I have included
an extract from CRIM JI, and I have included
it only because this is the best
comprehensive list of factors that I could
locate in assessing eyewitness identification
and the careful scrutiny that Your Honour
25 needs to apply. It's obviously framed as

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instructions that might be given to a jury,
but I draw your attention to number four,
"Factors for Assessing Eyewitness Evidence",
and it goes through a list of 14 particular
5 factors that assist in focusing our attention
on the factors that make an eyewitness more
or less reliable. With respect to the
individual witnesses, it may apply to a
greater or lesser extent but will assist in
10 framing that scrutiny.

Subject to any questions you may
have, those are my submissions on the legal
framework.

THE COURT: Thank you.

15 MR. SCARFE: Your Honour, on behalf of Ms.
Kish, her family, Ms. Simpson, Ms. Santara
(ph) and myself, I'd like to thank this court
for its patience and for allowing counsel to
conduct the proceedings as we did.

20 It's the respectful submission of
the defence that there is insufficient
evidence of identification to show that
Nicole Kish is guilty of any criminal
wrongdoing whatsoever.

25 I fully expect the Crown and

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5 defence will disagree on how Your Honour
 should interpret the evidence. Having said
 that, there are a number of basic things I
 think we all can agree on. Ross Hammond was
 murdered. His was a senseless and tragic
 death. Despite what may be said or not said
 about the behaviour of Ross Hammond and
 George Dranichak on August 9, 2007, nobody is
 suggesting that Ross Hammond somehow deserved
10 to be stabbed in the chest. This is not a
 case of self-defence.

15 Another thing I think we can all
 agree on is that Ross Hammond was stabbed
 four times in the chest. One of those wounds
 punctured his heart. This led to massive
 internal bleeding and eventually to his
 death.

20 We can also agree that Nicole
 Kish suffered a stab wound. The wound
 penetrated her left arm and caused
 significant bleeding.

25 From an evidentiary point of
 view, I think the following is also pretty
 clear - there were a lot of people on the
 street that night. The specific number varies

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5 from witness to witness. Some say as many as
20 to 30 people at one point. Either way, it
would be wrong to say it was just Ross
Hammond, George Dranichak and the four people
who were arrested that night. Again, from an
evidentiary point of view, not a single
witness testified they saw anyone stab Ross
Hammond in the chest, and not a single
witness testified they saw anyone stab Nicole
10 Kish in the arm. There's no direct evidence
before this court that Nicole Kish stabbed
Ross Hammond, or anyone else for that matter,
and there's no direct evidence that she
encouraged or abetted anyone to hurt or kill
15 Ross Hammond.

The issue of whether there was
any abetting or encouragement or aiding all
comes down to the inferences this court's
willing to draw from the circumstantial
20 evidence before it.

Based on Mr. Thompson's opening
at the beginning of this trial, I expect the
Crown will submit that Ms. Kish stabbed Ross
Hammond in the chest four times, causing his
25 death, and that she is guilty as the

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principal of second degree murder. I also
expect the Crown will submit in the
alternative that if this court is not
satisfied on the evidence before it that Ms.
5 Kish is guilty as a principal, then it should
find that Ms. Kish aided or abetted the
others to attack Mr. Hammond.

The Crown will urge you to find
that she incited, inspired, encouraged,
10 and/or participated by aiding those other
street kids to violently attack Ross Hammond,
and that she did so with full knowledge of
what the other street kids were likely to do.
In my respectful submission, Ms. Kish's
15 behavior, when viewed through the lens of all
the witnesses that night, was more consistent
with a call for help than inciting a riot.

How did we get here? First
witness by the Crown, or called by the Crown
20 on the trial proper, was Detective Sergeant
Giroux. Included in his evidence was a basic
overview of the investigation. Under
cross-examination it was suggested he rushed
to judgment as a result of the press coverage
25 in the case and the fact that Ms. Kish was

possibly going to be released on bail on the same day as Mr. Hammond's funeral. At that point in the investigation, there were no DNA results. Detective Sergeant Giroux insisted the main reason for charging Ms. Kish when he did was as a result of the interviews that he had done with Molly Stopford and Jonathan Paget, and not because he had watched the One of a Kind Pasta video. What does that tell us, Your Honour? That tells us that the woman the investigators believe to be Nicole Kish, who was seen rushing into a fight with a knife, on the south side of the streetcar, as best they could piece together, appeared to be a fight between Ross Hammond and Douglas Fresh. Based on this, the investigators must have decided it was Ms. Kish who stabbed Mr. Hammond, so Ms. Kish was charged with second degree murder on August 16, 2007, and at the time the Crown alleged that she was the stabber.

On behalf of the Crown, Mr. Thompson opened this trial by setting out the Crown's current theory. The Crown said that Ross Hammond and Doug Fresh were fighting on

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5 the south side of the streetcar and Ross
Hammond got the upper hand, that Ross Hammond
was hitting the head of Mr. Fresh against the
streetcar and that, meanwhile, Nicole Kish
began to strike him with a knife. Mr.
Thompson told this court it would hear
evidence that Ross Hammond tried to get away
from her by running to the north side. At
10 that point he is brought down by two males
and Nicole Kish. She stabs and hits out at
Mr. Hammond on the north side. He gets the
knife from her somehow, and she is cut. He
takes off with the knife.

15 Now that the Crown's evidence is
in, we know the only evidence of Nicole Kish
making any kind of a motion that could be
interpreted as stabbing comes from Melissa
Gallately, who says she never sees a weapon,
and I'll address the problems with her
20 evidence a little later.

I fully expect that the Crown
will ask you to infer from the evidence and
find as follows: A, that Nicole Kish stabbed
Ross Hammond in the chest on the north side
25 and; B, in the alternative, if he's failed to

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5 prove that beyond a reasonable doubt, that
Nicole Kish abetted or encouraged the two
males to attack Mr. Hammond, and/or
participated or aided in the attack itself.
He'll suggest that, based on the
circumstantial evidence before you, that if
she didn't stab him, the two males must have.
He'll also have to submit and argue that she
must have had subjective foresight that they
10 would do such a thing, and that her vocal
behaviour can only be interpreted as somehow
egging the males on.

15 So here we are, having moved from
she stabbed him on the south side to maybe
that's not her on the south side but, hey,
she must be culpable for what happens on the
north side, if not as a principal then maybe
as a party? If I'm wrong and I've somehow
misread the Crown's theory, Your Honour, I
20 hope this court will grant me leave to make
some very targeted reply argument once my
friend has completed his submissions.

25 I'm now going to review the
evidence and go through each witness. I'm
going to spend a little extra time on Mr.

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Dranichak and I'm going to try and follow this chronologically as the events unfold going west on Queen Street.

5 George Dranichak, Your Honour, is a liar and a coward. He left his friend. The only explanation he has for that is that he got beat up, and when he got up after, he thought Ross Hammond had abandoned him. He says that because of the pain he experienced
10 in the attack. He didn't stick around. He hailed a cab and went back to the office. When Ross wasn't there and when he didn't arrive shortly after, he did nothing to locate his friend. He slept in his car. In
15 the morning, he says he called in sick and went home. He says he simply assumed that Mr. Hammond went back to the Big Bop to hang out with his friends so he didn't worry about him.

20 Now, after all Mr. Dranichak told this court, in my respectful submission, that's completely preposterous. Mr. Dranichak made it pretty clear that he couldn't afford to get arrested that night or any night. He
25 is an American on a work permit since 2002 ,

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5 he has a house, two small children, and he
doesn't want to lose the right to live and
work here. So he abandoned his friend and he
rewrote this story to shield himself from any
potential criminal liability.

10 Now, the defence has received
disclosure and we've tried to narrow this
trial as much as we can, but I can indicate,
we agree that he is telling the truth about
going out with four other fellows, five other
fellows from work that night, and he's also
telling the truth when he says he and
Mr. Hammond broke off from the group and
ended up at the Big Bop, watching a band from
15 St. Catharines.

20 The defence also agrees that he's
probably telling the truth when he says he
and Mr. Hammond were approached by a girl on
a bike who asked for money at the TD Bank. He
says he and Mr. Hammond were rude and very,
very inappropriate, in the vulgar, profane
and insulting things they said to this girl.
He was asked about some of the things that he
and Mr. Hammond said. For the most part, he
25 agreed with all of it. I'll not repeat the

5 words these men used here. It's already in
evidence. Clearly he and Mr. Hammond were
drunk. They could have just said no and
walked on, but they didn't. They called them
a number of names and hurled insults at them.
It was offensive, and it offended some of the
other persons in the vicinity who immediately
approached as a result of an escalating
verbal dispute.

10 He describes Ms. Watts as the
instigator. She was aggressive, persistent,
and would not leave it alone, according to
him. He went on to say that she was
screeching, screaming, swearing, insane and
15 psychotic in her protestations. He said that
her face was sweaty and it appeared as though
she was on or coming down off drugs. This
dovetails with her admission that she had
injected an Oxycontin earlier that night.

20 Mr. Dranichak felt that from the
perspective of the people on the street, it
looked like he and Mr. Hammond were picking
on the kids.

25 He also made it clear that
Mr. Hammond was stubborn. He was lecturing

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5 him, saying things like, You don't know who I
am. You don't know what I've got, and words
to that effect. Mr. Dranichak said
Mr. Hammond just wouldn't leave it alone. He
was lecturing the kids and he clearly
acknowledges it may have appeared as though
Mr. Hammond was taunting Ms. Watts and some
of the other people on the street.

10 He says the group grew in number
very quickly. It seemed like all of us -- or,
It seemed like us against all of Queen
Street.

15 At one point he agreed that there
were as many as 15 people in the immediate
vicinity. He told the police that he crossed
the street and Ross Hammond followed. He also
told the police and this court that he never
went farther west than a few doors from where
he crossed, and he's sticking with that
20 story. He then says that he was suddenly and
viscously attacked by a girl on a bike in
front of a restaurant south and slightly west
of the TD Bank. He testified specifically
using the name that it was Nicole Kish who
25 ran her bike into him.

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5 This is quite impossible, Your Honour. Leave aside for a moment that there's no evidence that Nicole Kish had a bike, but what there is evidence of is that she's wearing an ankle length skirt. She could not possibly have ridden a bike into him as he claimed.

10 However, following this portion of the story he says he was down being beaten by others and suddenly got an adrenaline surge and was able to get up and get away. He doesn't seem to care that nobody believes him when he says he only went as far west as he said he did. We know from numerous witnesses,
15 including Shaun Park, Mr. Cooper, Laura Quigley, Cam Bordignon, I won't list them all, that he was seen with Mr. Hammond going all the way to Queen and Niagara.

20 Despite the obvious fabrication, the Crown had no choice but to call him. He was the only link to the narrative for Queen and Euclid and the only one who could explain why Ross Hammond was walking west on Queen Street that night. But because he lies,
25 because he refuses to tell us what really

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5 happened after the TD Bank, we'll never know. Clearly there's something about this story he is afraid to tell. As a result of his insistence on sticking with this fabrication, this court will never be able to piece together what his role in the massive confusion actually was.

10 What really happened to him when he and Mr. Hammond were unable to get on the streetcar? Did he just drift away and watch from a safe distance? Did he go to the north side and end up engaging in a fight? Was it his presence on the north side that drew Mr. Hammond over there? Finally, was Ross Hammond killed because he was trying to save George Dranichak? We don't know, and we will never know.

15 Another thing we'll never know is whether he made up all those people he described in his interview. Whether he really saw a hip hop guy, a Middle Eastern guy, and a blonde guy who looked like kid rock. As a result of his lies, there's no way to accurately splice what is truth and what is fabrication. Clearly everything he says after

20

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the TD Bank cannot be relied on due to a lack of credibility.

5 You may be tempted to ask yourself, Your Honour, are there little bits of truth mixed up in the things he says happened after he allegedly crossed the street? Maybe. But this is a criminal trial, not a murder mystery. I submit this court must be very cautious in using any of the
10 evidence of Mr. Dranichak in your findings of fact.

15 Turning for a moment to his reliability, I respectfully submit that it must be approached with caution as well. He was unable to reconcile his original descriptions with his subsequent
20 identifications based on his viewing of the City TV video. He repeated more than once that he may be mashing descriptions of people -- different people together. He described the person, who he later says is Nicole Kish, as having Portuguese features and a white t-shirt with little flowers on it. He says
25 Ms. Kish and Ms. Watts were both on bikes. There is no other witness who identifies

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either of these two females as being on a bike. There is a girl on a bike, according to Mystica Cooper, but it does not appear to be either of these two women.

5 Mr. Dranichak couldn't recall whether he actually got money from the TD bank or if Mr. Hammond talked him out of it. He couldn't get straight how much money he had on him or how he paid the cab driver who helped him make good his escape.

10 He had trouble with what he himself was wearing that night, even though he was told to turn the clothes in. Was it Steve Madden shoes or worn out Hush Puppies? 15 Jeans versus work pants? Exhibits 40 and 41 are photos of the clothes he turned in; they are before you. Can we be satisfied that he is bringing in the right clothes? Shouldn't there be more wear and tear given what he 20 says happened to him on Queen Street that night?

25 However you slice it, Your Honour, Mr. Dranichak's evidence lacks both credibility and reliability and must be approached with extreme caution.

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Next witness I'd like to talk about is Shaun Park. Out of order in where he testified but in order of the events unfolding. Shaun Park was the owner of a restaurant lounge known as Sole City, which, at the time, was located at 785 Queen Street. He was on the south side of the street across from a store called Coupe Bazar. The more easterly of the two Coupe Bazar's. You know, that's about seven to eight doors west of the TD Bank. What's important about his evidence is that he sees the dispute turn from a verbal argument into a physical confrontation, and that the instigators of the physical altercation were the two preppy guys.

He heard screaming. One female and two males were arguing. The female was very upset and yelling and screaming. He couldn't remember exactly what was being said but he remembered that the men were vulgar and said something to the effect of, Why don't you go something something, you stupid cunt.

He looked across the street. A

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female was behind the two males, walking west at a very slow pace while arguing and yelling. The female was dressed in street kid dress. It was gothic or punk. She had leggings and boots with laces and a backpack.

Another male came from the east and joined her. He was slim, wearing green clothes and dark pants. He joined in on what was still a verbal argument. He got between the female and the two preppy males and at that point Mr. Park watched one of the two preppy guys pick up the male and throw him into a store front. He threw him so hard Mr. Park was surprised the glass didn't break. The female immediately crouched down to help the male who had been thrown. She was still yelling; she was still very upset.

After helping the male up, the female and the male followed the preppy males west in slow motion, as he recalled it. The female fell to the ground. He didn't see how she fell because of the parked cars at the curb, but it appears as though she had been pushed by one of the two males. Two other male street kids were seen approaching at

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this point. They came from the east and travelled south to north towards Manning on a diagonal. Mr. Park then went back inside the restaurant.

5 A little while later his attention was drawn outside again as a series of emergency vehicles arrived. He stepped outside and looked down the street and saw the streetcar stopped at the corner of Queen
10 and Niagara. Some time after that, while back outside, he was approached by two males heading back east. One of the males told him that someone had been stabbed. The taller of the two males lifted his shirt and says, I
15 got stabbed. He observed three wounds on that male's abdomen and chest area. The male mentioned the fight and went on to say that he had been stabbed 19 times before so it was no big deal. He continued eastbound. He was
20 wearing a gray, faded, stone washed hoody, below the knee shorts, sneakers, a hat, and he had tattoos on his left leg, inside calf, and tattoos on his chest. Mr. Park was shown the One of a Kind Pasta video. He testified
25 that he saw the tattoo and the tattoo looked

the same.

Now, one of two things happened here, Your Honour. I've looked at that pasta video and tried to find the tattoo. You know I'm colorblind. It's hard for me to see. Either the tattoo's there or it's not. But when Ms. Simpson talks to you about the risks and this phenomenon of filling in, if you find the tattoo's not there, then you've been given a live demonstration of that very phenomenon.

Mr. Park's shown a video. Do you recognize the guy? I'm not sure. Looks at it again. He's trying to help us, and in the end he sees the tattoo. That's the same tattoo I saw with the guy walking past my restaurant after the incident. Either way, there's much to be learned from his evidence.

The next witness I'd like to talk about --

THE COURT: I only mention, Mr. Scarfe, and I almost did it in response to Ms. Simpson's submissions, is that of course it's a basic fact that a trier of fact can rely on all, some or none of a witness' evidence. A

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witness' evidence does not have to be taken
on an all or nothing basis. So I suggest the
mere fact that, in any witness, you find
something that you think the witness is
mistaken about or has, to use your
expression, filled in, does not mean that
that witness' evidence cannot be believed
with respect the other matters.

MR. SCARFE: No. I would agree with that. Of
course with the proviso, as Ms. Simpson
indicated, and the reasoning in *Boucher*, when
you get into specific issues of eyewitness
identification, and this requires a very,
very careful weighing, sometimes when a
witness says something that you can just sort
of ignore, it can also be looked at as
exculpatory. And so in my respectful
submission, the reasoning only goes so far,
but, yes, in essence, I agree with Your
Honour. Is there something more you wanted
me to... no.

The next witness I'd like to talk
about is Mystica Cooper. She was called by
the Crown, but her evidence is very important
from the perspective of the defence. Here's

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5 why. First, she's locking up her bike out
front of Squirly's Bar located at 807 Queen.
Now, this is about midway between Manning and
Claremont, but on the south side. It may be
8
9
10 eight or nine doors west of where Mr. Park
sees the man slammed into the store front.
She had not been drinking. She sees a woman
and a man screaming at two guys. They're
saying things like, You hit a woman. Don't
11
12
13
14 let them leave. Call the police. The men were
yelling back. It was clear to Ms. Cooper
that something had preceded this. She just
doesn't know what.

15 The woman that she saw had a long
skirt on. She was not on a bike and there was
no mention of a backpack. Then she sees a
different girl on a bike, ride up from the
east and yell something in the direction of
the men. This other girl then rides over to
20 where Ms. Cooper is standing and asks her for
a cigarette. She then rides away to the east.
Ms. Cooper described her as having dark hair,
Spanish or native, and wearing shorts.

25 At one point Ms. Cooper saw two
of the males get into a physical fight. It's

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5 a scuffle. The men are wrestling, and the
street kid gets thrown either into a store
front window or into a pile of garbage. She
wasn't clear. It broke up fairly quickly and
after this the girl was seen throwing garbage
bags and continuing to scream that she wanted
the police called. Ms. Cooper never saw any
of the garbage bags actually hit either of
the two men, nor did she indicate that they
10 landed anywhere close to them.

And in my respectful submission,
this was done more to attract attention
rather than an act of physical aggression.
Obviously throwing garbage bags is kind of a
15 futile exercise. If you really wanted to hurt
someone, you'd find something a little bit
more useful.

20 So as her memory's unfolding, the
men move west. A crowd began to form and she
noticed there was a streetcar stopped at the
corner of Queen and Niagara, pointing
eastbound. She wasn't sure if the men got on
the streetcar, but she saw the female
standing in front of the streetcar alone. All
25 by herself. Calling for someone to call the

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5 police. She was screaming at the streetcar
driver. The rest of the crowd wasn't with her
at this point. If that is Nicole Kish, she's
clearly not on the south side of the
streetcar trying to save Doug Fresh with a
knife, and nor at this stage is she on the
north side participating or encouraging
anybody to beat anybody up.

10 The last thing Ms. Cooper
remembers, it's not so much what she sees but
what she hears. She hears a female let out a
one second long, really loud scream, and she
concludes to herself that something really
bad had happened.

15 What time would you like me to --
can I do another witness? Or --
THE COURT: You can do one more witness then
--

20 MR. SCARFE: One more witness? The next
witness I'd like to talk about is Ms.
Quigley. She again is next in the chronology.
She was about five doors west of Mystica
Cooper but on the north side. She was working
at Terroni's, which is at 720 Queen Street
25 West. Presumably she was not consuming

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5 alcohol, although nobody asked her that. She
was at the end of her shift and she was
outside on the north sidewalk unlocking her
bike to go home. She heard screaming coming
from a couple of blocks to the east. She
looked east and saw what appeared to be a
female getting pushed to the ground. It
looked like she was pushed by the two guys
she describes as "the business guys". They
10 were like clones of each other. The female
got up right away. She had blonde hair in
dreads tied back and a hippie-style matched
dress. There was a male with her dressed in a
similar style.

15 Ms. Quigley's first reaction was
to go to help her, but her bike was now
unlocked, she had her purse in the basket of
her bike, so when the female got up right
away and continued west, she decided not to
20 go and help.

The two groups continued west.
The business guys were separated from the
others and she recalls the female screaming,
He hit me. I can't believe you're just going
25 to walk away. But the guys keep walking.

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As they get closer to the witness, the business guys move out onto the street and continue west, not on the sidewalk, but on the street. The street kids remain on the sidewalk and one or both of them - she's not sure - throw garbage bags, and I've already talked about that.

So the two business guys get to the streetcar but don't get on. The next thing she sees is an injured person on the south side of the streetcar lying limp on the ground. Someone drags him to the sidewalk. Next she sees the girl bleeding from her shoulder and hysterical, holding herself and yelling. That girl is in the middle of the street, according to her recollection. While that's going on, contemporaneously, at the same time, there was a physical altercation on the north side. It goes until the same two guys try to get into a taxi. After she sees the two men trying to get into the taxi, someone comes and gets the girl from the middle of the street and takes her to the sidewalk. And according to this witness, the taxi arrives, the guys try to get in, before

5 the girl moves from the middle of the street
 to the sidewalk. This is obviously important
 because like Mystica Cooper, she has the girl
 alone in the middle of the street for some
 time and, according to her, the events on the
 north side of the street end just before this
 cut girl moves from the middle of the street
 to the north sidewalk.

10 And at this point I think it
 might be useful to take 15 minutes?

 THE COURT: All right.

15 ---RECESS

(11:21 a.m.)

 ---UPON RESUMING

(11:37 a.m.)

20 MR. SCARFE: Thank you, Your Honour. The next
 witness I intend to review is Ms. Stopford. I
 don't intend to spend a lot of time on her
 evidence because of the Crown's shifting
 theory. Nonetheless, Ms. Stopford was a
25 friend of Mr. Paget. They were riding the

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streetcar home after dinner at the Drake
Hotel. The streetcar pulls up at Queen and
Niagara and she sees a fight between a jock
and a skinny street kid. The fight has two
rounds.

The first is the two men
fighting, and the second is when the jock
gets the upper hand and begins delivering a
one-sided beating to the skinny street kid.
This goes on for almost a minute and takes
place in the vicinity of the window she's
looking out, towards the south.

There were a number of people she
recalled that were around watching; yelling.
There were two girls. In cross-examination,
she conceded that there were maybe three
girls. Two of the girls were yelling and
trying to get the jock to stop beating the
street kid. One of the girls she described as
more persistent than the other. This
persistent girl was seen with a knife in her
mouth at one point. She recalled, and drew a
little diagram, and it's likely the same
knife that's before this court, because it's
got that little tag on the blade.

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No matter what either of the girls did, it seemed to have no effect on the jock. He just swatted them away and kept beating the street kid. He only stopped beating the street kid when the street kid became unresponsive.

Once the fight was over, she sees the jock guy move towards the rear of the streetcar and out of her view and, while he's staggering, he does not appear to be injured to her. Her attention is then drawn to the north side.

And I'm going to stop here and interject for a bit because you will see the same thing with Mr. Paget. That's this hole in the narrative where the fight with the skinny street guy, beside the streetcar, was suddenly over and the man who was doing the beating sort of drifts to the back and out of view. And we'll come back to that later, but that's very important because until we get to the very last witness in this case, we don't really know what happened, even the last witness, but it's important to keep that in mind as we carry on.

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5 In any event, her attention's
drawn to the north side. In examination
in-chief, she tells the Court that she thinks
the knife girl and the cut girl she sees on
the north side are the same, but in
cross-examination she makes it absolutely
clear that she's not sure and that she may be
interchanging the girls.

10 She concedes her recollection of
the events on the north side is sketchy, at
best. At one point she sees a woman running
to the north. She can't describe her. She
says it could have been either female, or
15 anyone else for that matter. She does not
actually see a fight on the north side. What
she describes as more of a scramble or a
commotion without physical contact. Like Ms.
Cooper and Ms. Quigley, she sees a woman cut
out front of the streetcar. She sees another
20 woman helping. This is the woman with the
white bra who takes off her shirt to wrap the
cut girl's arm.

25 She's absolutely clear she cannot
positively identify anyone. She also
acknowledges that she was unable to pick

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5 anyone out of a photo line-up. She's not 100 percent that knife girl is cut girl, but she is 100 percent that it was -- is the same jock guy she had seen on the south side beating up a street kid, who she sees on the north side on the hood of the car with the knife.

10 Jonathan Paget. Again, given the current theory of the Crown, I will not spend as much time on him either. He and Ms. Stopford were supposed to be the key Crown witnesses at one point, and the reason why Nicole Kish was charged with murder in the first place. Mr. Paget was out with Ms. 15 Stopford. He was drinking, but not drunk. When the streetcar stops, he hears noise and looks out the window to the south. He sees the jock guy and the street kid fighting and the street kid is backpedaling, to use his 20 words.

25 At one point he notices two women on the street in the curb lane and one of them was yelling at the males and trying to stop the fight. She approached the men with the intention of stopping the fight, and the

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5 fight stopped. The long haired street kid
ends up lying on the sidewalk. Either just
before or just after the fight, she can't
remember, he sees a woman with a knife in her
right-hand. He sees this very briefly, and
struggled with the timing of when he saw it.
He then sees the jock say, Who's next? And,
Bring it on. The guy is sweaty, agitated and
very worked up. He did not appear to be
10 injured at that time.

15 His attention shifts to the north
side. Same thing. Jock guy's there, turns
away, he starts looking to the north. Leaves
us with a hole as to what happened to the
jock guy. In the momentary seconds of turning
his head from the south to the north, he sees
a guy turtled on the sidewalk with two people
stomping on him. His view was blocked
slightly. The lighting was poor. He had to
20 stand up, and he conceded he was also
distracted by the people on the streetcar,
the driver, and his friend, Molly, who was
becoming increasingly scared and upset. He
also sees the short haired guy on the hood of
25 the taxi yelling at the driver, holding the

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knife. In addition he sees two girls, one of whom is tending to the other's arm. He recalls the girl doing the tending had a red shirt and the injured girl is yelling, He cut me.

In cross-examination, he admitted that he recalled absolutely nothing about what the girl was wearing or anything about her facial features. Body, style, we went from the floor all the way up to the top of the head. The only thing he recalls is blonde hair, either straight or wavy. So I showed him two photos from the line-ups that had been shown to other witnesses and he agreed that the girl he saw looked more like Faith Watts than Nicole Kish. He also agreed that the only thing he was basing his identification on was the irony. The irony that you always hear that a person who introduced the weapon into the fight is the one who usually ends up getting hurt.

He agreed that his observations could be divided into brief snippets, and here are the two things that are most important. First, there is a significant

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5 distance between the fight on the north side
and the location where one girl is tending to
the other's injury. Second, he believes the
fight he saw on the north side was at the
same time that he saw the one girl tending to
the other's injury, not after.

10 The next witness is Mr.
Hailmeraian. He was operating the first of
the two cabs going west. His windows were
shut and he had a passenger with him. He said
that there were lots of people on the street
that night. He saw a very brief fight on the
north sidewalk near the light poles. There
15 was one man being beaten, two or three males
and one female in the vicinity. He's unable
to describe what any one person is doing. He
cannot describe any identifiers about any of
the males who were kicking the man. He
20 doesn't recall the males kicking at the men
who was down -- sorry. He does recall the
males kicking at the man who was down, but
does not describe any actions by the female
except to suggest that she was involved, or
part of it. The female is wearing a jacket
25 and black pants or black jeans. He

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specifically stated it was not a skirt, and he was clear that the arms and the shoulders were covered. He was unable to pick anyone out of a photo line-up, and he says nothing about the female yelling that she's been cut, nor does he describe her being injured. So whoever this woman is that he sees, it's not Nicole Kish.

The fight moves into the street. The male who was being beaten is on the ground. At one point Mr. Hailmeraian says he's not 100 percent sure that it's the same man he saw on the sidewalk. Mr. Hailmeraian honks at him. The male gets up and tries to stop his cab. He sees the knife. The guy gets on the front of his car. Then he moves to the passenger side and tries to get in but the doors are locked. The other people scatter. He then gets on the cab behind him and is dragged.

There were other people in the area, including a man on a bike, and he actually indicated to us that he recognized that person on the bike the very day he came to testify in court. It's probably not

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surprising, because Mr. Patsiopoulos was the very next witness.

Mr. Patsiopoulos was obviously deeply troubled by his role in this case. In any event, he did his best to give us what he could recollect. As he approached the scene, he was on his bike coming from the south up Niagara Street. He rides up to the intersection and sees a group of six to twelve persons across the street, standing in the crosswalk, some of the street, some on the sidewalk, and somehow mixed into this group of six to twelve persons he sees two people fighting. He turns to go around the front of the streetcar and proceed west. He sees a man with a knife banging on the north side of the streetcar and he appears to be communicating with an Asian man who is on the streetcar. To Mr. Patsiopoulos, this man looked intoxicated. He had a knife. He seemed dangerous. It looked like he was ready to fight anyone and everyone.

So Mr. Patsiopoulos does a 180 degree turn on his bike. He's now facing east. He sees Ms. Kish standing in the middle

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of the street. He sees the look of panic and
distress in her eyes. He notices the wound.
He sees what he describes as an ugly injury
with lots of blood flowing down her arm. He
5 drops his bike and reaches for his cell phone
to call 911. He helps Nicole. She's alone. He
gets her to the sidewalk and into an alcove.
He gets her to sit down. She complies. He
leaves her for a moment, tells her to stay
10 there, and he goes and gets his bike off the
street and returns to where she is and spends
a few minutes with him.

She's not aggressive towards him,
nor distressed and confused. She expresses no
15 concern about the authorities coming. She
makes reference to a Canadian man but no
anger in her voice, no, Go get him, or, We
should get him, or, He deserves something.
Eventually her friends come to help. Mr.
20 Patsiopoulos leaves her and walks down to the
ambulance to get his own hands cleaned up.

In re-examination, he clarifies
the location of the fight. According to him,
it's in the -- in front of the pasta store,
25 it's in the street and east of the second

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light post, close to the north curb.

5 Melissa Gallately. Melissa
Gallately lived at 843 Queen Street, above
the Select Mart, with her husband Paul. She
said that, from her balcony, she couldn't see
the south sidewalk, but she could see the
north one. You recall her husband testified
later, and in cross-examination said, with
the streetcar there, you're not able to see
10 the entire north sidewalk.

She says she's awoken by the
noise, gets up, goes to the balcony and sees
four people on the north side, strangely
enough, with nobody else around them.
15 According to her, there is a man on the
ground in a fetal position being beaten by
two guys. The one with the cap goes back and
forth from standing and kicking to crouching
and punching. The second male was shorter and
20 less aggressive than the first male. He too
was kicking and punching, according to Ms.
Gallately. The female she sees is wearing a
skirt, part way down her calf. According to
her recollection she's yelling and screaming
25 and saying something about her hands,

something about bleeding and the word "stab".
The males are swearing and yelling at the
same time.

5 She yells from her balcony to try
and stop it. She says, Hey, once. It has no
effect on the individuals. She goes on to
state that she sees the female is flailing.
Her arms are moving. She's uncertain as to
10 whether the female makes any contact with the
male on the ground. This is, of course, in
stark contrast to the males she describes as
kicking and punching. Mr. Thompson gets his
watch out and asks her to estimate the amount
of time, and she waits for a minute and 40
15 seconds before saying that's how long the
fight went on for.

20 According to her, the man then
gets up and stumbles and moves towards the
driver's side of the dark vehicle. He went to
the vehicle and was gone. After that the
female was still screaming on the sidewalk.
She wanted an ambulance. She stays until the
police arrived.

25 She places the north side fight,
with all the participants on the north

sidewalk, left of the light post. In cross-examination, whoever, she concedes that regular people walk by and leave.

5 She described giving her statement the very next morning to an officer in uniform at her kitchen table while her husband was in the shower, I believe. She admits that she never mentioned flailing arms in her original statement, or at the
10 preliminary inquiry, and that that part of her story is new. She agrees she told the officer that the two males were beating the individual and the female was kind of on him. She also conceded that at the preliminary
15 hearing, she stated the female never punched or kicked the male. Finally, she conceded that if she had seen anything beyond the female yelling or swearing, she would have said so.

20 What's most disturbing about her evidence, Your Honour, is that when she's confronted with these contradictions, her excuse is that she didn't take the interview too seriously. Had she known someone had died
25 she would have been more diligent about the

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westbound streetcar stopped at the light. I
guess at Claremont and Niagara. There
appeared to be a fight that was moving
around. She agreed that her view wasn't
5 clear. She was looking around and through
people, cars, and this westbound streetcar.

She hears a woman screaming. As
soon as the light turns green, the vehicles
move westbound and the male is being pulled
10 by the taxi. Then she sees a woman who is
sort of spinning about, and yelling that she
wanted an ambulance. Clearly her observations
come very late in the sequence of facts.

To her the fight was confusing.
15 It kind of looked like the street kids were
fighting each other. There were people being
dragged all over the place, running back and
forth in the street. She says she was close
enough to see but cannot say who was fighting
20 who. She can't say who did what.

Afterwards, most of the people
stayed, but some left. One guy with a cut on
his arm took off; went right past her. The
whole thing was quick and chaotic. She does
25 say she sees a girl fighting. She thinks it's

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the one who gets cut and calls for the ambulance. However, she's shown a photo line-up. Who does she pick out? Faith Watts. Not Nicole Kish. And she says that the other girl she saw was not involved in the fight.

In my respectful submission, she's doing her best, but she's unreliable. She's the only one that puts the streetcar going west and she picks out Faith Watts as both the girl who was fighting and the girl who was cut.

Nelson De Carvalho, he was the fellow who made at least two u-turns. After his first u-turn, he sees a guy getting beat up by another male and a girl yelling, How could you do this to me? After having his memory refreshed by his video statement, he said the girl stated, How could you stab me? I'm a girl. Clearly at this point in his observations, the girl's already injured. He did an in-dock identification, or an in-court identification of Ms. Kish as the girl yelling.

In cross-examination, he says the fight takes place between Claremont and

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5 Manning Avenue. He says the woman and the two
to three men cross the street to the north
while he was driving west, and that he only
saw this in his rear-view mirror. He says he
turns around at the 7-11 and returns. At this
point some people are trying to fight and
others are trying to stop it. He is clear
that the men who crossed the street got into
the fight, but not her.

10 He turns around again. The man
with the knife gets off the taxi at the
church, goes and sits on the steps, leaves
the knife and returns to the sidewalk. He saw
no weapons in the fight and, clearly, most of
15 his attention was focused on driving rather
than what he saw.

20 Mr. Mir was the second taxi
driver. He had no passenger. He gets stopped
on the north side of Queen where he sees a
fight. His recollection is there were about
ten to twenty people in the area, all over
the place. Some were on the road, some were
on the sidewalk. A lot of them were moving
around. He sees a fight on the north side. He
25 only watches for eight to ten seconds. What

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5 he sees is different from anybody else. He
sees Mr. Hammond on top of a girl who is
lying on her back. There are two guys
fighting him as well, but, notwithstanding
that, from his perception, Mr. Hammond is
winning the fight. The girl he sees is blonde
with a ponytail.

10 The fellow gets up, grabs on to
his cab. Mr. Mir sees the knife in his hand
and gets scared. He drives west. Mr. Hammond
falls off the taxi at the church, so Mr. Mir
does a u-turn and phones 911 and eventually
makes his way back to the area of Queen and
Niagara.

15 When he gets there he sees a
woman in the street, east of where the fight
was, and there's a guy with a beard that's
near her. He recognizes the guy with the
beard and, because the guy with the beard was
20 near her, he figures, well, that must be the
same girl.

25 In cross, he concedes that he
can't remember much because he only saw this
group for eight to ten seconds. He concedes
the person he remembers best from the group

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5 is the guy with the beard, and the girl who was under Mr. Hammond is the person he got the worst look at. He tells this court, at the time, he was sure it was the same girl, but now he doesn't remember.

10 After being presented with two portions of his statement in cross-examination, he agrees he described this person as being either a boy or a girl. He thinks it's a girl but can't be sure.

15 In my respectful submission, he's the only person who sees Mr. Hammond on top of a girl. The description of the girl is more consistent with Ms. Watts than it is with Ms. Kish, but he's not even that sure if it's a boy or a girl. So I would submit it would be dangerous to rely on his evidence.

20 Those are the civilian witnesses who testified for the Crown. We then spent a day on the dying declaration, I ripped it out of his hand. There is plenty of evidence, Your Honour, to support the possibility that Mr. Hammond was stabbed by a male, rather than a female. Numerous people see two males
25 fighting with Mr. Hammond, including Cam

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Bordignon, who specifically hears a male say,
You die tonight, while bending over him on
the street just around the taxi.

5 P.C. Dawn came and testified in
this court. He can't explain why his
recollection differs so much from both
Adrienne Chan and Detective Gordon Scott. His
notes, he concedes, are not made until
10 several hours later, actually more like eight
hours later, because he's at the hospital at
7:00 and goes back to the station somewhere
around 8:00 or 9:00 he finally gets a chance
to make up his notes. And in it, he writes
down everything that happened in the last
15 eight hours and he tries to record
word-for-word what he heard Mr. Hammond say,
both on the sidewalk and in the ambulance.

Your Honour, he was
20 cross-examined at length and he was not even
prepared to acknowledge the possibility that
he may have got the exact words down
incorrectly.

THE COURT: Mr. Scarfe, what's the conflict
between Officer Dawn and Ms. Chan?

25 MR. SCARFE: The word "fight". Got it in a

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fight. It's all there on that one sheet that was filed.

THE COURT: She recollects, ah, Mr. Hammond saying he got it in a fight, Officer Dawn recollects saying, I got it from them.

MR. SCARFE: Mm-hm? Most importantly though, what Detective Scott recalls --

THE COURT: Detective Scott said he -- he wasn't much concerned, as I understood him, with how accurate he was going to be in terms of writing down what Mr. Hammond told Officer Dawn because he knew he wasn't going to be the source of that evidence at any trial. It would have to come from Officer Dawn. So he -- Detective Scott has no particular reason to be accurate in his record or reporting of that statement, and he admitted that himself.

MR. SCARFE: It's true, but if I -- with the greatest respect, Detective Scott is substantially more experienced than P.C. Dawn. Detective Scott has had the experience of having to conduct an investigation and then hand it over to homicide. He recalled having to do that in the past. And Detective Scott, in my respectful submission, was more

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attuned at the time to the importance of the exact words of what the deceased said than P.C. Dawn because of his experience. So he takes a few minutes at the hospital, he has P.C. Dawn tell him exactly what happened, exactly what was said, and instead of waiting eight hours to write it down, he goes down to his car, he gets in the car, and even though there's a call to go next to Toronto Western Hospital, he stays there and insists that he makes up his notes in the car five to ten minutes after hearing what P.C. Dawn had to say. And so while I understand --

THE COURT: Your submission that Detective Scott is more attuned to the accuracy of the record because of his experience flies in the face of Detective Scott's own evidence, that he wasn't particularly concerned with the accuracy because he knew he would not be the source of that information for the purposes of evidence at trial.

MR. SCARFE: So did he say that? Because he was attuned to issues? And why he was here? Or did he --

THE COURT: He knew at that point it was

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5 double hearsay, and if anyone wanted to know
what Mr. Hammond said to Officer Dawn they'd
have to call Officer Dawn. So I'm not taking
it, you know, down from the witness. I'm
getting it second-hand from an officer, so no
evidentiary value. I'm not going to be
particularly concerned with -- I'm not saying
that he wasn't going the try his best, but it
seems to me he fairly said, you know, I
10 wasn't paying particular attention to that
because I knew it wasn't going to have to
come from me in the future.

15 MR. SCARFE: Still though, and I don't want
to argue with Your Honour, and I appreciate
that I'm asking Your Honour to take double
hearsay and have it trump single hearsay. I
understand all of that. But Detective Scott
wrote in his notebook, five to ten minutes
after talking to P.C. Dawn at the hospital, I
20 ripped it out of his hands. And P.C. Dawn
doesn't make his notes up for hours and hours
later. And in my respectful submission, his
blind insistence that, What I wrote is what I
heard, is not very reassuring to this court
25 and does little to buttress P.C. Dawn's

credibility.

So you --

5 THE COURT: Not to belabour the point, Mr.
Scarfe, but, you know, I always have a little
difficulty with counsel who say to me it's
the firm position that that's what he heard
and that's what he wrote down, shouldn't be
of any comfort to you, when now if the
officer said, Well, I'm pretty sure, I'm not
10 100 percent sure, you would be saying to me,
The fact that he wasn't 100 percent sure,
Your Honour, should make you wonder whether
you can rely on it. So it's -- you know, you
can't have it both ways.

15 MR. SCARFE: Good minds disagree.

The forensics in this case, I
won't spend a lot of time on that either,
Your Honour. Ms. Sloan was the supervising
biologist in this matter and much of the
20 underlying basis for her findings went in on
consent or through the testimony of Aimee
Lukings and Steve Keron from Forensic
Identification Services. In the end, there is
one minuscule, one diameter -- one millimeter
25 in diameter spot of blood on the side of the

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5 toe cap of Ms. Kish's running shoe, which
belongs to Mr. Hammond. That spot, for a
normal person standing, would be about a
centimeter from the ground. The spot is found
after several rounds of testing. The previous
rounds of testing focused on the presence of
DNA higher up on the body and when nothing
was found, they went lower and lower until
they found that spot. In total, in the three
10 of four rounds of testing, there were 28
samples taken from Ms. Kish's clothing, and
that's what we're left with. One minuscule
spot.

15 In contrast, there are nine spots
on Ms. Watts. She has seven on her boots and
not just near the bottom of the boots but
higher up, shin level. The photos show spots
of Mr. Hammond's DNA that -- found at least
halfway up her Doc Martin boots, and, in
20 addition, there are two spots of
Mr. Hammond's DNA found on her shorts.

25 Mr. Wooley, Centre of Forensic
Sciences was -- were able to locate one spot
of Mr. Hammond's DNA on his shoe, and the
independent testing revealed a further spot

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of Mr. Hammond's DNA on Mr. Wooley's right
knee.

5 Nicole Kish's DNA was found on
the knife that Mr. Hammond left on the church
steps. Well, that's no surprise. She's been
stabbed and bleeding profusely.

10 The DNA map that was filed by the
Crown is of limited value here. We know that
most of Mr. Hammond's bleeding in the upper
part of his body was probably internal, from
Dr. Pollanen, but he did have wounds to both
of his hands, some of which would have caused
somewhat significant bleeding. The map that
15 the Crown files suggests that Ms. Kish was
bleeding all over certain areas of Queen
Street, but without some serious speculation,
it doesn't help us with what order those
bloodstains were deposited, and should also
remember that when you see a photo of a whole
20 cluster of blood, think back to Detective
Keron who says, Well, we just take one swab
randomly from somewhere in the cluster.

 The autopsy. The cause of death
here is --

25 THE COURT: Just before we move to the

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autopsy, in discussing the knife, you neglected to mention that Mr. Hammond's blood is also found on the knife, mixed with Ms. Kish's. Correct?

5 MR. SCARFE: Yes. There is a sample that has both. From the handle.

THE COURT: At the base of the blade I believe.

MR. SCARFE: I'll have to check my notes.

10 The cause of death is not in dispute. Clearly Mr. Hammond was killed by one of the wounds to his chest. Dr. Pollanen examined all of the stab wounds. The one on the left of his back was likely made with something serrated and regular, like the
15 knife that's in evidence. And if you look at the shirt that's all wrapped up in plastic, the tears on the back of the shirt in fact support that contention as well. In contrast,
20 the four wounds on the front lack any of those characteristics. When I suggested to Dr. Pollanen that the lack of any characteristics in the four wounds to the chest suggested that they were made with a
25 non-serrated edge, he said the logic doesn't

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work in reverse. And I questioned about why
it didn't work in reverse. He said he
couldn't explain it.

5 So, in my respectful submission,
Your Honour, logic is a two way street, and
basic, common sense suggests that the wounds
on the chest were likely made with a
different knife than the one filed with this
court.

10 At this point I'll proceed with
the defence evidence.

THE COURT: Well --

MR. SCARFE: Unless you have a question.

15 THE COURT: The difficulty with that
submission, Mr. Scarfe, seems to me to be at
least twofold. One is, it asks me to ignore
the evidence of Dr. Pollanen that you can't
come to that assumption from the available
evidence, and he's the expert and his
20 expertise was not challenged. So I would be
trying to make a finding not only without an
evidentiary foundation, but against the only
expert evidence that I have.

25 And secondly, no one in this
trial, unless I've missed something, has ever

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seen anything but one single knife.

MR. SCARFE: That is true. That's absolutely true. With respect to your second point, no one's seen it. That's why I place such
5 emphasis on the number of people who are seen fleeing the scene, running away.

With respect to Dr. Pollanen, he's an expert in examining these wounds and coming to conclusions. And you would think
10 that he could provide us with some rational basis for why the logic doesn't work in reverse. So yes, he's the expert, he was the only expert called, but Your Honour is entitled to evaluate his evidence and use
15 your own basic, common sense to see if all of the conclusions that he makes actually make sense.

THE COURT: Well --

MR. SCARFE: And it's not Biblical
20 protestations.

THE COURT: I have to be guided by the expert evidence that I have as opposed to going off on my own to come up with theories. As I
25 understand Dr. Pollanen's evidence, he said that a serrated knife might leave serrated

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edges on -- when it makes a cut and it might not, depending on a number of factors, including how the knife goes into the substance that is being cut.

5 MR. SCARFE: Mm-hm.

10 THE COURT: The other thing, and I don't believe either counsel asked Dr. Pollanen this, but the other thing that seems to me is of some note in that regard is pictures of the knife show that the serration on the blade appears to be only on one side of the blade. One side of the blade is completely flat and the other side is serrated. So that may also be a reason why the knife doesn't

15 leave necessarily any marks, other than your typical knife would.

20 MR. SCARFE: You're absolutely right. About all of that. But it's my respectful submission that if there was only one knife wound to the chest, then obviously that conclusion can't be made, but when you start to get into three and four wounds, it's my submission that the absence of any characteristics consistent with that knife

25 begins to gradually gain insignificance. If

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5 it was one wound, sure. It could have been
the way the knife went in. But to ram that
knife into that chest four times and not
leave any characteristics on any four of
those wounds, I submit that the evaluation
starts to change a little. Shall I continue?

THE COURT: Yes.

10 MR. SCARFE: The defence evidence. We heard
from Mr. Bordignon. He was first interviewed
by the police only a couple of weeks ago. He
sees the fight on the south side of the
streetcar, then he sees a brief altercation
in front of the streetcar, and then that
fight moves to the north side where he sees
15 the jock guy on the ground, two males on top,
kicking and punching him, and he says the
fight on the north side was only males. Had
it been females, he would have remembered it.

20 A little later on he hears one of
the males say, You die tonight. He says the
cab's already there when he hears that. The
jock gets up, stumbles around a little bit,
and he thinks he got in the taxi. His
observations last about a minute. The only
25 female he recalls is the one on the south

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side, who is tending to the injured, skinny male.

5 He also tells us that he sees the other jock guy. The two of them approach the streetcar. He's unsure where to put them both, but at one point he has the other jock guy standing beside a cab yelling for his friend.

10 Ms. Williams. Lindsey Williams testified, and the value of her evidence has more to do with what she hears rather than what she sees, and the timing here is important. She's been watching a movie with a friend. The friend lives in the apartment building that's behind the Coffee Time to the south. Rather than going out the main entrance on to Richmond, she goes out a side entrance, down a ramp, which leaves her on Niagara several meters south of Queen. As
15 soon as she hits Niagara, she hears two things in short succession. You hit a woman, and around the same time -- and that's a male voice, You hit a woman, and then right after that she hears a woman say, Not him, him.
20 Obviously she can't identify the woman's
25

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voice, she doesn't see anybody, so she continues to walk north towards Queen.

5 When she gets to the corner, she stops for a moment and she sees two guys who come from the direction of the 7-11, but not that far down the street, and they run across the street from south to north on a diagonal going eastward.

10 She then -- her attention turns and she sees her friend standing outside a westbound cab. She goes over and speaks with him briefly and then she turns and starts walking east to go home. So from the first thing she hears, a significant period of time
15 has gone by, and then she gets east of Claremont, she hears a female voice screaming hysterically and she hears, Stop, stop. She also hears, Help. The voice is one of sheer
20 panic. High pitched and shrill, and, as I said, by the time she hears this she's already east of Claremont.

 She can't ID anybody involved in the fight, including the female.

25 Next we heard from Raymond To. He lives above the One of a Kind Pasta and

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Grill. He was awoken by some noise. He sleeps
close to the windows that front out on to
Queen Street on the second floor. He
described getting up, going over to the
5 window, opening the window, and leaning out
and looking down. He saw two males beating up
another male right below the window. It was
the east window. He watched for 30 seconds,
maybe a minute, and eventually the man being
10 beat up gets up and goes and approaches a
taxi.

Now, the Crown cross-examined him
at length and focused on his observations
after this 30 seconds to a minute, and
15 clearly his observations must be mistaken in
a number of material respects, but I submit
to you he's pretty clear about his
recollections during those 30 seconds to a
minute. He's looking down, it's two males
20 beating up another guy. Doesn't see any
females.

Then the last witness, second
last witness, if you consider Faith Watts,
was Paul Gallately. Now, Mr. Gallately was on
25 the second floor of his apartment when he

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5 heard a bang at the door at street level. He
looked down the stairs and, apparently, the
way the windows are set up, you can see past
the door and outside. And he saw two men
beating another man, so he goes to the
sunroom. Takes him maybe a second to get to
the window, and again, sees two street-type
kids beating up another man fairly close to
the door you would use to enter his apartment
10 from the street, and the photos are in.

15 Separate and apart from those
three, he sees another man farther east lying
motionless. Presumably, this person's Doug
Fresh, who was beaten up on the south side of
the streetcar. The three guys are still
there. They don't interact with this
separate man lying motionless to the east. He
watches this for about 30 seconds or a
minute, and then goes up to the third floor
20 to check on his wife.

25 When he gets out to the balcony,
the person who was being beaten up is gone.
He sees one of the street kids who was doing
the beating jog across to the north side and
join a group of six to eight people. As soon

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5 as he gets there, a woman in the group grabs another man in the group by the arm, pulls him away, and the female and the male take off running south down Niagara. He watches that from his balcony. At the same time, another girl in the group on the north side is seen standing in the curb lane, screaming that she's been stabbed.

10 Now, in cross-examination, my friend Mr. Thompson suggested that his recollection may not be that reliable because he just had a newborn baby. He must be tired. Sleep deprived. Well, with the greatest
15 respect, that allegation could equally apply to Melissa Gallately, especially considering the fact that she's the one doing the breast feeding.

20 Important things about his evidence are that he quite possibly fills in a major blank. After Ms. Stopford and Mr. Paget shift their attention to the north side, we don't really know what's happened to this man on the south side. He's up, pumped up, bring it on, who's next, but just sort of
25 drifts from the story. It may be that Mr.

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Gallately's evidence is helpful in showing us another way in which, or another place, Mr. Hammond may have been stabbed.

5 Second, he resolves a lot of the confusion on the north side as to this female who is in the vicinity of the fight, but whether she's participating or not, it's not clear. Whether it's Ms. Watts, whether it's someone else, clearly there is a female there
10 that disappears and isn't present when everybody gets there later, and while -- in contrast to Ms. Kish who stays and continues to attract attention to herself, this woman
15 seems intent on getting herself and the male she grabs out of there as soon as possible. We have no idea who that woman is, but her presence is important in considering, or to consider, when the Crown asks you to find
20 that the only woman in proximity to the fight on the north side is Nicole Kish.

25 Now, it's a little unclear at what stage he got to the balcony, how much his wife had seen, but they clearly had different perceptions of the sight lines and what you can see from that balcony, and with

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the greatest degree of respect to Melissa Gallately, between the two of them, he seemed like a more reliable witness. His evidence hadn't fermented over time. Little things didn't seem to be added.

THE COURT: I suppose, though, he failed to see a streetcar.

MR. SCARFE: He didn't recall the streetcar.

THE COURT: He didn't recall the streetcar.

MR. SCARFE: That's right.

THE COURT: Rather, not to be facetious here, streetcars are sort of large and hard to miss.

MR. SCARFE: Absolutely. Especially double street cars.

THE COURT: Yes.

MR. SCARFE: The last witness I'm going to talk about is Faith Watts. She gave her evidence at the preliminary hearing under oath. She said she was drinking in the park all day; described who she was with. She also conceded she had injected an Oxycontin, and while there are significant gaps in her recall, she is clear that at one point she was on the street, she got scared, she pulled

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5 out her knife and it was taken away from her. Shortly after that she describes seeing Nicole's wound and participated in holding it together, and that's kind of consistent with what we see on the City TV video minutes later.

10 She identified, during her testimony, the knife as being much like the one she stole in Montreal a few weeks earlier. She also told us that Nicole Kish didn't carry a knife, despite her trying to convince her that she should.

15 She was cross-examined at length on her recollections and came through it relatively unscathed. She's made a major admission against interest here, Your Honour, and she wasn't sure at the time she made it if she was going to suffer any consequences. It was only after she testified that Ms.
20 Sloan, Detective Albrack (ph), Giroux and the previous crowns in this case got together at FIS to discuss further testing of the clothes, and it was only after she testified that Detective Sergeant Giroux wrote his
25 report to the Chief of Police and added the

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part about, Maybe we should consider
extraditing her back to Canada to face a
charge of second degree murder. Her evidence
was powerful when it was given and powerful
when it was played in this courtroom, and in
my respectful submission, that evidence alone
raises a reasonable doubt as to the guilt of
Nicole Kish.

In closing, Your Honour, the
police charged Nicole Kish based on the same
flawed reasoning of Mr. Paget. You always
hear that if someone goes into a fight with a
weapon, they're often the ones who get hurt.
Nicole Kish did not go into this altercation
with a weapon. Faith Watts did. Faith Watts
did so without getting injured, at least
beyond a bite mark. Nicole Kish was not the
only one with an injury that night. One of
the gentlemen seen leaving by Laura Quigley
had a cut on his arm. The man who stopped to
talk to Mr. Park outside of Sole City had
three stab wounds to his chest and abdomen
area, and there were a large number of
persons on the street at the time of the
incident, but not so many right after. Many

5 people left - some of them witnesses, some of
them possible participants. Nicole Kish
stayed. She attracted attention to herself.
She was heard earlier calling for the police,
and then later screaming for an ambulance. If
she just stabbed someone, or participated
with others, she wouldn't have been so quick
to approach the flashing lights and the
authorities.

10 There's nothing in her behaviour
following this confusing melee to suggest
that she had any kind of a guilty state of
mind. She provided a consent DNA sample
afterwards, and she pled not guilty before
15 you.

So based on the evidence before
you, the Crown has failed to establish that
she's guilty of any criminal wrongdoing
whatsoever.

20 A couple of moments on the lost
evidence application.

THE COURT: Just before we get to the lost
evidence.

MR. SCARFE: Yes, sir.

25 THE COURT: Are you suggesting Ms. Watts took

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the knife into the fight?

MR. SCARFE: That's what she told you.

THE COURT: No, she didn't. She said exactly
the opposite. She said she produced a knife
and it was almost instantaneously grabbed
away from her by someone.

MR. SCARFE: Okay. She didn't fully remember
what was going on at --

THE COURT: She didn't fully remember
virtually everything, but --

MR. SCARFE: She identified the knife.

THE COURT: You say Ms. Watts was the one who
brings the knife into the fight, at the same
time you're saying Ms. Kish hung around, went
toward the flashing lights. So did Ms.
Watts.

MR. SCARFE: That's true.

THE COURT: So how does it --

MR. SCARFE: I don't know what's in the mind
of Ms. Watts. What we're concerned about here
is what's in the mind of Ms. Kish, and it's
the submission to this court that Ms. Kish
never had a knife. The only --

THE COURT: No, I appreciate that's your
submission, but it seems to be coupled with

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5 if Ms. Kish had stabbed someone, she wouldn't
have hung around, she wouldn't have gone
toward the emergency vehicles. At the same
time you say Ms. Watts brought the knife into
the knife fight, but she hung around and she
went to the emergency vehicles. So then I
guess it wasn't Ms. Watts either.

10 MR. SCARFE: Well, Ms. Watts' perception was
not that she had stabbed anybody, only that
by pulling out her knife, that that -- that
she put the knife in play. The knife that
ends up in the hands of Mr. Hammond down by
the church.

15 So I'm not sure that you can,
from what her -- and I agree, her
recollection has its limitations, but she
didn't seem to have a guilty conscience about
the whole thing either. She got scared,
pulled out a knife, lost the knife, but
20 that's the knife. Whether it happened right
beside the streetcar, Doug Fresh is beating
up, or somewhere else, she's not sure, but if
you're going to try to string together, from
all of the circumstantial stuff, you know,
25 what Your Honour finds happened here, it's

important to recognize that she didn't think she'd done anything wrong, but that she had put the knife in play, and that Ms. Kish didn't carry a knife.

5 THE COURT: Well, then under that scenario, how does Ms. Kish wind up getting stabbed.

MR. SCARFE: We don't know. If we knew, you would have heard about it. It's a melee. There's all kinds of people on the street.

10 THE COURT: But --

MR. SCARFE: In order to be acquitted, she doesn't need to tell you how she got stabbed.

15 THE COURT: I fully understand that Ms. Kish is not obliged to tell me anything whatsoever as to what happened. I fully understand that.

MR. SCARFE: Thank you.

20 THE COURT: And I suggest that as a reasonable inference, that one would have to be involved in the knife fight in order to wind up being stabbed.

MR. SCARFE: Is that a reasonable inference?

THE COURT: Yes.

25 MR. SCARFE: Well, again, I don't want to descend into debate with Your Honour, but there are a number of people injured. Did

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they all have knives too? I mean --

THE COURT: I don't know. I don't know
whether it requires more than one knife.

But --

5 MR. SCARFE: There's a --

THE COURT: One thing that I am fairly
certain of is that in order to be stabbed, it
requires a knife.

10 MR. SCARFE: Yes. Somebody stabbed Nicole
Kish with a knife.

15 THE COURT: And unless Ms. Kish was standing
on the sidewalk minding her business, and
someone with a knife walked over to her and
stabbed her, and no one saw it happen, then
the alternative inference is that if there
was a knife fight going on and someone gets
stabbed, it's because that person is involved
in the knife fight.

20 MR. SCARFE: Well, the question is how
reasonable is that inference. You've got Ms.
Cooper with her all alone in front of the
streetcar yelling at the streetcar driver,
you know, maybe it's got more to do with her
attracting attention or appearing to be -- or
25 it has something to do with her trying to get

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5 the police to come and getting the two preppy
guys in trouble. An equally viable inference
is that, well, she's hurt, she must have been
involved in the fight. I suggest that's a
leap. I mean, when you go down and start
analyzing it from the perspective of a
reasonable doubt, another alternative
inference.

10 THE COURT: All right. Sorry. Lost evidence?

15 MR. SCARFE: Just my friend has reminded me
there was one other thing. You have before
you the exhibit, the City TV video. And the
City TV video was played a couple of times,
once I think with volume in this courtroom,
on a computer that had the effect of creating
hesitations in the sound, and the sound
didn't necessarily link up. And I'm going to
encourage Your Honour, in your deliberations,
to put that in your own computer - I see
20 you've got a fairly up-to-date computer there
- and play it with special attention to the
sound, and in my respectful submission, as
Ms. Kish is approaching the ambulance, about
three minutes and 48 seconds into the video,
25 you will hear the words, I got stabbed for no

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reason. Now, if that's her honest state of mind at the time, that tends to militate against the inference we just discussed.

5 Lost evidence. Since our
submissions last week on this issue, we've
heard the evidence of Raymond To. He was
closest to the fight of anyone. The fight
was in front of his restaurant and he had the
best view. Box seats, if you want to call it
10 that. He says the fight was below the east
window, on the second floor, and closer to
the store than to the street. Clearly the
lost video would have picked up the fight he
saw. The video would have confirmed that
15 neither Nicole Kish, or any other female were
participating or encouraging that fight in
any way. So I say it again, given the
unacceptable negligence by the police in
losing what was obviously very valuable
20 evidence for Ms. Kish, it would be grossly
unfair to find her guilty. Her rights were
breached. There's no real way to fix it. You
either stay the charges, or find some other
creative remedy under Section 24(1) of the
25 *Charter* that would, in my submission, be

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tantamount to an acquittal in any event. Of course if you find that, consistent with my submissions, there is insufficient evidence of identification on the merits of this case, if you find that Ms. Kish was not guilty of any criminal wrongdoing whatsoever, then I suppose the issue of the stay would be moot.

Thank you for your patience.

Subject to any questions, to me or Ms. Simpson, those are my submissions.

THE COURT: Thank you. Do you want to begin, Mr. Thompson?

MR. THOMPSON: I can, Your Honour. I'm more than prepared to do so if it pleases the Court.

I can indicate from the outset, Your Honour, I have had discussions with my friend with respect to filing at least an aid for you in terms of the evidence we are going through, and I'm going to provide him with a copy as well. If he wants to do the same he is more than welcome to do so. The reason being, and it may be a little longer in terms of going through the evidence, as I'm obliged to, in much more detail, but essentially I

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can just outline what is going to transpire
in this, Your Honour.

I divided the argument up into
the following, where it's going to take place
in three areas of the fight. The fight on the
north side originally started with the TD
Bank, moving to the south side in front of
the streetcar, and then back on the north
side. I also -- and in doing that I'm going
to be providing the evidence that is used --
that is used to support the Crown's position.
There is also a section with respect to the
end of the fight which did become an issue.
There is also -- I'm going to be speaking
about the area down by the church, the dying
declarations, and then I will be going
through the forensic evidence with respect to
the knife, and I will be making a comment
about the witnesses that my friend called,
and then I will be getting into legal
submissions just as to how the evidence
applies to the various culpability sections
under 21(2) and under the charge of murder as
a principal, as well and 229(1). I will also
make a very small comment about culpability

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in 221(1) as well.

5 And in terms of further I filed a
casebook, Your Honour, and my friend has a
copy of that. I can file it with the Court. I
plan to just very briefly -- and the casebook
is very thin. There is a couple of cases in
the area of murder, um, section -- common
intent, 21(2) and as well as manslaughter, so
they're very straightforward. I'm going to
10 just highlight certain areas.

So if I may begin, Your Honour?

THE COURT: Yes.

15 MR. THOMPSON: And I apologize. I'm going to
be reading this. I will be careful as to what
I read.

20 It is the Crown's position that
on the night of August 8, 2007, in the early
morning hours of August 9, 2007, that Ross
Hammond and George Dranichak were walking
west on Queen Street West when they
approached the door, TD green bank machine
located the northwest corner of Queen Street
and Euclid Avenue. The bank machine is
25 directly across the street from the community
centre.

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5 It is the Crown's position that
Mr. Hammond and Mr. Dranichak were approached
by Ms. Kish, and a request for money by Ms.
Kish was met by an abusive comment, or
comments, sorry, by both Mr. Dranichak and
Mr. Hammond, and the fight escalates. It is
submitted that the evidence of the following
witnesses establish that Ms. Kish was
involved in a verbal and physical altercation
10 with Mr. Hammond and Mr. Dranichak, which
continued along the north side of Queen
Street to the south corner of Queen and
Niagara, and ultimately the physical
altercation with Mr. Hammond on the north
15 side of Queen and Niagara.

So if I may deal with the fight
on the north side by the TD Bank, moving west
along Queen to Niagara. The evidence of
Mystica Cooper, she testified that after
20 finishing work that evening, she went to
Queen Street to meet some friends.

As she was locking her bike
outside of Squirly's, which is on the east of
Bellwoods on the south side of the street,
25 she heard people screaming across the street

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5 on the north side. Ms. Cooper testified that she saw four people. A male and a female beside each other, and two males beside each other. She sees the male and female screaming at the two males. She indicates that the female was screaming louder, screaming, He hit me, don't let him get away, call police. She said the males were responding but she could hear what they were saying -- but she
10 could not hear what they were saying with the girl screaming. I should have "not" there. However, she testified that the males were not screaming back. She also indicates that the male with the female was screaming as
15 well, saying the same things as the female. This man hit her. She described it as a verbal argument, with the female and male screaming at them.

20 At one point a female arrived on a bike, asked her for a cigarette and continued east. Ms. Cooper formed the impression that this female was somehow associated with the male and female across the street, and she had seen this female
25 behind the male and female yelling towards

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5 the two men. Ms. Cooper testified that the two men were trying to get out of the situation and trying to walk away. She sees the two males go west, and the male and female go east.

10 At one point, however, the female with the male changed her mind and turned back around and screamed at the man and it went further west, and the male with the female and the one male with the male, attacked each other. She recalled the female throwing garbage at the two males while following them further west. She recalled that the female's voice was loud and angry. 15 In cross-examination, she indicated that she can't remember whether both the male and the female were throwing garbage. She said that she remembers mostly the female because she was the most upset.

20 She describes the female who was with the male as follows: White, dirty blonde hair in dreads, dressed in loose fitting clothing, ragged and not clean, wearing a long, hippie-style skirt and a 25 loose fitting shirt. She is in her mid 20s

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5 and height maybe five six, because she is basing that on her height of five foot two. Or five foot even. In cross-examination, indicated that she had described -- indicated that she had described as having an Indian-styled pattern in her statement but does not remember that now.

10 Ms. Cooper remained on the south side and her view is soon blocked by a taxi and a streetcar. She saw the female run out into the traffic and screaming but could not tell if the female was chasing one of the men. She assumed that she was. She then heard a female scream very loudly and said that the female was screaming near the streetcar.

15 She saw a police car arrive. Her friends arrived at the same time and she went back into Squirly's.

20 The evidence of Ms. -- of Laura Quigley is as follows: She was working at Terroni's that evening, and around -- and at -- sorry, 730 Queen Street West, which is the north side of the street near Claremont. As she was outside unlocking her bike to leave she heard screams coming from the east a few

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5 blocks away. She testified that she heard a woman screaming and looked east. She formed the impression that a woman had been pushed over the curb and fell. She saw the woman get up immediately. She indicated she believed that the woman was pushed by the two men that were around her.

10 She testified that she observed four people in total. The two men she described as dressed up casual to go out for an evening, and a woman and another man, who were dressed in a similar clothing style to the woman. She provided the following description of the woman: She's white, 15 roughly five foot five, hair that seemed blonde with dark hair in it as well, maybe dyed with roots. The hairstyle may have been dreadlocks and was tied back. Clothing patched together, dress-type of thing, maybe 20 brown-ish in colour. In her evidence she repeated that the woman's clothing was a hippie-style patched together thing.

25 She testified that as soon as she saw the push happen, her instinct was to go help the girl. She changed her mind because

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5 the woman got right back up and it seemed
that the girl and her friend were pursuing
the two men. She then saw the woman and the
male with her, that's her friend, walk west
towards her.

10 She testified that she was then
picking up garbage and throwing it at the two
business guys who, according to her, were
walking away. She said that she heard the
woman saying repeatedly, I can't believe that
you're just going to walk away, and, I can't
believe you hit me. She did not believe that
the two business guys were responding.

15 Ms. Quigley testified that this
group of four never really get close to her
on the sidewalk, and they cross the street to
the south near Manning. She formed the
impression that they were heading toward the
streetcar, heading east at Queen and Niagara.

20 Shaun Park on this issue
testified that he made his observations that
evening from the south side of Queen Street
from his restaurant located at 785 Queen
Street West. At one point in the evening, he
25 testified that he sees the female speaking

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5 with his friend Daniel outside of his
restaurant. He describes that female as
follows: White, wearing dark black clothing,
black backpack or pack on her back, black
top, black leggings and wearing a skirt. In
cross-examination he said the woman was
wearing boots and that something was hanging
down, possibly a sweatshirt.

10 He testified that when the woman
left the front of the restaurant she went
eastbound, which was close to where the --
which is the same direction as the community
centre, which is 761 Queen Street West, and
it is east of that location.

15 Mr. Park went back into the
restaurant to the bar area no more than 15 to
20 minutes later. He had started to hear
screaming. It was obvious to him that someone
was very upset. He then looked outside and
20 across the street observed that the same
female, with two males, and they were arguing
with each other. He described the female as
being very upset. The screaming voice that he
heard was a female's, and he testified that
25 there were exchanges in words from the

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5 others. He testified that when he looked across the street he recognized this woman as the same one he saw earlier, talking to his friend Daniel. He testified that she had the same outfit, the same backpack, it was her.

10 He described the two males as looking more professional than the female, whom he described as a street kid. He testified that the two males were walking westbound, the female was behind them. They were yelling and arguing with each other. Mr. Park testified, although he could not hear the exact words that were being said, he heard one of the males use the word "cunt".
15 Mr. Park described that he saw another male join the female and appeared to be with her. He testified that whatever his reasoning for joining the female, he was her friend and he was coming to aid her. He described this man as the slimmer guy, wearing green.
20

25 At one point where the two groups get closer, one of the two clean cut guys picks up the male and threw him against the store front window. He testified the impact was significant enough that he thought the

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take the lunch recess.

5 ---LUNCHEON RECESS (1:00 p.m.)

---UPON RESUMING (2:17 p.m.)

10 THE COURT: Mr. Thompson?

MR. THOMPSON: Just one -- once again, Your Honour, I sort of want to apologize, but I know this is a very tedious process, but I think it's probably the most appropriate way of doing it.

15 THE COURT: Very well.

MR. THOMPSON: So I'm going to proceed on that point.

20 It is the Crown's position, I'm speaking about the fight on the south side of Queen at the streetcar near Niagara, it's the Crown's position that as the fight progressed to the south side of Queen Street, both Mr. Hammond and Mr. Dranichak tried to get away. They crossed the street from the north

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to the south towards the eastbound streetcar
at the corner of Queen and Niagara. They did
not get on to the streetcar.

5 The evidence indicates that,
amongst -- sorry. That among the street kids
heading in the same direction included Doug
Fresh, Jeremy Wooley, Faith Watts and Nicole
Kish. At this time a physical altercation
between Ross Hammond and Douglas Fresh
10 ensues. As indicated in Cam Bordignon's
testimony, it is the Crown's position that
the physical altercation was instigated by
Douglas Fresh, and Mr. Hammond fought back.
He quickly overpowers Mr. Fresh and the fight
15 moves toward the side of the streetcar.
Mr. Hammond hits Mr. Fresh off the pavement
and off the side of the streetcar. The
evidence indicates that Mr. -- sorry. Ms.
Kish enters the fight and was hitting
20 Mr. Hammond's back and side.

During the course of the fight,
it is submitted that Ms. Kish is the woman
that is seen with the knife both in her hand
and in her mouth. It is submitted that the
25 superficial sharp force injuries on

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Mr. Hammond's back were inflicted by Ms. Kish during the course of that fight. It is the Crown's position that Mr. Hammond did not react to Ms. Kish stabbing him because he was so focused on his altercation with Mr. Fresh.

Mr. Fresh is then dragged away from the streetcar to the sidewalk. Mr. Hammond changes his position of wanting to take everyone on to making efforts to extricate himself from the situation. It's the Crown's position that Mr. Hammond quickly moves to the north side of the street, as seen on the One of a Kind Pasta video. He is seen on the video facing to the south towards the street and appears to be addressing somebody or something to the south. It's the Crown's position that Mr. Hammond does not have anything in his hands as he's gesturing towards the street.

Further, it is the Crown's position that Ms. Watts is the female described by Cam Bordignon who remains on the south side of the street attending to Mr. Fresh after the fight. This position is supported by the evidence that Ms. Watts is

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5 Mr. Fresh's girlfriend, and the report which indicates that the male unknown profile number one is on the sleeve of Ms. Watts' hooded sweatshirt. That unknown profile number one belongs to Mr. Fresh.

10 Now, the evidence supporting that from the witnesses, Lindsey Williams. Ms. Williams was at a friend's apartment. She exited the building on the west side of Niagara and walked towards Queen. She testified that she was maybe ten meters south of Coffee Time. Before she reaches Queen she
15 hearings a man screaming at another one, You hit a woman. This was followed by a woman saying, Not him, him. She testified that she never saw a woman once she reached Queen Street and she testified that she had a sense that the voices were coming from the west of the intersection, west from the One of a Kind
20 Pasta, between there and Bellwood Avenue.

25 Mr. Bordignon. Mr. Bordignon testified that he was walking eastbound on the south side of Queen Street with two friends. He had come from a friend's apartment and had been drinking. He was on

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5 the sidewalk right near the Coffee Time and
the TTC shelter when he observed the
streetcar pull up. He also noticed two jocks
walking across Queen coming from the north to
the southwest corner. Behind them were a
bunch of kids yelling. Mr. Bordignon
testified that it was his impression that
these street kids were looking to get at
these two jocks.

10 He described the jocks as five
foot eleven, build athletic, with short dark
hair wearing jeans and a t-shirt. As for the
other people, he saw three to four street
kids, moving in the same direction after the
15 two jocks. He testified that this group was
yelling and it seemed that they were -- there
was obvious aggression between the two
groups. He does not remember what they were
yelling. He just remembers that it was loud
20 and that it was kind of going back and forth
as they were walking toward the TTC car. He
testifies that it was his impression that the
jocks were trying to get away, and were
looking behind them, concerned.

25 He testified he remembered as

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5 part of the group a huskier street kid who
was approximately five eleven, 200 pounds,
had a scruffy, not shaven look, and he was
wearing a hat. He testified that he observed
the fight between one jock and a skinny
street kid between the sidewalk and the
streetcar on the south side. As the two
jocks head towards the streetcar, the taller
street kid comes towards the jock, who turns
10 around. A fight ensues and the jock gets the
street kid on the ground and hits him in the
face a few times and hits his head off the
ground. He testifies that when this fight was
over, he remembers the jock saying, Who's
15 next, or something to that effect. Mr.
Bordignon forms the impression that the jock
was defending himself, but that the fight
ended quickly.

20 He testified he did not see the
other street kids coming. The fight moves
across the street to the north side.

Molly Stopford on that issue, a
fight on the south side, says the following:
Ms. Stopford was on the streetcar heading
25 eastbound while on Queen. She was accompanied

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5 with her ex-boyfriend, Jonathan Paget. The streetcar windows were open. She heard noises and saw movement, yelling, and the pushing caught her attention. When she looked out the window they were already there. She does not know where they came from. She observed pushing and shoving and yelling, punches being thrown. In the fight that she observed, she does not see any weapons in their hands.

10 She sees Mr. Hammond bending over, his side and back are exposed. Mr. Hammond was facing the streetcar but angled a bit towards the west. She saw the right side and top of his head. At this moment there seems to be several people around, but she specifically noticed two women. She first noticed them shortly after the fight between the two men. She saw them closer to the south sidewalk -- south side sidewalk, and partially on the pavement and to the west of the TTC shelter.

20 Description of females: Both are white, medium height, slim build, light brown hair, baggy clothing. Hard to differentiate between the two of them in terms of looks.

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They were yelling and screaming and trying to get Mr. Hammond to stop beating their friend. She saw them pulling on the jock and pushing him -- punching him.

5 One female was more involved than the other, more persistent. She was pulling at the shirt and punching at his backs and shoulders. Punches were like pummeling. A lot of hits and in different motions. Persistent woman was mostly to his back, not to his front and stomach. Both were circling him. Persistent woman was closer, her blows landed and she was yelling more.

10 In cross-examination she described the more involved woman as follow: White, average height, five foot five, slim build, light brown hair, thought it was very -- thought it was wavy, messy hair. Thought she was late teens or early 20s. In
15 cross-examination also only way to differentiate between the two women was by the role they played in the fight. One was more active than the other.

20 Mr. Hammond continues to beat up
25 on the street kid. Ms. Stopford did not think

that the blows would have -- were having any effect. She thinks that he knew that they were happening, but he was not very reactive to it.

5

In cross-examination Ms. Stopford testified that the efforts by the woman were ineffective, not making much of an impact. They tried for a moment.

10

She stopped looking out the window when she noticed the woman had a knife in her mouth. It was in her mouth with the blade sticking straight out. Exhibit 45, she drew a picture, thought that there was a hole in the knife and on the blade portion and that the important, well, yeah. That's Exhibit 45. I think Your Honour's fully aware of what it looks like. But of significance is the fact that she was able to draw that little circle there which is significant in that that knife has an unusual post on it that is what she identified as the circle and I put the picture to her.

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In cross-examination, she testified that the female's -- her hands were free, she never saw the knife in her hand,

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never saw anyone stab anyone. The first time that she saw the knife, the street kid was already down.

5 In cross-examination she testified that she sees the jock leave, moving westward. He is weaving. He is not, however, not holding his torso, and Ms. Stopford has no perception that he is injured. His hands are down at his side.

10 Mr. Paget. First sees two males in a fight. One person more in command. One person and in more defensive posture. Female approaches the fight and the -- the fight and ended the fight. He first sees her when the
15 two males are fighting against the streetcar. He heard yelling and screaming from the general direction where the two males came from. He saw two females coming from that direction.

20 He observed one woman approach the streetcar, yelling at the parties who were fighting. He cannot recall what the woman who approached the fight looked like,
25 just more in the street fashion than not. He testified that this woman came into the fight

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with intent.

At some point he saw her holding a knife in her right hand. She was holding the knife with the blade portion down.

5 Cross-examination, he testifies that she was not holding it in a stabbing grip. He testified that he could not see the handle. He only saw the blade portion of the knife.

10 He testified that he does not see her again during the same stop at the streetcar. He sees her on the north side of the streetcar just east of it. He testified that she was very upset at having been cut on the arm. He testified that the woman who
15 initially approached the streetcar and who had -- who brings the knife into the fight was the same woman who had the cut on her arm.

20 In cross-examination, he testified that he was less than 100 percent certain that the woman on the north side with the cut on her arm was the same woman whom he first saw on the south side break up that
25 fight.

The next transition is when the

(3) 2/s.

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5 fight moves to the north side of the street.
It is the Crown's position that after Mr.
Fresh is knocked out, dragged to the south
side, Mr. Hammond moves around the front of
the streetcar to the north side of the
street. It is submitted that Ms. Kish, Mr.
Wooley, and an unknown male pursue Mr.
Hammond to the north side of the street. It
10 is the Crown's position that the fatal
stabbing takes place on the north side of the
street. It is here that Jeremy Wooley,
another male and Ms. Kish have Mr. Hammond on
the ground.

15 It is the Crown's position that,
after having seen Mr. Hammond -- what
Mr. Hammond did to Mr. Fresh on the south
side of the street, they are all -- they are
all aware, they all are aware that they can
only overpower Mr. Hammond as a group. It is
20 submitted that the fight was not over, even
though Mr. Hammond is trying to extricate
himself from the situation. Ms. Kish and Ms.
Wooley - sorry - Mr. Wooley and the third
male are not finished. When the beating is
25 taking place, Mr. Hammond is trying to get

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away, but the kicks and blows to the head and the body keep him down on the ground.

Mr. Hammond is also trying to cover his head from the onslaught of blows and kicks to his head. It is submitted that while

Mr. Hammond's arms are up, protecting his head, his chest and midsection are exposed. It is the Crown's position, at this point, Ms. Kish delivers the four stab wounds to the centre of Mr. Hammond's chest while he's down on the ground in a vulnerable position.

It is submitted that while on the ground, after suffering multiple stab wounds, Mr. Hammond is able to disarm Ms. Kish and lashes out at her, delivering a serious stab wound to her forearm. It is the Crown's position that Ms. Kish suffers the most severe stab wound, other than Mr. Hammond, because she is in the closest proximity to him when he disarms the stabber, Ms. Kish.

Mr. Hammond is now armed, and as he attempts to flee from the attack, he lashes out and stabs Mr. Wooley on the upper arm and potentially injures the third male. Mr. Hammond, with the knife in his hand,



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heads to the street, looking for a means of escaping the area. After unsuccessfully trying to get into Mr. Hailmeraian's cab, he then hooks his arm through the centre panel of Mr. Mir's cab and is dragged westbound to Nicholas Church. St. Nicholas church.

5

Now, the evidence supporting that position is as follows:

Ms. Desilvia, Taj Desilvia, she was working at Terroni's that evening. She was alerted by her co-workers that the fight was happening outside. She heard yelling and screaming but could not make out any words. About ten minutes later, she went outside the front door and heard more screaming and yelling coming from the west. She testified the fight had moved to the north side, at the lights of the intersection at Queen and Niagara. She placed this fight across the street at Coffee Time.

10

15

20

She walked at Claremont and Queen and stood on the northeast corner of Claremont. She testified that a fight was occurring among four people. She observed three males and a female involved in a close

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quarters fight. She testified that there was not a lot of room in between them. She testified that they were throwing each other on top of the car -- of a car. She saw everyone involved throwing punches. She would break away -- people would break away and get chased across the street and then come back again. She described the fight as really chaotic, really close quarters.

With respect to the female, she testified as to the description of the female involved in the fight as white, short, wearing a tank top, wearing a large pair of dark pants, raver pants, which she described as really, really wide legged pants. Hair was blondish, not brown either, dreadlocks and her hair was up. She thought this was -- she thought that this female was young, in her early 20s, late teens.

She testified that she saw one of the other -- that she saw one other female who was not involved in the actual altercation. That female stayed on the sidewalk. The other girl with dreadlock hair was involved in the fight.

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5 The men that she saw involved in
the fight she described as follows: One man
was in a black shirt and blue jeans. She
testified earlier that this man had an olive
tone complexion, was white, not too tall and
in his late 20s, early 30s. She testified
that this man seemed to be singled out. In
comparison, the others involved in the fight
looked like squeegee kids or panhandlers.

10 She described the other males as
follows: There was a taller, skinnier male
wearing army green and backpack. The third
male was shorter and stockier and dressed in
a dress shirt that had been ripped. She
15 testified this man looked dirty. She
testified that the man who looked different
was also throwing punches. She testified that
he seemed like he was trying to break away,
but was being chased back and forth across
20 the street. She further testified that this
man was trying to get away, but was fighting
in defence of itself, and that's what she
said. It should have been himself but that's
what she said. In defence of itself.

25 Ms. Desilvia testified that the

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woman was involved in the fight. She heard
the woman yelling and screaming during the
fight, but could not make out anything
specific. She described this woman as quite
5 hysterical and felt at the time that if it
hadn't been -- if she had -- I used she
hadn't been, quite hysterical the situation
would never have escalated.

She testified that she never saw
10 a knife. She testified that she observed the
female involved in the -- on the north side
fight had been injured. She heard her
screaming for an ambulance and that she
needed to go to the hospital. The only other
15 person whom she saw injured was the stockier
man who had a cut on his arm.

The evidence of Mr. Wossen
Hailmeraian. He's driving westbound along
Queen Street in the intersection of Queen and
20 Niagara. He testified he saw a fight
occurring on the north side of the street to
his right. He observed three to four people
involved in this fight. One person was being
beaten by the other. Others. Sorry.

25 He testified he observed one

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5 female who was part of the fight, and described that female as white, wearing black clothing, pants, black lighter jacket or shirt, and in cross-examination he acknowledged that he could not remember whether his arms or shoulders were bear. He believed that.

10 He testified that this female and men involved in the fight were hitting the man on the ground with their feet. He testified that he could not provide a description of the men involved in the fight. He testified that the man who was being
15 beaten somehow managed to get up and approached his car. He described this man as white, fitting and -- fit and wearing jeans and possibly a black t-shirt. He observed this man holding a knife in his right-hand. Mr. Hailmeraian saw the blade portion of the
20 knife. He describes the knife as short.

25 Mr. Sad Mir was driving his cab westbound along Queen with his windows open. He testified that in front of 750 Queen Street, he saw a fight on the north side of the street and he heard lots of voices. He

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observed one guy on top of one girl,
fighting. He also saw two other men involved.

He described the female involved
in the fight as follows: She's female,
5 white, and blonde. Mr. Mir testified that
while that girl and Mr. Hammond are
struggling and fighting, he testified that --
did not know exactly what was going on but
observed this for approximately eight to ten
10 seconds.

He testified that he seemed --
that he sees movement from the girl as they
are struggling and fighting and acknowledges
that he does not know exactly what is going
15 on. Mr. Mir sees his hands move back and
forth as though she's -- Mr. Mir sees her
hands move back and forth as though she's
trying to punch someone. He testified that he
could not remember whether he saw anything in
20 her hands or not. He testified that the men
who are with the girl are kicking
Mr. Hammond.

My friend brought up in his
submissions as to whether or not it was a
25 girl. I would respectfully submit the 911

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5 call that was played back clearly states, The girl was in there too. So on that issue and that issue alone, I think my friend's comment about him not knowing whether it was a male or female, the 911 call is I think very clear.

10 With respect to Melissa Gallately. Ms. Gallately was looking out from her balcony at 843 Queen Street. She sees three people on top of one person. Female, she testifies that the female involved in the fight was wearing a black pleated skirt. She identifies Exhibit 27 as the skirt that she saw on the female. She testified that the 15 female was also wearing a black tank top. She identified Exhibit 26 as looking similar to the black top that she saw on the female. She could not recall her footwear. She described this female's hair as matted or in dreads and 20 half up and half pulled back. The hair colour was dark.

25 She describes the man as lying down almost in a fetal position. She observed that he was trying to cover himself and protect his head because he was being beaten.

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Ms. Gallately testifies that she saw the female with black skirt and was crouched down. She saw this female in a black skirt facing his stomach/chest area. This female was positioned north of the man. His stomach and chest area are exposed to her. He is covering his head from blows being swung at his head.

Ms. Gallately testified that this female in a black skirt was there from the beginning and was there the whole time. She saw the woman in the black skirt flailing down towards his body. She saw her arms moving. The woman in the black skirt was also screaming and saying something about being bloody. She was screaming and was angry.

Ms. Gallately could not be certain whether her arms were making contact with his body. She estimates the beating that she observed lasted I have down here one minute and 42 seconds.

She heard the female in the black skirt say something about her hand. She also heard the word "stab". Ms. Gallately estimates that she started hearing comments

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about bleeding and stabbing in the first 30 seconds.

5 She testified that the female in the black skirt was very aggressive. Ms. Gallately was concentrating on the man on the ground. She observed a man on the ground whom she described as having olive skin. He was on the ground almost in a fetal position. She testified that he was trying to cover himself and protect his head because he was being 10 beaten. He was trying to avoid blows.

15 He attempted to get up but was being held down between punches and kicks. She believed that the blows were holding him down.

20 She testified that he eventually gets up and goes into the road, clearly stumbling. He -- she observes that while he is in the process of getting up, the group of three attackers were still being aggressive towards him, trying to land more blows but missing. She testified that all three were being aggressive. She testified the female in the black skirt remains in the same position 25 in relation to the man on the ground until he

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5 stumbles away. She is in the middle, crouched
over him, on top, moving and flailing. She
describes this female in the black skirt as
quite angry, quite aggressive verbally. Her
mannerisms towards him were very aggressive.

10 She observes a taller man with
longer hair coming out the back of the
baseball cap he was wearing. She also sees
that his shirt was open. She testifies that
this man in the cap was punching and kicking
and stomping on man on ground. She observed
that the two men were on top of him, half
crouching. She did see blows land. The two
men would then get up -- sorry. Get back up
15 and kick and stomp near his head.

20 She testified that one man was
more involved than the other. She described
this man as taller, the man with the cap. He
was being more aggressive.

25 She testified that during the one
minute and 40 second time period, that the
beating seemed pretty continuous. While all
three involved in the fight may not have been
beating all at the exact same time, she
testified that among the three of them, the

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5 beating did not stop. She testified that all three are being aggressive toward the man on the ground. She saw the female in the black skirt from the beginning. She also sees the other men involved the whole time.

10 She testified she did not see a weapon in anyone's hands. She testified that the female involved in the fight was wearing a black pleated skirt and black tank top. She could not recall the footwear. She describes this female's hair was matted, in dreads and pulled up.

15 She testified all three people involved in the fight were still there when the police approached them. The female in the black skirt was screaming that she wanted an ambulance.

20 And with respect to my friend's comments about her evidence -- about her changing her evidence or -- from that of the -- or being in more detail from the preliminary inquiry from the statement she provided to the police, she indicated in her evidence at the time she did not know it was
25 a homicide. She would have -- had she known,

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she would have given more details.

Mr. Bordignon. He testified that he did not see the other street kids coming. The fight moved across the street to the north side. That's when the group started hitting the jock. He -- he did not remember how they got across the street and was not certain that it was the same jock involved.

He remembered the street kid involved in the south side fight staying there. The skinny street kid was helped by another woman who he believed had a more intimate relationship with this man. This woman was checking him to see if he was okay. He testified that he did not remember seeing this woman ever move across the street.

Mr. Bordignon's friend was also on the south side, trying to assist the skinny street kid. The one I believe is known as Brittany. He testified that he saw the group moving to the north side and sees them ganging up on one guy near the light standards near the One of a Kind Pasta. He testified that his attention was split between looking over at his own friend on the

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south side and watching what was developing
on the north side.

5 He noticed the huskier street kid
when the fight moved across the street. A cab
pulled up and blocked his view of the fight.
He could only see the two involved in the
fight from the waist up. He testified that
two -- that two involved in the fight were
beating up a guy quite heavily. He saw
10 punches and kicking motions towards the
ground. He could not see any blows actually
land on the guy on the ground. He could not
remember if any of the others involved were
male or female.

15 He testified that his attention
was drawn to what was a huskier street kid.
Said -- he testified that -- he testified
that what clearly stood out in his mind was
the huskier street kid yelled, You die
20 tonight, during the course of the beating on
the north side. The comment was made as they
were beating the jock on the ground. The cab
was already there. He testified that the
time-lapse between this comment and seeing
25 the jock get off - or sorry - get up was

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probably a minute.

He testified that the comment, as
intense -- Court's indulgence. He described
the comment, that being the comment in
5 reference back to, You die tonight, as being
intense, and he said that this is probably
why he does not clearly remember the other
people involved on the north side in the
fight. He agreed that if he could hear it on
10 the south side, those involved in the fight
could hear it as well.

Mr. Bordignon testified he sees
the jock on the ground get up and stumble
onto the cab. He observed that his face was
15 bloody and he was stumbling around looking
punch drunk. It was his impression that the
jock was hurt and looked to be in distress.

This was the last thing he saw.
When he saw the jock get up, he felt that all
20 he was doing is watching. He heard someone
say that they had called the police and
decided that he and his friend should leave.
He testified that he did not see any weapons.

Mr. Patsiopoulos. He's riding his
25 bike north of Niagara and stops at the light

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5 at the intersection of Queen and Niagara. He
testifies that he noticed that there was an
altercation at this intersection. He
testified further that he had already seen a
fight break out before he had made his turn
west into the intersection. He testified that
he observed two people involved in a fight
just east of the second traffic lights. He
testified the furthest north that he sees the
10 fight is right at the edge of the sidewalk,
in the curb lane, where the ash marks go into
the sidewalk.

15 He testified that he could not
make out what was happening in that group. He
was unable to determine who was the aggressor
and who was the defender. He testified that
there were more people -- there were more
people around the two people who were being
physically affected. He testified that there
20 was a small crowd, and he wanted to keep a
safe distance.

25 He testified that he saw the
person with whom he knows as Nicole come from
the same area as the fight. He testified that
she's in the middle of the fight. He

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testified he wants to stay -- to say that he saw Nicole get up from the ground, but that he could not say with 100 percent certainty.

5 ^
 And I'm going to indicate that with respect to Exhibit 4, tab B, that you can rely on that with respect to establish the witness' part of the north side fight before he engages with Ms. Kish.

10 He explains that the attention was diverted to the crowd, to him banging on the side of the streetcar. He described this man as approximately five foot eight, five nine, with short dark hair, and believed that he was wearing a jacket, jeans and dark
15 shoes. He testified that he saw a metallic object in his left hand and he thought that it was a knife, and the Crown submits that his 911 call can be relied on physical
20 description in the assertion that he was holding the knife as well.

25 With respect to the next section, that's the end of the fight, and we're going to go back to some of Ms. Quigley's evidence which is sort of divided into two sections because of her observations. But she -- Ms.

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5 Quigley testified her attention was diverted elsewhere. By the time she looked back, she noticed that on the south side someone had been dragged to the sidewalk. She testified that she sees the girl in the middle of the street. There is blood around her and she is holding her shoulder and is still hysterical and screaming.

10 The woman is brought to the middle of the street, to the north side. People are yelling and the woman is holding herself. She formed the impression that there was a physical altercation on the north side, but acknowledged that she does not watch --
15 that she was not watching that closely. It ends when the woman goes from the middle of the street over to the north side of the street.

20 Ms. Quigley testifies that the girl who fell down earlier on the north side of the street, east of Claremont, is the same girl that she sees being taken from the middle of the street to the north side of the street. She testifies that this woman, who is
25 ten or fifteen feet away from her, and that

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she was able to observe that this woman was holding her arm and that there seemed to be a lot of blood coming from her arm.

5 Taj Desilvia. She testifies the fight ended at the red light when the man in the black shirt and the blue jeans hooked his arm into the open window of a cab and took him -- that took him down the street. She did not see him after that. She testifies that
10 before he grabbed onto the cab, they were still fighting. At the -- at the same moment, the girl with the dreadlocks screams out, He stabbed me, he stabbed me, and was asking for an ambulance and to go to the hospital. The
15 dreadlocks girl was screaming that she got stabbed on the arm. Ms. Desilvia testifies that she saw the cut on her arm.

20 She described the girl as quite hysterical and spinning around on the street. Ms. Desilvia testifies that she saw a gash in her arm that was bleeding. The other girl standing beside her went to her and said, We need an ambulance.

25 The stockier guy was told to go and look for dreadlock girl's stuff. He went

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back and forth to look for her things. She testified that the stockier man had a cut on his arm. She saw this at the same time that she was yelling, He stabbed me.

5 She testified that a couple of the women's friends were saying that they should just leave. However, the girl with the cut was concentrating on getting in the ambulance and going to the hospital.

10 When the ambulance arrived, those involved in the fight were still there. She testifies that she saw a tall guy in green with a backpack, and two females - the one who had been cut and the one who was off to the side.

15 Now, my friend made some comments about her identifying Ms. Kish and Ms. Watts. I would encourage Your Honour, or implore Your Honour, to look at Exhibits 49 and 50 and just see what is actually written on the back of those in terms of Ms. Desilvia's observation of both Ms. Kish and Ms. Watts.

20 Molly Stopford. Okay. She testifies that she does not see the woman again on the south side, but does see the

25

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street kid who is -- has been beaten up. She
testifies that her attention then shifts more
to the north side, so she had a sense that
something was happening over there. She
5 testified she saw the jock lying on the hood
of the cab yelling and trying to get in the
cab. She observed him holding a knife in his
right hand. She testified that she believed
that it was the same knife that she had seen
10 in the woman's mouth on the south side of the
street. She reached this conclusion by
comparing the blade portion of the knife.

She testified that the next time
she sees the woman whom she believed was the
15 more persistent one on the south side who --
with the knife in her mouth, she is on the
north side of the street with a cut on her
arm. Jonathan -- she observes several people
around the woman and notices that one friend
20 had taken off her shirt and wrapped it around
the woman's arm. This friend was wearing a
white bra.

Mr. Paget. He testified that he
does see her again, during the same stop.
25 Sorry. He does not see her again during the

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5 same stop. He sees her on the north side of
the streetcar just east of it. He testified
that she was very upset and had been cut on
the arm. He testified that the woman who
initially approached the streetcar and who
brings the knife into the fight, was the same
woman who cut -- who had the cut on her arm.

10 In cross-examination, once again,
he testified that he was less than 100
percent certain the woman on the north side
with the cut on the arm was the same woman he
saw on the south side breaking up the fight.

15 He observed her friend take off
her shirt to help tend to the cut on the
woman's arm. He had testified that the friend
was standing there in a white bra.

20 And further, Jonathan Paget, and
this is in response to my friend's comment,
evidence on the sequence is that he recalls
the lac -- the laceration -- I'm just going
to leave that. ?

He testifies that Mr. Hammond got
up, as well as the girl.

25 Mr. Mir testified that his
attention is then focused on Mr. Hammond as

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he comes towards his car. He testified that Mr. Hammond tried to get into his car. When he was unsuccessful, he wrapped his arm around the centre post. The panel post. Mr. Mir saw a knife in Mr. Hammond's hand and got scared. As a result, he kept driving until Mr. Hammond fell off near the 7-11. It was at this time, while proceeding westbound, that Mr. Mir made his 911 call. He testified that he finished this call before he made his u-turn and proceeds back east past 7-11 on his way back to the intersection of Queen and Niagara.

During the 911 call, which is Exhibit 52B, he identified the girl as still being there in the intersection. At the intersection he sees the woman involved in the fight holding her left arm saying, I got stabbed. He describes her as using her right hand to hold her left wrist. He said this is the same woman he saw involved in the fight on the north side. He proceeds then to make another u-turn and parks his cab in the 7-11 lot. Scrap that. Sorry. Just take that out, please.

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5 Lindsey Williams. She next
observed an altercation that escalated into a
fight. She saw two additional males run
across the street. She testified that they
came from the south side of Queen Street and
were running diagonally.

10 Ms. Williams testified that she
saw this altercation around 754 to 758 Queen
Street West. She thought it was clear the
group was beating one person. She testified,
from the vantage point, that she did not see
any woman involved in the fight. She did hear
female voices.

15 Ms. Williams went in the
intersection to speak to a friend who was in
a cab. She then walked away and turned her
back to the situation. She testified she
thought the fight had ended. When she reached
Claremont, she heard a woman screaming
20 hysterically and could make out the words,
Stop, stop, and the woman was asking somebody
to help. She described the tone of her voice
as one that was sheer panic and high pitched,
shrill scream.

25 So the Crown submits that Ms.

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Williams believes that the fight is over and proceeds eastbound with her back to the situation. As she approaches Claremont, she then hears a woman screaming hysterically, Stop, stop. Help, help. She describes in her evidence that the tone of voice was one of sheer panic, high pitched and shrill scream. The suggestion that Ms. Kish was trying to break up or stop the fight is not supported by the evidence. I submit that just those words, in itself, do not, as my friend alluded to, wouldn't indicate that she was trying to stop the fight.

With respect to -- just a formatting issue here, Your Honour. Just a sec. Just so it's clear in your notes, the thing below on Mr. Patsiopoulos and the 911 call has got to be further down so that shouldn't be in there.

Reasons why Nicole Kish does not leave the scene. It is the Crown's position that the fact that Ms. Kish remains on scene after the stabbing does not provide evidence that she wasn't involved in the fight or wasn't the stabber. It is the Crown's

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5 position that Ms. Kish is seriously injured, believes that she is seriously injured, as a result of a stab wound that she has received to her left forearm. Therefore, even though she is the perpetrator, she does not leave the scene because she believes that she is requiring immediate medical attention.

10 So in support of that, the 911 call regarding Mr. Patsiopoulos. That 911 call, to support the position that Ms. Kish believes she is seriously injured and requires immediate medical attention, the 911 call is filed as Exhibits 48A and B respectively. And on page 3 of 10 on the transcript, starting at one minute, 25
15 seconds in the audio, Mr. Patsiopoulos asks Ms. Kish if she was bleeding, if she needed an ambulance. Ms. Kish answers, Yes.

20 And further, there is further additional stuff on that 911 call. At 2:17 is a male voice, You're fine, you're fine, you're fine.

2:40, male voice, Let's go. We got to get out of here.

25 2:44, female voice, which is Ms.

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Kish, I want a fucking ambulance.

3:20, female voice, Kish, Someone
go get me my backpack.

3:25, female voice, suggesting
it's Kish, Where's the fucking ambulance.

3:32, female voice, Kish, I've
got stabbed really bad.

Furthermore, as supported on the
City TV video, that further supports --
submit the City TV video provides further
support for the submission Ms. Kish doesn't
leave because she requires immediate medical
attention. She is seen walking westbound down
Queen directly to an ambulance parked in
front of St. Nicholas Church. She is yelling,
demanding to be let into the ambulance. I
submit that you can hear the following on the
video:

At 3:17, Kish, No. Let me in.
Let me in.

3:22, Kish, Do you want me to
take it off?

3:36, Jeremy Wooley, That's the
guy that stabbed me. Fuck him.

3:41, Kish, I just got stabbed. I

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am not okay.

3:46, Kish, I can't feel my
finger. I just got stabbed.

3:49, Let me in. Fix it.

5 4:12, Jeremy Wooley, This is a
class war.

4:15, Kish, Jeremy, go get my
backpack. Jeremy, go, get my backpack.

10 5:37, Kish, Somebody come out
with me. Don't make me go by myself -- sorry.
Somebody come with me. Don't make me go by
myself.

15 With respect to the dying
declaration, I'm not going to read the
entirety. Ms. Chan testified that when she
walked in the area of 77 Queen Street she
heard, Help me. Help me. Help me. I'm
dying. I've been stabbed. She saw
20 Mr. Hammond stumble down the stairs. She
couldn't recall which set of stairs. He
rolled and fell towards the street. She
places a 911 call. She testified that after
she placed her 911 call, a man appeared,
concerned that she was in danger and pointed
25 out there was a knife.

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5 She testified that neither her
nor the other man touched the knife. Police
picked it up. She was present when the police
arrived. She testified that she heard
Mr. Hammond respond, I got it in the fight.
She testified that she could clearly -- she
testified she could clearly -- she could hear
this clearly. She testified that she observed
10 other people go to the ambulance. Four people
- two men and two women, came from the east
heading west.

15 Mr. De Carvalho is the gentleman
who does come with Ms. Chan. He testified
that, down the church, he went up to a woman
who was helping Mr. Hammond. He thought that
Mr. Hammond still had the knife. He saw the
knife and described it as three inches in
length with a black handle. He pointed the
knife out to police.

20 P.C. Dawn testifies, he goes to
the intersection of Claremont and Queen. He
observes a man lying on the ground. Testified
the man kept saying, I can't breathe, I can't
breathe. He testified that while they were
25 still on the sidewalk, he became aware there

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was a knife near the scene. He asked this man
about the knife. The man's response was, No
comment, no comment. I just took it off him.
He testified he was approximately three feet
away from this male when he heard this
response. Despite further attempts to ask
about the knife, the male would not say
anything. Once in the ambulance, Dawn asked
the male to describe who did this to him. He
testified the response was, They were punks.
Just punks. And the male continued to
indicate he can't breathe.

P.C. Dawn spoke to Scott at 3:14
a.m. He acknowledged that he did not have an
independent recollection of what he
specifically said to Detective Scott about
Mr. Hammond's comments. He testified,
however, that he recorded Mr. Hammond's words
in his memo book as he remembered them to be.

Officer Scott, he writes down,
when asked about the knife, when he was
talking about P.C. Dawn, the comment was, No
comment, no comment. I ripped it out of his
hands, and indicated the wounds to his chest,
A bunch of punk kids did this to me.

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Detective Scott testified that he believed that all of this took place in the back of the ambulance, as opposed to on the street.

In any event, the Crown
5 acknowledges there is inconsistency between P.C. Dawn and Scott as to the content of the dying declaration. It is the Crown's position the only consistency among the three
10 witnesses, Adrienne Chan, P.C. Dawn and Detective Scott, is that Ross Hammond said he got the knife in the fight. It is to this extent the Crown asks Your Honour to rely on this dying declaration. It is the dying
15 declaration in the back of the ambulance, the inconsistencies found -- is found in the extent of his comments. However, the consistency is his generic description of those involved in the fight, those being
20 punks.

Just so it's clear, now I'm
25 dealing with the knife. Submits the -- FIS submitted the knife used in the fight on the north side of the street, comes from a group of Ms. Kish's friends as a matching knife to those located in Mr. Fresh's belongings. I

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can indicate, Your Honour had an issue with respect to where the mix sample comes from. That's Exhibit 23A for FIS and 5-1 for CFS. That's where the mixed sample comes from. It's from the hilt of the knife.

So the evidence from Monica Sloan establishes that CFS 5-1, Ms. Kish's DNA and Mr. Hammond's DNA, were found on the knife discovered at the church. Crown's position, no issue that the knife recovered from the church was the same knife that Mr. Hammond had in his hands when he managed to escape the fight. Ms. Sloan's conclusion regarding sample 5-1 was that Ms. Kish could not be excluded as a donor of the minor DNA sample at six STR loci, a random match probability of 1 in 670 thousand. Ross Hammond could not be excluded from the random match probability as 1 in 1.1 trillion. This evidence demonstrates an association between Ms. Kish and Mr. Hammond on the knife. The Crown's position is that Ms. Kish's DNA is on the knife because she was stabbed by Mr. Hammond after he disarmed her, and submits that Mr. Hammond's DNA is on the knife because he

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was stabbed with it.

5 Dr. Pollanen testified the knife
was recovered from St. Nicholas could not be
-- the knife in reference to one from the
church could not be excluded as having caused
all the sharp force injuries to Mr. Hammond.
Conclusion not impacted by the helping of the
blade. Irregular nature of the superficial
sharp force injury on the left -- upper left
10 side of his arm and the lack of serrations on
the cartilage on the left fourth rib that was
retained for further examination.

15 Dr. Pollanen testified that
Mr. Hammond suffered four sharp force injury
stab wounds to the middle of the chest and an
injury coming from the one of the four stab
wounds penetrated the chamber of the heart.
Dr. Pollanen concluded that the cause of
death was a stab wound to the chest.

20 With respect to expert evidence
that was brought up earlier in my friend's
submissions, we submit that that is the only
expert evidence before the Court with respect
to whether or not that knife could in fact
25 cause all the wounds. That knife is the

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murder weapon. It is the Crown's position
that the knife that was recovered from the
church was the murder weapon. That only one
knife was used in the course of the stabbings
based on the following:

Ms. Stopford testified that after
seeing the knife in the more persistent
girl's mouth, she closed her window and turns
her attention to the inside of the streetcar.
She testified that the woman was clenching
the knife between her teeth with the blade
portion sticking out. She did not see the
handle as a result. She describes this knife
as having what she believed was a hole in the
blade portion of the knife. Exhibit 45 is Ms.
Stopford's rendition of the knife that she
observed.

She testified that it was the
last time she sees the jock on the south
side. She does not believe he's injured. His
hands are down at his sides. She testified
that she does not see the woman again on the
south side, but does see the street kid who
was beaten up.

She testified that her attention

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5 -- that her attention then shifts to the
north side as she had a sense that something
was happening over there. She testified that
she saw the jock lying on the car, yelling.
She observed him holding a knife in his right
hand. She testified that she believed it was
the same knife she had seen in the woman's
mouth on the south side of the street. She
reached this conclusion by comparing the
10 blade portions of the knife.

15 Mr. Paget testified that he saw
the knife two times, once on the south side
and once on the north. He testified that he
saw the knife in the woman's hands on the
south side. He saw it next to the woman's
hands while she was laying on the hood -- the
man's hands while he was laying on the hood
of the taxi on the north side of the street.
He testified the knife was approximately a
20 three inch blade, and he explained that he
used -- he used to own a similar knife and
describes the blade as folding into the
handle.

25 Crown submits that these two
witnesses establish that the knife that was

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brought into the fight on the south side is the same knife that is seen on the north side.

5 Making comment with respect to the witnesses my friend called, the Crown has problems with respect to whether or not those witnesses raise reasonable doubt. And with respect to Raymond To, it is the Crown's position that Mr. To is attempting to be
10 helpful with the Court. However, the issue of reliability of his evidence is in question. First reasons, saw three people involved in the fight in front of his restaurant. They remained in the street following the fight.
15 Two persons who were on the ground attacked in fight was standing in the middle of the street calling -- the individual who was attacked in the fight, he was in the middle of the street calling for the police when the
20 police arrived on scene. Has been established that Hammond grabbed the taxi and -- sorry. The real issue here is that the three people that he actually sees involved in the fight is the same -- saw the same three people who
25 were fighting in front of his store walking

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5 towards the church, walking and talking to
the police, so obviously that can't be the
same individual who was being beaten up and
eventually dies. Describes the guy getting
beaten up, he was wearing an army outfit.
This is not what Mr. Hammond was wearing. He
describes that the three people in the fight
are dressed in similar fashion. Not
consistent with the evidence that Mr. Hammond
10 was the man on the ground being beaten by the
group.

 Mr. Gallately. He testified that
he was on the balcony for 30 seconds after
the fight on south side. Never saw any alter
15 -- any type of altercation on the north side
of the street. Therefore, the issue with
respect to what his timing was. I guess the
most glaring thing with respect to Mr.
Gallately is if he was looking at this fight
20 in such close view, he does not see a
streetcar. So in addition, he testified he
doesn't remember there being a streetcar
there. He -- it has been established that the
eastbound streetcar was parked at Queen and
25 Niagara during the south side and north side

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altercation. It would therefore raise the issue of his ability to observe.

5 My friend -- two things that my friend brought up with respect to -- the other thing is the two fights. That's the first and only evidence with respect to two fights happening on the south side of the street. And then the issue then of somebody running southbound. Two issues arise. First
10 of all, my friend, in his submissions, indicated that he was not able to see the north side of the street. It was blocked. The information I have on the evidence that I took down is:

15 QUESTION: If on the balcony, when look across the north side, what is view of the street?
He indicates a clear view.

20 And the other issue about the individual who's running with the woman southbound on Niagara street, his evidence is he cannot see past the Coffee Time store southbound from where he's looking, from his
25 point of view in his -- on his balcony. And

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5 I'm going to suggest when running, and his
words were running and went -- what was your
view? It's hard to -- his evidence was it's
hard to see on the balcony. So the furthest
he can see south on Niagara Street, if it is
even an issue, is probably as far as Queen
Street south right where the Coffee Time is.
It would be physically impossible from his
location to actually see down Niagara Street.

10 Now, Ms. Watt's evidence. Crown
submits that Ms. Watt's evidence regarding
what transpired that night is unreliable. She
testified that she does not remember what
happened and blacked out frequently. Crown
15 submits that her testimony that she was
disarmed and her testimony as to Ms. Kish's
role is motivated by a desire to help Ms.
Kish rather than be truthful. Crown submits
that her evidence regarding stealing the
20 knife in Montreal and offering to sell it to
Ms. Kish is corroborated by the fact that Mr.
Fresh has a matching knife in his belongings.
There are -- the Crown submits this may be
used to establish Ms. Kish's knowledge that
25 members of her group carry knives. I'm going

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to suggest that's about the only evidence that's of any value out of that. That and the fact that her relationship with Mr. Fresh.

5 The other just very minor issue is the location of the stab wound on the unknown male, and I think it should be addressed. Shaun Park testified that he noted two men walking on the south side of Queen heading east from the Queen and Niagara. Mr. Park also observed emergency lights coming 10 from the same area. Mr. Park asked him what was going on and the man said that someone got stabbed. Mr. Park testified that the one man was taller than the other. These men 15 appeared to be the same two men that Mr. Park had observed earlier crossing the street. The taller of the two men who Mr. Park described as having a larger build lifted up his shirt and said he got stabbed. This man had some 20 puncture wounds or marks on his abdomen in the upper left chest area. Mr. Park believed that he observed three.

25 The man mentioned that he was from the States and said that he had been stabbed before many, many times and that this

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was nothing. They spoke for a couple of minutes and then the two men proceeded eastbound on Queen.

5 I submit that this is not, um,
indicative of consciousness of guilt
immediately fleeing the scene after having
stabbed Mr. Hammond. Mr. Park testifies that
his clothes were -- was gray. He called the
man wearing a gray hoody and shorts, they
10 were either gray or faded gray or stone wash,
came below his knees. The man was wearing
sneakers and had a hat on as well and he
observed tattoos on the man's left leg, on
his calf, and also some on his chest. Mr.
15 Park observed that the man may have had a
wound around his nipple area. He did not
observe a lot of blood, but did not think the
one wound would be deep -- but did think that
the one wound looked deep. He thought the
20 flesh had rolled back and he remembered
seeing a layer of fat. He testified he had
never seen a puncture wound like that before.
He remembered -- you remember Dr. Pollanen
testified fat is usually the first layer
25 after the skin is penetrated, so the

indication is it may not have been indicative as to how deep that wound actually was.

Now, if I can just read through my legal submissions, Your Honour.

5 THE COURT: Perhaps before we go to the legal submissions, Mr. Thompson, there is a conspicuous absence to any of the evidence of Mr. Dranichak.

10 MR. THOMPSON: That's true. And the Crown -- and my friend was very correct in saying that the Crown had to call Mr. Dranichak. Mr. Dranichak provided a narrative as to what transpired prior to arriving there, gave an indication of any alcohol consumption or
15 anything along those lines.

In terms of the usefulness of his evidence past the time where they reached the TD Bank machine, I respectfully submit he provides absolutely no guidance that the
20 other three witnesses who observed the transaction on the north side don't already provide. Mr. Dranichak, I respectfully submit, Your Honour, you can disregard any of his evidence.

25 THE COURT: At some point Mr. Dranichak

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obviously left the scene. Literally.

MR. THOMPSON: He did. Well, I mean, if Your Honour's asking me what point in time do I think he left the scene? I think

5 Mr. Dranichak maybe, I mean, he does provide certain details of getting involved in a fight and pushing an individual into a glass panel. Where that took place seems to be at odds with the other witnesses and I

10 respectfully submit that his evidence, I don't think -- my friend would ask you that somehow that this could be something -- that something nefarious applied to his evidence.

15 That he was doing something at the scene to cause whatever and this is a consciousness of guilt by him not providing that evidence. Two things. First of all, it very well may be

20 he's just mistaken. He had a lot to drink and he may have been injured just to the point where he gets in a cab and leaves, or he may have reasons why he decided that it was time to leave the area and it was not safe for

25 him, and my friend's suggestion that he may be concerned that he has a criminal -- that if he get a criminal record would effect his

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status in Canada, maybe a legitimate concern.
But I don't think it really matters at the
end of the day because I don't think any of
his evidence provides any additional
5 information to what transpired that evening
other than the fact that he had been out with
Mr. Hammond and a group of people, and that
they had consumed alcohol and they eventually
wind up at the Green Machine TD Bank.

10 So that's all I can say. I mean,
unless Your Honour has specific questions
about Mr. Dranichak. He may have his reasons
for not providing anything additional. I
think it's very, very unsafe to say that
15 because he's lying about that, he has some
nefarious reason for doing it other than
maybe his own self-preservation.

THE COURT: All right. Thank you.

MR. THOMPSON: Okay. I mean, I'd be more than
20 -- any other additional questions on that. I
mean, we did think very strongly before we
called Mr. Dranichak, but the -- but the
bottom line is he was required.

THE COURT: You misunderstand my question.
25 I'm not in any way being critical. I

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understand he had to be called as a witness.
I just, as I would say, his rendition of the
events post the altercation starting is not
particularly helpful in terms of coming to
grips with what actually happened.

5 MR. THOMPSON: And I'll agree with that as
well. All right.

Your Honour, with respect to, as
I indicated, I would briefly touch on the
10 legal submissions and then I'm going to refer
to the cases if necessary, but and I am going
to read what I handed up to you because it's
appropriate that I do so.

15 And the first basis on which we
find is Nicole -- Ms. Kish would be the
principal. In other words, she's the stabber
of Ross Hammond. And the Crown submits that
the commonsense inference that the person
intends the natural consequences applies to
20 the subjective intent of the stabber, Ms.
Kish. Mr. Hammond suffered four stab wounds
to the centre of the chest, one of which was
fatal.

25 And just while I'm just on that
area, I'm sure it's not lost on the Court,

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5 but the nature of those stab wounds, they are
four and I use the term centre mass stab
wounds. I respectfully submit that, although
there is no specific evidence called on it,
that common sense would dictate that the only
way that those stab wounds could be applied
in that sort of symmetrical, close pattern is
if somebody was being held down on -- on
their back. It would be very difficult to
10 apply four stab wounds in that symmetrical
pattern if somebody was standing up. Because
after the first stab wound, they would turn
away, and it would be very unlikely that you
would be able to place the second that close
15 proximity to the other stab wounds.

So without going into the section
of 221(1)(a), intends to cause death, and the
other one being 229(a)(ii), by way of bodily
harm, I could indicate that that's the
20 Crown's position with respect to Ms. Kish. In
other words, I'm going to suggest that on the
evidence that's before this court, that there
is no question that she has the knife, and I
will go through the evidence that supports
25 that, but I would also indicate under that

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5 section of 229(a)(i) and (a)(ii), if Your
Honour does not find that, the Crown submits
that if Your Honour is not satisfied beyond a
reasonable doubt that Ms. Kish had a
subjective intent to kill Mr. Hammond or
intended to cause him bodily harm that she
knew was likely to cause his death, and she
inflicted this series of stab wounds,
unlawful act manslaughter would still apply.
10 In other words, unlawful act plus subjective
foreseeability of bodily harm as being the
transitory or trigger.

15 So I'm going to suggest you can
find with respect to the principal, you can
get at murder, but under the enabling section
of the *Code*, 229(a)(i) and (ii), that in the
event you don't find that she has the
subjective intent, you can look to the
objective aspect of it and the unlawful act
and the objective foreseeability.

20 The reason I bring that up to you
is because you can also find that under 221,
with respect to the culpability section, so
you can get at it two ways is my point.

25 Now dealing with 221, it's the

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221
222

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5 Crown's position that we really, in our
submissions, address it as Section 21(2) and
I'll make my argument with respect to that.
But what is also available, and it's not in
these submissions to Your Honour, Your Honour
alluded to it earlier, is in the event that
Your Honour doesn't find that she is the
actual stabber, but in fact provided the
10 knife to either Mr. Wooley or Mr. Fresh or
the third party that's unknown, that she in
fact would fall under 221(b), which would be
the aider under the -- under the party
liability. She would be aiding in terms of
making that murder, so she would fall under
15 the murder section, but she'd fall under as a
party by providing the knife. Under --
THE COURT: Well, just on your theory as
advanced, it couldn't be Mr. Fresh. Mr. Fresh
is still on the south sidewalk recovering
20 from the beating.

MR. THOMPSON: I agree. And perhaps I spoke a
little quickly. But my argument, under our
theory, Mr. Fresh is still on the south side,
but I'm just saying if Your Honour, for
25 whatever reason, found that one of the other

~~21(2)~~
21(2)(b)

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5 three parties who the Crown is alleging is
involved is the one who perpetrated the knife
wound, I'm not saying that we're saying Mr.
Fresh did it, but Your Honour may find that
for whatever reason, I don't know, but if any
one of those three, is my point, would in
fact fall under 21(1)(b) in terms of being an
aider. That's my only comment with respect to
that. I just want to leave that it's still
10 available. But the main thrust of what our
party liability is is under 21(2).

And the Crown submits that if
Your Honour's not satisfied that Ms. Kish is
the stabber, the Crown submits that she is
15 still culpable of second degree murder as she
engages in a common intention to assault
Mr. Hammond and subjectively foresees that
the probable consequence of the assault is
his murder by one of the participants of the
20 beating, and I have written down there the
Code provisions. I don't know if Your Honour
-- I'll read them on the record. Where two or
more persons form the intention in common to
carry out an unlawful purpose and to assist
25 each other therein, in any one of them in

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5 carrying out a common purpose, commits an
offence each of them who knew or ought to
have known that the commission of the offence
would be probable consequence of carrying out
the common purpose, is a party to that
offence. Section 21(2) extends to liability,
those who did not participate in the actual
offence that they -- that caused the death,
but who engaged in a different criminal
10 purpose and subjectively foresaw the
commission of that other offence is a
probable consequence to their criminal
purpose.

15 And under that section, there's
three elements to proof, that being
agreement, knowledge and intent, and the
Crown submits the evidence from the following
witnesses establishes that Ms. Kish engaged
in an assault, and that she subjectively
20 foresaw the murder of Mr. Hammond by one of
the participants of the assault would be a
probable consequence in the course of
carrying out that unlawful purpose.

25 So with respect to the agreement,
an agreement to have an assault and intention

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5 in common to carry out an unlawful purpose,
the Crown submits that the evidence that the
agreement in common intention is established
by the various witnesses who described the
beating of Mr. Hammond by a group of three
people on the north side. The Crown submits
that the evidence and description by Cam
Bordignon, Taj Desilvia, Melissa Gallately,
Saad Mir, places Ms. Kish on the north side,
10 involved in the beating of Mr. Hammond. Crown
submits the evidence and description provided
by Mr. Bordignon, Ms. Gallately, Desilvia
establish that Jeremy Wooley is one of the
two men involved in the fight on the north
15 side. Crown submits that the CFS and the
Maxum report establish association between
Mr. Wooley and Mr. Hammond, and Mr. Hammond's
blood is located on Jeremy Wooley's shoes,
and Mr. Hammond's blood is located on the
20 right knee of Jeremy Wooley's pants.

I'm going to read *R. vs. Tang*
(ph), but at tab 5, paragraph 24 stands for
the proposition that a common intention may
be formed at the very moment of carrying out.
25 So in other words, all those three parties

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5 who have a common -- they are bound together
by a common activity, and that activity, and
as indicated even with the forensics, the
blood is located on Jeremy Wooley's shoes,
Mr. Hammond's blood, as well as on Jeremy
Wooley's pants. Those three people who formed
a common intention to have an assault, that
the nature of the assault, and I'll go into
deeper facts with the case, but the nature of
10 the assault is such that it is a probable
consequence of the nature of that assault. In
other words, it doesn't have to be that the
injuries that Mr. Hammond suffered, other
than the stab wounds, would have been life
15 threatening. The point is that when they were
being applied, the kicking and the stumbling,
that it's a probable consequence that that
may cause severe damage in their mind, and in
the minds of the people applying it. The fact
20 that those injuries are not life threatening
at the end does not in itself absolve them of
the fact that, when they're doing it, that
it's the probable consequences of that type
of vicious beating, three on one, that death
25 could have happened. So there is a common

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intention to cause an assault and a probable
consequence of that would in fact be the
murder.

5 So the other element of that is
knowledge. So they actually knew the
participants would kill Mr. Hammond. The
subjective foresight is that the probable
consequence of the assault, the one -- the
10 participants would commit a murder? And the
Crown submits that Ms. Kish has the knowledge
that members of her group carry knives. And
that the evidence of Cam Bordignon imputes
knowledge to Ms. Kish that one of the
15 participants in the fight intends to kill
Mr. Hammond. Reference the comment, You die
tonight. And if you'll remember, that -- the
Crown submits that Mr. Bordignon's evidence,
along with the evidence of Ms. Gallately, Ms.
20 Desilvia, Saad Mir's evidence that Ms. Kish
continues to participate in the beating of
Mr. Hammond and does nothing to extricate
herself from the fight after imputed with
such knowledge.

25 In other words, what is
significant about that knowledge, Your

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5 Honour, is that with all of the knife, with
the comment that's made, that in fact the
evidence is that they continue to still, and
you will remember Mr. Bordignon said, that
they continued to beat on him at least for
almost a minute after that sound is made --
or sorry. That comment is made. You die
tonight. In other words, You die tonight,
they continually beat on him. Mr. Bordignon
10 hears that. He can hear it on the south side
of the street. The natural inference is that
people that are involved in there could hear
it as well and they continue, they continue
applying that much force.

15 And the evidence from the other
witnesses is Ms. Kish is there. She's either
on top of him, on the ground, or involved in
the fight.

20 So I'm going to, with respect to
knowledge, that that element is covered. That
in fact without getting into, well, there's
an argument to be held that it could also
speak to 21(1), but for the time being I'm
going to argue that it speaks to 21(2), but
25 as an element of knowledge, that fight

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continues. That they are armed there, now
that somebody wants to kill somebody.

5 THE COURT: In your position, does the
accused have to contemplate that Mr. Hammond
is going to be killed by stabbing? Or just
simply that he is going to be killed. In
other words by stabbing, shooting, excessive
force? Doesn't matter?

10 MR. THOMPSON: And that's the point, is
whether or not it is a probable consequence,
and once again, I don't think -- and I think
it would be better if it was a gun obviously.
A knife is helpful, and she's imputed with
the knowledge of having the knife. Remember
15 Ms. Watts said that she knew, you know, and
she discussed about buying a knife. She knew
that Ms. Watts had a knife. She knows that
they carry knives. That Mr. Fresh has an
identical knife. So she's going into a fight
20 knowing that there is a knife, and I will
speak of the *Young* (ph) case further, but --

25 THE COURT: But at the time that she's aware
of the fact that Ms. Watts has a knife, Mr.
Fresh has a knife, at the time of the actual
event, Ms. Watts and Mr. Fresh are nowhere

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near the scene.

MR. THOMPSON: Well, no.

THE COURT: Her and Mr. Fresh are still nursing his wounds on the south sidewalk and Ms. Watts is there helping him.

MR. THOMPSON: No, but my argument, Your Honour, if you remember the fight starts on the north side where Mr. Fresh is. Mr. Fresh carries a knife. There was a knife found on Mr. Fresh. She knows that people in her group have a knife. At least one knife. They have two identical knives. So that intent, or that knowledge, and I'll get into the cases that support that, but that knowledge can be -- doesn't have to happen in advance. It can happen -- it's not a temporal thing. It can happen immediately just before the incident takes place, as long as they go in with the common intention, and there is a probable consequence is that, number one, there is a knife, or that even if you can take it one step further, that the amount of force that they're applying to Mr. Hammond, regardless of whether the other injuries are life threatening, the point is they are applying a

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brutal beating, and it is a probable
consequence of that brutal beating that death
-- that bodily harm -- that --

5 THE COURT: But that was my original
question. Your position is the accused
doesn't have to know precisely how the death
is going to happen, whether it's by stabbing
or strangling or whatever, just that it's
going to happen.

10 MR. THOMPSON: Yes. And the *Simone* and the
Young case does speak to that. And I don't --
I want to be clear, that is the position of
the Crown, but obviously the -- the more and
more you go towards of having a weapon in
15 one's hands, the less hurdle the Crown has to
come over. If all parties are going in just
with their fists, the probable consequence
issue that someone's going to die from just
being beaten is less likely. The more towards
20 the more violent weapon, the less hurdle the
Crown has to come over, but it is the Crown's
position that they've gone in it and
delivered, there is a common enterprise to --
or common intent to do an assault, which is
25 an offence, and that is -- the nature of that

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5 assault, and I don't want to repeat myself,
Your Honour, but is such that it is a violent
beating and it is a probable consequence, and
I'm going to suggest that they do not have to
know, if it's that -- that amount of force
being applied, that it is a probable
consequence.

10 And the other significant factor
is that this fight escalates. In other words,
it starts on the north side originally, it
starts by pushing and shoving or throwing
into the window, you know, some garbage being
thrown, a couple punches, someone falling
15 down, escalates to the south side where in
fact somebody is basically knocked
unconscious, smacked into the side of a
streetcar. We have evidence of a continual
beating on Mr. Hammond. It is the Crown's
20 position that at that point in time that he
gets cut, blood is at that point is
dispersed, it would -- but notwithstanding
that the fight further escalates to the north
side and three people, two men and one woman,
are doing that, and it is that consequence of
25 a beating, originally started as an assault,

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but you could get to murder.

And in terms of the knowledge,
I'm going to suggest that they are deemed to
have knowledge based on, number one, the
5 knife. It supports the Crown's position, and
second of all, You die tonight, supports it
even further and the continuous beating after
that comment is made.

THE COURT: We'll take the afternoon recess.

10

---RECESS

(3:35 p.m.)

15

---UPON RESUMING

(3:50 p.m.)

THE COURT: Yes, Mr. Thompson.

20

MR. THOMPSON: Yes, Your Honour. I'm not
going to be much longer. It's been brought to
my attention that perhaps I wasn't as clear
as I should be, but with respect to the
question you asked, it is the Crown's
position that she does not need to foresee
25 how the murder -- how he will be murdered.

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Only that murder is a probable consequence of carrying out the common intention. Subjective foresight that the probable consequence will occur.

5 So I don't know if that answers your question. I was told that I wasn't perhaps clear enough, but that's the Crown's position.

THE COURT: Thank you.

10 MR. THOMPSON: And the other offence of that, being under the three elements, the third being the murder.

15 With respect to manslaughter, under 21(2), the Crown submits that Ms. Kish -- that if Ms. Kish did not foresee the murder would be -- the murder would be a probable consequence of carrying out the common intention, she may be guilty of manslaughter. The unlawful act is the assault
20 of Mr. Hammond while he's down on the ground getting kicked all over his body with the main focus on his head. The objective foreseeability that the bodily harm that is needed -- needed -- neither transitorial nor
25 trivial, and as a result, a reasonable

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person, in all of the circumstances, would have appreciated that bodily harm was a reasonable consequence carrying out the intention.

5 With respect to my caselaw, Your Honour, in addition to that there should be in there a copy of the jury charge. I think -- I think I have spoken enough so what I'm going to suggest doing, Your Honour, is as follows with respect to the submissions. If 10 it's fine with you, otherwise, I will read the respective passages, but I thought I would just highlight them for you.

THE COURT: Yes.

15 MR. THOMPSON: As opposed to reading them because I'm sure a lot of this is trite. But in any event, *R. vs. Cooper*, that just deals with murder. It's when a woman is strangled in the back of a car and it deals with the 20 subjective intent to cause bodily harm. Subjective knowledge that the death is likely to result.

25 The jury charge on page 3 and 4 outlines very clearly what the three elements are for 21(2), the agreement, the offence and

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the knowledge, how you can get at knowledge
different ways, and you will have a copy, but
in any event, rather than read it out, Your
Honour can refer to page 3 and 4.

5 And in *R. vs. Simon*, which is --
I should actually put these on here. It's
(2010) O.J. No. 4723, (C.A.) at tab 2. Simon
is charged with murder during a drug deal.
It deals with the liability under 21(2),
10 carrying out an unlawful purpose of the
robbery, or participating in the illegal drug
transaction. The paragraphs I was going to
read to the Court are paragraphs 41 and 42.

15 In *R. vs. Young*, a gang was out
-- and this is probably very important, this
particular case with respect to the
similarities of this case. But a gang goes
out to assault another and one of the members
brings a knife. And the case basically deals
20 with whether the judge erred in leaving 21(2)
with the jury. I would suggest, Your Honour,
that for the Crown, what we would be reading
is paragraph 5, paragraph 6, 7 and paragraph
14.

25 And with respect to the issues of

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manslaughter, I provided the Court with *R. vs. Jackson*, (1993) 4 (S.C.R.) 57. That's where Mr. Jackson is charged with killing his employer. The main issue is one of one party can be convicted of murder while the other of manslaughter. The paragraphs that I -- but the reality in referring to just the subjective -- the objective intent that's required for manslaughter, paragraphs 20, 21, 32 and 33.

Then of course *Tang* (ph) which -- where Mr. Raporsat (ph) is stabbed in the back by four assailants. One was acquitted, the other was the principal and the other two were found parties under 21(2). It goes into under 21(2) with the party liability issue is, and just for the record, *R. vs. Tang* is (1999) O.J. No. 91 (C.A.). paragraphs 10, paragraph 18, paragraph 24, paragraph 25, paragraph 26 and 27 outlining the liability of the 21(2).

And that, Your Honour, subject to any questions, are the Crown's submissions with respect to this matter. Actually, just before I do, there's one thing I did want to

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5 say. The issue was brought of common sense
and I'm just going to make one closing
comment. That the common sense that there are
four -- out of all the people there, there
are four people who end up with stab wounds.
The only four people who are involved are the
four people involved on the north side of the
fight, that being Mr. Hammond, Ms. Kish, Mr.
Wooley and an unknown male. No one else on
10 the street is stabbed, even though it's a
crowded scene, and who gets stabbed the
worst? Ms. Kish. Other than Mr. Hammond
obviously. And that's due to proximity.

15 And now I am finished, unless
Your Honour has any questions.

THE COURT: No. Ms. Middlekamp, is there
anything further on the stay application?

20 MS. MIDDLEKAMP: Just, Your Honour, you heard
from Ms. Williams and she put the fight
further west down the street, which was
completely out of the range of any of the
cameras.

25 I had made my submissions to you
in relation to where Mr. To placed the fight
and that was at the preliminary inquiry, and

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I submit to you that was between the garbage bags and the light standard which is out of the camera range of the eastbound camera and the westbound camera.

5 As well you heard the evidence from Mr. Gallately. He did not see a physical altercation on the north side of the street, so his evidence isn't of any assistance to the defence with respect to the lost
10 evidence.

And Mr. Bordignon put the fight in a similar place as to the other witnesses.

So it's my submission that the defence evidence did not further any position that Ms. Kish's right to full answer and
15 defence was impaired by the lost evidence.

THE COURT: All right. Thank you.

MR. THOMPSON: Your Honour, if I just may make one clarification I missed and that is,
20 just so it's clear, the blood sample from 23A or 5-1, that's -- the term hilt is probably the improper term. That is taken from the left side of the blade near the hinge as opposed to the hilt, which I guess if it was
25 a jackknife would be the same. If it was a

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regular knife as opposed to -- his testimony is it's from near the hinge.

THE COURT: Thank you. Any reply, Mr. Scarfe?

MR. SCARFE: Just briefly, Your Honour. I was going to clarify about the knife as well. I thank Mr. Thompson for doing that.

Just a couple of very brief points. Mr. Thompson indicated that after the incident south of the streetcar, that Mr. Hammond changed from wanting to fight anyone to trying to get away. I'm not sure exactly where that is in the evidence but I just remind you that Mr. Patsiopoulos, when he came around the corner of the streetcar, saw Mr. Hammond banging on the streetcar looking like he was ready to fight anyone and everyone.

Your Honour asked a question at the end of my submissions with respect to the inference being involved, and I just wanted to say, with the help of Ms. Simpson, that there are many ways to be involved in a fight without attracting criminal liability. One example is you are trying to stop a fight as per Mr. De Carvalho's evidence. Some people

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5 were fighting, some people were trying to
stop the fight, and of course Ms. Williams
who hears the girl yell, Stop, stop, help
help. Another example would be just being
close to the people who are fighting but not
aiding and abetting. You can be present, you
can even be present and upset about it,
without encouraging or doing anything to
help. And number three, you could be involved
10 in the fight in a sense that you're trying to
get a friend out of the fight and pull the
friend out, pull the friend away, much like
the kind of thing we hear from Ms. Desilvia
about the chaotic back and forth and the fact
15 that it looked like street kids were fighting
each other.

So subject to anything else,
that's my reply.

20 THE COURT: Thank you. I'm sure it will not
come as a surprise to anyone to hear that I
need some time to consider this matter. There
are close to 20 witnesses whose evidence has
to be considered and reviewed. And unlike a
jury, I do not have the luxury of giving a
25 conclusion without giving reasons, so all of

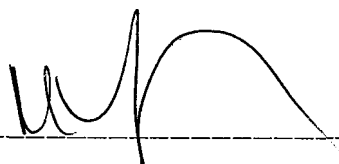
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that is to say that it is my intention to
consider this matter with a view to giving my
decision a week today on Tuesday. So if there
is nothing else, we will adjourn.

MR. SCARFE: Thank you Your Honour.

---COURT ADJOURNED

CERTIFIED, true and accurate
to the best of my ability.



Marcy Lancaster, C.S.R.

Official Court Reporter