

500-10-006048-159

Court of appeal of Quebec

Montreal

Appeal from a judgment of the Superior Court, District of Laval, rendered on December 4, 2015 by the Honourable Michael Stober

N°: (540-01-063428-141)

HER MAJESTY THE QUEEN

APPELLANT - prosecutrix

v.

VITTORIO MIRARCHI
CALOGERO MILIOTO
STEVEN FRACAS
FELICE RACANIELLO
JACK SIMPSON
PIETRO MAGISTRALE
STEVEN D'ADDARIO

RESPONDENTS - accused

APPELLANT'S FACTUM

VOLUME VI – SCHEDULE III - DEPOSITIONS

Page 1763 to 2203

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Appellant

500-10-006048-159

Court of appeal of Quebec

Montreal

Appeal from a judgment of the Superior Court, District of Laval, rendered on December 4, 2015 by the Honourable Michael Stober

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TABLE OF CONTENTS

		VOLUME	PAGE
<u>APPELLANT'S FACTUM</u>			
VOLUME I			
PART I	FACTS	I	1
PART II	ISSUES IN DISPUTE.....	I	6
PART III	ARGUMENTS	I	7
	a. The finding of privilege and its corollary: the nature of the balancing exercise		8
	b. The balancing exercise itself: relative use of the information and nature of the charges		19
PART IV	CONCLUSIONS.....	I	29
PART V	AUTHORITIES	I	30
<u>SCHEDULE I – JUDGMENT APPEALED FROM</u>			
	R. v. Mirarchi & al, December 4, 2015, Michael Stober, J.S.C., 540-01-063428-141 (S.37 objection)	I	31
	R. v. Mirarchi & al, November 18, 2015, Michael Stober, J.S.C. 540-01-063428-141 (Common Law Judgement)	I	54
<u>SCHEDULE II – PROCEEDING AND REGULATORY</u>			
<u>PROCEEDINGS</u>			
	Appeal from an order of disclosure rendered by a Superior Court under s. 37 of the Canada Evidence Act and Notice of appeal.....	I	149
	Direct Indictment.....	I	159
<u>REGULATORY AND/OR LEGISLATIVE PROVISIONS</u>			
	Sections 37 to 37.3 Canada Evidence Act.....	I	160

TABLE OF CONTENTS

	VOLUME	PAGE
VOLUME II		
<u>SCHEDULE III</u>		
<u>EXHIBITS</u>		
R-25: Motion "Investigative privilege" (en liasse).....	II	165
R-25 C 1: Respondent's Reply to the application for disclosure of information and annexes	II	203
R-25 C 2 I: Document that identifies the individuals involved in the conversation.....	II	240
R-25,1: Agreement to a procedure for inspector Mark Flynn's ex parte testimony	II	248
R-25,2: Joseph S. Wilkinson's affidavit (Motion for Special I Disclosure)	II	251
R-25.3: Lettre datée du 25 août 2011 (RCMP).....	II	257
R-25.4: Lettre datée du 12 septembre 2011 (RCMP)	II	258
R-25.5: Lettre datée du 14 septembre 2011 (RCMP).....	II	259
R-25.6: Affidavit of Jason Morton dated the 16th June 2011	II	260
R-25,7: Pin to pin printout sent out Friday 26 August 2011 at 17:21	II	271
R-25,8: Pin to pin HTLM printout sent out Thursday 14 July 2011 at 10:29	II	273
R-25,9: Communication security Establishment, Security of Blackberry Pin to Pin messaging, Document originally signed Toni Moffa Deputy chief IT security	II	280
R-25,10: Lettre de 2 pages de Me Lacy Michael datée le 18 novembre 2014	II	283

TABLE OF CONTENTS

	VOLUME	PAGE
R-25,11		
Unredacted sealed transcript Mark Flynn <i>(Not reproduced in Appellant's factum)</i>		
R-25,12:		
First redacted copy of Inspector Flynn's ex parte testimonyII		285
R-25,12A:		
One page investigative Techniques motion (R-25) Redacted ex parte testimony of inspector Mark FlynnII		312
R-25,12B:		
Two page document entitled "Accused's reponse to proposed judicial summary of redacted testimony"II		313
R-25,13:		
Document de 27 pages updated redacted version of Inspector Flynn ex parte testimony - includes numbered questionsII		315
R-25,13A:		
3 pages Recto-verso Judicial summaryII		342
R-25,14:		
Décision du juge Hélène Morin, JQC, #500-54-000074-105, 9 pages recto-verso "Authorization to intercept private communications"II		344
R-25,15:		
Document intitulé "Motion R-25: Investigative Techniques Privilege proposal order for the transmission of audio recordings and unredacted transcripts of ex parte hearings of the amicus curiae"II		349
R-25,16:		
Agreed statment of facts on the chronology of disclosure for the purpose of motion R-25II		350
R-25,17:		
Affidavit de Patrick Boismenu daté le 25 novembre 2015, "Expertise Report, Projet Clemenza" and Curriculum vitaeII		354
R-25,18:		
Affidavit de "Alan William Treddenick" 25 novembre 2015II		376
R-25,19 I:		
Judgement rendered orally upon motions for disclosure of information upon which Crown is claiming investigative Techniques privilege <i>(Not reproduced in Appellant's factum official copy filed as "Common Law judgement)</i>		
R-25,20:		
Parties joint position on relevance of S.37 CEA's new evidenceII		378

TABLE OF CONTENTS

	VOLUME	PAGE
<u>R-32 (En liasse) Applicant's factum and application record in relation to MDI</u>		
R v Mirarchi - Applicant's Factum	II	379
R. v. Mirarchi et al. - Notice of Application for Disclosure of	II	399
Information to Obtain a General Warrant, dated December 17, 2010	II	495
Technical Report #2 authored by Sgt. Martin Dubois, undated	II	524
Affidavit of Megan Savard	II	563

VOLUME III

Ex A - 28HarvJLTech1	III	571
Ex C - A Lot More than a Pen Register	III	647
Ex E1 - Meet the machines that steal your phone's data _ Ars Technica	III	685
Ex E2 - Meet the machines that steal your phone's data 2_ Ars Technica	III	689
Ex F - Hacker Spoofs Cell Phone Tower to Intercept Calls _ WIRED	III	693
Ex G - We Must Secure America's Cell Networks From Criminals and Cops _ WIRED	III	698
Ex H - FBI's 'Stingray' Cellphone Tracker Stirs a Fight Over Search Warrants, Fourth Amendment - WSJ	III	703
Ex I - How a Stingray Works - Washington Post	III	709
Ex J - The covert cellphone tracking tech the RCMP and CSIS wont talk about - The Globe and Mail	III	710
Ex K - Met police using surveillance system to monitor mobile phones _ UK news _ The Guardian	III	714
Ex L - imsi_catcher_update	III	718
Ex M - Florida v Thomas - transcript	III	740
Ex N - 1440-S.SL - Washington State Law	III	867
Ex P - KingFish Product Description	III	876
Ex P - StingRay Product Description	III	878

TABLE OF CONTENTS

	VOLUME	PAGE
Ex Q - 3G UMTS IMSI Catcher _ PKI Electronic Intelligence GmbH Germany	III	880
Ex Q - GSM IMSI Catcher _ PKI Electronic Intelligence GmbH Germany.....	III	881
R. v. Desjardins et al - Crown's reply to motions R-32 and 32A on the MDI technique.....	III	882
R33 (en liasse) : Motions R25, R32 and R32A Order for appointment of an amicus curiae	III	898
R-32.1: Courriel daté le 2 septembre 2011 de Russell Moore à Michel Messier	III	901
R-32.2: Courriel du 3 décembre 2012 de Rick Gendre à Michel Messier	III	902
R32.3: Rapport complémentaire sur l'utilisation de l'appareil IDM	III	903
R-32.4: Affidavit of Corporal Josh Richdale - document caviardé	III	913
R-32.5:. A Analysis of Data collected for M. Colapelle 2011-03-15 and 2011-03-16	III	919
R-32.6: Affidavit of civilian member Jocelyn Fortin (MDI project Clemenza)	III	929
R-32.7: Note Colapelle	III	937
R-32.8: MDI technique targetting V. Mirarchi - September 21, 2011	III	939
R-32.9: MDI technique targetting V. Mirarchi September 21, 2011 and December 19, 2011	III	952
R-32.10: Excerpts V. Mirarchi Calendar, September 21, 2011	III	970
R-32.11: Surveillance document V. Mirarchi September 21, 2011	III	981
R-32.12: Lettre datée le 21 juin 2012	III	995

TABLE OF CONTENTS

	VOLUME	PAGE
R-32.13:		
Agreed statement of facts on the chronology of disclosure for the purpose of motion R-32	III	997

VOLUME IV

R-32.14:		
Notice of objection to disclosure of information s.37.1 CEA	IV	1006
R-32.15:		
Order for the appointment of an amicus curiae s 37 CEA	IV	1008
R-32.16:		
Notice of application for standing on s 37 of CEA application	IV	1014
R-34 :		
On motions R25, R-32 and R-32A Issues that necessitate a ruling from the Court	IV	1020
R-34.1:		
Defense precisions to R-34	IV	1022
R v Mirarchi et al - Supp Submissions re MDI Disclosure.....	IV	1027
Factum of amicus Motions R-25 and R-32	IV	1059
Outline for Crown's final arguments on R25 and R32.....	IV	1072
Motions R-25 and R-32 concerning the Investigative techniques privilege		
List of Items filed in ex parte sessions	IV	1079
EP-32.1.....	IV	1083
EP-32.2.....	IV	1085
EP-32.3.....	IV	1091
EP-32.4.....	IV	1096
EP-32.5.....	IV	1103
EP-32.6.....	IV	1114
EP-32.7.....	IV	1125
EP-32.8.....	IV	1131
EP-32.9.....	IV	1132
EP-32.10.....	IV	1134

TABLE OF CONTENTS

	VOLUME	PAGE
EP-32.11 a)	IV	1140
EP-32.12.....	IV	1148
EP-32.13.....	IV	1168
EP-32.14.....	IV	1197
EP-32.15.....	IV	1209
EP-32.16.....	IV	1213
EP-32.17.....	IV	1215
EP-32.18.....	IV	1216
EP-32.19.....	IV	1217
EP-32.20.....	IV	1219
EP-32.21.....	IV	1221
EP-32.22.....	IV	1223
EP-32.23.....	IV	1224
EP-32.24.....	IV	1227
EP-32.25.....	IV	1230
EP-32.26.....	IV	1240
EP-32.27.....	IV	1252
EP-32.28.....	IV	1256
EP-32.29.....	IV	1258
EP-I-32.9	IV	1272

VOLUME V

DEPOSITIONS

Mark Flynn, November 11, 2014, transcript.....	V	1316
Mark Flynn, November 11, 2014, ex parte transcript.....	V	1490
Mark Flynn, November 17, 2014, transcript.....	V	1517

TABLE OF CONTENTS

	VOLUME	PAGE
VOLUME VI		
Mark Flynn, November 27, 2014, transcript.....	VI	1763
Mark Flynn, December 1, 2014, Transcript.....	VI	1837
Reasons for redactions, December 2, 2014, ex parte transcript.....	VI	2036
Mark Flynn, June 30, 2015, transcript.....	VI	2062
VOLUME VII		
Mark Flynn, June 30, 2015, ex parte transcript.....	VII	2204
Mark Flynn, July 2, 2015, ex parte transcript.....	VII	2265
Mark Flynn, July 14, 2015, ex parte transcript.....	VII	2419
Mark Flynn, July 16, 2015, transcript.....	VII	2454
VOLUME VIII		
Josh Richdale, July 17, 2015, transcript.....	VIII	2655
Josh Richdale, July 17, 2015, ex parte transcript.....	VIII	2770
Josh Richdale, July 20, 2015, ex parte transcript.....	VIII	2845
Jocelyn Fortin, July 21, 2015, transcript.....	VIII	2877
Jocelyn Fortin, July 21, 2015, ex parte transcript.....	VIII	2923
Jocelyn Fortin, July 22, 2015, ex parte transcript.....	VIII	2985
VOLUME IX		
Jocelyn Fortin, July 23, 2015, ex parte transcript.....	IX	3096
Josh Richdale July 23, 2015, transcript.....	IX	3157
Josh Richdale, July 24, 2015, transcript.....	IX	3240
Crown's submissions, September 9, 2015, transcript.....	IX	3300

TABLE OF CONTENTS

	VOLUME	PAGE
VOLUME X		
Defense's submissions, September 11, 2015, transcript	X	3451
Crown's submissions, September, 17-2015 , ex parte transcript.....	X	3510
Crown and amicus curiae's submissions, September 18, 2015, ex parte transcript.....	X	3671
Common Law judgement, November 18, 2015, ex parte transcript.....	X	3842
VOLUME XI		
Exchange between the Court and the parties, November 23, 2015, transcript	XI	3384
Reasons for redactions, November 30, 2015, ex parte transcript.....	XI	3932
Reasons for redactions, December 1, 2015, ex parte transcript.....	XI	3963
Judgement on S.37 objection, December 4, 2015, ex parte transcript	XI	3981
S.37 evidence and exchange between the Court and the parties, November 27, 2015, transcript		
S.37 evidence and exchange between the Court and the partie, November 30, 2015, transcript		
ATTESTATION		
Attestation of the appellant	XI	3986

SCHEDULE III
DEPOSITIONS

STÉNOGRAPHE: **DIANE LEWIS**
Sténographe officielle bilingue

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 L'AN DEUX MILLE QUATORZE (2014), ce vingt-septième
2 (27^e) jour du mois de novembre.

3 **MARK FLYNN**
4 **RCMP officer**
5 **Badge #02887**
6 **DULY SWORN**

7 CROSS-EXAMINED BY Me MICHAEL LACY:

8 Q. Sorry, maybe I missed the oath, did he --

9 THE COURT:

10 No, he did it.

11 Me MICHAEL LACY:

12 Okay, I'm sorry.

13 THE COURT:

14 He did it, sorry.

15 Me MICHAEL LACY:

16 Q. Okay. I'm sorry, Sir. Last time we were talking
17 about some particular documents that have now been
18 marked as exhibits. So, they were, what I refer to
19 is, comfort letters, there were a series of three
20 (3) of them that I presented to you, do you recall
21 that?

22 A. I do.

23 Q. And they were marked, for the purposes of the
24 proceeding, as R-25.3, .4 and .5. And when I was
25 asking you some questions about those letters, one
26 of the things I suggested to you by taking you to
27 those letters was that, by necessity, RIM, time

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 Research In Motion, now, BlackBerry, had to be
2 involved in terms of the interception of a
3 particular pin and that was evidenced by the fact of
4 the comfort letters. Do you recall questions like
5 that?

6 A. I do recall questions like that, yes.

7 Q. And as I recall your answer, you indicated, well,
8 essentially, that was really in the nature of a *pro*
9 *forma* kind of situation where the investigators
10 simply would have sent that to RIM but you wouldn't
11 want us to take anything from that in terms of
12 whether RIM needs to be involved in a particular
13 interception or not. Am I correct about that?

14 A. That's correct.

15 Q. And when you say you wouldn't want us to take
16 anything from that, is that because the exact role
17 of RIM is, part of which you take the position, is
18 something that can't be disclosed?

19 A. The reason for that in those particular instances is
20 that I know, from past experience involving such
21 letters, that a request going to RIM, asking them to
22 facilitate something, doesn't necessarily mean that
23 they had to take a physical action that caused the
24 intercept to occur.

25 So, I would be reluctant to say, because a letter

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 went forward and back, that that meant that an
2 actual physical role took place in facilitating that
3 intercept.

4 Q. But, to the extent that I suggest to you, RIM has to
5 have a role, a physical role to play, in terms of
6 allowing the RCMP to intercept pin to pin
7 communications through the BlackBerry Internet
8 server. Is that something you can answer or do you
9 take the position that subject to some privilege?

10 A. I believe specifying that explicitly would reveal
11 where we can or where we can not do our intercepts,
12 yes.

13 Q. Alright. So, what I'd like to do, then, Sir, is to
14 take you to a sworn document that's been provided by
15 way of disclosure. So, this isn't anything other
16 than what the Crown has provided to me and I'll hand
17 out, with the Court's permission, a copy to the
18 Crown and two (2) copies to the clerk and one (1) to
19 you, if I might, Your Honour?

20 THE COURT:

21 Go ahead.

22 Me MICHAEL LACY:

23 Q. So, I'll give you a copy first, Sir, and I'll
24 identify it for the record in a moment. What I've
25 put before you, Sir, and provided the Court and my

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 friends with a copy of, is a document that has a
2 file number on the top right, PPSC number F11-050,
3 and on the face of the first page of the document,
4 it appears to be something that's called an
5 *Application for a Confirmation Order*.

6 A. Uh-huh.

7 Q. Am I correct about that?

8 A. Yes, you are.

9 Q. Sorry, *Application for Confirmation Order and*
10 *Sealing Order*, to be more correct. Is that right?
11 That's what the document is. Right? On the face of
12 it?

13 A. Yes. I'm just reading through, I see the sealing
14 order now, yes.

15 Q. I just (inaudible) with the title in the middle of
16 the document. In any event, this appears to be an
17 application authored by someone by the name of Jason
18 Morton, who's a peace officer, correct?

19 A. Correct.

20 Q. Do yo recognize that name?

21 A. I do not, no.

22 Q. And if you just turn to the second page, you'll see
23 the underlined affidavit that identifies Jason
24 Morton as a peace officer employed by the Royal
25 Canadian Mounted Police, do you see that?

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 A. Yes, I do.

2 Q. And can I just have a moment's indulgence, Your
3 Honour, I'm sorry.

4 THE COURT:

5 Go ahead. No, no problem, go ahead.

6 Me MICHAEL LACY:

7 (Inaudible) it's available. I'm sorry, I have a bit
8 of a cold. Thank you very much.

9 THE COURT:

10 Keep the box.

11 Me MICHAEL LACY:

12 Q. And to the extent that there's some investigative
13 privilege or public interest privilege in relation
14 to what role, if any, RIM has to have in terms of
15 allowing the interception of pin communications,
16 you'd expect every member of the RCMP to take steps
17 to protect that privilege, correct?

18 A. I would expect that, yes.

19 Q. And the document that I put in front of you, if you
20 just, if you flip through -- and I don't expect you
21 to read the whole thing, everyone is welcome, of
22 course, to read the whole thing -- it's an unsworn
23 copy of the affidavit. If you turn to the last
24 page, it appears that officer Morton signed the
25 document although the copy that's been provided is

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 not the commissioned copy so, not, actually, the
2 sworn copy, do you see that?

3 A. I do.

4 Q. But, you see, there's a note, a handwritten note,
5 underneath that, which says, "Sworn Copy 'fealed' in
6 Ontario" -- I think it's "sealed" but -- in Ontario,
7 Superior Court, Kitchener. Do you see that?

8 A. I do.

9 Q. And then, there's a word - and I don't know what the
10 word is, maybe you do - on June seventeenth (17th),
11 by justice, and I can't tell you that, is Reilly,
12 R-E-I-L-L-Y, do you see that?

13 A. I do.

14 Q. So, presuming that this is a true copy of actually
15 what was filed in the sealed version and ultimately
16 unsealed and provided to the defense lawyers.

17 THE COURT:

18 They're sealed. I think the word that you look
19 after is, "sealed on June seventeenth (17th)".

20 Me MICHAEL LACY:

21 Okay. Well, I wasn't sure so I didn't want to
22 suggest it.

23 THE COURT:

24 Yes.

25 Me MICHAEL LACY:

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 Q. And if you can just turn to paragraph 12 of the
2 affidavit, because this is the part I'm having
3 trouble with your evidence on. In light of this
4 statement that apparently was made under oath by
5 officer Morton of the RCMP. So, just before I get
6 to the question, the context is, in order to -- To
7 the extent that RIM had to be involved physically in
8 Waterloo, Ontario, with the facilitation of the
9 interception of private communications, this
10 confirmation order and underline affidavit would
11 appear at least to be the basis upon which the
12 police asked a judge in Ontario to confirm the
13 Quebec order so that it can be carried out in
14 Ontario. You're familiar with that process, right?

15 A. Yes, I am.

16 Q. It's a particular provision in the *Criminal Code*
17 that provides a mechanism to do that, correct?

18 A. That's correct.

19 Q. It's actually explained in the affidavit. But,
20 paragraph 12, officer Morton says this:

21 *Through prior*
22 *investigations, I know*
23 *that the head office of*
24 *Research in Motion Ltd.*
25 *is located at 295,*

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 *Phillips Street,*
2 *Waterloo, Ontario.*
3 *During a prior*
4 *investigation, I was*
5 *informed by Research in*
6 *Motion Ltd. employee,*
7 *Jeff Lynch, that the*
8 *interception of pin to*
9 *pin messaging requires*
10 *action to be taken by*
11 *Research in Motion Ltd.*
12 *employees, in Waterloo,*
13 *Ontario.*

14 I read that correctly?

15 A. Yes, you did.

16 Q. *As such they will only*
17 *comply with the*
18 *assistance order portion*
19 *of the authorization, if*
20 *it is confirmed by the*
21 *Ontario Court.*

22 Do you see that?

23 A. I do see that.

24 Q. So, in terms of some action being taken, it requires
25 something being done in Waterloo, Ontario, according

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 to the author of this affidavit, correct?

2 A. That's correct.

3 Q. And presumably, if we just take the presumption of
4 regularity, officer Morton would have only put
5 before the judge in Ontario accurate and truthful
6 information presumably, correct?

7 A. That's correct.

8 Q. So, is that an accurate statement?

9 A. It is an accurate statement in the proper context.

10 Q. Well, the context, here is, this authorization,
11 which was the Quebec authorization to intercept the
12 pin to pin communications, all of which are set out
13 the various authorizations, right?

14 A. Correct.

15 Q. And so, in this context, in this case, it appears
16 the police have disclosed already that RIM had to be
17 involved in Waterloo, Ontario doing some action in
18 order to facilitate the interception of pin to pin
19 communications, correct?

20 A. Drawing the line in where the actual action occurs
21 in that facilitation. So, there's many steps
22 involved in actual interception. It varies from
23 device to device. It can be something as simple as
24 providing information to us, as opposed to taking an
25 actual, as I stated earlier, a physical action that

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 leads to an actual intercept. The actions can vary
2 quite extensively from device to device
3 configuration, the way it's being used. What exact
4 involvement they have, or don't have. And in many
5 occasions, it's not until we reach the stage of
6 having the initial request come in, certain
7 information come to us about the device, the
8 configuration where it's used, what actual action
9 will be required by whom, in which situation. But,
10 that is, I believe, consistent with what I have
11 stated previously that without looking at each
12 explicit case, the level of involvement, the type of
13 involvement, where intercepts are done, or where
14 intercepts are not done, varies greatly on a case by
15 case basis.

16 So, this member's statement saying that action is
17 required, certainly action is required to -- the
18 proper word -- aid in facilitation of an intercept
19 but, not necessarily aiding in performing the
20 intercept. I don't know if that's clear enough.

21 Q. But, this whole --

22 A. There's a line somewhere.

23 Q. Sorry, I keep interrupting you, please, I thought
24 you were done. Go ahead, you wanted to say
25 something else?

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 A. No, that was it. There is a line in there,
2 somewhere, and it's that line in where we get to the
3 point where our intercepts are done that is the most
4 concerning for me.

5 Q. This all started today, when I asked you the
6 question whether or not you were asserting privilege
7 over whether or not RIM had to be involved in the
8 interception of pin communications. Do you recall
9 me asking you that question?

10 A. Yes, I do.

11 Q. This is an order and an affidavit filed in support
12 of an order that makes it one hundred percent (100%)
13 unequivocal that RIM has to be involved, in
14 Waterloo, Ontario, to facilitate the interception of
15 pin communications, doesn't it?

16 A. As you recall my answer to the first question when
17 you started, was I drew to the physical involvement
18 because the word involved an action required. Where
19 I am concerned, is about the actions required to
20 perform the physical intercept. The fact that
21 inquiries go to RIM, RIM has to look things up, RIM
22 has to do certain things, such as looking into their
23 data bases to pull information to be informative for
24 us.

25 My statement earlier was about the physical

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 involvement. These actions here, I can't tell you,
2 reading this document, in fact, I can tell you I
3 don't know from reading this document, what "action
4 required" means in this case. It could mean a very
5 broad range of things and I'm not trying to dance
6 around this, it is, there is a wide range of actions
7 required.

8 Q. We're not talking about getting subscriber
9 information, that's not what this affidavit is
10 about, you agree with me? Do you want to read the
11 whole affidavit?

12 A. I have not had the ability to read the whole
13 affidavit, so --

14 Q. It has nothing to do with subscriber information.
15 It has to do with what the police needs in order to
16 actually intercept pin to pin communications. It's
17 very particular. You see that paragraph?

18 A. I think I would need to take the time to actually
19 read it if we're going to get to that level of
20 detail. My testimony is, and my honest belief is,
21 that depending on the individual device, once we are
22 permitted to have conversations, once RIM believes
23 there is a legal obligation for them to have a
24 conversation with us on something like this, which
25 is the first step of getting this order backed,

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 because it is mainly related to, I suspect, the
2 actual assistance provision, which can be anywhere
3 from subscriber down to other types of information
4 about how the things work. Okay?

5 Q. You agree with me with respect to pin to pin
6 communications, the subscriber information, in the
7 context of this case was irrelevant?

8 A. I don't know that.

9 Q. Okay.

10 A. I don't know what devices were registered, I was not
11 involved at that level.

12 THE COURT:

13 When you say, "in this case", do you mean in the
14 present case or in the case of this affidavit?

15 Me MICHAEL LACY:

16 Sorry, the present case.

17 THE COURT:

18 Present case.

19 Me MICHAEL LACY:

20 Yes.

21 THE COURT:

22 Okay.

23 Me MICHAEL LACY:

24 Which this affidavit relates to.

25 THE COURT:

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 Alright, thank you.

2 Me MICHAEL LACY:

3 Q. If I can see Exhibits 25.3, .4 and .5., though, what
4 I want to do is to look at the document I've just
5 put in front of you, which I'll ask to mark in a
6 moment, which says that "action is required".
7 Sorry, let me rephrase that.

8 *Interception of pin to*
9 *pin messaging requires an*
10 *action to be taken by*
11 *Research in Motion Ltd.*
12 *employees, in Waterloo,*
13 *Ontario.*

14 So, first of all, it's very particular in terms of
15 the location where it has to happen, you agree with
16 me?

17 A. It's stated specifically here, yes.

18 Q. Yes, I mean, RIM has offices all around the world,
19 correct?

20 A. Correct.

21 Q. They have offices that you can access date basis
22 information, subscriber information, through any
23 number of international offices, correct?

24 A. I suspect they've put that address down there
25 because that is where the public safety office for

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 RIM operates but --

2 Q. And if we looked at the exhibit, and I'll just let
3 madam registrar locate them. If we took into
4 account the wording of paragraph 12 and we looked
5 again at the wording of the comfort letters, which
6 specifically ask through an affidavit that RIM can
7 figure certain things for the purposes of
8 facilitating the interceptions, do you recall that?

9 A. I do recall that, yes.

10 Q. Do you have your copies with you?

11 A. I do not. I did not have a copy, I was borrowing
12 the Crown's during my last testimony.

13 Q. Do you mind, just, I don't -- We can carry on, and
14 madam registrar has many documents --

15 THE COURT:

16 Yes, yes.

17 Q. So.

18 THE CLERK:

19 You ask for 25.1, 2, 3?

20 Me MICHAEL LACY:

21 It's actually 3,4,5.

22 THE CLERK:

23 I'm sorry.

24 THE COURT:

25 Give the witness my copies, purpose of your --

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 Me MICHAEL LACY:

2 Q. So, on the face of the affidavit, it says:

3 *In effect, if we don't*
4 *get a confirmation order*
5 *for this Quebec*
6 *authorization in Ontario,*
7 *RIM is not going to be*
8 *able to assist us in*
9 *intercepting*
10 *communications.*

11 That's in effect with this status. Do you agree
12 with me or disagree?

13 A. That's correct.

14 Q. Okay. And then, we have these comfort letters that
15 were provided. Madam registrar, maybe I can
16 identify it, if I can just look at that pile you had
17 there? It might be of some assistance, I'm sorry.

18 THE CLERK:

19 They're here, Mr. Lacy, they're not separate then,
20 3, 4, 5 --

21 Me MICHAEL LACY:

22 Yes, thank you.

23 THE CLERK:

24 (Inaudible), I'm sorry.

25 Me MICHAEL LACY:

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 Perhaps what I'll do is I'll just keep one copy, one
2 of them, 25.3, I'll give you 25.4. It's the same
3 wording in each of the letters, and I'll let His
4 Honour, if His Honour needs 25.5 just to follow
5 along with the wording, you may have your copy.

6 THE COURT:

7 I have it.

8 Me MICHAEL LACY:

9 Thank you.

10 Q. If you look at the language of the comfort letter
11 and, I said it's done in sort of the form of an
12 affidavit, they're done in an affidavit kind of
13 style but they're not sworn, correct?

14 A. That's correct.

15 Q. And in the example I'm using, 25.3, it's the third
16 paragraph from the bottom, but it says the following
17 language:

18 *Could you please take the*
19 *appropriate steps and*
20 *proceed with the*
21 *configurations to ensure*
22 *the successful*
23 *interception of this*
24 *device.*

25 You see that?

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 A. I do see that.

2 Q. And it names two (2) particular BlackBerry devices
3 through pin numbers, correct?

4 A. Correct.

5 Q. With references to subscriber phone numbers
6 associated with the pin, correct? Well, at least in
7 my example it says --

8 A. The phone numbers are there, yes.

9 Q. Yes. So, this comfort letter actually references
10 the, at the very top it says, *Reference*
11 *Authorization and Assistance Order*, do you see that?

12 A. I do, yes.

13 Q. So, now, we've got these comfort letters which you
14 said were simply *pro forma*, reminding RIM about the
15 confirmation, about the authorization and assistance
16 order and then, we have this affidavit in June of
17 two thousand and eleven (2011) describing how RIM
18 must be involved, in Waterloo, in order to
19 facilitate the interceptions and you're telling me
20 that the language:

21 *Could you take the*
22 *appropriate steps and*
23 *proceed with the*
24 *configurations to ensure*
25 *the successful*

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 *interceptions of these*
2 *devices -- doesn't mean*
3 *what it says, is that*
4 *right?*

5 A. I'm not saying it doesn't mean what it says, I'm
6 saying that, on a case by case basis, on a device by
7 device basis, the level of involvement that's
8 required by a wide variety of people, varies greatly
9 and it does not always mean what the common person
10 might take from that language.

11 Q. But, it's more than that, isn't it? Are you telling
12 me that you can't even confirm, giving your claim
13 about privilege, you can't even confirm for us that
14 RIM has to be involved when any new pin is being
15 intercepted, isn't that part of what you're telling
16 us?

17 A. It is exactly what I'm telling you. And part of
18 what I'm telling you is, it's actually impossible,
19 even if I wanted to or felt it was appropriate to
20 say who should be involved, where, by taking one
21 device, putting that device in front of me.
22 That is not enough information for me to say, at the
23 time of this particular investigation, who, when or
24 where needs to be involved in it, to perform the
25 intercept. So, when I'm reviewing these letters

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 that I know, and the backing orders that I know are
2 done, prior to a point when my technical staff are
3 involved in performing the intercept, that's not
4 enough for me to say exactly what actions are needed
5 to be taken, okay.
6 So, actions are always required to some degree in
7 order whether to look up information whether be as
8 simple as subscriber information, because I know
9 your statement was this is not a about that, the
10 reality is, in some cases, it is about that.
11 Because, the subscriber information is a piece of
12 information that, in some occasions, is very
13 important to us. When it proves to be unreliable,
14 well, then, the importance of it goes down. Right?
15 When the information is less reliable, it can vary
16 broadly what that action required means.
17 Unfortunately, in the BlackBerry intercept world, it
18 is extremely complex and it is extremely varied in
19 what actions are actually required in the end,
20 whether they be minimal or exhaustive.
21 It's impossible for me to stand here and tell you,
22 with a piece of paper alone, without looking at the
23 rest of the information, without looking out what my
24 staff would have done, to say what that action is or
25 was not. And I would argue that telling you what

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 the action was or was not, is what I'm saying, is
2 subject to potential harm if it's released publicly,
3 depending on what it is. If we take little pieces,
4 if, in this case, it turned out that all that
5 somebody had to do was look up subscriber
6 information or tell me information of which network
7 it was on or not on, stuff that I cannot gain access
8 to without having proper judicial authorization in
9 place. If that's all it came down to, I could tell
10 you that. I would not make any argument but, that
11 is something that needs to be protected, because
12 it's not something that can be taken and used to
13 circumvent my ability to intercept.

14 When it comes down to the explicit actions of the
15 individuals to perform, as I stated earlier, at the
16 start of this testimony, the physical interception,
17 that physical starting to touch the pathways and
18 rights of communications, that is a different story.

19 Q. Done?

20 A. I am.

21 Q. I'm going to suggest to you the following and the
22 Crown may object. So, I'm trying to be careful and
23 just to alert everyone. The notion that it is not
24 known that BlackBerry must assist the police in
25 intercepting communications that travel through the

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 BIS server is farcical. It is known, it may not be
2 well known, but it is known. I don't know if the
3 Crown objects to that on privilege or not.

4 Me ROBERT ROULEAU:

5 Actually, it's not a question of privilege. It's a
6 question of, can the witness himself answer the
7 question. How can this man say what's, what's known
8 out there.

9 THE COURT:

10 So, you're not objecting on grounds of privilege?

11 Me ROBERT ROULEAU:

12 Well --

13 THE COURT:

14 Let me just repeat the question. The notion that
15 it's not known that RIM must be involved in the
16 interception?

17 Me MICHAEL LACY:

18 Yes, a pin to pin that travels through BIS is
19 farcical.

20 Me ROBERT ROULEAU:

21 Listen, at the end of the day, what I believe is
22 that it's irrelevant because for the sake of
23 argumentation, let's say that that's true, they need
24 to be involved. Our claim is on what they should or
25 shouldn't do, we want to keep that within the scope

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 of the investigative privilege because that gives
2 out clues as to what to do or not do in the field in
3 order not to be intercepted. So, whether or not it
4 --

5 THE COURT:

6 But, the question is just the notion that it's not
7 generally known to the public that RIM must be
8 involved in independent interception that travels to
9 BIS, it's farcical.

10 Me ROBERT ROULEAU:

11 Okay. If it's --

12 THE COURT:

13 That was his question.

14 Me ROBERT ROULEAU:

15 Okay. Right. Well, then, what I would say is that
16 he's placing the witness in a situation where he has
17 to confirm that RIM has to be implicated,
18 technologically speaking, in doing a physical
19 action, which is precisely what we're trying to
20 protect. So, yes, I would.

21 THE COURT:

22 I might be wrong, I thought he already said that.

23 Me MICHAEL LACY:

24 I think he has not.

25 Me ROBERT ROULEAU:

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 No, no.
2 THE COURT:
3 Hasn't gone that far.
4 Me MICHAEL LACY:
5 He's either asserting, I thought, to this point,
6 that that was privileged and that's why I cautioned
7 before the witness.
8 THE COURT:
9 Okay. So, he --
10 Me MICHAEL LACY:
11 I'm going to take the documents from the Government
12 of Canada.
13 THE COURT:
14 Okay. You qualified it on a case basis whether or
15 not RIM has to be involved.
16 Me ROBERT ROULEAU:
17 Correct.
18 THE COURT:
19 Alright.
20 Me ROBERT ROULEAU:
21 And to what extent.
22 THE COURT:
23 Okay. Which is why you qualified paragraph 12, in
24 the Morton affidavit, okay.
25 Me MICHAEL LACY:

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 Correct.

2 THE COURT:

3 I understand. It's just a question hands off is
4 farcical. Maybe, maybe you could rearrange the
5 question in a different way.

6 Me MICHAEL LACY:

7 I'll try to be more articulate, it's not the best
8 question.

9 THE COURT:

10 Well, maybe, it's also that a negative. So, just
11 also for the transcript. So, you know, when you
12 read a transcript so it's clear.

13 Me MICHAEL LACY:

14 You're absolutely right.

15 THE COURT:

16 And you can make two (2) questions out of it.

17 Me MICHAEL LACY:

18 I will.

19 Q. We've already covered the fact that pin
20 communications, generally, can be dealt with through
21 BES server or a BIS server, correct?

22 A. Correct.

23 Q. And we've talked generally about the fact that BES
24 is a way in which a third party, other than RIM, can
25 control encryption, correct?

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 A. That's correct.

2 Q. We've also talked about PGP in that context as well
3 for e-mail communications.

4 A. Correct.

5 Q. Not pin communications, we clarified that last time.

6 A. But, we discussed it and, at one point, I was unsure
7 of whether or not PGP supported encryption on pins
8 and subsequent to that, I have gone and verified
9 that in fact, it does. But, as I testified, our
10 usual, the common place where we see it is with e-
11 mails.

12 Q. Okay. The PGP with pins is actually a relatively
13 new phenomena, is that something you're familiar
14 with or no?

15 A. I don't know the date of when it started or stopped
16 so --

17 Q. So, you couldn't tell us whether or not you could
18 PGP encrypt a pin in two thousand and eleven (2011),
19 that's not something you're aware of?

20 A. Not standing here today. I could certainly find out
21 but, not today.

22 Q. Can you send me an e-mail to (inaudible) my
23 curiosity.

24 THE COURT:

25 Not in the courtroom.

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 Me MICHAEL LACY:

2 No, definitely not.

3 Q. My question to you is premised on BIS
4 communications. And what I'm suggesting to you is
5 that when it comes to pin to pin communications that
6 are being handled -- for lack of a better word -- by
7 the BIS, the BlackBerry Internet Server, my question
8 to you is, it is well known that BlackBerry has to
9 be involved in assisting with the interception of
10 those communications and don't answer yet, unless,
11 again, my friends want to object. But, I think
12 that's, maybe a clearer question.

13 A. Yes. And I'm --

14 THE COURT:

15 Yes. Just repeat it again, as I well --

16 Me MICHAEL LACY:

17 I'll try.

18 Me ROBERT ROULEAU:

19 Good luck.

20 THE COURT:

21 When it's an important question, I like to get it
22 down completely.

23 Me MICHAEL LACY:

24 I'll do my best to repeat it exactly as I said it.

25 THE COURT:

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 Take your time.

2 Me MICHAEL LACY:

3 Q. When it comes to pin to pin communications that are
4 handled -- for lack of a better word -- by the BIS
5 server, BlackBerry Internet Server, I'm going to
6 suggest to you that it is well known that RIM has to
7 be involved in assisting with the interception of
8 those communications and the decrypting of those
9 communications. That's the question.

10 Me ROBERT ROULEAU:

11 Yes. Obviously, part of it is delicate, on my part,
12 because I would need to relate to what was done *ex*
13 *parte* in front of you. But, obviously, in
14 confirming or denying this, witness addresses what
15 can be done, what are the capacities of the RCMP to
16 -- It pertains to the RCMP's capacity of
17 interception, their advancement in these
18 technologies and their knowledge of those and in
19 confirming the fact the other party needs to be
20 involved or not.

21 THE COURT:

22 The question was just, "I suggest that it's well
23 known that RIM has to be involved." He's just
24 suggesting that it's well known, that generally
25 speaking, people out there are aware of that. He's

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 not asking him specifically what the particular
2 situation is with RIM or BlackBerry. He's saying, I
3 suggest that it's well known to the members of the
4 public.

5 Me ROBERT ROULEAU:

6 So, therefore, his answer would have no relevance
7 whatsoever because he could say, yet, there's...

8 THE COURT:

9 But, he'll argue that.

10 Me ROBERT ROULEAU:

11 ... there's a conception out there that maybe there
12 is, or --

13 THE COURT:

14 Well, in terms of --

15 Me ROBERT ROULEAU:

16 It doesn't advance my friend's case very much.

17 THE COURT:

18 Well, that's an argument. But, the question is the
19 opinion of this person is brought here. He has
20 given some opinion evidence on a variety of things
21 and he's asking if it's well known, if RIM has to be
22 involved.

23 He's not asking specifically, Does RIM always have
24 to be involved, he's saying, "In your opinion,
25 Inspector Flynn, when pin to pin is handled by the

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 BIS server, I suggest that it's well known that RIM
2 has to be involved in assisting with the
3 communication and decrypting". Is that what it was,
4 the end of your question?

5 Me ROBERT ROULEAU:

6 I get the subtlety, and if the follow-up question
7 is, Well, do they, I would then --

8 THE COURT:

9 We haven't gotten there yet. So I'm going to allow
10 that question.

11 Me ROBERT ROULEAU:

12 Yes.

13 THE COURT:

14 Go ahead.

15 A. As far as what's commonly known, I don't know. But,
16 do I believe that many would take that belief, yes.
17 But, (inaudible) broadly that's known or what people
18 think or don't think, I don't know.

19 Me MICHAEL LACY:

20 Q. What we do know is that when it comes to pin to pin
21 communications that are handled through the BIS
22 server, it's a general encryption (inaudible) that's
23 standard to all BlackBerry devices, correct?

24 A. That's correct.

25 Q. And in the course of your work, (inaudible) the

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 agency of the Government of Canada, you're familiar
2 with the communications security establishment?

3 A. Yes, I am.

4 Q. And you're familiar with documents that they've
5 produced with respect to BlackBerry and pin to pin
6 communications?

7 A. I'm aware they produced documents related to many
8 types of communications. Specific documents you're
9 talking about, I would have to see them to determine
10 whether I'm familiar with them or not.

11 Q. Sure, I'm just asking you generally if you're
12 familiar with the fact that they issue bulletins
13 commenting about things like pin to pin
14 communications, how they can be decrypted, how they
15 travel through the RIM server. Are you familiar
16 with that in a general way or no?

17 A. I'm familiar they put out bulletins about types of
18 communication and their security, that particular
19 one, I don't know, I'd have to look.

20 Q. Providing you with the document that's produced by
21 an agency of the Government of Canada, all the
22 communications security establishment, and I'm
23 sorry, Your Honour, I thought I had five (5) copies,
24 it appears I only have four (4).

25 THE COURT:

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 We can make copies.

2 Me MICHAEL LACY:

3 Yes, we'll make another copy.

4 UNIDENTIFIED VOICE:

5 Pardon me, but, I don't think we've marked the
6 affidavit yet.

7 Me MICHAEL LACY:

8 Oh! Thank you very much, I appreciate that. If I
9 can ask that that be marked with the next exhibit,
10 please, the affidavit of officer Morton, that, let's
11 just say, it was signed on June sixteenth (16th), two
12 thousand and eleven (2011) rather than sworn.

13 THE COURT:

14 Is it R-25.6? R-25.6.

15 Me MICHAEL LACY:

16 And officer Flynn is returning to the Court through
17 me Exhibit R-25.4.

18 THE CLERK:

19 Thank you so much.

20 Me MICHAEL LACY:

21 And I'll just, if His Honour --

22 Q. So, what I've put before you, Sir, is a document --

23 Oh! I found the fifth copy.

24 THE CLERK:

25 Okay. I give it to the Court, that's fine, okay.

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 Me MICHAEL LACY:

2 A document that, on the face of it --

3 Unfortunately, the HTTP address cut off went we
4 printed it but, if I had WiFi, I could show you
5 where it is on the Internet but, I don't. So, in
6 any event, I'm going to suggest to you this is a
7 document widely available on the Internet and it's,
8 it's, when I say, widely available, it's accessed
9 through a public domain space. So, I've just,
10 looking at the community communication security
11 establishment Website. And it's a document entitled
12 *Security of BlackBerry Pin to Pin Messaging, March*
13 *two thousand and eleven (2011)*, and it has a
14 subtitle, *ITSB-57B*, which I think is just an
15 internal bulletin reference. But, you know, this
16 particular document, if it's one that you've seen
17 before?

18 A. I'm reading it now and it doesn't ring a bell but,
19 I'm just through the first part here so --

20 Q. It's okay. I don't want you rush through the
21 document. I am going to ask you, I was going to ask
22 you if you'd read it before and if you're familiar
23 with the contents of it, including the way in which
24 they distinguish BES servers from BIS servers and
25 comment about the vulnerability of pin to pin

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 communications through the BIS server of a global
2 encryption key, etc. But, you may need some time to
3 look at the document, is that right? Not trying to
4 bring you back on Monday, I just...

5 A. No, no, just --

6 Q. ... you like to read it.

7 A. I guess your question is, do I recall reading this.

8 Q. That's my first question.

9 A. My answer is, I do not recall reading this specific
10 document. I've read many documents related to this
11 technology. So, it's very difficult to pick and
12 choose whether or not this one explicitly I've seen
13 before.

14 Q. Well, let's just talk a little bit about the
15 document and then, I'm not going to stop you from
16 reading it. But, you see, there's various
17 subheadings in the document. There's a purpose and
18 a background and a BlackBerry Internet Service, B-I-
19 S, versus BlackBerry Enterprise Server, B-E-S,
20 another subheading e-mail and pin to pin messaging
21 differences and then, there's a figure, you see
22 that?

23 A. Yes, I do.

24 Q. Diagram? And then, there's an explanation of the
25 diagram, then, another figure (inaudible) pin to pin

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 messages on BlackBerry devices, right?

2 A. Correct. *Sending or Receiving Pin to Pin Messages,*
3 *yes.*

4 Q. And as given the nature of your role with the RCMP,
5 I mean, this bulletin appears to be directed to
6 government of Canada Departments and Agencies of the
7 Security Vulnerability. Sorry.

8 *The purpose of the*
9 *bulletin is to advise*
10 *Government of Canada*
11 *departments and agencies*
12 *of the security,*
13 *vulnerabilities arising*
14 *from the use of*
15 *BlackBerry pin to pin*
16 *messaging service.*

17 It may be the RCMP is not considered to be a
18 department or agency and I'm not making, come up,
19 walking that. It may be because of your particular
20 role with the RCMP, it's considered to be outside of
21 the normal category of department and agency of the
22 federal government. But, I would have thought you
23 were a department or agency of the federal
24 government, are you?

25 A. Yes, we are. This type of bulletin, as it appears

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 to me, would go through what would be our corporate
2 security, our IT security people. It's possible
3 that some of my engineering staff or some of the
4 engineering staff that work for other areas may have
5 read this document.

6 Q. I guess, what I'm interested in, it seems to give a
7 particularly detailed explanation available publicly
8 about the difference between BES at insuring
9 security and the difference between BES and BIS and
10 intercept vulnerability for BIS versus BES and it
11 seems to deal with issues, in a general way, that
12 you've purported to say or the subject of
13 investigative privilege, not specifics, in a general
14 way. And what I'd ask is if you could take the time
15 to read it and tell me whether or not you agree that
16 this document deals with those types of things.

17 A. So, I will take the time to read it. But, as you'll
18 note from reading the information that we also
19 provided to you, and I believe it's approximately
20 seventeen (17) pages of information on how our
21 systems work, when we talk at a general level, I
22 don't have concerns about that. That is why we
23 shared the information that we have shared and I
24 think we've shared quite a bit of detail on our view
25 of how things work as well. As far as what is in

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 here from the details, I'll have to read it, to get
2 to the fine details of what they reveal in here.
3 But, making a statement of the communications can be
4 intercepted versus a statement of how to do it in
5 the matter that I'm speaking to, is two (2)
6 different things.

7 I'm obviously making no issue with the fact of
8 making the statement that BlackBerry communications
9 can be intercepted, which I suspect, I suspect
10 because I haven't read it. I suspect this document
11 speaks to that. It's the vulnerability that it can
12 be intercepted, that they are likely putting this
13 bulletin out to inform people and some of the rest.
14 Where I'm taking the exception, because of the
15 impact, I believe, could occur is giving information
16 as to how we do it as opposed to a general
17 description of it can be done. Right?

18 Q. But, there's more to it than that. The
19 qualitatively different way in which people -- when
20 I say qualitatively, I mean in terms of encryption -
21 - the qualitatively way in which people can
22 differently organize themselves for the purposes of
23 sending pin to pin messages which make it harder to
24 intercept is something that I understand, from your
25 evidence to this point, is something you're taking

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 the position should be a matter of investigative
2 privilege. Am I incorrect in that regard?

3 A. No, you're not. Because, if I tell you that a
4 certain action makes it harder or doesn't make it
5 harder, I'm being very informative to any individual
6 that's trying to circumvent us.

7 Q. Sure. But, this document speaks to what makes it
8 harder.

9 A. I'm not --

10 Q. The document makes it clear that if you use a BES
11 server and control your encryption, the chances of
12 having interception by way of a third party, or by
13 way of anyone else -- you can read it -- is less
14 likely because it doesn't involve the global key.

15 A. In fact, I believe I also gave that testimony in
16 this court when I expressed that the BES server is
17 used too and advertize for the purposes of taking
18 the security involved in BlackBerry communications
19 and putting it into the hands of a third party. So,
20 if that's all the document says, I take no issue
21 with that because I believe I've testified to the
22 same thing.

23 Q. And BlackBerry, this is the other aspect to this,
24 BlackBerry, in their documentation, their white
25 papers, do you know what I'm talking about, the

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 technical white papers they produce?

2 A. I know they produce many, many, many, many, white
3 papers.

4 Q. Sure. And they make the point that if you buy their
5 BES server, they don't control the decryption.
6 Right? You know that.

7 A. Right.

8 Q. Right?

9 A. And I've testified to that as well, so, yes.

10 Q. So, but, this is the point, Sir, it's the worst kept
11 secret apparently, that there's not a better way to
12 protect interceptions because if the reality is --
13 and this is just a hypothetical, I'm not asking you
14 to confirm one way or another -- if the reality is,
15 one of the things you're seeking to keep private, is
16 that there are ways in which you can organize
17 yourself that make it harder to be intercepted, I'm
18 suggesting to you, that is well known within the
19 public community, the Internet community and the
20 technical community. And are you in a position to
21 answer that or not?

22 A. I am. The, it comes down to where does the grey
23 area transition from white to grey to black, okay?
24 The general discussion we're having here, right now,
25 and again, I have not read explicitly here, but, if

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 this document speaks similar to what I've testified
2 that BES devices allow a third party to control
3 encryption, obviously, that makes it more difficult,
4 okay? My understanding of the level of knowledge
5 you're seeking from us, based on the letter of
6 request that I read, was wanting to know the points
7 of interception, the capabilities of our systems,
8 that go far beyond this.
9 If you're simply asking for the level of information
10 that you challenge me on right now, that does a BES
11 sever utilization make it more difficult to
12 intercept? I'm more than prepared to say yes to
13 that. If you want to know the details about how it
14 can be configured, how a device can be figured, what
15 networks that can be on and so on, that is where I
16 draw the delineating mark point in saying, you're
17 transitioning from a general knowledge that is
18 common to explicit things that will defeat the
19 capabilities of my team to perform the actions they
20 were authorized to perform on these individual
21 judicial authorizations.
22 It's the level of detail in where that line turns
23 white to grey to black and in that grey area, it's
24 very difficult to draw the line of saying, that one
25 more point, is okay to go out. And then, the next

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

- 1 point, well, that's very close, that can go out.
- 2 The fact remains that we have seen an impact, in the
- 3 past, as information gets revealed on various
- 4 technologies that people take advantage of those
- 5 fine little points. So, in my testimony, I've given
- 6 details that I believe are acceptable, right?
- 7 If I took a very strong position, I wouldn't even
- 8 want to admit BES this or BIS that and talk about
- 9 the keys and the encryption because that is
- 10 important. But, I believe that is commonly known
- 11 and I want to be careful not to go too far to a
- 12 point where I am enabling further things to be done
- 13 to defeat the capabilities of my team.
- 14 Q. But, it's more than that, because one of the things
- 15 you indicated, at least in the, in camera hearing,
- 16 we have a redacted transcript but, in the in camera
- 17 hearing is that the relationship between RIM,
- 18 BlackBerry and the RCMP is an important aspect that
- 19 needs to be preserved in terms of this investigative
- 20 privilege issue, not the details of it, just in a
- 21 general way, am I incorrect about that?
- 22 A. The general way. So, the fact that the RCMP has a
- 23 relationship with RIM, that we have Court orders, we
- 24 have intercepts on their network, no. Anything
- 25 below that, yes.

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 Q. BlackBerry themselves make it clear in their
2 material - and you can refresh your memory from some
3 of it if you'd like - that if you communicate
4 through a BES server, whether you're legitimate
5 organization or illegitimate organization, that the
6 only one who's going to control the encryption, is
7 the administrator of the server, correct?

8 A. Correct.

9 Q. The only way, there's two (2) things we talked about
10 the RCMP have to do to be successful with pin to pin
11 communications, one is intercept the data, correct?

12 A. Correct.

13 Q. And the second is to decide for the data, correct?

14 A. Correct.

15 Q. The only way to decide for the data, is with an
16 encryption key, correct? Not where you get the key
17 from. The only way to decide for the data is with
18 an encryption key, correct?

19 A. Depends on what you mean by that, okay. Because, we
20 have the key meaning gaining access to the key,
21 there's access in keys for encryption, there's
22 defeating vulnerabilities in, encryption protocols,
23 there's a lot of ways of doing it. So, yes, you
24 have to figure out, you have to be able to reverse
25 the encryption process.

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 Q. Let's say it that way, you have to be able to
2 reverse the encryption.

3 A. Correct.

4 Q. In BES servers, RIM doesn't control the key or the
5 infrastructure to help you decrypt or reconstruct
6 the message in a readable format, correct? Or, you
7 can't answer that?

8 A. I don't want to answer it in a way that is
9 incorrect. I will say, generally speaking, that is
10 correct.

11 Q. Of course, they can assist you in understanding the
12 technology in terms of how the encryption works in a
13 BES server, correct?

14 A. Without saying yes or no, obviously, they're the
15 creators of the technology. But, I'm not stating
16 whether they have or had not done so.

17 Q. I don't know if you, I made a suggestion to you and
18 I haven't produced all the newspaper articles about
19 this issue that BlackBerry RIM was having in India.
20 Do you recall my questions in that regard to you?

21 A. I recall you speaking about India, yes.

22 Q. There's also the United Arab Emirates that had the
23 same issue. Are you familiar with that issue?

24 A. I'm aware they had issues with their -- am I
25 familiar right now what the issue was, I do not

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 recall, other than that it was related to some sort
2 of demand on the part of the government to provide
3 assistance to them.

4 Q. Yes, if I --

5 A. I don't recall the outcome.

6 Q. If I suggested to you, you may not be able to answer
7 this then, if you don't recall the outcome. If I
8 suggest to you that the issue at the time involved
9 both BIS, pin to pin communications and BES pin to
10 pin communications. Do you know that much about the
11 dispute or no?

12 A. I do.

13 Q. And what BlackBerry made clear was We will always
14 assist, pursuant to a lawful demand, the
15 interception of pin to pin communications that
16 travel through the BIS server, where we control the
17 encryption key. You recall that being part of what
18 BlackBerry made clear?

19 A. No, I do not. So, if you have a newspaper article
20 for that, I'd be happy to read it.

21 Q. And the other aspect of it was when it comes to BES
22 communications, they don't control the encryption
23 key, so, they can't make it available to law
24 enforcement personnel in any country. Do you recall
25 that being part of the answer from RIM?

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 A. No, I don't.

2 Q. I'm going to move in a slightly different direction.

3 One of the things you've talked about where in the

4 path of travel it gets intercepted, this is the

5 communication, the data --

6 THE COURT:

7 Before you do that, do you want to file this?

8 Me MICHAEL LACY:

9 Oh! I'm sorry, Your Honour. Yes, I probably have,
10 not that I have --

11 THE COURT:

12 Up to you.

13 Me MICHAEL LACY:

14 No, I want to file it, I don't want to say it as if
15 the witness is being an inconvenience. I said I
16 would give the witness an opportunity to review it,
17 so, I should probably let him review it before we
18 mark it. But, I would like to mark it.

19 THE COURT:

20 Okay. We'll leave it until after the break. Go
21 ahead.

22 Me MICHAEL LACY:

23 Q. Thank you. Just in terms of this, I understand, I
24 mean, I'm not going to be able to ask where you
25 intercepted on the path of travel. But, if I

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 suggested to you that when you send a pin
2 communication from a device, and it travels to a
3 cell tower, the data path that goes through the cell
4 tower doesn't contain information that the cell tower
5 readily identifies as a pin communication. Are you
6 able to speak to that or not?

7 A. Yes, you have to get you to state out again because
8 I...

9 Q. Sure.

10 A. ... I think I missed part of it, so --

11 Q. So, if I'm outside the courtroom with my BlackBerry
12 device and I'm sending a pin communication to
13 someone and it hits the nearest tower near the
14 courthouse in Laval, that's the nearest point of
15 entry into the, into the pathway of communication.
16 When that data leaves my device, it's going to have
17 not just the substance of the message, it has all
18 kinds of other data routing information, for lack of
19 a better word, correct?

20 A. Correct.

21 Q. And I'm going to suggest to you that the way pin
22 communications work is that when that data hits the
23 tower, the tower will recognize that the path of
24 travel for that communication is through a RIM
25 route, it's to be routed to the RIM server, if it's

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 a BIS communication. Is that something you're
2 familiar with?

3 A. There would be an IP address that tells it, where
4 that packet is destined.

5 Q. Right.

6 A. So, for the RIM-based communications, then, it takes
7 a (inaudible) but, that again it depends on the
8 configuration of the network, the device, exactly
9 which path. It's not always the same path.

10 Q. But, it's not as if that data pack communicates with
11 the cell tower in a way that allows the cell tower to
12 recognize it's a pin communication.

13 A. That's correct. The cell tower, it is Internet
14 traffic as far as the (inaudible) network is
15 concerned.

16 Q. What first recognizes that, as a pin communication
17 if it's BIS, is the RIM server. Do you agree with
18 me or disagree?

19 A. It's, the IP address is put on the packet when it's
20 sent by device, depending of where the device wants
21 it to go. So, whether it's a pin, a BES or
22 whatever, the network doesn't draw any inferences
23 other than it looks at the IP address that's on that
24 packet as it leaves a device, travels through the
25 air, goes through the network. It is simply an IP

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 address. It's not telling that it's a pin or
2 anything different.

3 Q. Right. And as it effectively gets to RIM, because
4 that's the path of travel, if it's a pin associated
5 IP address, it goes to RIM, correct?

6 A. Correct.

7 Q. And it's the RIM technology, infrastructure,
8 whatever we want to call it, that's able to read the
9 path or read the data and identifies it as a pin
10 communication. Do you agree with me or disagree?

11 A. Their server has to be able to identify what it is
12 in order to handle it properly.

13 Q. Right.

14 A. Yes.

15 Q. And that applies whether it's actually BES or BIS,
16 correct? It all goes through a RIM relay, correct?

17 A. Depending on the configuration of the device and
18 depending on which type of communication type it is
19 using.

20 Q. We're talking about pin to pin communications?

21 A. Pin to pin, yes, it does.

22 Q. So, let's just stick with pin to pin. All pin to
23 pin communications, whether BES or BIS, travel
24 through the RIM relay, correct?

25 A. At some point, that's correct.

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 Q. And that's -- I think you told us that's not
2 necessarily Waterloo, is that correct?

3 A. Depending on the configuration of their network,
4 they may send it to anyone of their servers. I
5 don't know where all their servers are.

6 Q. Anywhere in the world, right?

7 A. Potentially, that's correct.

8 Q. And you can't tell us exactly where you intercept
9 the communication, correct?

10 A. That's correct.

11 Q. How can we know they were intercepted in Canada?

12 A. Our actions are all based here.

13 Q. It's a different question. You're physically here,
14 that has nothing to do. If you can't tell me what
15 relay, where in the RIM network it was intercepted,
16 how do I know it was in intercepted in Canada?

17 A. If you don't know where we do our intercepts, you
18 don't know that answer.

19 Q. So, I can't know, because of your claim of
20 investigative privilege, where in the World Wide
21 Network of infrastructure that RIM owns, you've
22 intercepted my communications, is that right?

23 A. If I tell you --

24 Q. (Inaudible) communications.

25 A. If I tell you where we've intercepted them, you will

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 know our capabilities or our lack of capabilities.

2 Q. So, I can't know?

3 A. I -- no, if can finish here. I can tell you that in
4 all the locations where we have our equipment, where
5 we gain access to communications, I can tell you,
6 that is on Canadian soil.

7 A. But, I can't verify that.

8 Q. You can't without me telling you where, that's
9 correct.

10 Q. Right. I have to just accept that.

11 A. That's correct.

12 Q. I can't challenge the claim because there's no way,
13 based on the claim of privilege, there's no way for
14 me to independently assess that, fair enough?

15 A. That's correct.

16 Q. One of the things, just before, if it's appropriate,
17 I'll ask His Honour, of course, to take a break.
18 There's data that, I'm going to suggest to you,
19 sometimes, came through the interception process
20 that contained scrambled characters. Do you know
21 what I'm talking about?

22 A. I would have to see it.

23 Q. Okay. So, I'm going to show you, if I can, as a few
24 examples, but I'll just hand out, I have five (5)
25 copies of each, so I can hand out. So, I'll just

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 give you that one first. I want to make sure it's
2 the same. It's hard sometimes just to keep it all
3 straight, yes. And I'll identify it for the record
4 in a moment. I thought I had been trained well.
5 I'm sorry, Madam registrar, I only have one, one for
6 the Court right now but, I will make the second
7 copy.

8 THE CLERK:

9 No problem, thank you.

10 Me MICHAEL LACY:

11 Q. There's nothing particularly significant about the
12 communication I've put in front of you but, if
13 you'll accept for the purposes of my question this
14 came from disclosure.

15 A. Yes.

16 Q. And it is the type of raw data that you describe in
17 you report and by that I mean it's got the fields
18 xMata (phon.) source, xMata destination, xMata date,
19 subject, etc., correct?

20 A. Correct.

21 Q. And information about the intercept day and a
22 sending device day, correct?

23 A. Correct.

24 Q. So, this one example I put in front of you has five
25 (5) characters. It looks like some French language

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 characters, it looks like the character for Euro, I
2 think that's what that is and I'm not trying to
3 misstate that. And then, it starts out with text.

4 *So, is almost one (1),*
5 *one (1), then the rate is*
6 *our rate at point nine*
7 *eight (.98), he just sent*
8 *me the rate.*

9 I'm just trying to identify the document. Have I
10 read that relatively correctly?

11 A. Correct. With approximately six (6) characters that
12 appear to be non-standard characters.

13 Q. Oh! Because of the, I can't recall that, the
14 ellipsis, or what would you call that, the arrow?

15 A. No, I'm including the arrow in that.

16 Q. You left arrow, okay. And are you able to tell us
17 whether or not that is something that happens as a
18 result of the interception process, the decryption
19 process or whether or not that's actually part of
20 the message?

21 A. I'm not able to tell you just by looking at this.

22 Q. What would you have to do to tell us?

23 A. I would have to go back to the processing of this
24 and look at any issues that were there and see
25 whether or not this issue has a reason that caused

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 that to be there.

2 Q. Okay. So, this has never be brought to your
3 attention, not this particular example but, this
4 phenomena?

5 A. We have had, during the time of operating our
6 processing systems where we have had unusual
7 characters that are used, that have caused
8 processing issue. What that issue comes up, it's
9 addressed, our engineers take something like this
10 and analyze it to determine what caused the problem.

11 Q. What are the types of things that cause the problem?

12 A. We have had it where, in a particular field, a
13 character length, unusual character sets are used
14 that are not recognizable and the system thinks
15 there's a problem and doesn't put the output out or
16 puts it out.

17 Q. Can I just try to help to explain that first of
18 all...

19 A. Yes.

20 Q. ... because I think I understand what you're talking
21 about. If those people who text or use BBM with,
22 you know, those characters that our children
23 sometimes use, the happy face, probably people under
24 twenty-five (25), happy faces and things like that,
25 sad face, whatever, surprised face, that's the type

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 of thing that your system would, when you're
2 deciphering a message, would convert into a
3 character, as opposed to replicate the visual
4 representation of those characters?

5 A. That specific example, I'm talking something
6 different.

7 Q. Okay.

8 A. Something different. And I don't want to tell
9 someone what to do to cause a problem with our
10 system but, I can tell you that at one time, we did
11 have an issue where an unusual character that we
12 would not expect to see on a device was inserted
13 somehow by a user that caused the system to not
14 recognize it properly, okay? That was, caused an
15 alert on the system, it was detected, (inaudible)
16 occurred, they went back, looked at it and made
17 modifications to the system.

18 Q. So one of the things we've talked about last time
19 was, I think, the willingness on a general level of
20 providing us any situations of, probably
21 mischaracterizing ain't exactly but, of failures or
22 where you had to rerun data, that kind of thing?

23 A. Yes.

24 Q. Is that the kind of scenario you're talking about?

25 A. That is the scenario I'm talking about and we've

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 been working through the process of getting that
2 material together for a you.

3 Q. Let's put aside that disclosure for a second. So,
4 you're telling me that we should find then, in that
5 material you're putting together, if this is what
6 caused the characters in this example, we should
7 find a corresponding alert that there had been a
8 problem deciphering or reading the message.

9 A. I would hope that it'll be there, I would hope that
10 it was enough to either trigger a fault on the
11 system or that is was enough that an investigator
12 saw something and brought it to our attention, yes.

13 Q. But, doesn't that -- Go ahead, sorry.

14 A. I think I'll get to your point and I'll say it for
15 you.

16 Q. Okay. It's easier.

17 A. Yes, faster. Am I saying that it is always going to
18 cause an alert, or that our investigators, when they
19 see something like is always going to let us know,
20 no. It would be impossible for me to tell you
21 that's always going to be there.

22 I can tell you that we regularly test the system, we
23 run large amounts of data through it to try and
24 ensure that everything comes out and that, when we
25 do output stuff, we output it through the reversal

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 process of what we're able to reverse, okay? So, if
2 there was something in there that was odd, which
3 could have been these characters entered by an end
4 user or rather there was something put in there that
5 was an unusual, not common language character that
6 we see in these devices, could it put something out
7 like that, yes.

8 When we see those, if they're brought to our
9 attention, we go through and try and improve the
10 system. But, as you know, if you use a BlackBerry
11 regularly, this could be what was actually sent. If
12 the device sends something that is garbled, it comes
13 out garbled. A reversal of the process is a
14 reversal of the process. So, something is garbled
15 when it goes in, that is what we treat.

16 Q. I don't use BlackBerry anymore, after this case.
17 But, in light of what you just said, sure, that's
18 one possibility, is that's the way it was inputted.
19 But, you've recognized there are circumstances where
20 it relates to a flaw or a problem with the ability
21 to render a message readable, correct?

22 A. Potentially.

23 Q. That has to do with your system architecture,
24 doesn't it? If it's that, if it's that latter
25 example I just gave you.

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 A. Could it be, I don't, system architecture is the
2 word.

3 Q. Software...

4 A. Could it be the software...

5 Q. ... or whatever.

6 A. ... does not have the property coding for whatever
7 it was entered there, that is possible.

8 Q. Okay. Can I ask that that be marked as the exhibit?
9 And I'll take the witness' copy. Unless you wrote on
10 it, did you?

11 A. I did not write on this one.

12 Q. So, I'll take that as the second, and fourth copy of
13 that --

14 THE COURT:

15 25.7.

16 Me MICHAEL LACY:

17 Q. And then, I'll just take you to one (1) or two (2)
18 other examples of this. This is one that it seems
19 to be more (inaudible). So, it's a communication,
20 I'll pass one out to the Crown.

21 THE COURT:

22 25.7

23 THE CLERK:

24 (Inaudible) identified...

25 THE COURT:

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

- 1 I'll write 25.7.
- 2 THE CLERK:
- 3 And you call it what? (Inaudible)
- 4 Me MICHAEL LACY:
- 5 Call it Raw -- Sorry, Your Honour, if I can give
- 6 some...
- 7 THE COURT:
- 8 Go ahead.
- 9 Me MICHAEL LACY:
- 10 ... assistance. I think we'd be okay calling it Pin
- 11 to Pin Printout. Is that fair, Officer?
- 12 A. Not very technical but, it just helps the Court to
- 13 identify it.
- 14 Me MICHAEL LACY:
- 15 Sure.
- 16 UNIDENTIFIED VOICE:
- 17 HTML?
- 18 Me MICHAEL LACY:
- 19 Yes, it is.
- 20 A. I would call it a message with the intercept date of
- 21 --
- 22 Q. Well, that's not accurate because it's actually more
- 23 than one message.
- 24 A. Okay.
- 25 THE CLERK:

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 But Pin to Pin Printout.

2 Me MICHAEL LACY:

3 It's a pin to pin HTML printout.

4 THE CLERK:

5 Thank you very much.

6 Me MICHAEL LACY:

7 And, I've now provided a second example, which is a
8 seven (7) page document and I'll ask -- Madam
9 registrar, can you give that to His Honour and then,
10 I'll give you the witness' copy.

11 Q. And we see similar, a similar phenomena. It's like
12 the same characters, do you see that?

13 A. I do see that, yes.

14 Q. And I gather the same, you'd provide the same
15 explanation, it could be any number of things,
16 correct?

17 A. Correct.

18 THE COURT:

19 Q. But, that might be, when he sent these emoticons,
20 you know what I'm referring to?

21 A. Yes.

22 Q. Sometimes you send an emoticon and the actual Smiley
23 Face doesn't come through, you get, it could be
24 something like that. Could that be an explanation?

25 A. It could be but, to say whether it is or not, I'm

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 not able to do so.

2 Me MICHAEL LACY:

3 Q. Can I just follow up on what His Honour is saying
4 because we talked about that briefly, in terms of
5 questions I asked you. You'd have to check but, for
6 regular pin to pin communications at the time, do
7 you know if emoticons were an option?

8 A. I don't know.

9 Q. That's a relatively new phenomena in connection with
10 BBM message and I'm going to suggest to you, is that
11 something you're familiar with or not?

12 A. Not at all.

13 Q. Okay.

14 THE COURT:

15 Q. You're not familiar with what?

16 A. I'm not familiar of when the ability to use
17 emoticons came in or, to be honest with you, I'm not
18 even positive if it's available on pin to pin today.
19 I would have to look to see, I'm not familiar with
20 that.

21 Me MICHAEL LACY:

22 Q. Thank you. Find if Mr. Gauthier surrendered his
23 device of BBM messages you can do it. He has a lot
24 of Smiley Faces.

25 Me ROBERT ROULEAU:

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 He does mostly frowny faces.

2 Me MICHAEL LACY:

3 That, I believe.

4 A. And I'd like to add one part here. Can I see the
5 original message that you took from me?

6 Me MICHAEL LACY:

7 Oh, yeah! Of course, sorry. It's the same user as
8 you're going to point out, I think, for the same pin
9 communication, communicator in law, perhaps, I don't
10 know. Okay. Because that's now been marked as an
11 exhibit so, we'll just refer to that as Exhibit
12 25.7, okay?

13 THE COURT:

14 It's a seven (7) page document, we'll mark it 25,8?

15 Me MICHAEL LACY:

16 Yes, thank you, Your Honour. Can I do just a copy
17 of that.

18 THE COURT:

19 Madam clerk, the seven (7) page document, 25.8.

20 Me MICHAEL LACY:

21 Q. Does that help you, having 25.7 in front of you?

22 A. It did, I just made a comparison.

23 Q. Okay, yes. Go ahead, explain your comparison.

24 A. Okay. So, when I look at the comparison between
25 these two (2) and I see the same character set from

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 that one instant to this particular messaging, this
2 actually is one message.

3 Q. I see, okay.

4 A. It's a back and forth...

5 Q. Yes.

6 A. ... stream that they just don't start a new thread,
7 they just go back and forth. When I see that
8 occurring again, like this, it moves my, as far as
9 if I was the one operating the system that decodes
10 this, it takes my suspicion away from it being
11 something corruption that was sent from the device
12 to point towards a character set or a character that
13 has likely entered into that field, that the system
14 did not handle or know how to handle other than to
15 just output the character set representation of the
16 values (inaudible).

17 Q. Well, you'd have to go back and look, right, at the
18 actual data that was intercepted, wouldn't you?

19 A. In some cases, looking at the data, it'd be more
20 trying to replicate the behavior because sometimes
21 looking at the data is not enough to actually tell
22 you what caused that character to be there because
23 you look at the data, there's a value there, it is a
24 value. We could take this and go back the other way
25 to create the value that created this. So, I could

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 take this message as it is here and reverse it back
2 to get the values that led to this occurring in the
3 screen. So, technically, I would not have to have
4 the actual data to do that, I could take this in of
5 itself and then, what we would do is we would try to
6 find out through investigators if they know what the
7 end users might be doing.

8 We would look at whether or not there were changes
9 in the capabilities, for example, emoticons came as
10 a feature and we would try to simulate something to
11 create the same output.

12 Q. Okay. Does the hashtag --

13 THE COURT:

14 Just, Mister, at the appropriate time, you decide,
15 but, we will take a break. Also, to let him read
16 the document. So, pick the appropriate time.

17 Me MICHAEL LACY:

18 I think I might be able to finish in five (5) or ten
19 (10) minutes. So, if everyone is okay with that,
20 then, we could take the break and let him read the
21 document and --

22 THE COURT:

23 Madam clerk, is that okay?

24 THE CLERK:

25 That's fine, thank you.

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 Me MICHAEL LACY:

2 Q. Just on that point, then, the hash value comparison,
3 we talked about this before, the MD-5 hash value
4 comparison, that just tells you the data, that tells
5 you it's the same as it went in and as it came out,
6 correct?

7 A. Correct.

8 Q. It doesn't really assist you if there was some kind
9 of flaw in terms of the ability to decrypt some
10 aspect of the message. Because it's going to have
11 the same MD-5 hash value?

12 A. Correct, yes.

13 Q. Okay. And one of the things that you talked about
14 in a general way was this sort of grey area with any
15 law enforcement technique. There's this area where
16 there's white, you have to give disclosure of the
17 confession and there's back, you're not going to
18 give informant privilege and then, there's a wide
19 grey area, correct?

20 A. Correct.

21 Q. When I say never informant privilege, you know what
22 I mean, correct?

23 A. I know what you mean.

24 Q. And, in this case, in this context, I'm going to
25 suggest to you that one of the investigative

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 techniques that privilege was asserted over, at one
2 point in time, was the use of a, in French, the
3 acronym, I think, is IDM, what I, in English, I
4 think the acronym is MDI.

5 A. Correct.

6 Q. Which allows the police to engage in a certain
7 action for the purposes of reading information about
8 a mobile device that is transmitting information.
9 It's a very general description but, you know what
10 I'm talking about, correct?

11 A. I know what you're talking about.

12 Q. And originally, I'm going to suggest to you that, at
13 one point in time, even for the purposes of the
14 affiant who wanted to know more about how that
15 device worked, your group took the position that you
16 couldn't tell the affiant about that because it was
17 a matter of privilege. Do you what I'm talking
18 about?

19 A. Yes, I do.

20 Q. And that's reflected, and we don't need to mark them
21 if you know what I'm talking about, that's reflected
22 in some e-mail communications, at one point in time,
23 where the affiant was making inquiries and they were
24 told, the affiant was told, You got to speak to Mark
25 Flynn because this is a matter over which there's a

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 privilege claim, correct?

2 A. That's correct.

3 Q. But you know that that's been disclosed, correct?

4 A. I do know that's been disclosed.

5 Q. You know that the operability of that has been
6 disclosed, how it works, correct?

7 A. That's correct.

8 Q. You know that the number of times it was used has
9 been disclosed, correct?

10 A. That's correct.

11 Q. Whether it was successful or not has been disclosed,
12 correct?

13 A. That's correct.

14 Q. And, obviously, from your perspective as a, I mean,
15 no disrespect, I forget your exact title in terms of
16 tech. ops but, your high position in terms of
17 special (inaudible), your preference would have been
18 to keep that secret in long (inaudible)?

19 A. Components of that, yes.

20 Q. And but, you ultimately, you were involved,
21 presumably, at some level, in ultimately
22 understanding that you had to let some of that go
23 for the purposes of allowing the accused to make
24 (inaudible), that's correct?

25 A. Not in the characterization that you've put it but,

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 yes, I was definitely involved with the case that
2 led to that level of detail going out, yes. And
3 some of that was through disclosure and some of it
4 was through some airs that were made by some of our
5 members.

6 Q. Not in this case, in another case you're talking
7 about?

8 A. In other cases, correct.

9 Q. But, you know, if something was privilege and it was
10 released in error there were mechanisms to restore
11 the privilege.

12 A. Correct.

13 Q. I mean, you're an officer for a long time, you know
14 council can't take advantage of inadvertent errors
15 with respect to privilege matters, correct?

16 A. Correct.

17 Q. So, all I'm suggesting to you, Sir, is that
18 obviously, from your position, you'd like to keep
19 every sort of high tech technique that you can
20 secret because it's more efficacious for law
21 enforcement for these techniques not to be released,
22 correct?

23 A. I like to keep the information that would enable
24 somebody to circumvent our abilities to surveil
25 them, secret, that's correct.

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 Q. Well in the -- Go ahead, sorry.

2 A. When there's a balance of things that I know we need
3 to release, for example, a lot of the details in the
4 seventeen (17) page report. My natural instinct
5 would be to have nothing go out, okay, my natural
6 instinct would be that.

7 Although I have learn throughout my time in this
8 specialization, that that is not the correct answer
9 all the time and that there needs to be an
10 appropriate balance (inaudible), which is why things
11 like we disclose that we are intercepting based on
12 the pin address, okay? That pin address, is
13 something that I would love to keep secret because I
14 don't want to tell somebody that that's my selection
15 criteria.

16 But, I recognize that in order for you to understand
17 and know that we've intercepted the correct devices
18 or that we've intercepted the wrong one, if that
19 were to ever happen, that you need to know that
20 information. So, we let that out. Again, there's a
21 balance.

22 I do not take the view that everything needs to be
23 protected. I take the view that things that can be
24 used to circumvent our ability to intercept, need to
25 be protected if there's not a strong counter

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 argument as to why it needs to be released.

2 Q. You may not be in a position to answer this
3 question, I'll give you a fair warning. Were you
4 involved in an institutional level when the RCMP
5 tried to keep the details of projects like Mr. Big
6 operation secret?

7 A. Absolutely not.

8 Q. Okay. Thank you. Those, I think, are my, they are
9 my questions, Your Honour. I don't think, they're
10 my questions, if we can just take the break, you can
11 look over that document. All I've asked you really
12 to do, is to confirm, I guess generally, what I
13 suggested to you the document speaks to. I think
14 you said if that's all the document says, you would
15 expect it to say that. But, why don't you take a
16 few minutes, if we can. That agree with
17 (inaudible).

18 THE COURT:

19 Yes. It's fine.

20 THE AUDITION IS SUSPENDED

21 UPON RESUMING

22 Me MICHAEL LACY:

23 Thank you, Your Honour. Mr. Flynn had an
24 opportunity to review the document and, consistent
25 with what he said, his evidence was, the expected

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 contained the kind of general information and
2 disclosure we've talked about, and...

3 THE COURT:

4 But, your basing that on what he told you during
5 the -- Or you're going to ask him a question?

6 Me MICHAEL LACY:

7 No, no, he said that during the evidence.

8 THE COURT:

9 He did, okay. Alright.

10 Me MICHAEL LACY:

11 Q. I'm just confirming that, consistent with what he
12 said, I understand that, having read the document,
13 you agree, Sir, that it's consistent with what you
14 thought it would be, before you had read the
15 document?

16 A. That's correct.

17 Q. On that basis, Your Honour, I wonder if I can ask
18 that it be marked as an exhibit.

19 THE COURT:

20 Yes.

21 Me MICHAEL LACY:

22 Q. But before I do so, just to indicate that the
23 figures that are contained within the document,
24 Officer Flynn, I understand that, on a general macro
25 level, you have no issue with those diagrams,

/jtb

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 correct?

2 A. Correct.

3 THE COURT:

4 25.8?

5 THE CLERK:

6 9

7 THE COURT:

8 9?

9 THE CLERK:

10 Yes.

11 Me MICHAEL LACY:

12 You're sure you don't want that for your friends
13 back at the -- Those were my questions.

14 THE COURT:

15 Q. Is there anything in that document you feel is
16 privileged?

17 A. No.

18 Me MICHAEL LACY:

19 Those are my questions.

20 THE COURT:

21 Thank you. Anything other, defense councils, since
22 your parties to this motion, do any of you have
23 questions?

24 AN UNIDENTIFIED VOICE:

25 No questions, Your Honour.

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 THE COURT:

2 No. Did you receive their forms, Madam clerk?

3 THE CLERK:

4 I received two (2), the others promised to give it
5 to me next day.

6 THE COURT:

7 Alright. So, you give me copies on Monday, that's
8 fine. Crown, any redirect?

9 Me ROBERT ROULEAU:

10 None.

11 THE COURT:

12 Okay. So, you can come back if you want but you're
13 excused.

14 AND FURTHER DEPONENT SAITH NOT.

15

Mark Flynn, November 27, 2014 - Transcript

540-01-063428-141

MARK FLYNN
CROSS-EXAMINATION
Me LACY

1 Je soussignée, DIANE LEWIS, STÉNOGRAPHE OFFICIELLE
2 BILINGUE pour les districts de Bedford, Joliette,
3 Labelle, Laval, Longueuil, Montréal, Richelieu,
4 Sherbrooke et Terrebonne, déclare sous mon serment
5 d'office que les pages ci-dessus sont et contiennent
6 la transcription de CD, hors de mon contrôle, et est
7 au meilleur de la qualité dudit enregistrement. Le
8 tout, conformément à la loi.

9

10 ET J'AI SIGNÉ

11

12

13

14 DIANE LEWIS

15 STÉNOGRAPHE OFFICIELLE BILINGUE

C A N A D A

PROVINCE DE QUÉBEC

DISTRICT DE LAVAL

COUR SUPÉRIEURE

(Chambre criminelle)

No : 540-01-063428-141

DEVANT L'HONORABLE MICHAEL STOBER, J.C.S.

SA MAJESTÉ LA REINE,

Plaignante

- vs -

RAYNALD DESJARDINS & AL,

Prévenus

COMPARUTIONS :

Me ROBERT ROULEAU,
Me ALEXIS GAUTHIER et
Me MARIE-CHRISTINE GODBOUT,
Procureurs de la poursuite

Me MARC LABELLE (ABSENT) et
Me KIM HOGAN,
Procureurs de la défense - R. Desjardins

Me LACEY (ph),
Me CORBO,
Me HÉBERT,
Procureurs de la défense

LE 1er DÉCEMBRE 2014

1 L'an deux mille quatorze (2014), le
2 premier (1er) jour du mois de décembre.

3
4 LA COUR :
5 Allez-y, madame.

6
7 --- ASSERMENTATION DES INTERPRÈTES ANGLAIS/FRANÇAIS.

8
9 LA COUR :
10 Bon! Alors, madame la greffière... Premièrement,
11 monsieur Desjardins, vous êtes avec nous?

12 M. DESJARDINS :
13 Oui, monsieur le juge.

14 LA COUR :
15 Est-ce que les écouteurs fonctionnent?

16 M. DESJARDINS :
17 Tout fonctionne.

18 LA COUR :
19 Oui, ok. Maître Gauthier, pouvez-vous... ou maître
20 Godbout pour identifier les accusés?

21 Me GAUTHIER :
22 Oui. Première rangée, à la gauche, monsieur

540-01-063428-141
1er décembre 2014

PRÉLIMINAIRES

1 Mirarchi, monsieur Milioto, monsieur Simpson,
2 monsieur Magistrale.

3 Deuxième rangée à partir de la gauche, monsieur
4 D'Addario, monsieur Racaniello et monsieur Fracas.

5 LA COUR :

6 Merci. Et tous les accusés ont indiqué que les
7 écouteurs fonctionnent; c'est exact? Ça va. Un
8 moment. So, I'd like to know, Mr. Desjardins, if
9 you can hear the translation into French, what I'm
10 saying?

11 M. DESJARDINS :

12 Oui, j'entends, monsieur le juge.

13 LA COUR :

14 D'accord. Vous avez entendu les interprètes; c'est
15 ça?

16 M. DESJARDINS :

17 Oui.

18 LA COUR :

19 Merci. Vous pouvez consigner ça au procès-verbal,
20 madame la greffière. Madame la greffière, avez-vous
21 vérifié, comme vous faites chaque journée, que le
22 CourtLog fonctionne non seulement pour ce qui se dit
23 dans la salle de cour, que ça soit en anglais ou en
24 français, mais ce qui est traduit par les
25 interprètes dans la cabine en arrière de la salle de

540-01-063428-141
1er décembre 2014

PRÉLIMINAIRES

1 cour, que tout ce qui se dit par les interprètes
2 dans la cabine est capté dans notre système
3 CourtLog?

4 LA GREFFIÈRE :

5 Oui.

6 LA COUR :

7 Tout fonctionne. Alors, vous allez consigner comme
8 d'habitude au procès-verbal. Je vois que notre
9 technicien est présent. Est-ce qu'il y a une raison
10 particulière?

11 LA GREFFIÈRE :

12 Oui. Je voulais juste que tout soit dit puis qu'il
13 quitte après pour être sûre que tout fonctionne
14 bien.

15 LA COUR :

16 Pouvez-vous répéter son nom?

17 LA GREFFIÈRE :

18 J'ai dit je voulais s'assurer que tout...

19 LA COUR :

20 Non, non, j'ai compris. Pouvez-vous répéter son
21 nom?

22 LA GREFFIÈRE :

23 Dominique Constantin.

24 LA COUR :

25 Monsieur Constantin, d'accord. Vous pouvez vous

540-01-063428-141
1er décembre 2014

PRÉLIMINAIRES

1 approcher. Merci pour votre présence. Vous avez
2 vérifié que tout fonctionne...

3 M. CONSTANTIN :

4 Oui.

5 LA COUR :

6 ... entre la salle de cour ici puis la salle où se
7 trouve monsieur Desjardins, à Bordeaux?

8 M. CONSTANTIN :

9 Oui.

10 LA COUR :

11 Et ce que je viens de dire que tout fonctionne.
12 Tout ce que je dis ici dans la salle de cour, tout
13 ce que dit n'importe qui, les avocats, le personnel,
14 les témoins est capté dans le système CourtLog, y
15 compris ce qui est traduit par nos interprètes dans
16 la cabine, vous avez tout vérifié, que les propos
17 des interprètes, les traductions sont captées dans
18 le système CourtLog?

19 M. CONSTANTIN :

20 Oui, votre Honneur.

21 LA COUR :

22 Merci pour votre présence. Si vous voulez rester,
23 vous pouvez rester. Si vous voulez quitter, vous
24 êtes libéré.

25 M. CONSTANTIN :

540-01-063428-141
1er décembre 2014

PRÉLIMINAIRES

1 Merci.

2 LA COUR :

3 Vous êtes gentil. Maître Gauthier.

4 Me GAUTHIER :

5 Yes. So, the (inaudible) are ready to give the
6 submissions related to the special I motion. We
7 haven't had yet the occasion to speak together
8 regarding the agenda for the week. We suggest to
9 the Court to do the... to do so at the break and to
10 come back here with some suggestions.

11 THE COURT :

12 Okay.

13 Me GAUTHIER :

14 I believe we will arrive with common suggestions for
15 the agenda of the week.

16 THE COURT :

17 Yes. I was left with the understanding last week,
18 unless there is a change, that today, we were doing
19 your...

20 Me GAUTHIER :

21 Yes.

22 THE COURT :

23 ... argument on investigator's privilege. Tomorrow
24 morning...

25 Me GAUTHIER :

540-01-063428-141
1er décembre 2014

PRÉLIMINAIRES

1 Yes.

2 THE COURT :

3 ... we're going to complete maître Labelle's
4 argument on the motion to quash the direct
5 indictment...

6 Me GAUTHIER :

7 Yes.

8 THE COURT :

9 ... and the response of maître Rouleau...

10 Me GAUTHIER :

11 Yes.

12 THE COURT :

13 ... his argument.

14 Me GAUTHIER :

15 Yes.

16 THE COURT :

17 And after that, on Wednesday and Thursday, I
18 understand that we were doing Judy Costello?

19 Me GAUTHIER :

20 Yes. The only question remaining was concerning
21 the... Mr. Simpson's motion, whether or not we would
22 start them this week, if we would have time to do
23 so, and this is what we want to discuss amongst us.

24 Also...

25 THE COURT :

540-01-063428-141
1er décembre 2014

PRÉLIMINAIRES

1 Well, I understood that the... because if there is
2 not an agreement among counsel, then I'll set the
3 order of the motions.

4 Me GAUTHIER :

5 That is why I mention to you that we will speak...

6 THE COURT :

7 Okay. Let me finish.

8 Me GAUTHIER :

9 Yes.

10 THE COURT :

11 But I understood that you all preferred to have the
12 Costello motion dealt with before the Simpson
13 motion. Is that...

14 Me GAUTHIER :

15 Absolutely.

16 THE COURT :

17 Is that still the position?

18 Me GAUTHIER :

19 It is.

20 THE COURT :

21 So...

22 VOICE NON IDENTIFIED :

23 It is, your Honour, yes.

24 THE COURT :

25 So as far as whether or not, we'll have time to do

540-01-063428-141
1er décembre 2014

PRÉLIMINAIRES

the Simpson motions will depend when we finish the others. We figured we'd finished maître Labelle's motion last week. We didn't finish. Things happen.

Me GAUTHIER :

Exactly.

THE COURT :

So, if...

Me GAUTHIER :

We just want to be ready for any eventuality to use as efficiently as we can all the dates that could be open. That's it.

THE COURT :

So for the time being, my understanding is what all counsel stated last week, we'll do the investigator...

Me GAUTHIER :

Yes.

THE COURT :

.... privilege arguments today.

Me GAUTHIER :

Yes.

THE COURT :

Maître Labelle tomorrow.

Me GAUTHIER :

Yes.

540-01-063428-141
1er décembre 2014

PRÉLIMINAIRES

THE COURT :

And then we'll do the Judy Costello motions.

Me GAUTHIER :

Absolutely, no change.

THE COURT :

Is that the position of defence counsel as well?

THE DEFENCE :

It is.

THE COURT :

Fine. If there is no objection from the defence counsel, then that's what it will be at this time, unless I hear differently. But thank you for raising it. Go ahead.

Me GAUTHIER :

Thank you.

Me LACEY :

Yes. Thank you, your Honour. You have the notice of application before you with respect to this motion, which is R-25, and just to put the submissions in context, throughout the period of time when disclosure was initially being provided by the Crown, in the form of pin to pin communications, the defence sought further information from the Crown related to those issues and rather than take you to the original documents, if you just refer to

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

our notice of application, at paragraph 12...

THE COURT :

I'm there.

Me LACEY :

... and in particular going back to June 28th, 2012,
a request was made by the defence. So, this was 17
days after the defence had received the pin to pin
communications by way of Excel spreadsheet and we
don't need to go back over that ground, but you'll
recall that there was original disclosure provided
in the form of a synopsis and then ultimately, it
was in June of 2012 that something closer to the raw
data was provided to the defence and in that letter
specifically at number 1, the defence sought the
following.

Disclosure of the name of the software and/or
hardware utilized by the RCMP to manage the
interception of the pin communications and then some
other particularized requests related to the manner
of interception. Paragraph... subparagraph 2,
you'll see the request of disclosure as to whether
or not, this manner of interception had been used
before and I mean, these are all particularized
again in the notice and set out here in the letter

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

of June 28th.

But what I would submit is it was a very thorough request in terms of what was being requested by the defence, including the opportunity to attend in Ottawa. You'll see at number 5, to have the manner of interception demonstrated by officers and subsequent to that communication, there were other communications between the Crown and the defence and there was some disagreement as to whether or not everything summarized in the defence letter was accurate, according to the Crown.

But the bottom line for the purposes of this motion is that in the face of a request by the Crown... by the defence for the type of information dating back to that letter of June 28th, 2012, the Crown took the position that they could only provide a smaller subset of the disclosure being requested, not on the basis that it didn't exist, but on the basis that the Crown was going to be asserting privilege with respect to those matters.

One thing that did get disclosed was the fact that the RCMP... some part of the interception management

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 process was a piece of software called P to P and
2 I'll come back to that in a minute, but pin to pin.
3 But what I wish to make clear is what the defence
4 were seeking all along were two things. So just...
5 so think of the interception process as being in two
6 steps.

7
8 One is the interception process itself and the
9 second is the management of the intercepts, once
10 they're received and at the time of the filing of
11 this motion, which was dated August 22nd, 2014, it
12 was very clear that the Crown had refused to make
13 disclosure in relation to both matters, other than
14 telling the defence and giving examples by way of
15 some screen shots of the P to P software, so the
16 software that manages the interceptions, not the
17 implementation, but the management of the
18 interceptions, after they're intercepted and that's
19 what led to the notice of application being brought
20 by the defence and the relief requested under
21 subparagraphs 1, 2, the last page of the motion
22 where the defence request two general things.

23
24 One is disclosure of everything that the Crown is
25 refusing to disclose on the basis of investigative

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 privilege and then secondly is an order directing
2 that the Crown make arrangements for the applicants'
3 counsel to attend at the RCMP offices to obtain a
4 demonstration as to the manner of interception,
5 including a demonstration of the software used to
6 manage the interceptions.

7
8 So, the latter software is P to P. We now
9 understand that clearly to be the P to P software
10 and the former, we now clearly understand as a
11 result of the evidence of inspector Flynn, to be the
12 system architecture that his group developed for the
13 purposes of facilitating the interception of the
14 private communications and I'll come to this in a
15 moment, but it's clear now in my respectful
16 submission, after the evidence of inspector Flynn,
17 that there is no claim of investigative privilege
18 being made with respect to the software used to
19 manage the interceptions and you have to reflect
20 back to the evidence of inspector Flynn on this
21 issue.

22
23 But it was clear during cross-examination that he
24 distinguished between the system architecture and
25 software, including the software, that his group

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

developed and utilized to facilitate the interception of the communications versus the investigative tool that was developed by the investigators in Montreal, the P to P software, for the purposes of managing the interceptions.

THE COURT :

In order to streamline the issues on that point, it's an important one, I'd just like to know if the Crown disagrees with you?

THE CROWN :

No, we agree. That's been... that's been... I'm sorry. It's been our position...

THE COURT :

Yes.

THE CROWN :

... that the distinction that is made is one that should be made and we do not claim privilege on the latter part, on the P to P (inaudible).

THE COURT :

Very good. Continue, please.

Me LACEY :

So, on that particular issue then, and I'll come to it, there has been a further disclosure request that was made, but we're asking you to make the order requiring that the Crown provides the disclosure.

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 It is before you on the motion. The Crown is not
2 challenging our claim that that's first party
3 disclosure, without the need for any claim of
4 privilege.

5
6 So, we are asking that an order be made in that
7 regard and I'm saying an order be made because we
8 have a timing issue, because we do want to proceed
9 to deal with the Garofoli issue and in order to deal
10 with the Garofoli issue, not some of the preliminary
11 things we might be able to deal with, but before we
12 can get into the meat and potatoes of the Garofoli
13 issue, we need to have access, in my submission, to
14 more information about that software, including a
15 demonstration as to how that software was used to
16 manage interceptions.

17 THE COURT :

18 What about the second part, maître Rouleau,
19 demonstration and attending?

20 Me ROULEAU :

21 On that issue, I had announced before that we were
22 of the opinion that... I'm sorry to be long, but...

23 THE COURT :

24 You're not being long. You haven't even started
25 yet.

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 Me ROULEAU :

2 Yes, I know. We will be... our jury aid motion will
3 necessitate, in our view, a demonstration of the way
4 that the system functions.

5 THE COURT :

6 I know, but...

7 Me ROULEAU :

8 Its reliability. So, that will be done in court,
9 yes, in our...

10 THE COURT :

11 ... what your colleague is saying is he's
12 anticipating the hearing on the Garofoli motion...

13 Me ROULEAU :

14 Yes.

15 THE COURT :

16 ... and these types of requests are tied into that
17 and are going to assist him in how he proceeds on
18 that motion. So, with respect to the software, the
19 Crown consents. He's asking for an order and that
20 will wait until... we can plead it with this motion
21 and if there is any other agreements that should go
22 into the order, we'll deal with that at that time.

23
24 But he's asking to, and he mentioned it, in his
25 relief requested, number 2, for counsel to attend

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 and have a demonstration. You're saying that's the
2 exact kind of thing you're going to do, anyway?

3 Me ROULEAU :

4 Yes.

5 THE COURT :

6 But that won't be till later because you're not
7 doing that motion till much later.

8 Me ROULEAU :

9 True.

10 THE COURT :

11 So, my question is... and I'm not pushing you. Your
12 position is your position, but I just want to know
13 what it is. On his request now to have one of the
14 defence counsel attend at the RCMP office, you can
15 answer me at the break, if you want...

16 Me ROULEAU :

17 Yes.

18 THE COURT :

19 ... to discuss it with your colleagues because I see
20 you're making eyes at each other, but I'd like to
21 know your position because if there is an agreement,
22 then Mr. Lacey doesn't have to continue arguing
23 that. He can go on to his next point.

24 Me ROULEAU :

25 In an ideal world, we would have had done the jury

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

aid motion which would have taken care of all that,
but I understand that that's going to be pleaded at
the very end. I also...

THE COURT :

Let's not...

Me ROULEAU :

I also understand...

THE COURT :

No... Okay, now, I'm going to interrupt. Let's not
deal with what could have been done.

Me ROULEAU :

Yes.

THE COURT :

There is a plethora of motions here in this case and
the order is what it is and defence counsel and the
Crown indicated that they would recommend the order
by consent, rather than me imposing it. This was
done at the pre-trial conferences. So, I've tried
to follow the agreement of all counsel up to now.
So what could have been done in a perfect world,
that doesn't interest me now.

Me ROULEAU :

I understand that.

THE COURT :

My question is quite simple. So, you can answer me

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 after the break because before Mr. Lacey goes on and
2 on about why he feels he should attend, there is no
3 point in him doing that, if you're going to agree to
4 it and if your... if the information that he wants
5 to get from an attendance at the RCMP headquarters
6 is going to be disclosed in court anyway later on...

7 Me ROULEAU :

8 It's a matter of... for us trying to maybe make
9 things work...

10 THE COURT :

11 Yes.

12 Me ROULEAU :

13 ... in a practical way. So let... if I may, if...
14 at the break, I'll have a chance...

15 THE COURT :

16 Yes.

17 Me ROULEAU :

18 ... to discuss this matter with the individuals
19 concerned.

20 THE COURT :

21 I have to say, we didn't sit Friday. These are the
22 kind of things that can be done outside the presence
23 of the Court because we're starting a day of hearing
24 on the arguments of this motion...

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

Me ROULEAU :

Yes.

THE COURT :

... and it seems that these are things that there is going to be some joint position of counsel, you should discuss it outside the presence of the Court and come to me and say we've agreed on this. You don't need... we're not going to argue that and if there is an order that's been jointly requested, present it to me.

Me ROULEAU :

I'm...

THE COURT :

Because I didn't intervene...

Me ROULEAU :

... not arguing.

THE COURT :

No, you might find I intervene too much because sometimes, there is things that are said that the other side doesn't necessarily oppose. So rather than go on and go on, I'd like to get... to cut to the chase on what issues are actually being contested which I have to say is not always clear, unless there is an intervention.

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 Me ROULEAU :

2 I agree. I can only agree and I don't want to cut
3 my colleague short, but...

4 THE COURT :

5 It makes sense to interrupt him if he's about to
6 embark on an argument and he's going to go on for 45
7 minutes and at the end of the day, you're not going
8 to oppose it. So, why should he... as much as we
9 like to hear him, why should he argue that point if
10 you're not opposing it and you're going to present
11 it in front of everybody eventually, anyway? In
12 other words, it won't really be a matter of
13 confidentiality and privilege.

14 Me ROULEAU :

15 So, I can tell both my colleague and the Court that
16 we will try to have everybody's interests looked
17 after in a practical way. What's very complicated
18 is to arrange for a visit of the RCMP headquarters.
19 The demonstration of the software is a different
20 thing and I think there is a question of equipment
21 involved and...

22 THE COURT :

23 Yes. And...

24 Me ROULEAU :

25 ... and a question of delay...

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 THE COURT :

2 Alright. And...

3 Me ROULEAU :

4 ... as to when that can be done. But we are
5 willing...

6 THE COURT :

7 But...

8 Me ROULEAU :

9 ... to do everything that we can, to...

10 THE COURT :

11 But you...

12 Me ROULEAU :

13 ... to do it before what was...

14 THE COURT :

15 Well, it should be...

16 Me ROULEAU :

17 ... our...

18 THE COURT :

19 ... it should have been done before his argument on
20 the point. You've had a lot of days where we didn't
21 sit on other things. It's something that could have
22 been done. I just want to know here today, since
23 you're arguing investigative privilege, what is not
24 agreed to? What is contested? I just want to hear
25 arguments on the points that are... you have the day

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

for it. What's being contested?

If there is things that potentially, you can agree to, well, hold off the argument on that point until it's settled. Either it's agreed to or it's contested. If you need a break now, I'll give it to you, but these are things that you've had ample time to discuss these things.

Me ROULEAU :

Well, then I suggest that we take 15 minutes right now and I'm convinced that I'm going to be able to make a proposal to my colleague that will solve the P to P part, not the...

THE COURT :

Okay. Wouldn't that...

Me ROULEAU :

... the first part is...

THE COURT :

Okay. Yes. I appreciate the suggestion. I'm sure, Mr. Lacey, you don't oppose a 15 minute break at this point? No, but wouldn't it make sense, maître Rouleau, to... the lawyers have an office here in the building, so do you. There have been days we don't sit. We didn't sit last Tuesday, I believe. We sat Monday, Wednesday, Thursday. So Tuesday and

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 Friday were non sitting days. There is other weeks
2 where we didn't sit.

3
4 You've had ample time all the lawyers to get
5 together. Rather than for me to come here on
6 Monday, December 1st, while he's arguing a point and
7 I ask you if you oppose to it or you might not? Why
8 do I have to find that out now in the middle of his
9 argument? One of the roles of a case management
10 judge is to manage and to manage time.

11 Me ROULEAU :

12 Now, of course. Of course and I...

13 THE COURT :

14 And I'm going to repeat what I said to... I'm very
15 interested to hear his argument, but there is
16 probably 68 other motions waiting. So, if it's an
17 argument that he doesn't have to make because you're
18 not contesting it, why should he make it? I just
19 want to know, for me, on this motion and every other
20 one, what is it that is contested? Green line it
21 for me. That's my role, de trancher...

22 Me ROULEAU :

23 Of course.

24 THE COURT :

25 ... les points en litige. What is not agreed to?

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 And it's not always obvious to me. So, I'd suggest
2 you get together and he can orient... Mr. Lacey can
3 orient his argument based on the Crown's position
4 and for me, try to help me, what is not agreed to
5 here? What's contested and what's not?
6

7 Maybe nothing is contested. Maybe there is certain
8 points that are contested that Mr. Lacey is not
9 going to require. Maybe with what you're agreeing
10 to, it will be very close to, if not completely
11 resolve this motion. Better to find out now than at
12 the end of your arguments.

13 VOICE NON IDENTIFIED :

14 I ask till 10:35, your Honour. I know it's a little
15 longer than...

16 THE COURT :

17 No, no, you...

18 VOICE NON IDENTIFIED :

19 ... what's being suggested, but...

20 THE COURT :

21 ... you can...

22 VOICE NON IDENTIFIED :

23 ... and I'll adjust...

24 THE COURT :

25 Okay. You can have...

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

VOICE NON IDENTIFIED :

... my argument accordingly.

THE COURT :

You can have the morning, if you want.

VOICE NON IDENTIFIED :

No, no.

THE COURT :

You can have as much time as you need. Had I known this was going to happen, I wouldn't have come this morning. I have other matters to deal with. There is other outstanding judgments that I could have worked on, rather than come and I would have allowed you all to discuss your respective positions.

But to come on the bench on a Monday morning when we postponed Thursday and I intervene and find out on an argument that defence counsel is raising, maybe the Crown is going to consent to that. But at the very least, there is not an issue of privilege because they're going to disclose it all to the courtroom eventually anyway on a later motion. So, that's not a very good management of time, is it?

THE CROWN :

I understand now...

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

THE COURT :

Is it? Is it?

THE CROWN :

No, and... but the progress that was made should have been made clearer to the Court. I agree 100 percent, but I just can assure you that other than your time this morning, and we apologize for that, no time has been wasted...

THE COURT :

Well...

THE CROWN :

... meanwhile back at the ranch, that's...

THE COURT :

Well, had I not intervened, Mr. Lacey would have continued his argument. I would have taken detailed notes, ask questions and he would have gone on and then I might have found out this afternoon or maybe I would have found out after rendering a judgment that it's moot because later on, on a jury aid, that aspect of his argument you weren't contesting and then you would have heard from me because that's a complete waste of time and I'm trying to avoid that, to put our time to good use.

So, we'll take a break till 10:35. I'll be in the

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 back. As soon as you're ready, let me know and
2 quite frankly, if you need more time to cut to the
3 chase and present to me the real issues here that I
4 have to decide, you'll take more time and I'll allow
5 it. Take the time you need so that arguments aren't
6 made for nothing. You're experienced counsel. You
7 know where you're going. Just give me the issues
8 that I have to decide, not things that you're
9 consenting to amongst yourselves. I don't need to
10 hear arguments on that. Thank you.

11
12 --- SUSPENSION

13
14 -----
15
16 --- UPON RESUMING

17
18 LA COUR :
19 ... tout attendre les accusés.
20 VOIX NON IDENTIFIÉE :
21 Simplement.

22
23 --- DEMANDE POUR AMENER LES DÉTENUS.
24
25

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

THE DEFENCE :

My apologies, your Honour. We were told ten minutes
and that was obviously a mistake...

THE COURT :

Fine.

THE DEFENCE :

... on our part.

THE COURT :

It's not... no mistake on your part. It's fine.
The... your client is not here. So, nothing has
happened. We're waiting. Madame la greffière...

LA GREFFIÈRE :

Oui.

LA COUR :

... je les ai les copies des gens qui se sont
jointes.

LA GREFFIÈRE :

Vous les avez...

LA COUR :

Oui, je les ai. C'est tout le monde...

LA GREFFIÈRE :

Moi, mais il m'en manque un.

LA COUR :

C'est tout le monde, sauf Desjardins, c'est ça.

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

LA GREFFIÈRE :

C'est ça. Et moi, ils me les ont tous donnés, sauf maître Battista.

LA COUR :

Ça va. Les accusés sont là. Alright. The accused are present. Monsieur Desjardins, vous êtes avec nous? Vous nous entendez?

M. DESJARDINS :

Oui. Je vous entends bien, votre Honneur.

LA COUR :

Vous m'entendez parler en français and when I speak in English, can you hear the interpreter's voice translating into the French language?

M. DESJARDINS :

Oui.

LA COUR :

Excellent. Alors, juste avant de continuer où on a terminé. On another issue, during the break, maître Godbout, my assistant told me that you sent the agreed statement of facts on the Telus motion?

Me GODBOUT :

I did, yes.

THE COURT :

Alright. Perhaps later during the day, you could give me a printed... not right now, a printed copy.

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

Also if you could provide me with a printed copy of
the agreed statement of facts on the 11b) motion,
the most updated one, because they were modified...

Me GODBOUT :

Yes.

THE COURT :

... as well as sending one to my assistant
electronically.

Me GODBOUT :

I will.

THE COURT :

Alright. So, we can have that dealt with during the
day. On this motion, investigator's privilege, just
I had the... all the notices already. It was the
clerk that didn't and I understand that all of the
accused are party to this motion, except for
Desjardins. Is that everybody's understanding?

Me GODBOUT :

That is (inaudible).

THE COURT :

Maître Hogan, c'est votre compréhension aussi? Tout
le monde fait partie de cette requête pour le
privilège de l'enquêteur, sauf monsieur Desjardins.

Me HOGAN :

Exactement, monsieur le juge.

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 LA COUR :

2 Ça va. Ça va. C'était juste pour confirmer.

3 Maître Corbo?

4 Me CORBO :

5 I would just like to deposit the notice to join the
6 application.

7 THE COURT :

8 That's fine. For?

9 Me CORBO :

10 There is two copies.

11 THE COURT :

12 For?

13 Me CORBO :

14 Mr. Fracas.

15 THE COURT :

16 Okay. Alright. Signed by maître Battista?

17 Me CORBO :

18 Battista, yes.

19 THE COURT :

20 Okay. I had it and the clerk has one. Alright.

21 Has the adjournment assisted?

22 Me LACEY :

23 Yes. Perhaps I can...

24 THE COURT :

25 Please do.

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

Me LACEY :

... make a layout for the Court. After the evidence of officer Flynn, the first day of cross-examination, which was on November 17th, you may recall that we did not sit on November... or we did sit on the 18th, sorry. But in any event, there was a... the defence sent a letter to the Crown and I'm going to actually ask that it be marked as an exhibit.

It will help resolve some of the disclosure issues and if I can just take the Court through the items and summarize the discussion that we've had with the Crown, with respect to this disclosure request. So, this letter was dated November 18th, 2014.

THE COURT :

Okay. Madam clerk, do you have a copy?

Me LACEY :

I have a second copy. I'm sorry.

THE COURT :

Okay. What's the next exhibit?

THE COURT :

R-25.10.

THE COURT :

R-25.10.

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

THE COURT CLERK :

Yes.

Me LACEY :

And what you'll see, if I can deal with the first three items that are enumerated numbers 1, 2 and 3, the Crown is going to provide disclosure with respect to those items.

THE COURT :

So, the Crown is going to provide disclosure with respect to numbers?

Me LACEY :

One, 2 and 3.

THE COURT :

Okay. Let me just read them. You want to refresh my memory on point 3?

Me LACEY :

Yes. During the evidence of inspector Flynn, he indicated that there was data that would be... there was data that would emanate from a BlackBerry device in order to notify a cell tower of the relative location of the BlackBerry device, so the tower knows to communicate with the device, the same way it would know if it was a phone... if a phone function was being utilized and there were two ways to describe the data.

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 I think I suggested it was a "ping" and officer...
2 inspector Flynn said it's sort of like an I'm here
3 signal notifying the tower where the person is.
4 Now, just to be clear, there is... he also went on
5 to describe various caveats with respect to the
6 usefulness of that information, but that's not the
7 issue for us on the disclosure application. So that
8 was 1, 2 and 3.

9 THE COURT :

10 Just before you go further, I just want to know if
11 the Crown has this understanding. It's not because
12 a cell tower picks up a device that necessarily the
13 device is in that area. There could be... do you
14 agree with that?

15 THE CROWN :

16 Yes. And that's the caveat my colleague referred to
17 as the relative usefulness of that information. But
18 that question being put aside, we agree to give the
19 data to our colleagues and let them do what they may
20 with it.

21 THE COURT :

22 Alright. Okay. I'll look at the... just let me
23 look at number 4. What's SENC-I-S, the long form?
24 Long form, SENC-I-S?
25

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 THE CROWN :

2 I'm sorry. I don't...

3 THE COURT :

4 In number 4.

5 THE CROWN :

6 It's... number 4... Sencis, it's the system used by
7 the RCMP to manage the classic... if I may, classic
8 private communication, so voice communication or SMS
9 and on that point, we are ready to disclose these
10 communications, if any, but we are still waiting for
11 the RCMP to assess (inaudible) not what is left
12 concerning item 4, on this letter. But if any, we
13 will disclose.

14 THE COURT :

15 Okay. Go ahead.

16 Me LACEY :

17 With respect to the (inaudible) paragraph commencing
18 with "we would also reiterate our request", that
19 paragraph, the Crown has also agreed to do the
20 following. With the RCMP, the software management
21 tool is going to be installed on a stand alone
22 computer, likely a laptop I expect, and arrangements
23 will be made and that computer will have the
24 software and the underlined data in the same way
25 that the investigators would have it, if they were

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

sitting in their RCMP offices.

And what will happen at that point is arrangements will be made between the Crown and the defence and a representative of the RCMP or multiple representatives, who know the software, to provide a demonstration, an active demonstration and which will include allowing the lawyers to the extent that they want to interact with the software, in a controlled environment and by that, all I mean by that is this computer is not being left with the defence lawyers. It will be in the presence of the Crown, in the presence of however many police officers need to be present.

THE COURT :

Where would it take place?

Me LACEY :

We haven't decided that yet...

THE COURT :

You can...

Me LACEY :

... but it will be at a mutually agreeable location, not necessarily the room that was used by the RCMP. It's not... the physical room is really not something that particularly matters. With respect

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 to 1 through 4 or 1 through 3, efforts are being
2 made to provide that disclosure this week. Number
3 4, the Crown needs to ascertain whether anything
4 exists to disclose.

5 THE COURT :

6 Anything? I'm sorry.

7 Me LACEY :

8 Whether anything actually exists to disclose and if
9 something does exist, the Crown will disclose it.

10 THE CROWN :

11 This week.

12 Me LACEY :

13 This week and then the last item about that
14 paragraph we just reviewed, the Crown will... has to
15 work together with the RCMP and efforts will be made
16 to do that, either the week of December 15th or the
17 following week and...

18 THE COURT :

19 The number 4, December 15th week or following?

20 Me LACEY :

21 It's actually the last paragraph. Sorry. It's not
22 numbered. The one with the demonstration of the
23 software.

24 THE COURT :

25 We would also, alright.

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

Me LACEY :

Yes. That's not... I mean that's not fixed in stone. They're doing their best efforts to try to make that available to us sooner than later.

THE COURT :

Alright. And 1, could you repeat? One, 2 and 3 will be disclosed when?

Me LACEY :

This week.

THE CROWN :

As well as 4, sir.

THE COURT :

Four this week too?

THE CROWN :

Yes, if any.

THE COURT :

So 1, 2 and 3, there is, and it will be disclosed this week, so the week of December 1st, 2014 and number 4, if anything to disclose, it will be done this week, week of December 1st, 2014?

Me LACEY :

Yes. Yes.

THE COURT :

On your... is there any... are there any other outstanding pieces of evidence that the Crown still

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

claims are covered by privilege or if this was disclosed with this covering?

Me LACEY :

No, there is a subcategory of information that the Crown still asserts it is subject to investigative privilege and for which we'll need your Honour to make a ruling.

THE COURT :

Okay. Alright. Which is?

Me LACEY :

Everything that was the subject of the hidden camera hearing that is not included within what the Crown is willing to disclose. So, I take for granted that during the ex parte in-camera hearing, the Crown adduced evidence explaining what material the police wanted to maintain, control over in terms of dissemination.

As I heard the evidence, at least in the public aspect of the hearing, it relates to two areas, two broad areas. One is the manner of interception, including the location and places where the police acquire the interception, what would I would call the intercept portion of the task, and the second general area, as I would describe it, not being

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 privy to the in-camera hearing, is the deciphering
2 or decoding of the encrypted message because what
3 they acquire, some level is encrypted and it
4 requires decryption or deciphering.

5
6 And as I understand it, the police maintain, through
7 the Crown, that telling us, for example, whether
8 BlackBerry provides the general encryption key to
9 permit the deciphering of the messages would raise
10 investigative privilege concern.

11 THE COURT :

12 Could you repeat that again?

13 Me LACEY :

14 As I understand it, even telling us that BlackBerry
15 provides the decryption key, the global... let me
16 rephrase that, the global encryption key which
17 unlocks the encryption, that even telling us that
18 BlackBerry is the one who provides that to the
19 police, pursuant to the confirmation orders and the
20 judicial authorization, the police assert it's
21 privileged because of their relationship with RIM.
22 In other words, knowing what RIM does to facilitate
23 the interception is privileged.

24
25 And on... I can summarize my position for you with

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 respect to both items, but with respect to the
2 second area, that's not properly the subject of a
3 privilege claim and with respect to the former, even
4 if there is some aspect of privilege related to that
5 issue, the right of the accused to make full answer
6 in defence outweighs whatever investigative...

7 THE COURT :

8 On number 1, on the location issue?

9 Me LACEY :

10 Yes. And I... again you know, I don't want to be
11 unfair to the position the Crown advances because
12 they have the... I'm calling it the benefit and I
13 don't mean it... they have the legal right. They
14 have a legal benefit of articulating the concern in
15 a very clear way in our absence, in articulating the
16 privilege in a very clear way in our absence and
17 the... an accused in this position is always in a
18 bit of a catch-22, a conundrum, a legal conundrum,
19 because we're asking for disclosure of something
20 that we may have a certain understanding of or a
21 general understanding of that doesn't necessarily
22 mirror what happened in part... ex parte in-camera.

23
24 But at least, based on the cross-examination of
25 inspector Flynn and the public portion of his

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

evidence, it seems to me those are the broad categories where the Crown asserts privilege and I include in that second category the role of RIM, that includes the claim of privilege over issues related to PGP vs.- BES, vs. BIS, what inspector Flynn characterized as the way in which people, who want to avoid interception, might arrange themselves and coordinates themselves to prevent lawful interception. So, from our perspective, as the accused, we still require you to make a ruling with respect to those issues.

THE COURT :

So, let me just repeat that and you can fill in the blanks afterwards. There is two points that at this point you feel are not covered by any consent, and I'll address the Crown in a moment. One is the location and the manner of interception of the pin to pin messages, the places where the police intercepted the pin to pin messages. In other words, by places, the places where their equipment exist, is that what you're saying?

Me LACEY :

Yes, where on the path of travel.

THE COURT :

So, their equipment could be in one place, but the

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

interception on the path of travel could be
somewhere else?

Me LACEY :

It's more where on the path of travel they were
intercepted that day and my submission is what's
required.

THE COURT :

So, when you say location, is there something else
or it's specifically that only or is there something
else?

Me LACEY :

Based on what's known to me in terms of what's
public and the evidence I've heard, it relates to
that. But of course, one of the things about a
motion like this, your Honour, as the gatekeeper has
to, in my submission, draw from what we're asking
for and to the extent that it applies by analogy to
other aspects of what you know that we don't to
apply our submissions accordingly to those things.

THE COURT :

Alright. Then on point 2, it relates to the
decryption or decoding?

Me LACEY :

Yes.

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 THE COURT :

2 You mentioned BlackBerry provides what you said a
3 global encryption key that unlocks the encryption.
4 The police are asserting privilege due to their
5 relationship with RIM. You want details on that;
6 correct?

7 Me LACEY :

8 Yes, not disclosure. Just to be clear, I'm not
9 asking for disclosure of the global encryption key.

10 THE COURT :

11 Hum, hum!

12 Me LACEY :

13 I don't know if you want me to expand on that a
14 little bit?

15 THE COURT :

16 I will. Just... I will. Just one minute. So, you
17 went on, the police are asserting privilege due to
18 their relationship with RIM. You also want
19 information on BES, the way people, who want to
20 avoid interception, might arrange themselves. So,
21 on these two points, on the BES and you're not
22 asking disclosure about global encryption, well,
23 maybe you can go ON a little more about what you're
24 asking for.
25

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

Me LACEY :

To the extent that I can glean from the public aspect of this hearing and...

THE COURT :

Yes, from what you know.

Me LACEY

right, from what I know and again, it's in a bit of a dark room, with a little bit of light exposed. So, it might be that the little bit that I know is you know, you see a bit of something and you think you have a sense of the bigger picture but you might not, and I acknowledge that during the course of my submissions.

But in terms of this issue, as I understand it, the RCMP are asserting privilege over whether RIM... the mechanism by which RIM allows them to decrypt these messages. So, during my submissions, I'll take the position that it's the elephant in the room to suggest that everyone doesn't know that RIM has to cooperate with the police and provide them with some type of tool that either has the key already programmed in, allowing them thereby to intercept the device, the... sorry, to decipher the message or that RIM provides the encryption key to the software

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 developers at the RCMP to allow them to decipher the
2 messages and to suggest somehow that that cannot be
3 something that is disclosed, in my submission, is
4 not a matter of privilege.

5
6 That's a matter of police convenience to maintain
7 relationship, a relationship with RIM. On the issue
8 of how parties organize themselves, I sort of see
9 these two issues related because as I understand it,
10 inspector Flynn's position is, well, we can't get
11 into RIM's role or lack of role, where it's a BES
12 communication or a PGP communication because to tell
13 you what RIM can or cannot do would, by necessity,
14 expose potential weaknesses in the police ability to
15 decipher messages and again, maybe I'm reading too
16 much into his evidence, but that's certainly what I
17 read into his evidence, based on the public nature
18 of the hearing.

19
20 And I submit as well on that issue, although it may
21 not be widely and commonly known that there are ways
22 to defeat interception, it is not a matter of State
23 secret that encryption is easier... let me rephrase
24 that. Avoiding interception of your private
25 communications, whether you're seeking to avoid

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 lawful interception or third party unlawful
2 interception is quite easy to do by arranging
3 yourself in a certain way, through levels of
4 encryption which, with respect to BlackBerry
5 devices, can be done through BES where you control
6 the key. It can be done through an added layer of
7 PGP encryption together with BES.

8
9 So again, I submit that that's simply the claim that
10 knowing those things is a matter of some State
11 secret, if that's what the State secret is. In my
12 submission, I don't want to say it's a joke, but
13 that's not a State secret and that's why I filed
14 some of the material before you.

15
16 You might have wondered why I'm putting certain
17 material in front of you, but to hopefully give the
18 Court some additional information perhaps over and
19 above what you heard in-camera and what you heard in
20 public, to help you assess the claim being made by
21 inspector Flynn that these are matters of privilege,
22 that you have to protect the dissemination of.

23
24 That's sort of the overview. I can go into a little
25 more specifics, but I don't know. Your Honour

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

indicated you wanted to hear from the Crown at some point.

THE COURT :

Yes, I think before... I think it's prudent from what I've seen here and not just on this motion, but on others before you go on in an argument...

Me LACEY :

Of course.

THE COURT :

... to see what their position is.

Me LACEY :

Alright.

THE COURT :

I would have thought that... and I'll repeat what I said before the break, that with experienced counsel, before anyone begins on a motion, that you would have gotten together before and this motion was filed in August and we had pretrial conferences in April, May and June.

I can't understand how a defence counsel gets up to argue something, after filing a motion like that and sending a letter earlier in November, he's about to go on in his argument and the Crown is going to agree to certain of his points. I don't even want

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 you to answer me now, but just don't let it happen
2 again.

3 Me ROULEAU :

4 Well, respectfully, sir, what we're about to argue
5 in front of you was... in our view and we might be
6 wrong on that, I have no trouble with that, but the
7 subject of the motion is going to be argued. What
8 is... what was agreed to by the Crown was the second
9 disclosure motion brought and my colleague has said
10 he figures that's part of the first motion. We
11 never saw it like that. We still don't and...

12 THE COURT :

13 What about his... my understanding was your position
14 was to object to a defence counsel having a meeting
15 with the police for a demonstrations. Just a
16 minute. And I'm not pushing you either way. The
17 Crown's position is the Crown's position and if
18 there is a different position by the defence, which
19 it appeared to me, in preparing for today, that
20 there was, that I'll listen to your position and
21 I'll have to rule on it.

22
23 Well, now, you get up before the break and you say
24 you're going to present a motion on jury aids. So,
25 this issue of a demonstration request by the defence

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 might be moot because you're going to show that in
2 court, anyway. So, there is no privilege. Well,
3 why wasn't I advised of this?
4

5 I'm preparing for this argument. I'm looking
6 through the jurisprudence. I'm reading the motion.
7 I'm reading all the letters. I'm reading Joseph
8 Wilkinson's affidavit about attending there,
9 presuming that you're objecting vehemently to that
10 part of his motion and now, you're telling me that
11 it's not objected to, that you're going to present
12 this in open court.

13 Me ROULEAU :

14 We still object to the intercept part, we still do,
15 but I think my colleague is going to let...
16 presumably let that go. As far as the P to P, which
17 was raised by the second letter that was deposited
18 a couple of weeks ago, I think I've had the occasion
19 in court, in this hearing, of saying publicly that
20 as far as... that's a different concern. We thought
21 it was not comprised in the original motion...

22 THE COURT :

23 Yes.

24 Me ROULEAU :

25 ... and that's a separate issue that we... that

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

needed to be...

THE COURT :

I... okay.

Me ROULEAU :

... dealt separately and that we would argue that...
we would present that proof, anyway, in the jury aid
motion.

THE COURT :

I have to tell you something. I'm really confused.
So, for me to render a decision on a contested
issue, it really has to be narrowed for me and I
have to understand very clearly what your position
is and I think what I'm going to do, once the day is
over, you're going to have to present a clear
position for me in writing because the oral position
shifts and it's not clear for me and I'm going to
want it in writing what your position is on what the
defence is asking for.

I understand that there is some pieces of disclosure
that will be given to the defence this week and on
the demonstration, in the way that Mr. Lacey
described it, that will be done by December 15th or
subsequently. So, having said that, does it make
sense to continue this motion, the final arguments

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 now or does it make sense to do it when the defence
2 has had, at least what I've just referred to, that
3 you're going to give to them upon their request in
4 the letter of November 18th, 2014?

5 Me ROULEAU :

6 I mean I have no trouble arguing it now or later and
7 the two points being separate, I believe we should
8 argue them now because everybody is here present and
9 ready and our positions have never changed, were
10 always the same and are what was given to the Court
11 in our written argument.

12
13 On the intercept part, the special I in Ottawa, on
14 the way that the interception was done, we claim
15 privilege. We will not renounce to that and my
16 colleague will not renounce to his right to ask for
17 a ruling saying that the privilege doesn't apply.
18 This will have to be argued and decided.

19 THE COURT :

20 Okay. So, you're saying on the manner of
21 interception or on the location of interception?

22 Me ROULEAU :

23 Well, both. On the gathering of the data by special
24 I in Ottawa. The... Our point of contention is on
25 that. Once that is gathered, sent a special I in

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 Montreal and then organized.

2 THE COURT :

3 Oh! So, if you're objecting to the location and the
4 manner of interception and the meeting with the
5 police officer and the software, what are you going
6 to show?

7 Me ROULEAU :

8 That's P to P. That's once the data bank is
9 collected by special I in Ottawa, how it's organized
10 and how it's... produces and organizes the data in
11 a way that is comprehensible and well organized.
12 That's the...

13 THE COURT :

14 So...

15 Me ROULEAU :

16 ... P to P software.

17 THE COURT :

18 So, subsequent to the interception, whatever the
19 location might be in the pathway as requested by Mr.
20 Lacey, once the data is collected, subsequent to the
21 interception, how it's organized and formatted into
22 an intelligible manner to comprehend. That you're
23 disclosing?

24 Me ROULEAU :

25 Yes, that's the scope of the.. what I call the

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

second part of the...

THE COURT :

So, once the data is collected, how it's put into an
intelligible human format, that's being disclosed?

Me GAUTHIER :

No.

Me ROULEAU :

Your Lordship, I'm very sorry. We...

THE COURT :

You can see why I'm confused. If you're confused,
how am I...

Me GAUTHIER :

No, I...

THE COURT :

Well, now, if... you have three Crown sitting here
at a table... no, just a minute, maître Gauthier.
And one is telling the other... look, what I'm
saying here, and this isn't... I'm going to say it
because it can't be picked up by the recording
equipment. I'm trying to understand what the issues
are.

Mr. Lacey says there is one or more issues that I
have to decide on the investigative privilege
motion. Fortunately, I intervened this morning to

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 get your position. Otherwise, he would have gone on
2 on an issue that you're not really objecting to and
3 we just found out today.

4
5 I'm trying to understand on the second page of the
6 letter, the second to last paragraph, about this
7 meeting with defence counsel and the police, at a
8 location which will be upon agreement of both sides,
9 where the RCMP will provide an act of demonstration.
10 I'm told by Mr. Lacey a few minutes ago, this is by
11 consent and it would allow defence counsel to
12 interact with the software in the presence of the
13 Crown and the police and not necessarily in a room,
14 wherever that might be, that the RCMP does this.
15 According to Mr. Lacey, that's not important.

16
17 I heard from you, maître Rouleau, a few minutes ago,
18 that what they would learn from this is once the
19 data is collected, at a location somewhere on the
20 pathway referred to by Mr. Lacey earlier in his
21 argument, in response to my question, the RCMP would
22 show you at this meeting how the data collected is
23 put into an intelligible human format and you said
24 yes.
25

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 Then, in front of me, seconds ago, your colleague,
2 maître Gauthier, maître Godbout are making motions
3 and nodding of the head that maybe that's not it and
4 that... excuse me, maître Gauthier, can I finish my
5 remarks?

6 Me GAUTHIER :

7 Yes, sir.

8 THE COURT :

9 Because... so, you're saying one thing and your
10 colleagues aren't agreeing with you. If the Crown
11 can't present a coherent uniform position to the
12 Court, how can I understand what the arguments are?
13 And how can I render a decision? I won't do it
14 until you make your position very clear and if your
15 position is not clear and it's vague and if your
16 claim to privilege is very vague, then I'll do what
17 I have to do.

18 Me ROULEAU :

19 I can only agree with the Court.

20 THE COURT :

21 Do you want to speak to your colleagues before going
22 further?

23 Me ROULEAU :

24 I will by way of deference to my colleague, but...
25

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 THE COURT :

2 You want to step out for a minute? Excuse me.

3 Maître Rouleau...

4 Me ROULEAU :

5 Yes.

6 LA COUR :

7 ... un moment. Do you want to step out for a
8 minute...

9 Me ROULEAU :

10 Yes. Why don't we do that?

11 THE COURT :

12 ... with your colleagues or do you want the Court to
13 suspend for five minutes?

14 Me ROULEAU :

15 No, no need to suspend. It will take one minute.

16 THE COURT :

17 Go ahead.

18 Me ROULEAU :

19 Just one minute.

20 THE COURT :

21 So, for the record, madam clerk, the three
22 prosecutors stepped out of the room and everybody is
23 remaining in the courtroom and we'll wait for their
24 return.

25

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

--- LAWYERS FOR THE CROWN WENT OUT OF THE COURTROOM.

THE COURT :

Alright. The three prosecutors are coming back in.

Do you need more time or you're ready...

Me ROULEAU :

No, no, no, no, I understand my colleagues' preoccupation and we're saying the same thing, but just with a level of precision to be... make absolutely sure we're on the same page.

So, the second part, what we agree to for the meeting and the use of the software is data organization. We just want to point out that the decryption of the data takes place in the first process, in the interception process.

It is then decrypted and once it's in the database, that my colleagues will have access to, it's... it is already decrypted. What the software does is permit a user to interrogate the database in order to organize the information that is in the database in a manner that...

THE COURT :

So, once the data is collected, is it already in an

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 intelligible human format that can be comprehended?

2 Me ROULEAU :

3 It needs to be decrypted.

4 THE COURT :

5 Okay. But you said... you just said, once the data
6 is collected, it's already decrypted.

7 Me ROULEAU :

8 Exactly. It needs to... the first part,
9 interception gathers raw data, decrypts it, sends it
10 to the second part that uses the database of
11 decrypted information in order to organize it, to
12 present it in an intelligible...

13 THE COURT :

14 Okay. When...

15 Me ROULEAU :

16 ... manner.

17 THE COURT :

18 Okay. When you propose to have this meeting, is it
19 your intention that the police will explain to
20 defence counsel how it's put, once the data is
21 collected? You're saying it's already decrypted or
22 it's going to be shown to them how it's put into
23 intelligible human format?

24 Me ROULEAU :

25 Being put into intelligible human format is not

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 decryption. Decryption will have already taken
2 place. The database that they will...

3 THE COURT :

4 The decryption is... it's sort of those letters and
5 numbers that we saw, that inspector Flynn referred
6 to and that are even indicated in his report?

7 Me ROULEAU :

8 It... yes...

9 THE COURT :

10 So, what you plan to demonstrate to defence counsel
11 is when you have those numbers or letters that don't
12 mean anything, how you can convert that in...

13 Me ROULEAU :

14 No.

15 THE COURT :

16 No.

17 Me ROULEAU :

18 That's part of the privilege. That's the area of
19 interception that we claim privilege to, once...

20 THE COURT :

21 So, you're not going to show them how it's put into
22 intelligible human format?

23 Me ROULEAU :

24 Not how it's decrypted and...

25

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

THE COURT :

No, but... okay. Look, you did indicate that. Once the data is collected, it's already decrypted but it's not something if you were to read that, it's not a message, hi, Bob, I'm going to the store? It's not something like that; right?

Me ROULEAU :

Okay. Can I give you again an example?

THE COURT :

Please do.

Me ROULEAU :

Special I in Ottawa gathers raw data, needs to decrypt it. They produce HTML messages. So, that's... a message is one like we... the example that was taken from either our jury aid motion or the examples that were given. It's the... you have the header, all the numbers and what's in Mr. Flynn's report and it also contains the decrypted message. What Montreal gets is all that in a... in huge stacks. What P to P enables special I in Montreal is to take these...

THE COURT :

Yes.

Me ROULEAU :

... HTML messages...

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

THE COURT :

Take... could you give him, Madam clerk, exhibit
25.7?

Me ROULEAU :

Okay, exactly. Well, this...

THE COURT :

Okay. So...

Me ROULEAU :

I have it.

THE COURT :

... let... no, no.

Me ROULEAU :

Ça va, madame.

THE COURT :

I'm going to ask you a couple of questions.

Me ROULEAU :

Yes.

THE COURT :

At the top of 25.7, it says ex-Medisource (ph) and
a number, 2694, two letters, DB62. Alright. And
then there is other similar designations; correct?

Me ROULEAU :

Yes.

THE COURT :

Alright. So, when you say that the data is

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

collected, it's already decrypted. Do you mean that you get something like that or do you mean you get something that's further down? For example, here, a little further than the middle of the page:

"N.M. was getting hungry, LOL,
and you are... you hungry?"

That's a message that people can understand?

Me ROULEAU :

Yes.

THE COURT :

"N.M. was getting hungry".

Me ROULEAU :

Yes.

THE COURT :

We know what that means, right. But when you're saying that you're going to meet with defence counsel, once data is collected and it's already decrypted, are you going to show them how it gets into the form like this, "N.M. was getting hungry"?

Me ROULEAU :

No.

THE COURT :

No. You're going to show them that you get the top part?

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

Me ROULEAU :

What we're going to show them is how we start from that, from 25.7 and eventually are able to produce calendar B9, for example. How... what's the process from this to having the conversations organized, sorted out and I'm saying it in a rough fashion, but...

THE COURT :

I'm not following you, honestly. If I were defending someone here and the Crown told me something like that, honestly, I wouldn't understand you. So, I'm not defending anybody. The defence counsel are, but I have to resolve an issue that's contested between both sides. You're going to have make that clear for me.

Me ROULEAU :

I will do my best.

THE COURT :

Because, first, you said that the meeting will indicate what happens once the data is collected, how it's put into intelligible human format. I repeated myself about three times until maître Gauthier and maître Godbout disagreed with your agreement with what I said and then you stepped out. Now, you're saying, once the data is collected, it's

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 already decrypted, but you're not going to show them
2 how to put it into an intelligible form.

3 Me ROULEAU :

4 It's... well, it's a question of what we mean by
5 intelligible human format. If it's...

6 THE COURT :

7 Well...

8 Me ROULEAU :

9 ... decryption that is meant, the answer is no.

10 THE COURT :

11 Well, no, no, but...

12 Me ROULEAU :

13 And if it's organization of HTML, the answer is yes.

14 THE COURT :

15 Well, to my knowledge, what an intelligible human
16 format means is for a lawyer to sit down and read it
17 and be able to understand what the message is, not
18 ex-Medisource, 2695DB32. What they want to see is
19 a message... how you got "N.M. was getting hungry,
20 LOL, and are you hungry"? That type of message.

21
22 I'm not pushing you one way or the other. I just
23 want to know what your position is because I have to
24 rule on it. Maybe you're right not to disclose this
25 or not to disclose that, but I don't know what your

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

position is. It's not clear to me.

Me ROULEAU :

Well, I agree with my colleague's proposition as to what the zones of contentions are. What he has brought in front of you is... I believe is an accurate description of...

THE COURT :

Okay. Let's deal with one thing at a time. On the second page of this document that was filed today, the letter dated November 18th, 2014, R-25.10, you're going to come back to me later and you're going to tell me what it is that you're going... so that I can understand that you're agreeing to with the software with an RCMP officer at a meeting, Crown and defence. How far are you prepared to go for that? I'd like to know.

Okay. On the points referred to by Mr. Lacey, with respect to location, he's asking for the manner of intercept pin to pin and the places. By places, in response to my question, he said where on the path of travel were the messages intercepted? In his argument, I'm going to ask him. I suppose he's going to do it anyway, what exactly he means by that, where on the path travel? He knows what he's

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 talking about and he'll be more specific.

2
3 On his second point, on the decryption, he said many
4 things. He said... and this is from his argument,
5 not from anything else. He said today, BlackBerry
6 provides a global encryption key that unlocks
7 decryption and he's confirming that the police
8 assert privilege due to their relationship with RIM.
9 This is often his argument.

10
11 BES, he states, the way people, who want to avoid
12 interception, maybe arrange themselves, he said that
13 would be something that is subject to privilege that
14 he wants to argue as well. So, on those two points,
15 what's your position on them? Is there anything...
16 and I'm... I have to ask you because I might find
17 out tomorrow that there is something in there that
18 you're not really objecting to. So, I'd like the
19 position quite clearly.

20 Me ROULEAU :

21 We are of the position that that information is
22 privileged. The need for BlackBerry to participate,
23 what they do or don't do for the RCMP to be able to
24 intercept, we feel that is privileged for reasons
25 that I later on will give to the Court and so

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

definitely there, that's a point of contention.

THE COURT :

Okay. So, what RIM does or does not do for the RCMP
you're saying is privileged?

Me ROULEAU :

Yes, and our answer to that is the hashtag value of
the intercepted message that... but I don't want to
get too... too...

THE COURT :

No.

Me ROULEAU :

... much to ahead of myself.

THE COURT :

What about the other things I just said in my
comments, repeated what Mr. Lacey said? What about
that in terms of the location number 1?

Me ROULEAU :

Ah! Definitely...

THE COURT :

In other words, places where on the path of travel
are intercepted?

Me ROULEAU :

But that's the heart of the... the heart point of
contention. The points and matter of interception,
technically the way that was done, definitely, that

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

is at the heart of our claim of privilege.

THE COURT :

Number 2, the points I just mentioned about Mr. Lacey's comment, a global encryption key unlocking decryption. You're maintaining a...

Me ROULEAU :

Yes. And I can assure this Court that this will not change.

THE COURT :

Did I not hear Mr. Flynn say something in the public part of his testimony on that?

Me ROULEAU :

Well, he didn't go... he mentioned the reasons why that is sensitive, but without going... answering the specific questions, what did you do with RIM and what did RIM have to do in order for you to be able to achieve that goal which is what we're trying to have...

THE COURT :

And the ins and outs of the BES service, you're requesting privilege on that as well. In other words, people who want to get away with being... without being detected, how they would go about doing that?

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

Me ROULEAU :

Yes.

THE COURT :

So, I understand a little clearer your position, maître Rouleau, but maybe you can think about this when you reply. How is the defence going to challenge the integrity of the messages if they can't know where they were intercepted and how they were decrypted?

Me ROULEAU :

It's the hashtag value of the test, the hashtag value test that was... it's Mr... I'm sorry, I don't have the...

VOICE NON IDENTIFIED :

Boismenu.

Me ROULEAU :

Mr. Boismenu's report that was filed in this motion. That, in our view, assures the Court that what is presented to the Court is indeed what was intercepted. I'm certain that my colleague will have representations regarding that, but that is our position...

THE COURT :

The...

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

Me ROULEAU :

... on that matter, of course.

THE COURT :

Okay. Boismenu's report is... what is presented to the Court is?

Me ROULEAU :

Is the same thing as what was input into the machine. Did the hashtag value of a given message, if it changes, if (inaudible) is omitted or if there is any modification to a message, the hashtag value will change and the data has been tested here and since the hashtag values are 100 percent match, we know for a fact that the message that was sent, intercepted is the same one that is being presented to the Court.

THE COURT :

Alright. Okay. Mr. Lacey. Sorry. Was there something else, maître Rouleau?

Me ROULEAU :

No. Well, I mentioned to my colleague that I had the redacted version of Mr. Flynn's ex parte testimony, as well as the judicial summary that was given to the defence, the latest version of that.

THE COURT :

Is this an updated one, another one or is this the

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

second one?

Me ROULEAU :

It's the second one, yes. So, we might need to address that and I will be depositing them, but my colleague mentioned that he was going to address that question and well, we can do it right away or later on. It's just a matter of having it done and not forgetting about it.

THE COURT :

I'm just curious. For your arguments on these points, are there any parts of your argument that you're going to ask to be heard ex parte?

Me ROULEAU :

I don't believe I need to.

THE COURT :

Alright.

Me ROULEAU :

I think it can be done without resorting to an ex parte.

THE COURT :

Okay.

Me LACEY :

I'm happy if we want to deal with that issue now. We should mark... I would suggest we mark originally the original transcript that was provided. I don't

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 know if that was marked yet as an exhibit on these
2 proceedings. So, I have copies of that, the
3 original. You may recall, your Honour, that...

4 THE COURT :

5 The original... the original redacted transcript?

6 Me LACEY :

7 Of course, yes.

8 THE COURT :

9 So, the... let's do that. The unredacted transcript
10 will be marked and sealed.

11 Me ROULEAU :

12 Yes, I have it here. It is not sealed. So, madame
13 la greffière, est-ce que ça va? Est-ce qu'on est
14 équipés pour le faire? Alors, we'll officially
15 deposit it. So, we can give it a... oui.

16 LA GREFFIÈRE :

17 Juste m'indiquer combien de pages parce que je ne
18 pourrai pas le...

19 Me ROULEAU :

20 Vingt-sept pages.

21 LA GREFFIÈRE :

22 Merci.

23 Me ROULEAU :

24 I was just checking if it totals up...
25

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

THE COURT :

So, the...

Me ROULEAU :

... and it does.

THE COURT :

... R-25.11?

THE COURT CLERK :

Yes.

THE COURT :

So, the...

Me ROULEAU :

Now, I will...

THE COURT :

... the unredacted transcript of inspector Flynn's
testimony heard ex parte will be R-25.11 and the
Court orders that it be sealed and not opened,
unless there is an order of the Court.

THE COURT CLERK :

Superior Court?

Me ROULEAU :

I would suggest an order of a Court of competent
jurisdiction, which is self-explanatory, but...

THE COURT :

Well, you could put by the Superior Court or a Court
sitting in appeal.

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 Me ROULEAU :

2 Exactly.

3 THE COURT :

4 Okay. Not to be opened except by order of this
5 Court, not to be opened except by an order of the
6 Superior Court of Quebec or a Court sitting in
7 appeal.

8 THE COURT CLERK :

9 It shall be noted.

10 THE COURT :

11 Which would be the Court of Appeal of Quebec or the
12 Supreme Court of Canada. I don't think you want me
13 to include the Federal Court, in any way,
14 jurisdiction and something like this? No.

15 Me LACEY :

16 If we can avoid dealing with the Federal Court, we
17 should.

18 THE COURT :

19 We don't need the Court Marshall Court either.
20 Alright. So, except... not to be opened except by
21 order of the Superior Court of Quebec, the Court of
22 Appeal of Quebec or the Supreme Court of Canada.

23 THE COURT CLERK :

24 It will be noted.

25

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

THE COURT :

Okay. So the... that's R-25.11. The first redacted copy will be R-25.12.

Me ROULEAU :

You have the version, your Lordship, of the... with the questions that are numbered because there were two that were used. They are both identical, but one of the two has the questions numbered, whereas the first version didn't have...

THE COURT :

Well...

Me ROULEAU :

... question numbers...

THE COURT :

... yes, on...

Me ROULEAU :

... Q1, Q2, Q3.

Me LACEY :

(Inaudible) should just mark (inaudible).

THE COURT :

On the second redacted copy, I have numbered questions.

Me ROULEAU :

That's fine.

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 Me LACEY :

2 We can mark the first redacted copy as you
3 suggested, your Honour, as R-25.12. We have extra
4 copies, if the Court requires.

5 THE COURT :

6 So the first, we'll call it the first redacted copy
7 of inspector Flynn's ex parte testimony, R-25... I
8 have one.

9 THE COURT CLERK :

10 You already have one.

11 THE COURT :

12 I have one.

13 THE COURT CLERK :

14 (Inaudible).

15 LA COURONNE :

16 Je vais la prendre. On va la prendre.

17 THE COURT :

18 So, that's R-25.12. Then I have a second redacted
19 copy.

20 Me LACEY :

21 Can I ask before we do that, your Honour, just...
22 there was another document that we were provided,
23 called the...

24 THE COURT :

25 Summary?

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

Me LACEY :

... the first summary and I wonder if it makes sense to include the first summary as the next exhibit, R-25.13? We have copies for the Court and the...

THE COURT :

The investigative techniques motion, redacted ex parte testimony of Flynn?

VOIX NON IDENTIFIÉE :

Bien, c'est le premier qu'on a donné.

VOIX NON IDENTIFIÉE :

Oui.

Me LACEY :

Just because it flows after the first transcript.

THE COURT :

Alright. Alright. Well, this is connected to the first redacted copy; correct?

Me LACEY :

Yes.

THE COURT :

Put them together.

Me LACEY :

Well, A and B?

THE COURT :

Yes. So, the investigative techniques motion redacted ex parte testimony of inspector Flynn is R-

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

25.13A and the actual redacted 27 pages is R-25.13B.

Me LACEY :

I'm sorry to interrupt, your Honour, but you already
marked R-25.12 as the redacted transcript. Perhaps
we can mark that as 12A?

THE COURT :

I did. No, you're right. Well, no, R-25.12 is the
first redacted copy. So, you want to have it with
the first redacted copy?

Me LACEY :

Yes, I'm sorry.

THE COURT :

No, you're right.

Me LACEY :

I wasn't clear.

THE COURT :

You're right. So, R-25.12A will remain the same.
The R-25.12A is the investigative techniques motion.
It's a summary, redacted ex parte testimony of
inspector Flynn, one page.

Me LACEY :

Does the Court need copy... a copy of...

THE COURT :

I have one.

REPRESENTATIONS

540-01-063428-141
December 1st, 2014

Me LACEY :

Right here. Sorry.

THE COURT CLERK :

So, the one page document should be A?

Me LACEY :

That's going to be A.

THE COURT :

And...

Me LACEY :

There was also, your Honour, a document that the
defence then prepared.

THE COURT :

Well, let's just attach that to R-25.12B, the first
redacted copy of inspector Flynn.

Me ROULEAU :

An extra copy of...

VOICE NON IDENTIFIED :

Yes.

THE COURT CLERK :

And this will be B?

Me LACEY :

Yes. No, that's the same.

THE COURT :

You...

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

Me LACEY :

That's the same document.

VOICE NON IDENTIFIED :

I'm sorry.

THE COURT :

... you're referring to...

VOICE NON IDENTIFIED :

The same.

THE COURT CLERK :

No, it's the same thing.

THE COURT :

We have the respondent's reply. That's the
respondent's reply.

Me LACEY :

No, sorry, your Honour.

THE COURT CLERK :

Just a minute. There is missing a document.

Me LACEY :

Yes. R... where we are right now is R-25.12A who
was marked, which was Marc Flynn's one page summary
and then what I was going to suggest in response to
that summary, the defence prepared a two page
document which was also shared with the Court by way
of email on consent of all the parties.

REPRESENTATIONS

540-01-063428-141
December 1st, 2014

THE COURT :

Let me have a copy.

Me LACEY :

I do. I have extra copies. I was going to ask that
that be marked as R-25.12B because it goes with R-
25.12 which was the first redacted transcript.

THE COURT :

Just one copy for me. Maître Rouleau, to have it
filed, anything to say?

Me ROULEAU :

Oui, oui, j'ai la copie...

LA COUR :

Non, non, mais est-ce que... do you want it to be
filed with the R-25.12B?

Me ROULEAU :

Yes, it makes sense to do it there...

THE COURT :

Alright.

Me ROULEAU :

... if my colleague wants to file that.

THE COURT :

Okay. So, R-25...

THE COURT CLERK :

Two pages.

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

THE COURT :

... 12B, the defence response to Crown's... well,
defence response to R-25.12A.

Me LACEY :

Yes.

THE COURT :

Summary of inspector Flynn's redacted ex parte
testimony.

Me LACEY :

The Crown then provided the numbered version of the
redacted transcript which, if it's appropriate, I
would suggest we mark as R-25.13.

THE COURT :

Is... this second transcript with the questions
numbered, is it identical to the first one or is
there anything else that's unredacted?

Me ROULEAU :

Yes, it's the same one. We just added the question
numbers in order for it to be...

THE COURT :

Alright. So...

Me GAUTHIER :

The redacting is not the same.

Me LACEY :

The redacting is different.

REPRESENTATIONS

540-01-063428-141
December 1st, 2014

THE COURT :

The redacting is different?

Me LACEY :

Yes.

Me ROULEAU :

Yes. On en avait fait un petit peu plus.

THE COURT :

Alright. So, R-25.13C is...

Me LACEY :

It will just be 13, your Honour, no C. It would just be... it's the first document in...

THE COURT :

You're right. So, R-25.13C is an updated redacted version of inspector Flynn's ex parte testimony.

Me LACEY :

I know this is tedious, your Honour. I don't mean to...

THE COURT :

Just one second. As well, the questions are numbered. Go ahead.

Me LACEY :

I think when you were just identifying it for the record, you said R-25.13C, but this would just be R-25.13.

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 THE COURT :

2 No, no, you corrected me already and I agreed with
3 you. It's R-25.13.

4 Me LACEY :

5 Thank you.

6 THE COURT :

7 And that is dealt with.

8 Me LACEY :

9 And the Crown has that numbered document. Do you
10 have that in file?

11 THE COURT :

12 Okay, just a moment. So, with respect to R-25.12,
13 A is the summary...

14 THE COURT CLERK :

15 Of one page.

16 THE COURT :

17 ... of one page. B is the defence response to R-
18 25.12A.

19 THE COURT CLERK :

20 Of two pages.

21 THE COURT :

22 And C is the first redacted...

23 THE COURT CLERK :

24 We don't have a C. I'm sorry. There is no C.

25

REPRESENTATIONS

540-01-063428-141
December 1st, 2014

THE COURT :

Well...

THE COURT CLERK :

Mr. Lacey wants it to be 25 point...

THE COURT :

No, no, the first redacted copy?

Me LACEY :

Was R-25...

Me ROULEAU :

R-12...

Me LACEY :

... 12.

Me ROULEAU :

Yes.

THE COURT :

Oh! Alright. Okay.

THE COURT CLERK :

You have the same thing.

THE COURT :

So, that's R-25.12 standing alone, okay.

THE COURT CLERK :

Alone, right.

THE COURT :

So, we have an R-25.12 and then we have A and B
joined.

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 Me LACEY :

2 Yes.

3 THE COURT :

4 Okay, that's fine.

5 Me LACEY :

6 And then...

7 THE COURT :

8 And R-25.13 is the updated redacted copy.

9 Me ROULEAU :

10 Yes.

11 Me LACEY :

12 Correct.

13 THE COURT CLERK :

14 R-25.13.

15 THE COURT :

16 I'm just going to repeat this, so that it's clear.

17 The unredacted sealed copy is R-25.11. R-25.12 is

18 the first redacted copy of inspector Flynn's ex

19 parte testimony. That's R-25.12. R-25.12A is the

20 redacted ex parte testimony, we'll call it the

21 summary from the Crown of inspector Flynn's ex parte

22 testimony. R-25.12B is the defence response to the

23 Crown's summary.

24 THE COURT CLERK :

25 Of two pages.

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

THE COURT :

So, yes, it's the defence response to R-25.12A and then R-25.13 alone is the updated redacted version of inspector Flynn's ex parte testimony which includes the numbering of the questions which didn't exist in the first copy. Everybody agrees with that numbering

Me LACEY :

Yes. Thank you.

Me ROULEAU :

Yes.

THE COURT :

Alright. Go ahead.

Me LACEY :

And the last document in that series would be the Crown's new judicial summary, which is a different summary with reference to the question numbers.

Me ROULEAU :

Yes.

Me LACEY :

And I think it would make sense that we mark that R-25.13A.

THE COURT :

Okay, that's done.

REPRESENTATIONS

540-01-063428-141
December 1st, 2014

THE COURT CLERK :

Thank you.

LA COUR :

Ça va, madame?

LA GREFFIÈRE :

Moi, ça va très bien. Je voulais juste aviser que le premier document était de 27 pages. Là, j'en ai 28, mais la dernière page est vierge. Est-ce que je pourrais l'enlever?

Me ROULEAU :

Oui.

LA COUR :

Vous parlez de quel... what document?

THE COURT CLERK :

The document that we have of 27 pages which was R-25.12.

THE CROWN :

The one in your hands is 13; right?

THE COURT CLERK :

It's 13.

THE CROWN :

Yes.

THE COURT CLERK :

It has 28 pages, but the last page is a blank. Can I...

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

THE COURT :

Thirteen has 20... I have 27 pages.

THE COURT CLERK :

Exactly.

Me ROULEAU :

It... that is correct.

THE COURT CLERK :

I can remove...

Me ROULEAU :

Yes, yes.

THE COURT :

in fact, all of the documents, the original sealed copy that's unredacted is 27 pages. They're all 27 pages, the first redaction and the second one as well.

THE COURT CLERK :

Thank you.

THE COURT :

So, the last document was the Crown's updated judicial summary of the redacted ex parte summary of the testimony of inspector Flynn, R-25.13A.

THE COURT CLERK :

That's right.

THE COURT :

Alright.

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

THE COURT CLERK :

Thank you.

THE COURT :

Go ahead.

Me LACEY :

Thank you. In order to assist the Court and to frame the issues, it may be helpful for the Court to have regard to exhibit R-25C.1 which is, as I understand it, the Crown reply. (Inaudible). No, that's right, 25C.1, Crown reply to special I motion. It's the bound volume, a small white bound volume.

THE COURT CLERK :

You have your copy?

THE COURT :

Yes, I have an additional copy.

Me LACEY :

Okay. Thank you, your Honour.

THE COURT :

It's entitled "Respondent's reply to the application for disclosure of information".

Me LACEY :

Yes, your Honour.

THE COURT :

And the first title, the introduction is "Procedure

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 to follow under the Common Law and section 37 of the
2 Canada Evidence Act". So, we're talking about the
3 same document.

4 Me LACEY :

5 Okay. Thank you. And if you just turn to... within
6 that document, you'll find the report of inspector
7 Flynn.

8 THE COURT :

9 What page?

10 Me LACEY :

11 It's a... if I give you a page number, it's page 5
12 of the report, but it's not the 5th page into the
13 document. It's the 5th page of Annex R-1.

14 VOICE NON IDENTIFIED :

15 The one with the diagram.

16 Me LACEY :

17 With the diagram, yes, the blue...

18 THE COURT :

19 (Inaudible)?

20 Me LACEY :

21 Yes. And just because I was listening to your
22 exchange with my friend, Mr. Rouleau, and I thought
23 it might be of some assistance to the Court because
24 it assists in framing the issues as I suggest they
25 should be framed to look at this diagram which is

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

the intercept system.

There is two things that the RCMP had to do in this investigation globally. One is the active interception which included two subcategories, acquiring the data and being able to read the data, so deciphering the data. That was the interception stage.

The second stage was what I would call the data management stage of the project. The diagram that's before you which says:

"The generalized overview of
system architecture..."

It's difficult to read even if we have our glasses on, but everything in that diagram represents the interception process, that first process and if you follow the arrows all the way through, on the right-hand side of the diagram you see "collections", a box at the top that says "collections" and then a box to the right of that that says "processing". "Collections" is the acquiring of the data, the intercepting of the data and collecting it in a place for the RCMP to use it.

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 And then when it gets to processing, "processing" is
2 where the decryption occurs and I'm not trying to be
3 the expert. I'm just trying to explain the evidence
4 as I understand it from the person who was involved
5 in creating the architecture and then if you see the
6 box or the line, sorry, that comes from the box
7 after "processing", it goes down to Montreal special
8 I, at the very bottom. So, that's the transmission
9 of the processed data. So, the data, at that point,
10 has been deciphered, decrypted into a format that
11 allows special I to read it.

12
13 And the format that allows special I to read it is
14 the R-25.7, example that you took Mr. Rouleau to,
15 which contains information about source and other
16 things, but also contains what the RCMP says is the
17 substance of the message that was decrypted. So
18 that gets sent to Montreal special I.

19
20 Montreal special I developed a software to help them
21 manage the 1 million plus messages that they were
22 getting. If we drew a line down from Montreal
23 special I or if we just wanted to explain what
24 Montreal special I did, we would include in the
25 Montreal special I box P to P software, the

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 management tool, the tool that was used to manage
2 the interceptions after they had already been
3 acquired and processed by Ottawa special I.

4 THE COURT :

5 So, you're saying P to P software manages the
6 messages, after they're intercepted and acquired by
7 special I in Montreal?

8 Me LACEY :

9 That's correct, after they've been deciphered.
10 What's been resolved albeit very late in the day,
11 but that's not... it's not for now, is any
12 disclosure related to P to P, that's been resolved.
13 That's that second last paragraph on exhibit R-25.10
14 I believe it was or 11. Eleven?

15 VOICE NON IDENTIFIED :

16 Ten.

17 Me LACEY :

18 Ten, the letter of November 18th. So, the P to P
19 issue has been resolved. That's at the second last
20 paragraph on R-25.10.

21 THE COURT :

22 Okay. So, alright. The paragraph that's... we
23 would also reiterate the... our request included in
24 our special I motion, that's resolved?
25

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

Me LACEY :

Yes, on the terms that we've discussed that I will not repeat.

THE COURT :

Right.

Me LACEY :

Additionally, from R-25.10, numbers 1, 2, 3 relate to the interception process. So, it's not... it doesn't do with... have anything to do with Montreal special I. It has to do with Ottawa special I, a very general overview, but what's been resolved when we talk about the data packs, the IP address, information, the ping, the I'm here, that's all in that first cloud on diagram at page 5.

So, there are certain things now that after the evidence of inspector Flynn, the Crown has acknowledged they cannot or do not assert privilege over. So 1, 2 and 3 happened in that first cloud which is entitled "Normal telecom network carrying target communication" and there is a sub-parenthesis "Wi-Fi Rogers RIM", et cetera. So there is certain data at that stage that is going to be now provided.

What the Crown is saying will not be provided,

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 subject to a Court order, is other information about
2 where within the various sources and the path of
3 travel, which I will elaborate on, the Crown says
4 you cannot know about those things because if you
5 knew about those things, it would compromise our
6 ability generally to intercept people's
7 communications who do want to be intercepted and
8 I'm... this is a very general characterization, but
9 that's, as I understand it, the Crown's position.

10
11 Additionally, the Crown is taking the position that
12 what happens between collections and processing,
13 that act of deciphering and decrypting the messages
14 and the role, if any, and it... and just let me be
15 clear about this. That is the position of the
16 Crown, the role, if any. They don't want to even
17 confirm the role of RIM. The role, if any, that RIM
18 plays in the decryption process between collections
19 and processing, as well as whatever role RIM might
20 have played at the point in time of that first
21 cloud, first bubble, acquiring the communication.

22
23 When my friend, Mr. Rouleau, talks about... and this
24 is not a criticism. He says hashtag values. It's
25 actually MD5 hash values which is something

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 different than hashtag, but I know what he's talking
2 about. When he talks about the report that was
3 authored by the RCMP member in relation to hash
4 values, as I understand it, that relates to... if
5 you looked under the collections, there would be an
6 analysis of the data, before processing, that gives,
7 for lack of a better word, a number to the file.

8
9 Inspector Flynn described this in some detail, but
10 it's an algorithm. It's an algorithm generated
11 number that is a particular identifier for that file
12 ascribed at the point in time of collection and then
13 they process that data and they run the algorithm
14 again, after processing to again generate an hash
15 value and they want to make sure there is
16 concurrence between the two hash values because that
17 they would say, according to the author of the
18 report, gives you confidence that our processing did
19 not affect the data that... because the hash value
20 represents a unique identifier making it clear that
21 the data has not changed at all.

22
23 And I think the example you had from inspector Flynn
24 that I attempted to use with him that at least, some
25 lawyers are more familiar with is the child

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 pornography example that hash value is not
2 necessarily about the name of the file or anything
3 like that. It has to do with the integrity of the
4 underlined data so that an image, for example child
5 pornography, the way the police sometimes know that
6 someone is possessing child pornography is they do
7 hash value searches through computers and through
8 databases and they confirm using the hash value,
9 regardless that you can call the image, you know,
10 old person, but through the hash value, the police
11 would know a particular hash value represents a
12 known child pornography image and that was one of
13 the examples I took inspector Flynn to.

14
15 So, that gives them, at least they would say, the
16 confidence to know when they use the hash values
17 here between collections and processing, that it
18 represents, they would say, the data integrity is
19 untouched and because the Crown says we're assuring
20 you through that report that the integrity is
21 untouched, you're not entitled to know anything
22 about how we deciphered the message.

23
24 So that, in my respectful submission and maybe it
25 is... I think this is where we... using the diagram,

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 I think helps sort of situate where the issues arise
2 for the purposes of the parties, in a graphic way
3 that may or may not have assisted the Court and I'm
4 not... this is no criticism to Mr. Rouleau. It's
5 difficult sometimes to keep all of these issues
6 together, but for my purposes, as I was listening to
7 us all talk about these issues, it seemed coming
8 back to the diagram and seeing if we're all in
9 agreement in a macro level about the way I've just
10 explained, it may be of some assistance to the
11 Court.

12
13 So, I don't know if you want to ask Mr. Rouleau or
14 if I should just continue? But it seems to me
15 that's an accurate summary. There may be tweaks
16 here and there, but an accurate global summary.

17 Me ROULEAU :

18 We agree that the depiction of the issue at hand is
19 what our colleague... our confrere stated to be.

20 THE COURT :

21 So, what he described on page 5 of the inspector
22 Flynn's report, about the first cloud and the
23 collections and processing, you agree with his
24 explanation?

25

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 Me ROULEAU :

2 Yes, it's an accurate description of the problem at
3 hand.

4 THE COURT :

5 Okay. Go ahead.

6 Me LACEY :

7 Thank you. So, I'll come back to the law later,
8 towards the end of my submissions, but just if I can
9 just to say a couple of things generally with
10 respect to these matters. As you know, your Honour,
11 the privilege being claimed here is not a class
12 privilege in the same way as informant privilege or
13 in the same way as solicitor/client privilege.

14
15 Those two privileges are I don't want to say
16 absolute, but virtually absolute and will be
17 protected, except in those rare circumstances where
18 it's necessary to disclose the privilege because the
19 innocence of the accused is at stake. It's a very,
20 very high threshold to pierce that privilege.

21
22 That is not the privilege we're dealing with. The
23 privilege we're dealing with is not in that
24 category. We're dealing with something that's being
25 characterized, I think going back to Wigmore, as a

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

case by case privilege and...

THE COURT :

I don't think anybody is disagreeing with that.

That's clear.

Me ROULEAU :

Yes, it's obvious.

Me LACEY :

... and just to sort of again frame the issues for me as I worked through what can be difficult issues, especially when we're not party to what happens in our absence by necessity. The balancing therefore is one of looking at the question of the accused applicants constitutional right to make full answer and defence and whether or not any limit on that right is justified because of the larger public interest in ensuring and protecting a police investigative technique.

But to be clear, we are, by necessity, limiting the right of the accused to make full answer and defence and when you turn to the questions before you, factually, the question... one of the things you'd have to grapple with at the end of the (inaudible) threshold issues is the issue one to which any privilege attaches anyway and that's the second

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 issue, as I've characterized it, which is the
2 relationship with RIM, RIM's involvement and you
3 know, I can start there.

4
5 Perhaps, maybe I should start with the second issue,
6 because it's a relatively compact issue and on that
7 issue, I would ask the Court to be mindful of the
8 following. That it's not anything that the police
9 would like to keep private or anything that the
10 police would like to limit the dissemination of,
11 that is subject to a privilege claim. There are
12 many police investigative techniques, there is no
13 question, that the police would rather not disclose
14 and you have some very good examples in my
15 submission.

16
17 One of the examples you have in this case is well,
18 the acronym in French is IDM and the acronym, I
19 think, in English is MDI and you may recall, I asked
20 inspector Flynn about this device, the last day and
21 what... I wasn't asking him about the technical
22 operation of the device, but I was asking him about
23 the RCMP's initial reaction to disclosing what that
24 device can do.
25

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 And what that device does, you heard some evidence
2 about, is it allows the police to ascertain certain
3 information about the way a BlackBerry communicates
4 or any mobile device actually communicates with cell
5 towers when... you've heard about ping, I'm here.
6 Cellular phones which informs... the Court's
7 discretion to require them to be off in court, for
8 example.

9
10 Cellular phones are constantly broadcasting data and
11 they're broadcasting information related to where
12 the phone is relative a network, the identity of the
13 phone and I don't mean the user, but the peculiar
14 identity of the phone by way of an IMSI number that
15 communicates with the network and some of that can
16 be intercepted by the police using this device, if
17 you're in close enough proximity to the user and it
18 allows the police... and in this case, it happened
19 from time to time.

20
21 You're going to hear about it in respect of other
22 people, not most of the accused, where the police
23 were able to use that device to confirm the identity
24 of a user because they were able to link the IMSI
25 number to a particular BlackBerry device and you can

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 be sure that the police did not want to disclose the
2 fact that they have this technology.

3
4 In fact, inspector Flynn was very clear that the
5 RCMP special I position originally was no, you
6 shouldn't disclose it at all and as I recall his
7 evidence from last week, he acknowledged that even
8 vis-à-vis the affiant with respect to the part 6
9 authorization in this case, there was a reluctance
10 to disclose how that technology worked or what it
11 would do and how it could assist the police in
12 dealing with the issue of identification.

13
14 And there is another example in the cases as well,
15 the decision of Mentuck which is a Supreme Court of
16 Canada decision that I... I'm going to have to hand
17 up. It's not one that was in our case, but we
18 provided the bilingual version to my friend and if
19 I can provide a bilingual version to the Court as
20 well.

21 THE COURT :

22 That's the journalistic decision?

23 Me LACEY :

24 It is, yes. And the thing about Mentuck, it was
25 about dissemination of information in terms of the

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 media, the ability of the media to broadcast
2 information. But Mentuck also is a case that gets
3 used properly, in my submission, for framing the
4 issues of investigative privilege because the claim
5 actually in Mentuck was that the police and the
6 Crown did not want dissemination of the Mr. Big
7 technique, because disseminating the Mr. Big
8 technique would lead future potential accused
9 people, future potential suspects to be on guard to
10 the possibility that members of the RCMP may pose as
11 bosses in criminal organisations with a view to
12 getting them to confess a past crime, which is a
13 technique that was actually developed quite
14 successfully up until last year by the RCMP in
15 extracting confessions from people for historical
16 crimes.

17
18 And in the course of that decision, you'll see a
19 description of the technique, which I'm sure the
20 Court is familiar with, at page 447, paragraph 4 and
21 following, but the Crown and the police tried to
22 resist the information and what's interesting is
23 everyone acknowledged that the technique was known
24 and it was going to be disclosed to some extent in
25 the course of Mr. Mentuck's trial, but there was the

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 suggestion that somehow, a larger broadcasting of
2 the information making it more widely available to
3 the public, well, that could be injurious to police
4 investigative techniques and for the interpreter's
5 benefit, I want to just read from page 468,
6 paragraph 43.

7 THE COURT :

8 She has a copy?

9 Me LACEY :

10 Yes. And this is the bilingual version and the
11 appellant was... in this case was the Crown:

12 "It is my view that on balance,
13 the appellant does not, at this
14 first stage of the test, make
15 it a case that the band, as to
16 operational methods, should
17 have issued. The serious risk
18 at issue here is that the
19 efficacy of present and future
20 police operations will be
21 reduced by publication of these
22 details. I find it difficult
23 to accept that the public of
24 information regarding the
25 techniques employed by the

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 police will seriously
2 compromise the efficacy of this
3 type of operation.

4 There are a limited number of
5 ways in which undercover
6 operations can be run.
7 Criminals, who are able to
8 extrapolate from a newspaper
9 story about one suspect that
10 their own criminal involvement
11 might well be a police
12 operation, are likely able to
13 suspect police involvement
14 based on their common sense
15 perceptions or on similar
16 situations depicted in popular
17 films and books."

18 Yes, I'm reading a bit quicker only because I know
19 they have the French translation. So...

20 THE INTERPRETER :

21 Excuse me, your Lordship. We just need to know
22 exactly where Mr. Lacey is reading.

23 THE COURT :

24 He's on page 468...
25

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 THE INTERPRETER :

2 Yes, we are there.

3 THE COURT :

4 ... in the middle of paragraph 43.

5 THE INTERPRETER :

6 Thank you.

7 THE COURT :

8 I think you stopped, depicted in popular films and
9 books?

10 Me LACEY :

11 Yes. Do I wait and let them get... caught up, your
12 Honour?

13 THE COURT :

14 Yes. So, he stopped at depicted in popular films
15 and books, about eight or nine lines up from the
16 bottom of page 468, paragraph 43. Just the
17 interpreters, let me know when you've caught up. If
18 he goes too fast, we'll have him read the French
19 version, it will go slower and you can catch up in
20 English.

21 Me LACEY :

22 Much slower.

23 THE COURT :

24 But we'll just wait a moment. Okay. So, you can
25 continue from films and books.

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

Me LACEY :

"Will I accept that operations will be compromised if suspects learn that they are targets? I do not believe that media publication will seriously increase the rate of compromise. The media have reported the details of similar operations several times in the past, including this one.

In spite of this publicity, sergeant Germain, in his affidavit, was only able to positively identify one instance in which media reports arguably resulted in the compromise of an operation."

And ultimately in that case, as your Honour knows, they... the Court... Supreme Court of Canada concluded that seeking to limit the dissemination of information about a particular technique that would make it less efficacious for the police, was not sufficient for the purposes, in that case, of

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 prohibiting simply publication, a right guaranteed
2 under section 2b) of the Charter.

3 THE COURT :

4 I think though that a Mr. Big operation and the way
5 we know it, particularly the recent decisions and
6 the recent media description of these types of
7 police investigations, they're really different than
8 what we have here.

9 Me LACEY :

10 I do agree. It's different. I'm simply making the
11 point that the police often come at these issues
12 from the perspective that they overreach in terms of
13 what they do not want disclosed and I've provided
14 two examples from this case or... not from Mentuck.
15 One example from this case in terms of the IDM, the
16 use of the IDM. Another example from the Supreme
17 Court of Canada where the RCMP in Mentuck tried to
18 limit the disclosure.

19
20 The other aspect of Mentuck which is informative, in
21 my submission, is that it also speaks to the
22 question of assessing claims about disclosure or
23 dissemination, where there is already a body of
24 information available about a particular police
25 technique or in our case, I would say a particular

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 way of limiting or organizing yourself in a way that
2 would make it harder for the police to lawfully
3 intercept your communications and that leads me to
4 some of the other material I put before the Court
5 through the cross-examination of inspector Flynn,
6 including exhibit 25.9, which was the communications
7 security establishment document.

8
9 Again, I don't propose to take you through that
10 necessarily in detail, although I can, and I provide
11 this for two reasons. One, to make the point that
12 the vulnerability of pin to pin communications that
13 are travelling through the BIS network is a well-
14 known phenomena that is well published.

15
16 And in fact, the Canadian Government has put all of
17 their institutions on notice about the vulnerability
18 of BIS communications and BIS... by BIS I mean pin
19 to pin BIS communications and they do so in a way
20 that's very helpful in terms of the diagrams that
21 they provide and if you turn to page 2 of that
22 exhibit, under the heading it says:

23 "Figure 2 illustrates the
24 process of sending or receiving
25 pin to pin messages on a

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 BlackBerry device."

2 THE COURT :

3 So, the...

4 Me LACEY :

5 (Inaudible).

6 THE COURT :

7 ... the rectangle on the top or the bottom you're
8 referring to?

9 Me LACEY :

10 I'm now... it's actually on page 3 of the diagram I
11 want to look at. I'm sorry.

12 THE COURT :

13 Page 3?

14 Me LACEY :

15 Yes. It was... page 2, at the bottom, introduces
16 the diagram.

17 THE COURT :

18 Okay. So, on page 3 above figure 2?

19 Me LACEY :

20 That's right. But the figure 2 is actually
21 illustrating the process of sending or receiving pin
22 to pin messages which is a really straightforward
23 illustration of the fact that every pin that travels
24 through the internet has to go through a RIM relay
25 and when you're dealing with the BIS server, what we

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 know, what is known and which inspector Flynn
2 acknowledged, what is well-known is that you're
3 dealing with a global encryption key that BlackBerry
4 controls.

5
6 And the only way to alter the global encryption
7 key... not... you're not altering it, the only way
8 to secure yourself, beyond the global encryption
9 key, is either through a BES server sending and
10 receiving emails through a BES server as opposed to
11 pin or through the addition of PGP software for
12 email communications and in both of the two latter
13 scenarios, in BES, you have an organization that
14 controls the encryption.

15
16 So that if you... all the users within the network
17 of people you're trying to prevent... let me
18 rephrase that. Think of a BES server, if we had one
19 that was being used by a law firm, which is a very
20 common phenomenon, and the law firm had all their
21 users of BlackBerry devices going through the BES
22 server.

23
24 When email was exchanged between one lawyer to
25 another of that same firm, the encryption is

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 controlled by the firm, not by BlackBerry. I mean
2 you're not dealing with a global type of encryption
3 in terms of the email exchanges and similarly, if
4 the firm decided to deal with the email
5 communications by way of PGP, the firm would control
6 the encryption through the PGP server and on that
7 point, you have other evidence before you with
8 respect to how that compromises the ability of the
9 RCMP to intercept communications.

10
11 This is why I say this is like the elephant in the
12 room. They're trying to protect a secret that, in
13 my respectful submission, at least on the basis of
14 what I can know in terms of my submissions to you,
15 is hardly a secret at all. The door is sort of open
16 as it were to this secret room where they're having
17 these communications with BlackBerry. Because you
18 know from Project Tornado, which was filed as
19 exhibit... give me one moment. It was 25, sub C2
20 and there were various sub-exhibits, 1, 2 and 3,
21 Roman numerals, I, II and III.

22
23 But you remember (inaudible), that's the Nova
24 Scotia, I think it was project or East Coast of New
25 Brunswick?

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

VOICE NON IDENTIFIED :

New B, yes.

Me LACEY :

Brunswick, yes. It was the project in the East Coast and this was to be used as a demonstrative aid by my friends to show how people, who are involved in alleged criminal activity, are conscious of the ways in which the police can intercept their communications.

And if you look at the substance of the communications, the people allegedly involved in those communications are sort of saying, well, how did that happen? How is it possible that the police were able to get access to our messages?

And what's clear in my submission, when you read the summary, the synopsis is that these people were utilizing PGP technology and the only way that the police were actually able to secure their communications was by being the ones who controlled the key, who controlled the encryption by posing as... putting an agent in place who offered up the devices and the security to the group.

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 I mean my point in taking you this example is it
2 betrays the fact that they're... that you need to
3 keep all of this secret because the very fact that
4 that's how the police had to infiltrate a group
5 using PGP tells you almost everything you need to
6 know or at least a lot of what you need to know
7 about the capabilities of the police to intercept
8 communications otherwise.

9
10 You cannot get into a safe without having a key,
11 unless you have the means to break the safe
12 otherwise and when you talk about PGP encryption, I
13 think inspector Flynn said, in terms of civilian
14 encryption, it's considered to be the most secure
15 type of civilian encryption available.

16 THE COURT :

17 Remind me with this R-25C2 Project Tornado, you're
18 referring... you're indicating that's with PGP.
19 That was on a BES... in a BES basis?

20 Me LACEY :

21 Yes. I don't think there was any information on the
22 summary about whether it was BES or not. PGP, you
23 do not have to run through a BES server though.
24 PGP, in that case, it's...
25

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 THE COURT :

2 No, PGP can add to a BES, but you don't need it?

3 Me LACEY :

4 And you don't even need a BES at all, in the sense
5 that it's a second layer of encryption. As I
6 understand inspector Flynn's evidence, it's a second
7 layer of encryption. Let me rephrase that. You say
8 you don't need... I said you don't need a BES. You
9 just need a separate server. It doesn't have to be
10 a BlackBerry enterprise server.

11 THE COURT :

12 And you call it... in the message, they...

13 Me LACEY :

14 It can be a third party server.

15 THE COURT :

16 ... in the message, they referred to PGP, the...
17 some of the parties to that conversation in Project
18 Tornado?

19 Me LACEY :

20 Well, if you look at the summary, it says encrypted.
21 They communicated by way of encryption, which it
22 wasn't pin, because they were emailing by... they
23 were emailing. They weren't doing it by way of pin
24 and we heard about two ways to do that. One is
25 through a BES server and the other is through PGP.

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 That's the evidence before you from inspector Flynn.

2
3 A PGP I should be clear. When I say a PGP, we're
4 not talking about a single software provider. PGP
5 is an umbrella, pretty good privacy for... I don't
6 know if it's hundreds of thousands, but certainly
7 hundreds of providers of... if not thousands of
8 secondary providers of encryption in the market
9 place.

10
11 And again, I'm just taking you to that example
12 because when we test the claims, one of the claims
13 being made, that all of this secrecy, the reasons we
14 can't know all of this is because for us to know it
15 is to permit us or other people, and I don't mean
16 defence counsel, I'm not suggesting that's what my
17 friends would say, but us or other people, other
18 like minded people, who want to avoid interception,
19 who are involved in alleged illegality to organize
20 themselves in a way to avoid detection and the
21 measure of that claim, in my submission, has to be
22 assessed as against what's already readily available
23 to people who want to inform themselves.

24
25 It doesn't have to be that Mr. Smith on the street

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 necessarily knows all of these things, but if it's
2 readily available to be known, if the police are
3 advertising one of their techniques on this motion
4 to infiltrate a group using encrypted messages, is
5 to take control of the devices they're using, well,
6 then how secret is this claim?

7 THE COURT :

8 Well, let's just to go back to your two claims in
9 terms of location and the pathway and the second
10 one, the decryption. So, you link up what we
11 learned from this 25C2. Does it tell you anything
12 about the pathway?

13 Me LACEY :

14 No, it relates to the second point.

15 THE COURT :

16 To the deciphering.

17 Me LACEY :

18 Yes, and that's what I said I would deal with first.
19 So... and that's where I say... on the first point,
20 I say if there is a privilege issue, the right to
21 full answer in defence outweighs the investigative
22 technique. On the second point, this idea about oh,
23 we can't tell you what BlackBerry does? That's
24 not... my friends are way more articulate than that.
25 We can't share with you that they tell us or give us

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 the encryption key or in effect create a BlackBerry
2 device in a computer which can read the decryption.
3 That's part of the CSC memo that any BlackBerry
4 device has the global encryption key in it. You...

5 THE COURT :

6 So, you're saying the... your argument about public
7 domain...

8 Me LACEY :

9 Yes.

10 THE COURT :

11 ... maybe the average person doesn't know about it,
12 but could find out about it, relates to your second
13 point...

14 Me LACEY :

15 Yes.

16 THE COURT :

17 ... but you're not raising that for the first point.

18 Me LACEY :

19 Not the first point. The first point is different.

20 THE COURT :

21 The balance.

22 Me LACEY :

23 I acknowledge that, yes.

24 THE COURT :

25 The first point is the balance, okay.

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

Me LACEY :

And I say that again in the context of your Honour is the gatekeeper that I trust that... to the extent that I misinformed or I... misinformed is the wrong word. To the extent that I'm misapprehending the first point of privilege, I have to rely to your Honour as gatekeeper, but to the extent that there is something about the where the police set up their equipment, the nature of the equipment and the how and location of intercept that is an investigative technique that's sensitive. If that's actually true, then I say that full answer in defence outweighs it.

There was one more case I was going to take you to on this second issue and I note the time. I can do it before lunch or I can come back and deal with it after lunch. It's in English. It might take a little longer for the interpreters and they've been working hard, but I'm in your Honour's hand.

THE COURT :

How long will it take on this particular point?

Me LACEY :

Not long from my perspective. Five or ten minutes.

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

THE COURT :

Interpreters, you need a break now for lunch or five, ten minutes? Five, ten minutes is okay. Madam clerk, is that okay, five, ten minutes? Alright. So, it's a quarter to one. We'll go to five to and I think we'll try to wrap it up around then. So...

Me LACEY :

Thank you.

THE COURT :

... we'll keep an eye on the time.

Me LACEY :

The next case then is a decision of a Superior Court judge in Toronto, Justice Nordheimer, and it's Toronto Star Newspapers & al and the Crown and this was again a case that, like Mentuck, involved the dissemination of information or the... it was the redacting of an information to obtain and whether or not the Crown's redactions could be upheld and it's a case if... I don't want to bore everyone with the details, but paragraph 4.

It had to do with the Royal Group Technologies Limited. It was an insurance company and it was a large claim of fraud and other things and it had

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 (inaudible) significant media attention and the
2 media wanted to know more about the underlying
3 allegations in the form of the information to obtain
4 various search warrants and I've provided the case
5 because at page 4, paragraph 10, Justice Nordheimer
6 summarizes this issue of suppression of information
7 and the (inaudible).

8
9 He says, paragraph 10:

10 "It's also clear that the
11 justification for any continued
12 suppression of information used
13 in a Court proceeding must be
14 clearly made out. In
15 particular, any asserted risk
16 to the proper of administration
17 of justice that is used to
18 justify a further restrain on
19 public access must be based on
20 a firm evidenciary foundation."

21
22 And I say obviously that applies equally in the
23 context of evidence which is... would otherwise be
24 disclosable pursuant to Stinchcombe and Justice
25 Nordheimer quotes from Justice Dorothy. I won't

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 read the quote into the record, but he quotes from
2 Justice Dorothy on that issue and then at paragraph
3 14 of the same judgment, Justice Nordheimer deals
4 with the issue of investigative privilege and I just
5 want to highlight the last three sentences.

6
7 It starts with the words "For example":

8 "For example, there are
9 circumstances where the police
10 utilize a particular technique
11 to investigate a particular
12 crime that if revealed
13 generally might undermine the
14 use of that technique, both
15 with respect to a current
16 investigation, as well as in
17 future investigations.

18 If the Court is satisfied on
19 proper evidence that such a
20 result might occur, then the
21 Court will allow that technique
22 to remain concealed in order to
23 promote the greater societal
24 interest of the effect of
25 investigation of criminal

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

activity."

And I would highlight the following:

"It is a basis for secrecy that
is however fairly narrow in its
application and one that, out
of necessity, needs to be
determined on a case by case
basis."

And in that case, if you... if I leave paragraphs 15
and 16 with you, the basis of the claim...

L'INTERPRÈTE :

Excusez-moi, juste arrêtez un instant.

Me LACEY :

I'm sorry.

L'INTERPRÈTE :

C'est parce que madame l'interprète n'avait pas
terminé de...

THE COURT :

Yes, slow down a bit.

L'INTERPRÈTE :

... d'interpréter...

Me LACEY :

I'm sorry.

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

LA COUR :

Merci, madame.

L'INTERPRÈTE :

... la citation.

THE COURT :

Yes. Okay. Just go at a slower pace...

Me LACEY :

I will.

THE COURT :

... for the interpreters. Thank you.

Me LACEY :

I just finished reading the last three sentences of paragraph 14 and I was suggesting to the Court that I would leave the analysis at paragraphs 15 and 16 and the Crown there argued that something called... something they called the victim corporation model was a key investigative technique employed by them, that they wanted to protect from dissemination.

And I think it's important to point out at paragraph 17 the Crown's submissions to the Court in that case because they, at least to some extent, mirror what inspector Flynn claimed about the relationship between RIM and the police and what the Crown submitted in that case was as follows. This is

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 the... because I'm now reading the quotation at
2 paragraph 17:

3 "If the nature and extent of
4 the negotiations and
5 cooperation became generally
6 known, it could prejudice the
7 ability of the RCMP in the
8 negotiate agreements in the
9 future in other significant
10 white-collar cases. There is a
11 real and substantial risk that
12 future corporate wrong doers
13 will learn methods to frustrate
14 cooperation by the victim
15 corporation."

16
17 And Justice Nordheimer quickly dispenses with that
18 claim in the analysis that follows and I appreciate
19 it's not exactly the same, but we're on the second
20 category now, not the first, the second category of
21 the relationship with RIM and knowing exactly what
22 RIM does.

23
24 And where that really leads us is to what is already
25 clear on the face of the sworn evidence and the

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 Court orders in place in this case, with respect to
2 the absolute essential role that RIM has to play in
3 facilitating the interception of communications,
4 that, according to inspector Flynn, he can neither
5 confirm, not deny for risk that it would jeopardize
6 future relationships and I'll come back to that, if
7 it's appropriate, after the break.

8 THE COURT :

9 Okay. Approximately, Mr. Lacey, how much time do
10 you have left?

11 Me LACEY :

12 Yes. I'm going to try to wrap up within about 45
13 minutes. I have not been a great estimator of time,
14 I acknowledge.

15 THE COURT :

16 Fine. Fine. You're not the only one. Maître
17 Rouleau?

18 Me ROULEAU :

19 I would think that within an hour, I have time
20 enough to cover the basis.

21 THE COURT :

22 Alright. So, if we resume... are you proposing 2:15
23 or... we're not going to come back at 2:00. Two 15
24 or 2:30? Any comments?
25

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

Me ROULEAU :

Whatever the Court decides.

Me LACEY :

I'm in your hands, your Honour. Whatever you...

THE COURT :

Alright. Two 20.

Me ROULEAU :

That's what I wanted to say.

--- SUSPENSION

--- UPON RESUMING

THE INTERPRETER :

Excuse me, your Honour. We haven't been able to
test, to establish the communication with monsieur
Desjardins. Can we...

THE COURT :

Go ahead.

THE INTERPRETER :

Thank you.

THE COURT :

Go ahead.

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

LA GREFFIÈRE :

Parce qu'elles sont arrivées en retard.

LA COUR :

Les interprètes.

LA GREFFIÈRE :

Oui. Ça ne sera pas long, monsieur Desjardins. On
essaie de communiquer avec vous.

M. DESJARDINS :

Pas de problèmes, madame.

L'INTERPRÈTE :

Je n'ai pas de réponse de monsieur Desjardins.

LA GREFFIÈRE :

Me permettez-vous, monsieur le juge...

L'INTERPRÈTE :

Peut-être...

VOIX NON IDENTIFIÉE :

... d'aller vérifier quelque chose?

LA COUR :

Allez-y. Je reste ici.

LA GREFFIÈRE :

Oui.

--- VÉRIFICATION DE LA COMMUNICATION AVEC M.
DESJARDINS, À BORDEAUX.

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

LA COUR :

Est-ce qu'il y a deux interprètes ou juste une?

VOIX NON IDENTIFIÉE :

Il y en a deux, monsieur le juge.

VOIX NON IDENTIFIÉE :

Deux, monsieur le juge. Il y a une nouvelle. Il va
 falloir l'assermenter.

LA COUR :

Ok. Ok.

LA GREFFIÈRE :

Désolée, monsieur le juge, mais il devra suspendre
 dix minutes, s'il vous plaît. Mais je ne sais pas
 si c'est l'appareil ou si c'est les personnes devant
 l'appareil. Là, je vais appeler le technicien.

LA COUR :

Je vais attendre ici quelques minutes. Appelez-le.

LA GREFFIÈRE :

Je vais appeler le technicien.

--- APPEL AU TECHNICIEN POUR PROBLÈME DE
 COMMUNICATION.

LA GREFFIÈRE :

Bon! Ça fonctionne, monsieur le juge.

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 LA COUR :

2 Ça marche. Bon! Monsieur Desjardins, est-ce que
3 vous nous... vous êtes capable de nous entendre?

4 M. DESJARDINS :

5 Oui, je vous entends bien.

6 LA COUR :

7 Ok. Et... Bon! I'm going to speak in English. So,
8 the translation into French, do you hear the
9 interpreters translating into French what I'm saying
10 in English?

11 THE INTERPRETER :

12 Yes, there is one interpreter in the room.

13 THE COURT :

14 No, I'm asking Mr. Desjardins.

15 THE INTERPRETER :

16 Yes, she...

17 THE COURT :

18 No, madam.

19 M. DESJARDINS :

20 Oui. Oui. Oui, j'entends la dame en français.

21 LA COUR :

22 Ça va. Merci. Okay. You can swear in the other
23 interpreter.

24 THE INTERPRETER :

25 I'm sorry, your Honour, for the confusion. I wasn't

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

sure who you were talking to.

THE COURT :

Fine. Just come in.

THE INTERPRETER :

I was asked to come in...

THE COURT :

It's alright.

THE INTERPRETER :

... and be sworn in.

THE COURT :

It's alright. Just step forward. We'll swear you
in.

--- ASSERMENTATION DU NOUVEL INTERPRÈTE
ANGLAIS/FRANÇAIS.

THE COURT :

Thank you, madam. Any time you're ready, Mr. Lacey.

Me LACEY :

Thank you. Before the break, we were dealing with
some of the authorities and there is an authority
included in my friend's book of authorities.
It's...

THE COURT :

Which tab?

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 Me LACEY :

2 ... tab 4, (inaudible) of Justice Vauclair and
3 it's... I'm just going to refer the Court to page 9,
4 paragraph 28, which is... it's in French and it
5 references the Quebec Court of Appeal decision in
6 Regina and Charron.

7 THE COURT :

8 Okay. Just one second.

9 Me ROULEAU :

10 What paragraph are you? I'm sorry.

11 Me LACEY :

12 Page 9, paragraph 28, tab 4. I won't read or try to
13 read, more precisely, the French version.

14 THE COURT :

15 Everybody wanted to hear it.

16 Me LACEY :

17 My daughter would not be impressed with my feeble
18 attempts...

19 THE COURT :

20 Alright.

21 Me LACEY :

22 ... but as I understand it, the Court there says in
23 law, confidentiality is always a prerequisite to
24 privilege as the Court of Appeal reminded us or
25 words to this effect. As the Court of Appeal

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

reminded us, there cannot be privilege without confidentiality, but what is confidential is not necessarily privileged and that really, I think, feeds the same point I was trying to make with respect to some of the other cases.

That it's important, from our perspective, that the Court dissects or absorbs or takes cognizance of the evidence of inspector Flynn, recognizing the distinction between those two concepts and on this question of what... you know, whether they attempt to keep BlackBerry out of it, as it were, is actually privileged or confidential, there is some other documents that the Court has access to in terms of the exhibits and you may recall that during the evidence of inspector Flynn, I introduced exhibit 25.6 which is...

THE COURT :

Jason Morton's (ph) affidavit?

Me LACEY :

Yes, the affidavit in support of the confirmation order and I also introduced the comfort letters, numbered 25.3 through to 25.5.

THE COURT :

The paragraph about the configurations?

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

Me LACEY :

Yes, that's right, for the comfort letters and in the affidavit, it was paragraph 12 that references the necessity of having a confirmation order because the interception of pin to pin messaging requires action to be taken by Research In Motion Limited employees and I don't have the benefit of the ex parte in-camera testimony.

But your Honour can assess the explanations given by inspector Flynn that were offered to us in public, about why he would need a confirmation order or more precisely, doesn't a confirmation order necessarily tell us that RIM had to be involved with the actual physical interception process, not simply subscriber data or anything else, but the actual physical interception process?

THE COURT :

It goes further than that. In 25.9, there is reference to RIM's implication, BlackBerry messages and when maître Rouleau gives his argument a little bit later, I'm going to ask him, and he may not do it today, but I'm going to ask him to go through the sealed transcript and I'll even go through it with you question by question without identifying the

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 content, but just the blacked out parts because
2 there are certain things that Mr. Lacey already said
3 the average person might not know, but could know in
4 the public domain.

5
6 And there are certain things in R-25.9 into the
7 public material, anybody can download this from the
8 internet. Read it carefully, maître Rouleau. The
9 letter 25.3 which is why if you want to do part of
10 your argument ex parte, you can do that to be more
11 specific. I'm sure you'll have no objection to
12 that, Mr. Lacey?

13 Me LACEY :

14 No. You raise a point I'm going to come to though
15 in terms of the redactions, but I'll deal with that
16 in a moment.

17 THE COURT :

18 Yes. The other point about the redactions, if there
19 are things in there that... because some of the...
20 I don't want to reveal anything in there, but if
21 there are issues in the redactions that have nothing
22 to do with this case, I don't really think that Mr.
23 Lacey is necessarily interested in it.

24
25 It might be privileged, but maybe there is things in

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 there that could be privileged, that weren't done
2 here and maybe sometimes, the extra question wasn't
3 asked. Was it done here or was it not done here?
4

5 I read over a few times. There are certain things.
6 That's why, if you'd like to, we could have that
7 exchange in-camera when the arguments are finished.
8 But I think and I recommend that you go through the
9 transcript, the whole thing. I would say a good 90
10 percent of that testimony is blacked out, unless I'm
11 missing something. So, take a look at 25.9. I
12 don't want to do it for you, but take a look and
13 then we can have a discussion as to whether or not,
14 we have an in-camera discussion. Please continue.

15 Me LACEY :

16 So, the only other point on this issue taking into
17 account the comfort letters, the confirmation order
18 in Ontario, the affidavit that was sworn in support
19 of the confirmation order and importantly, the
20 language of section 188.1, sub 2, of the Criminal
21 Code. So, the confirmation order itself is only
22 required if something physical needs to be done, in
23 terms of the manner of execution (inaudible).

24 THE COURT :

25 Run that by me again the section?

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

Me LACEY :

Section 188.1, sub 2. I don't think I filed this when I filed officer Morton's affidavit, but it's a copy of the actual confirmation order. I don't know if my friend would have an objection to...

Me ROULEAU :

Of course not.

Me LACEY :

... of putting that forward. It doesn't say much other than... let me rephrase that. It's a judicial order. It confirms that, pursuant to section 188.1(2), the order will issue and I can just provide this to the Court. But you'll notice the paragraph preceding that says because the Court was satisfied that to give effect to the order of Justice Morin would require execution and assistance by Research In Motion in Ontario and I can... perhaps that doesn't need to be marked as an exhibit, but I can...

Me ROULEAU :

(Inaudible). Do you have other copies...

Me LACEY :

It's the only copy I have right now.

Me ROULEAU :

Yes.

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 THE COURT :

2 You want to mark it?

3 Me LACEY :

4 Sure. It may be helpful to your Honour just to see
5 it.

6 THE COURT :

7 Yes. We'll get copies.

8 VOICE NON IDENTIFIED :

9 It's 217?

10 Me LACEY :

11 It's...

12 LA COUR :

13 Madame la huissière, je peux voir le document, s'il
14 vous plaît.

15 Me LACEY :

16 ... November order.

17 Me ROULEAU :

18 But it specifies assistance.

19 VOICE NON IDENTIFIED :

20 It doesn't go with the affidavit you...

21 Me LACEY :

22 It's a different confirmation. You're quite right.

23 I'm sorry.

24 Me ROULEAU :

25 But the wording is assistance; right?

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

Me LACEY :

Well, execution and assistance.

THE COURT :

So, the wording in that paragraph is the same as it
is in the authorizations in the present case?

Me LACEY :

That...

THE COURT :

Is that right?

Me LACEY :

Sorry, your Honour.

THE CROWN :

I would presume and I go by memory. I would presume
that the wording in this one is the same as the
wording in the other authorization...

THE COURT :

Alright.

THE CROWN :

... the other backing authorization in the past.

THE COURT :

So, before we copy it, you should be certain, make
sure if the wording is the same and then we'll file
it or...

THE CROWN :

Alright.

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

THE COURT :

... you can get a copy of your authorization with
the same wording if you like?

THE CROWN :

I...

THE COURT :

I'll leave that to you.

THE CROWN :

Alright.

LA COUR :

Madame, pouvez-vous remettre ça à maître Lacey, s'il
vous plaît?

Me LACEY :

But in any event, if we turn to the language of
section 188.1, sub 2, it is clear that you only need
a confirmation order in the following circumstances.

This is the English version of the Code and it says:

"When an authorization is given
under section 184.2, 184.3, 186
or 188 in one province, but it
may reasonably be expected that
it is to be executed in another
province and the execution
would require -- sorry -- the
execution of the authorization

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 would require entry into or
2 upon the property of any person
3 in the other province or would
4 require an order under section
5 487.02 -- which is the general
6 warrant provisions I believe --
7 be made with respect to any
8 person in that other province,
9 a judge in the other province
10 may..."

11
12 And then it goes on to talk about confirming the
13 authorization and I'm pointing out the language of
14 the confirmation order, the language of the
15 affidavit and the language of the Code because
16 again, in my submission, what this tells us, the
17 only reasonable inference is that it's already been
18 disclosed, that RIM had to play an actual role in
19 terms of the interception of the part 6 pin to pin
20 communications in this particular project. A role
21 that went beyond providing subscriber information,
22 but involved a physical role in terms of requiring
23 them to do something in Ontario.

24
25 We also know from the evidence in this case, the

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 police did not rely on subscriber information.
2 That's part of the evidence before you from
3 inspector Flynn. What he said was, in some cases,
4 you get these comfort letters because it's just a
5 matter of dealing with things like subscriber
6 information. But in this case, we know the police
7 position is, the subscriber information was not
8 correct in any event.

9
10 So, I come back to this. It's the worse kept secret
11 if it's supposed to be a secret and more
12 importantly, it may be something that the police
13 would like to continue to maintain some kind of
14 confidentiality over, but it's not something over
15 which a privilege would attach.

16
17 Now, the obvious question then, I think, arises even
18 though if it's not privilege, it gets disclosed.
19 Well, why do you need it? Why do we need to know
20 what role RIM played or did not play?

21 THE COURT :

22 Because the 25.3, the comfort letter, look at 25.3
23 and I just want you to... this was filed by
24 yourself...
25

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

Me LACEY :

Yes.

THE COURT :

... in cross-examination. You're saying this is connected to this case or this is just a general example?

Me LACEY :

Oh no, the comfort letters, 25.3, 4 and 5 are this case.

THE COURT :

This case?

Me LACEY :

They are. They came from the disclosure. They were entered on that basis.

THE COURT :

Okay. Go ahead.

Me LACEY :

So, the why comes back to that figure 5, in the Crown's reply, that page 5, the figure of the system architecture that we've been dealing with before lunch, in page 5 of the report of inspector Flynn. It matters to know what, if any role, RIM had to play because RIM controls the encryption key and if the police somehow developed some other mechanism of deciphering, this global encryption key, without the

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 assistance of RIM, which we're told they can neither
2 confirm, nor deny, then how can we be satisfied
3 about the integrity of that process?
4

5 And this is important because the Crown's answer is
6 essentially, well, trust us. You have to just trust
7 us on this one. You have to trust us because we
8 did... we developed our own system of comparing the
9 hash values before the data got processed and after
10 the date was processed.
11

12 Therefore, you can know, without us disclosing to
13 you, that, in fact, RIM had to provide us the
14 encryption key or had to do something to assist us
15 in ensuring the integrity of the data. Just trust
16 us that we did it right and the whole point is,
17 we're not required to trust them that they did it
18 right and I know it's not a perfect analogy in terms
19 of the example offered by way of the voice box
20 system.
21

22 Mr. Wilkinson's affidavit, I appreciate it's not a
23 perfect example, but that was the original police
24 response on the issue of following Court orders,
25 following the terms and conditions of the Court

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 order. Just trust us. We're doing live monitoring
2 when we say we're doing live monitoring. Just trust
3 us. We've configured the software in such a way
4 that we can only intercept it, if we're in fact live
5 monitoring.

6
7 And what, in fact, happened is when the curtain was
8 pulled, as it were, and the wizard was exposed, it
9 turned out that in fact, it wasn't the case that
10 they were complying. In fact, there was a systemic
11 institutional failing on the part of the RCMP, which
12 to their credit they've since addressed but the
13 point is that it's only through disclosure that the
14 parties, the applicants, the accused can have the
15 confidence that when we talk about the deciphered
16 message, the end result of the interception process
17 is in fact an accurate reflexion of the
18 communications that actually were the data that was
19 intercepted.

20
21 And that's at the heart of why we say hey, we need
22 to know that second thing and if there is no secrecy
23 about it, anyway, and if knowing how to organize
24 yourself to avoid being intercepted is something
25 that you can know with a moderate level of inquiry.

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 It doesn't even take a lot of inquiry, in my
2 submission, that what we're talking about
3 protecting, in my submission, is not privileged at
4 all.

5
6 It's no different... it's different in kind, but no
7 different in result than Mr. Big. It's no different
8 in result than the IDM.

9 THE COURT :

10 And what?

11 Me LACEY :

12 The IDM example I gave. And for that reason, we say
13 it must be disclosed. It's not privileged is the
14 position. Again to be clear, we're not asking for
15 RIM to give us the encryption key, so we can go
16 around and build our own third party ways of
17 intercepting communications, as the CESC, that
18 exhibit 25.9 suggests that it's easy for third
19 parties to do. That's not what we're looking for
20 here, is the global encryption key. We just want to
21 be satisfied and have knowledge of the role that RIM
22 played in facilitating the interception process.

23
24 So, that's my argument with respect to this... what
25 I started out as the second area, the second general

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 area and I'm going to turn, if I can, to the first
2 area, the location or where on the path of travel,
3 the communication or the data is, in fact,
4 intercepted and this argument requires the
5 consideration of the various provisions of the
6 Criminal Code, together with considering the Court
7 order in this case.

8
9 And the... we... the part 6 Court order in this case
10 from Justice... Oh sorry. From Justice Morin was
11 translated into English. There is reference to it
12 in the confirmation order affidavit that's already
13 before the Court and I've made extra copies for the
14 Crown and for the Court as well.

15 THE COURT :

16 Are you filing it?

17 Me LACEY :

18 I can file it, yes, if that's appropriate.

19 LA COUR :

20 Quel numéro, madame?

21 LA GREFFIÈRE :

22 R-12... attendez. Ce n'est pas R-12 du tout.

23 LA COUR :

24 Vingt-cinq.

25

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

VOIX NON IDENTIFIÉE :

Vingt-cinq.

LA GREFFIÈRE :

R-25, excusez-moi, R-25.

LA COUR :

Quatorze?

LA GREFFIÈRE :

Quatorze. Fourteen, maître Lacey.

Me LACEY :

I actually can follow that much. So, before I turn to that, just if I can remind the Court of the evidence of inspector Flynn. So, the evidence of inspector Flynn is, we, the police, can acquire the communication at different places within the path of travel and it's easy, I think, to think about these things in a complicated way and sometimes, it's harder to think about it in a simple way, but it does break down, I think, pretty simply at the end of the day.

Regardless of the path it travels, we're not talking a straight line. It doesn't go from point X to Y in a straight line. In fact, on the evidence you have before you, at least in the public hearing from inspector Flynn, a communication could travel

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 halfway or all the way around the world at various
2 points in time, upon its path of travel.

3
4 And in fact, even when it travels through the RIM
5 server, which all pin communications must do, those
6 servers, according to inspector Flynn, could be
7 anywhere in the world and are not necessarily
8 restricted to the physical address of... in
9 Waterloo, Ontario.

10
11 And when we think about where these communications
12 are intercepted, we can't think about it in terms of
13 you know, you go to a street address and you
14 intercept it there. We're talking about where on
15 that path of travel and you could physically be in
16 Ottawa or physically be in Montreal and in theory
17 acquire a communication based upon the evidence
18 we've heard, in Singapore or somewhere else in the
19 world.

20
21 And as I understand inspector Flynn's evidence, he
22 says, well, don't worry, we've... all of the
23 communications were acquired in Canada, even though
24 they could be acquired on anywhere on this path,
25 this global path, but you have to accept our word

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 for it because I can't tell you where in Canada they
2 were intercepted and that goes to a very important
3 issue with respect to the validity of the part 6
4 authorization in this case.

5
6 So, section 186, sub 4, of the Criminal Code
7 requires that an authorization... section 186, sub
8 4, sub C, and maître Hébert will provide a bilingual
9 version to the interpreters and if your Honour
10 likely has both versions like, but we have others,
11 if people want both versions.

12
13 One of the things that's required in the
14 authorization, one of the statutory requirements is
15 that:

16 "The authorization shall -- sub
17 C -- state the identity of the
18 person, if known, whose private
19 communications are be... are to
20 be intercepted, generally
21 describe the place at which
22 private communications may be
23 intercepted, if a general
24 description of that place can
25 be given, and generally

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 describe the manner of
2 interception that may be used."

3
4 I accept just for the purposes of this argument that
5 place can have various meanings and there is a lot
6 of case law that deals with the question of what a
7 place is. Is... a cell phone device, is that a
8 place or is the place of interception, when you're
9 dealing with a cell phone device, somewhere else?
10 Similarly, the same arguments can arise with respect
11 to pin communications.

12
13 But you do have to provide the Court with some
14 information about the place of interception and the
15 affiant is also required, under section 185, sub 1,
16 sub E, to similarly describe the place of
17 interception.

18
19 If you look at the Court order that's now been
20 marked as R-25.14 and in terms of the locations
21 which is at page 4, paragraph 7. This is an early
22 version of the authorization and some of it is
23 blacked out because it was at a time before the
24 Crown wanted to disclose the identity or places of
25 various people who were being intercepted.

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 But I think the point I'm trying to make is when you
2 look at the authorization in this case, this sort of
3 distinction or explanation as to where these
4 interceptions, where these pin communications were
5 going to be intercepted is not set out in any kind
6 of detail in the order and that may very well be.
7 The argument will be, well, it was too difficult to
8 try and describe the location where these
9 communications would be intercepted, other than in
10 a general sense.

11
12 But one thing that is not, in my submission, subject
13 to dispute is that section 188.1, sub 1, of the
14 Criminal Code makes it clear that the interception
15 of private communications may be carried out
16 anywhere in Canada and what that means is they can't
17 be carried out outside of Canada in terms of a
18 judicial authorization granted by a Superior Court
19 judge in Canada. You can execute it in other
20 provinces, but you can't have an authorization in
21 Canada that authorizes the interception of
22 communications in the United States.

23
24 And I want to give an example, if I can, like Telus.
25 There, the text messages lived on a server in

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 Canada, in Ontario and a part 6 authorization,
2 ultimately, the Supreme Court of Canada said was
3 required to acquire those communications from the
4 server. If Telus's server was in the United States
5 of America, a judge in Ontario could not issue an
6 authorization to acquire the communications as they
7 sat on the server in New York or in the United
8 States and I say that for two reasons.

9
10 One, because the Code doesn't allow it and secondly,
11 because it would be extraterritorial in reach and
12 there is just one other case I have with respect to
13 that issue and it's a case from the Federal Court
14 involving the Canadian Security Intelligence Service
15 (inaudible).

16 THE COURT :

17 So, just before you do that, take an example of the
18 equivalent of Telus in the United States. If
19 somebody from the United States has a cell phone or
20 a BlackBerry with a server in the State of Ohio and
21 comes... it's an example, and comes here and it goes
22 through the different servers, you're saying that
23 the authorization doesn't cover that?

24 Me LACEY :

25 If there was a server here in Ontario and they

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 wanted to acquire the communication from that server
2 in Ontario, then it would capture that, there is no
3 question. Sorry, Quebec, in Quebec.

4 THE COURT :

5 So, somebody from Ohio with a device they bought in
6 Ohio, they're serviced by a server in Ohio, the same
7 way someone here might be serviced by Bell or any
8 other server. The Ohio person comes here to
9 Montreal and they communicate with that phone, that
10 device from Ohio. What's your opinion on that
11 situation?

12 Me LACEY :

13 If the communication... the person is in Montreal
14 and the communication either originates in Montreal
15 or ends in Montreal, it can be intercepted in
16 Montreal or in Canada, in other provinces, pursuant
17 to a confirmation order. That's the way I would
18 read the Criminal Code because the meaning of
19 interception is... the meaning of private
20 communication has to do with whether it originates
21 or is received in Canada.

22
23 I'm not... but I know where this goes. Well, what
24 do you do with people who you're saying are
25 originating communications in Canada or sending them

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 to people who receive them in Canada or in Montreal,
2 which is the Crown's theory with respect to the
3 communications here? My point is that yes, you can
4 intercept those communications as long as the active
5 interception occurs within Canada.

6
7 I mean, bearing in mind the definition of intercept,
8 as confirmed by the Supreme Court of Canada in
9 Telus, the acquiring of the communication, that
10 would not permit the police to get an authorization
11 and then go off to Kuala Lumpur and put their
12 equipment in there in theory or from here put their
13 equipment in Kuala Lumpur and capture the
14 communication at that point in time, as it goes
15 through a RIM relay.

16 THE COURT :

17 So, the device has to be in Canada?

18 Me LACEY :

19 The active interception has to take place in Canada.
20 That's my position. And here, what the officer has
21 said is, yes, they all took place in Canada,
22 although he acknowledged that the path of travel of
23 these communications and their ability to intercept
24 these communications can occur anywhere on the path
25 of travel and it's not so farfetched in my

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

submission.

It's not completely out of left field to suggest that State authorities may seek to intercept communications in other countries. That's what happened with the CSIS case, which I've put before you. So, the Canadian Security Intelligence Service has a separate code that authorizes the interception of private communications for national security issues and their test for the issuance is different than ours because it's a reasonable suspicion standard.

It's not about gathering evidence. It's about gathering intelligence. But in this particular case, this Canada Security Intelligence Service act case, from June of 2007, CSIS sought to intercept the communications of persons extraterritorial, so people who were outside of Canada, but were threats to Canadian national security and I can just leave you with the passages of the analysis. Paragraphs 55 and 69 are the ones I would highlight.

THE COURT :

Fifty-five and 69?

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

Me LACEY :

Yes. And what ends up happening in that case is the Court finds, in the circumstances of the request there, that the legislation did not allow the extraterritorial interception of private communications based on the language of the act and the statutory provisions, but also international rules of comity, C-O-M-I-T-Y. So, in terms of this first area where...

THE COURT :

Just before you leave this case...

Me LACEY :

Oh sorry.

THE COURT :

... in the legislation, I think we're on paragraph 19 and following. What does it permit in terms of place?

Me LACEY :

It's any place.

THE COURT :

So, under this legislation, can it go extraterritoriality?

Me LACEY :

No.

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 THE COURT :

2 No.

3 Me LACEY :

4 The Court found that it couldn't because when we
5 looked at the surrounding provisions of the act,
6 that even though the act is about national security
7 beyond Canada's borders and even though it
8 authorized the interception at any place, by
9 necessary inference when you looked at the
10 surrounding provisions in the statute that, in the
11 absence of an expressed permission to intercept
12 communications outside of Canada, that based upon
13 Canada's international treaty obligations and the
14 rule of comity, as it relates to international...
15 respect for international law, it could not be read
16 as authorizing the interception of communications
17 outside of Canada.

18 THE COURT :

19 But the police officer in there... in this case,
20 testified under oath that they were all intercepted
21 in Canada.

22 Me LACEY :

23 Yes, he did.

24 THE COURT :

25 He did. He just didn't say where.

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 Me LACEY :

2 How do you test it? That's the obvious point. How
3 can you test... how can you test it, not just... and
4 I don't mean me sort of saying to the officer,
5 you're a liar. That's not what I mean when I say
6 tested...

7 THE COURT :

8 No, no.

9 Me LACEY :

10 ... because that's not... I mean there is no...
11 that's not the way to assess the value, as I know
12 your Honour appreciates, of evidence, of disclosure.
13 It's not assessed by whether or not you can have
14 what I would describe as a Matlock moment where you
15 could have the witness admit you caught me, I'm a
16 liar.

17
18 Although interestingly enough, on the voice box
19 example that's, in fact, exactly what happened in
20 terms of the guy from special I. He ultimately
21 admitted under oath, a senior official, that he had
22 fabricated disclosure, fabricated a memo with a view
23 to putting an issue to bed that he ought not to
24 have, but you'll be glad to know he received four
25 days suspension for that.

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

THE COURT :

So, you're saying that notwithstanding the officer's testimony, in view of other things he said, although he says the interception took place in Canada, who knows, without being able to verify it, perhaps the message originated somewhere else.

Me LACEY :

Originated somewhere else. Perhaps the infrastructure that BlackBerry or someone else, because he suggested it could be someone else. BlackBerry RIM, someone else provides them access to what I call a window, you know, a window to take the data. How do we know that window is in fact a Canadian window as opposed to a different portal and a different place?

And I don't have to demonstrate... the applicants don't have to demonstrate on an application of this nature that they'd be successful making that claim later on, that it would be a great Charter argument or otherwise. All they have to demonstrate is that it's relevant to their ability to make full answer in defence in this case, in the context of the wiretap.

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 THE COURT :

2 Well, give me an example, where, from what you've
3 just said, it could be a non Canadian window.

4 Me LACEY :

5 Because what I understand from the officer of... the
6 evidence of inspector Flynn is that because the path
7 of travel could be anywhere around the world and RIM
8 has servers anywhere, all around the world in terms
9 of their system architecture, and he acknowledged.
10 He doesn't even know exactly where in the world
11 their system architecture is.

12
13 For example, if RIM was the one hypothetically
14 because we can't know, hypothetically giving the
15 window, the portal to acquire the information, how
16 do we know it was being acquired at a portal in
17 Canada as opposed to somewhere else, in India, in
18 the Arab Emirates, in Europe? Because as I
19 understood his evidence, the communication could be
20 doing that kind of circuitous route. You can't just
21 assume it's going to travel from Montreal through
22 the cell tower, to Waterloo and from Waterloo, back
23 to a cell tower in Montreal to the user.

24
25 It's not that simple, as he explained it. He

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 explained that that may go... and we're talking
2 instantaneously. We're not talking obviously...
3 it's not like hopping on a plane. It's
4 instantaneous, but where in that path of travel is
5 it actually being acquired, the information? It's
6 not always... what the officer said is it's not
7 always on the sending end, right. Sometimes, it's
8 on the receiving end, so after it's gone through the
9 server or through the server or at a point in time
10 during the path of travel.

11
12 That's what I understood the officer's evidence to
13 be and in my submission, there is no reason why we
14 cannot test that. That has nothing to do with
15 knowing the technical specificity of the equipment
16 they use. It's not what we're talking about. I
17 think I put it to the officer quite fairly at one...
18 I think everything I put to him, I put fairly but at
19 one point, I said to him, are you telling me you
20 can't tell us where on the path of travel it was
21 intercepted? And he said no, I can't do that.

22
23 To do that would reveal an investigative technique
24 over which we claim privilege and I said to him,
25 well, to the extent that the authorization only

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 allowed the interception of communications in
2 Canada, how do we test whether or not the way in
3 which they were intercepted, that that's where they
4 were intercepted? And he said, well, that's... you
5 know we processed it in Canada.

6
7 Well, that's not the definition of intercept. The
8 definition of intercept, we know from Telus, is the
9 acquiring of the information. So that doesn't help
10 us and then he said, well, you... you know, I'm
11 telling you, they were all intercepted in Canada and
12 that's it. We just have to accept that and in my
13 submission, given that at least the legal
14 requirement or the arguable legal requirement... I
15 don't even think it's arguable.

16
17 The legal requirement that the interceptions have to
18 be acquired in Canada is one that the applicants are
19 entitled to examine and explore. Telling us to just
20 trust us on it, in my submission, doesn't go far
21 enough. Which leads to the next point on the issue
22 of disclosure. It does not have to be an all or
23 nothing proposition.

24
25 I know the Supreme Court of Canada in Basi, which is

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 not a case that's before you, B-A-S-I, cautioned
2 against, you know, putting counsel in the position
3 where they're told certain information that they
4 can't share with their client but the B.C. Court of
5 Appeal in Meuckon, M-E-U-C-K-O-N...

6 THE COURT :

7 That's the S.I.N. case? The serial number case?

8 Me LACEY :

9 Yes, I think it was, your Honour, yes. It's just...
10 it's on page 7. It's the second full paragraph...

11 THE COURT :

12 Go ahead.

13 Me LACEY :

14 ... where the Court said, tab 7:

15 "If an objection is made and a
16 public interest is specified,
17 then the trial judge may
18 examine or hear the information
19 in circumstances where he
20 considers appropriate,
21 including the absence of the
22 parties, their counsel and the
23 public.

24 When the trial judge does hear
25 or examine the information or

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

whether he does not, the trial
judge may then either uphold
the claim of Crown privilege or
order the disclosure of the
information either with
conditions or unconditionally."

And this case, Meuckon is the one that gets held up
as sort of the shining light on the issue of
investigative privilege and the test that's proposed
by the B.C. Court of Appeal in the next paragraph.

But I'm...

THE COURT :

Just where... just could you tell me where you are?

I'm at tab 5 and the...

Me LACEY :

I misstated. It's tab 7.

Me ROULEAU :

No. You have our book of authorities, your
Lordship. In our book of authorities, it is tab 5.

THE COURT :

Alright.

Me ROULEAU :

And it's at page 5 of the decision...

REPRESENTATIONS

540-01-063428-141
December 1st, 2014

1 THE COURT :

2 Yes.

3 Me ROULEAU :

4 ... but it's the fourth paragraph.

5 Me LACEY :

6 You modify the language...

7 THE COURT :

8 Yes.

9 THE CROWN :

10 No, it has the same in D-5, hash value.

11 THE COURT :

12 Go ahead.

13 Me LACEY :

14 So, that's the passage I'm referring to. I won't
15 read it again, but it's the...

16 THE COURT :

17 The one that starts "If an objection is made".

18 Me LACEY :

19 That's right.

20 THE COURT :

21 Alright.

22 Me LACEY :

23 And the last line is... ends with "either with
24 conditions or unconditionally".

25

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 THE COURT :

2 What kind of things did you have in mind for
3 conditions?

4 Me LACEY :

5 Well, you know, this is where it kind of leads to my
6 last point. It becomes... it's difficult to
7 envision all of the... without knowing exactly what
8 it is that we're not being told, it's difficult to
9 know what kind of conditions can be placed on it but
10 you could, for example, provide a condition that the
11 counsel for the applicants are to be satisfied...
12 are to be given enough information to satisfy
13 themselves that the place of interception was an
14 authorized place of interception.

15
16 I'm just... and I think I'm just putting this out
17 there. And shall not disclose what they learned,
18 that kind of thing where you put conditions on. You
19 let them... you let counsel satisfy themselves but
20 you put conditions on their ability to disclose it
21 or disseminate it.

22 THE COURT :

23 Including your clients?

24 Me LACEY :

25 You can do that. I acknowledge, I do acknowledge...

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 this is why I started with this, that in Basi, a
2 case that post-dates the B.C. Court of Appeal
3 decision, the Supreme Court of Canada raises
4 concerns about that practice, albeit in the context
5 of informant privilege, which is a more absolute
6 obviously privilege and they also query the logic of
7 putting accused persons in that position vis-à-vis
8 their lawyers.

9
10 But the way I look at it, at the end of the day, if
11 that is the only way, for example, to ensure that
12 the applicants, their rights to make full answer in
13 defence are met, then you could make the order on
14 the condition that it not be shared with the clients
15 and only those counsels who are prepared and
16 instructed, fully instructed to go ahead with that
17 condition, would then benefit from being able to
18 share that information and counsel may decide not to
19 and that... but at least, you've provided them an
20 opportunity.

21 THE COURT :

22 So, what would flow from that if a Court would
23 proceed in that manner and if they were at trial and
24 the police officer was in the witness box and the
25 defence counsel was going to question the police

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

officer on that information, a publication ban would
ordinarily follow.

Me LACEY :

Yes, it also raises this issue, though. If upon the
issue... the material being disclosed to the lawyer,
let's say the lawyer is adept enough to be able to
understand it and maybe sees a problem with
what's... in other words, that it actually does give
rise to an issue that can be litigated, well, the
parties would have the right to come back before you
because if, on a preliminary assessment, there is
actually... yes, there is a real problem here, well,
then the parties would be entitled to readdress you
on the issue...

THE COURT :

Fine.

Me LACEY :

... and say well, now, it's not sort of just a
question of making full answer in defence. Now,
it's a question where we can show that never mind
disclosure, but we want to be able to adduce this
evidence. We want to be able to litigate this issue
fully and completely before you and then we talk
about what conditions, if any, need to be placed on
it.

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 THE COURT :

2 What's the reference for Basi? Do you have a copy?

3 Me LACEY :

4 I actually don't.

5 THE COURT :

6 Just the reference is fine.

7 Me ROULEAU :

8 Yes. We'll have a copy for you in our arguments.

9 It wasn't part of our initial...

10 THE COURT :

11 Alright.

12 Me ROULEAU :

13 ... book of authorities, but we will provide the

14 Court with a copy of Basi because we will need to

15 refer to it. I don't know the reference by heart.

16 THE COURT :

17 A bilingual copy.

18 Me ROULEAU :

19 Yes.

20 THE COURT :

21 Okay. Thank you. Continue.

22 Me LACEY :

23 And this now, it leads to the last point which is

24 this issue of the redactions and your Honour already

25 made some comments about this and I just want to

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 make sure our position is clear with respect to the
2 redactions and also the judicial summary.

3
4 As you know from the exhibits that are now before
5 you, there was an agreement in place initially with
6 respect to how this motion would unfold and that
7 agreement is still in place, but it was abundantly
8 clear from... actually, I think Basi is.. might even
9 be cited in that agreement, (inaudible) is in that
10 agreement, but in any event, maybe just as based on
11 the authorities.

12
13 In any event, the point was that it was clear that
14 the accused were only to be excluded to the extent
15 absolutely necessary in order to allow the issue to
16 be fully litigated and then, there was the provision
17 for the transcript, a redacted transcript and then
18 the judicial summary and I'm not trying to be overly
19 critical and I'm certainly not being critical on a
20 personal level with the Crown.

21
22 But what you know now from the exhibits before you,
23 you have R-25.12, which was the original redacted
24 version, and you have R-25.12A, which was purported
25 to be a judicial summary. That was the Crown's

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

attempt on the face of it to apparently comply with
the agreement and it took an objection from the
defence. That's why maître Hébert is indispensable.
He found Basi, your Honour. We had it with us.

THE COURT :

Thank you.

Me LACEY :

May I have a moment's indulgence, please?

THE COURT :

Take your time. Maître Rouleau, est-ce que c'est
une journée où vous devez quitter de... à 4 heures
et demie?

Me ROULEAU :

Oui, votre Seigneurie.

LA COUR :

Bon! Alors, si vous ne terminez pas aujourd'hui,
demain.

Me ROULEAU :

Absolument.

Me LACEY :

You'll see in the Basi decision, at paragraph 30,
there is a summary by Justice Fish of the order that
was made, in that case.

THE COURT :

Sorry. What...

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

Me LACEY :

Page 399, paragraph 30. So, that just is... you'll see the trial judge had given an order that allowed a defence counsel access to the information on certain conditions and you'll see, at paragraphs 44 and 45 and following, is a discussion by Justice Fish addressing some concern about that type of process.

That was what I was mentioning when I said there is language from Basi that expresses concern about putting the accused in that position vis-à-vis their counsel. But at the same time, I'm not... again, it is not my first position that you should make an order with those types of conditions, but if the alternative is to make no disclosure at all, I'd urge you to make one with conditions.

But where I wanted to finish is on the issue of the redactions. So, 25... exhibit 25.1-12 was the first version of redactions which, if the latest version is 95 percent redacted, this would be 99.2 percent redacted. It was virtually all blacked out and then, the Crown also provided what purported to be a summary, a judicial summary, which was exhibit

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

25.12, sub A, and this was the Crown's first attempt, apparently, to meet the agreement.

Now always open to the parties to object and we did. We objected with R-25.1-2, sub B, and that led then to a substantially different redaction and judicial summary as contained in R-25.13 and R-25.13A and all of that is to say... and this is not casting aspersions, but the Crown's attempts and understanding of what's required in order to ensure the accused can meaningfully participate in this motion and these proceedings may not take the most generous approach of what needs to be kept private from us, for the purposes of making these submissions to you.

And I was going to say to your Honour that all.. that leads us to the submission that we have to, by necessity, tax your Honour and ask you as the gatekeeper to make sure that whatever now is redacted, after you've heard the full cross-examination of inspector Flynn, after you've heard the submissions of counsel for the applicant and after you've had a chance to review, as you pointed out, matters such as exhibit 25.9, the CESC

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

document, it's for your Honour now to assess whether or not there needs to be revisions to the redactions or there is some other information that ought to be disclosed to the parties and to the extent that your Honour requires those submissions be made by the Crown ex parte and in-camera, that's part of the procedure that we agreed to because that's what we understand the law to require.

So, if that's what your Honour directs, that's what your Honour directs, but we would urge your Honour to hold the Crown to the proverbial fare and...

THE COURT :

Yes. On the point you raised, do all defence counsel agree that if there is the necessity, in my view, to have an ex parte hearing with respect to a part of the Crown's argument on the redaction, does anybody object to that?

VOICE NON IDENTIFIED :

No.

THE COURT :

No. Okay.

VOIX NON IDENTIFIÉE :

Non.

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

LA COUR :

Madame la greffière, vous pouvez consigner ça au
procès-verbal?

LA GREFFIÈRE :

Oui.

THE COURT :

Alright. Because I may very well do that.

Me LACEY :

And that's what... you know, you quite properly said
at the time that we filed the procedural agreement,
one of the things you made the point, well, you
know, how are the accused going to really
meaningfully challenge the redactions at the end of
the day? And it's a fair point. I mean what are
they going to say? They can't see it.

And the point was that we wanted to always have the
option of asking your Honour at least what we would
say on an expanded record, on a more fulsome record
of what's relevant to your determinations on this
motion for your Honour to have that option of
putting the Crown to the task of maintaining the
redactions and ensuring that it really is only that
which is necessarily... necessarily can't be
disclosed because it is the very thing we're

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

litigating about.

But if it's other items that are either in the public domain or not the very thing we're litigating about then in my submission, the Crown may have very well overreached in their redactions, just as they did when they... on their first attempt.

THE COURT :

Or there might be something that could be subject to privilege, but has nothing to do with this case?

Me LACEY :

And if that's the case, then it may be more properly articulated as irrelevant, although to the extent that the Crown relied on it to sustain the privilege claim, it's hard to... it's hard for an applicant not being there to know how there could be something that's irrelevant, but yes, it was necessary to adduce before you in-camera.

THE COURT :

Well, you know, I understand your point but sometimes, a lawyer asking a question doesn't attempt to adduce something, but some witnesses might give information that maybe weren't requested.

Me LACEY :

Right. Well, that witness did that. We know that

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 from the public domain.

2 THE COURT :

3 I made a comment.

4 Me LACEY :

5 Yes.

6 THE COURT :

7 Yes.

8 Me LACEY :

9 You said you...

10 THE COURT :

11 Yes, I won't repeat it but I certainly did.

12 Me LACEY :

13 Yes.

14 THE COURT :

15 So, it's difficult to blame the Crown if a question
16 is asked. What... let's say the car is blue and the
17 Crown wants to know what colour is the car and the
18 witness goes in and describes the engine and whether
19 it's an automatic or a manual. That wasn't the
20 question. So, anyway, I think we understand each
21 other.

22 Me LACEY :

23 Well, I think we do and those are my respectful
24 submissions and you know again, I say it with the
25 caveats that we make these types of arguments in a

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

vacuum, without the benefit of the full context. It may or may not... we may be close, we may not be, you know to be candid in terms of what we're saying, but I submit to you that on the basis of the evidence we have heard, that there is certainly a basis for the submissions being made by the defence and to challenge the claim of the Crown and frankly, had we not done so, we might not have received the material that the Crown has now agreed to actually provide us.

THE COURT :

Yes.

Me LACEY :

In any event, at the end of the day though, even though this is styled as the applicants' motion, I know I don't need to say this to the Court, but the actual onus, as we know from the Chaplin case, which is... maybe we'll just turn there in the applicants' book of authorities, at tab 5, Supreme Court of Canada decision. Do you have the bilingual one, Mr... the interpreters have the bilingual version.

THE COURT :

So, it's the Crown's book. What...

Me LACEY :

No, it's actually the applicants' book, tab 5.

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 Me ROULEAU :

2 White. The cover is white.

3 THE COURT :

4 Yes. Go ahead.

5 Me LACEY :

6 It's page 10, paragraph 25, and you may recall,
7 before we ever scheduled this motion, it was the
8 applicants' position that really this was a Crown
9 application, not a defence application.

10 THE COURT :

11 I recall that.

12 Me LACEY :

13 Yes, but we actually... we wanted to move the matter
14 forward and that's why we went ahead and filed the
15 notice of application on August 22nd. In any event,
16 paragraph 25 makes it clear, and we're in a Common
17 Law situation right now, it makes it clear that the
18 onus is on the Crown to justify the non disclosure
19 of the privileged information.

20
21 It's not on the defence because it's not the case
22 that the Crown is taking the position that what
23 we're asking for is clearly irrelevant. They're not
24 taking that position. This is important because by
25 necessity, that means that whatever it is that's not

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

being disclosed to us meets the Stinchcombe likely
relevance test in the sense that it may assist the
defence in the presentation or defence of the case.

THE COURT :

Maître Rouleau, you're not disagreeing with Chaplin
in terms of your burden?

Me ROULEAU :

No.

THE COURT :

It would be hard for you to disagree with that?

Me ROULEAU :

No, no, no, no, but I...

THE COURT :

Yes.

Me ROULEAU :

... like every answer, you think of what you are
going to say but clearly, the irrelevancy of a given
piece of evidence has to be argued by the Crown.

THE COURT :

On what burden?

Me ROULEAU :

Well, listen, given all the cases from the Supreme
Court, my take on that is that what is... I would
say in French, tout ce qui n'est pas manifestement
non pertinent devrait être divulgué.

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 LA COUR :

2 Sur une prépondérance de probabilités, quant à vous,
3 votre fardeau?

4 Me ROULEAU :

5 Vous savez, je ne me suis...

6 LA COUR :

7 Oui. Oui.

8 Me ROULEAU :

9 ... pas posé cette question-là tellement le fardeau
10 est faible à rencontrer, dans le sens que... no, I'm
11 going to follow in English. I'm sorry. J'ai...

12 THE COURT :

13 But let's see what's Mr. Lacey's view on that? You
14 might have a common ground. In terms of the burden
15 of proof?

16 Me LACEY :

17 It's on the Crown, on the balance of probabilities.
18 It's the only time the Crown is required to prove
19 something beyond a reasonable doubt is...

20 THE COURT :

21 No, no, it's...

22 Me LACEY :

23 That's my position.

24 THE COURT :

25 ... that there had been other types of burden in

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

other motions.

Me LACEY :

Yes.

THE COURT :

And that's why I said in French, on a preponderance
of evidence which is the same thing.

Me LACEY :

Yes.

THE COURT :

So, if you have a different point of view, tomorrow,
when you finish your argument, you can address that.

Me LACEY :

And to be clear, it's not simply an evidenciary
onus. That's why it's actually an onus beyond an
evidenciary onus. It's to meet the threshold of
satisfying the Court that the privilege or the
information cannot be disseminated or disclosed and
I heard my friend at least in English talk about
irrelevance and to the extent that the Crown takes
the position, some of this might be irrelevant.

But that's... my submission, that's not the position
that's been taken by the Crown. The position that's
been taken by the Crown is that what we are seeking
is relevant.

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

THE COURT :

I agree, but my questioning earlier is with respect to certain details that may have gone beyond.

Me LACEY :

Yes. That I understand. The superfluous answers given by the witness.

THE COURT :

Which is why I may follow up on the agreement of all defence counsel to have an exchange with the Crown in-camera tomorrow. But you'll have to have the equipment set up in the same way.

Me ROULEAU :

Yes. Okay.

THE COURT :

Alright.

Me ROULEAU :

No, and I was going to say, given the circumstances, we believe that it's a good idea to do so.

THE COURT :

Yes. But in order to avoid delay tomorrow, the...

I don't know who is going to come with the equipment to record whatever we say but actually, it's an argument. No, you'll have to do it the same way because...

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 Me ROULEAU :

2 Yes.

3 THE COURT :

4 ... there are things we say that relate directly to
5 what the police inspector said.

6 Me ROULEAU :

7 Exactly.

8 THE COURT :

9 So, I'll leave that to the Crown to take steps to
10 set that up. You'll advise defence counsel what
11 you're doing and we'll do it tomorrow and you can
12 discuss with maître Labelle, if you want to do it
13 before or after his argument on the other motion.

14 Me ROULEAU :

15 Okay.

16 Me LACEY :

17 I'm sorry. I neglected to say one thing that... I'm
18 sure I neglected many things. I neglected to say
19 one thing that maître Hébert remembered to tell me
20 to say which is that the where of the interception,
21 on the basis of the evidence that was adduced at
22 least in public, and I leave it to you to assess the
23 evidence in-camera, you have an insufficient basis
24 to conclude that the where of the interception along
25 the path would not assist the parties in either

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

identifying the location of the user or raising a
doubt about the location of the user, of the device.

And again, I'm not privy to the evidence that was
heard in-camera, but in terms of the evidence that
was heard in public, either by way of the report or
otherwise the evidence simply did not rise to the
level of assisting you in being sure that it would
not assist the party...

THE COURT :

Oh! So...

Me LACEY :

... which is a central issue at this trial.

THE COURT :

So, what maître Hébert's argument is the where of
the interception with respect to that, there is an
insufficient basis to say where and this information
could assist defence counsel with respect to the
location of the user.

Me LACEY :

Right, the where of the acquisition of the data
could be relevant and not on a proof beyond a
reasonable doubt, which is not the test for the
defence, but on the issue of the defence being able
to use that information to either raise a doubt or

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

otherwise identify the potential location of the
user. Those are my submissions.

THE COURT :

Thank you.

Me LACEY :

Thank you.

THE COURT :

Maitre Rouleau, do you want to begin today? We have
till 4:30. You have a few choices. You can begin
today...

Me ROULEAU :

Yes.

THE COURT :

... or in view of the consent of the defence and my
intervention, you may want to look... well, you're
going to do it anyway, but you should look very
carefully at the unredacted sealed transcript. You
should also look at the exhibits referred to by Mr.
Lacey, particularly some that were referred to by
myself, including the Government of Canada document
that was downloaded from the internet.

Me ROULEAU :

The 25.9, yes.

THE COURT :

The comfort letters, as well.

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 Me ROULEAU :

2 Twenty-three.

3 THE COURT :

4 And the Morton affidavit. If you feel that there is
5 arguments that you could make now, that aren't
6 hinged upon that, upon those concerns, you can do it
7 now or you can do the whole thing tomorrow.

8 Me ROULEAU :

9 Can you give me just...

10 THE COURT :

11 Yes.

12 Me ROULEAU :

13 I just want to check one... so, your Lordship, we
14 will have the equipment necessary to do the ex parte
15 audition...

16 THE COURT :

17 In-camera, yes.

18 Me ROULEAU :

19 ... and I'd rather do the whole thing after that is
20 done...

21 THE COURT :

22 Yes.

23 Me ROULEAU :

24 ... for the main reason being that given I can't
25 foresee the outcome of decisions you will be taking

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

tomorrow and that might enable me to go further in
the... in my submissions...

THE COURT :

Yes.

Me ROULEAU :

... given that more information has been...

THE COURT :

Before we even get to a discussion on things like
conditions, as raised by Mr. Lacey, publication bans
or things like that and without me taking any
position whatsoever at this point, I would like the
Crown to review line by line, word by word that 27
page transcript to see if, in your view, you feel
there is material in there that has already been
disclosed publicly in the testimony of inspector
Flynn and in exhibits that have been filed, that are
public, just for example, the Canadian Government
information document about BES servers, BlackBerry,
RIM, et cetera, security issues.

Me ROULEAU :

That will be done, of course.

THE COURT :

As well, you heard my remark to Mr. Lacey about the
responses of the witness. Sometimes, you might ask
a question and either the question doesn't answer

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 what you asked or the question answers what you
2 asked and five other things that you didn't ask,
3 that may or may not be pertinent and there are times
4 that perhaps, you'll address me on that, that maybe
5 a witness might have said something that's not
6 privileged, that has nothing to do with this case.

7
8 It could be disclosed or maybe the witness said
9 something that is privileged, a technique tool or
10 something that has nothing to do with this case.
11 So, I'll agree to finish early, but to avoid what
12 happened this morning, please take the time to go
13 through it very carefully, extensively and if your
14 position has changed, you can let me know before the
15 argument. Otherwise, we're going to have a detailed
16 in-camera hearing where I'll have several questions.
17 Alright. Anything else?

18 Me ROULEAU :

19 That's it. No.

20 THE COURT :

21 You're going to make your 4:30 today.

22 Me ROULEAU :

23 Definitely.

24 THE COURT :

25 Okay. Ça va. And you're certainly welcome to come

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 back in réplique to respond to his argument later.
2 So, having said that, the Judy Costello motion, we
3 don't know when it will begin specifically? It's
4 supposed to being on Wednesday, but this could take
5 some time tomorrow. I think it's important. So,
6 this could take some time and then we have to do
7 maître Labelle's argument and I'm going to leave to
8 counsel in what order they wish to do it.

9
10 In fact, maître Rouleau, maybe you can give me your
11 position now because maître Labelle is going to...
12 je vais le dire en français. Il va venir demain
13 matin prêt pour cet argument-là.

14 Me ROULEAU :

15 Oui.

16 LA COUR :

17 Et vous allez plaider ça vous-même?

18 Me ROULEAU :

19 Oui.

20 LA COUR :

21 Préférez-vous faire ça avant ou après?

22 Me ROULEAU :

23 Je... bien, en fait, je serais intéressé de savoir
24 ce que maître Labelle, lui-même, préférerait. Moi,
25 je pense que ça serait efficace si on le faisait

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

1 après parce que cette argumentation-là est déjà
2 prête puis elle peut être livrée un peu n'importe
3 quand.

4 LA COUR :

5 Ça va. Alors, vous préférez... pour l'acte
6 d'accusation privilégié, vous préférez faire ça
7 après?

8 Me ROULEAU :

9 Oui, exactement.

10 LA COUR :

11 D'accord. Maître Hogan?

12 Me HOGAN :

13 Aucun commentaire, monsieur le juge.

14 LA COUR :

15 Est-ce qu'il va être ici toute la journée demain?

16 Me HOGAN :

17 Tout à fait, monsieur le juge. Ce que je...

18 LA COUR :

19 Et est-ce qu'il va être ici, excusez-moi, mercredi
20 également, maître Labelle?

21 Me HOGAN :

22 Oui, monsieur le juge.

23 Me ROULEAU :

24 Ça peut être mercredi aussi. Je n'ai pas de...

25

540-01-063428-141
December 1st, 2014

REPRESENTATIONS

LA COUR :

Ça va.

Me ROULEAU :

C'est un inconvénient pour mon confrère.

LA COUR :

Alors, dites-lui il devra être prêt demain ou
mercredi, quand on finit l'autre requête.

Me HOGAN :

Je lui ai parlé sur l'heure du midi, monsieur le
juge. Il le sait déjà. Je vais simplement...

LA COUR :

Ça va.

Me HOGAN :

... lui faire mon résumé de la suite de l'après-
midi. Il sera prêt et il sera là.

LA COUR :

Non, non, mais pour lui, pour faire son argument
dans l'autre requête demain après-midi ou mercredi.

Ça va?

Me HOGAN :

Tout à fait, monsieur le juge.

LA COUR :

Merci. Bonne fin de journée à tout le monde.

--- AJOURNEMENT

* * * * *

1
2
3
4 Je, soussignée, RENÉE C.-DUPRAS,
5 sténographe officielle, certifie sous mon serment
6 d'office que les pages qui précèdent sont et
7 contiennent la transcription exacte et fidèle des
8 paroles recueillies au moyen de l'enregistrement
9 mécanique, le tout sans mon contrôle de la qualité
10 dudit enregistrement, conformément à la loi;

11
12 ET J'AI SIGNÉ :

13
14 RENÉE C.-DUPRAS,
15 Sténographe officielle
16
17

Reasons for redactions, December 2, 2014, ex parte transcript

Investigative Techniques motion

(Superior Court Ex Parte hearing in Laval, on 2014-12-02, 11:14 – 12:27)

Justice Michael STOBER: Est-ce que c'est prêt?

Mr. Sylvain LANOUE : C'est fonctionnel.

Justice Michael STOBER: Okay, so, this is JusticeStober speaking, I'm going to repeat what I said earlier, we're proceeding in an ex parte hearing in camera. The only persons present are myself, 3 prosecutors Me Rouleau, Me Gauthier, Me Godbout, um...MrLanoue is here, he is a police officer with the RCMP...um... and he will be monitoring a tape recording device that will ...eh...record everything that's said in this courtroom. The court, the bailiff, the special constables, all the lawyers, the accused have left, no one else is in the courtroom. The courtroom has been checked to make sure that there is no devices or anything of that nature. Special constables that did that, have done that, I'm advised, before we began so there's no one in the room and there's a sign on the door "in camera" and no one is allowed in. The reason for this hearing is to continue what we began earlier, the ex parte in camera hearing in which Insp. Flynn testified on the investigative privilege motion presented by MIRARCHI joined in by all other accused except for DESJARDINS in which the defense wishes to ...have further information with respect to the where and the manner of interception of PIN to PIN messages that were done by the police in this case and the crown objects based on the investigative techniques privilege. The evidence has been concluded, not only the ex parte hearing but all exhibits have been filed, the witnesses also Mr. Flynn has been cross-examined with respect to the public part of his testimony to which there was no objection and the defense has clarity. The purpose of this ex parte hearing is for the crown to explain to me why such an extensive um redacting of the ex parte testimony of Insp. Flynn has been done... and I've asked him before we commenced this hearing to examine carefully the public testimony of Insp. Flynn, various exhibits that have been filed in particular document from the Government of Canada, describing many things including BlackBerry internet service, blackberry enterprise server as well as some comfort letters between the RCMP and RIM as well as expert's reports that have been filed including one from Insp. Flynn...um, so Maître ROULEAU, go ahead.

Reasons for redactions, December 2, 2014, ex parte transcript

Maitre Robert ROULEAU: Yes. I'd like to point out to the court in starting this exercise that last night me and my colleagues have reviewed the...um... documentation. We've also reviewed the redacting. We have come up with a new version. Now I just want to point out to the court that we submitted it, or we sent it to Insp. Flynn, not to get his approval judicially speaking but to get his input as, since they are the professionals of public security, safety of the investigations, we feel that he should take a look at it. If he has any comments he will get back to us. Now we did this this morning. We finished last night at 11:30, the redaction. That's been done, so what we are going to discuss, what we think, we're ...eh...eh ready to...eh... un-redact if I may use that expression, is still pending that we eh cross-check it with Mr. Flynn this morning.

Justice Michael STOBER: The eh, police officer, Insp. Flynn in his testimony said very clearly that as far as the police are concerned they prefer to redact everything and he referred to another case as well, another example, they always prefer to redact everything. Um... but the crown are professionals in the prosecution of criminal cases. Lawyers and members of the bar and it's not because the police ask for something, that prosecutors... that the prosecutors are going to rubber-stamp it every time it's asked. You have a job to do and I appreciate you looked at it more extensively, since my comments yesterday, because the first and second redaction, for someone that's going to read that they wouldn't get very much out of it, and I'd like you to... I haven't seen your latest redaction but I'd like you today to go through every page here eh and... eh ...in which you're maintain, you are requesting the maintenance of the redaction and explain to me why. Firstly I'll just raise a couple of things and then we'll go through it. For example the Global Key, the Global Key is in the Federal Government document that's been filed. The Global Key has been referred to in Mr. Flynn's report that's been filed, um... aside from the Global Key, cause I asked some questions as well earlier, every computer has a hard drive and most people in the public know that when you delete something it doesn't necessarily disappear so the Global Key may not be a hard drive but what we heard from Insp. Flynn is that with the Global Key they can ...eh...eh, determine what messages were sent or received on a particular device,

[REDACTED]

Reasons for redactions, December 2, 2014, ex parte transcript

[REDACTED]

So, those are a few examples, he talked very generally about the software and I don't really have any information in his testimony other than generalities about the RCMP software and their engineers. Where were the interceptions done? That should be specifically stated in front of me ex parte. That's something that the defence wants to know. Something that you object to on basis of privilege, but did he say so in his testimony? I've gone through it a few times and maybe you'll point out the passage that can be interpreted in a certain way...um... but before you respond Me ROLEAU, where in this document, in this testimony, does Insp. Flynn speak as a specific investigative technique that's used in this case, with respect to these accused and the manner of interception and the manner in which they conducted

Reasons for redactions, December 2, 2014, ex parte transcript

their investigation. He spoke of many things and a lot of the things as Mr. Lacy said, maybe every person in the public doesn't know, but if somebody in the public did a little homework, without any assistance from the police, they could probably find out a lot of this material. So let's start from there. We could do it page by page if you like and it's an exercise that I figure will take some time unless you've changed your point of view.

Maître Robert ROULEAU: No, I agree that it takes... it will take some time and...

Justice Michael STOBER: See, and I don't mean to interrupt you, but this whole case is based on these pin to pin messages um... you very candidly, all of the crowns have candidly stated to the court that without the pin to pin messages you have no case. If the pin to pin messages don't go in, the accused are going to be acquitted, right?

Maître Robert ROULEAU: That's obvious.

Justice Michael STOBER: Alright, so this is very important evidence, and as the defence has stated, they have to be able to have, to exercise their right to full answer in defence. But on such a crucial portion of the evidence when they get a document ...that on the evidence that could make or break the case that every page is blacked out and then I'm reading my notes on Insp. Flynn's public testimony and all the other material that I've indicated, I'm thinking well a lot of this stuff is public, number one, and number two what does it have to do with this case, [REDACTED]

Maître Robert ROULEAU: So... um... a few things I want to set out on the... to begin with, first is, I've already made, second is in discussing the redaction of the transcript, we necessarily came to the conclusions, to the conclusion that there is an area where I don't really have a choice but to go into more specific details, um about this actual case and that necessarily makes it so that part of the submissions, sorry about that, the submissions... eh... I wanted to make ideally all public. Part of it will necessarily have to be ex parte and eh... I think we should use this occasion that we have today not to double up, but to tell you

Reasons for redactions, December 2, 2014, ex parte transcript

where... this area that we are discussing is going to be part of my submission at the end of the day to convince you as a matter of fact that this information that I need to give to the court should remain, should remain ex parte and you're right in an ideal situation the precise points could have been addressed by Mr. Flynn can still be addressed by Mr. Flynn if the court so requires, I think we have all the answers that the court might...to the questions that this court might have but in all fairness we started out with the necessity to protect basically the interception points, the software that is used by the RCMP... and then was added a second layer which complicated the things and in all fairness that wasn't part of the original motion but was the...the relative implication of BlackBerry in the interception process that became more an issue as the... as the questions of my, of my colleague Mick Lacy ... were more clear, now it is now pretty clear that this is a zone of contention on their part and we're ready to....

Justice Michael STOBER: What, what's his argument?

Maitre Robert ROULEAU: The implication, if any, of Blackberry in the interception process. They have made it abundantly clear in their questions to the witness and in their submission that our refusal to answer the question to...eh... as per the necessity of BlackBerry to be implicated [REDACTED]

[REDACTED] That is something that they want us to answer and for reasons that I am about to tell you, we feel that we shouldn't give out that information and that it's not necessary for us to do so... in a context of full answer in defence.

Justice Michael STOBER: Do you, do you feel that your witness answered these questions you're asking, the interception points?

Maitre Robert ROULEAU: No.

Justice Michael STOBER: The software, if RIM is involved, these are things that I should have been advised of in the ex parte hearing. I don't know about these things.

Maitre Robert ROULEAU: Well the software he did...

Reasons for redactions, December 2, 2014, ex parte transcript

Justice Michael STOBER: In very general terms.

Maitre Robert ROULEAU: Yes, but we went as far as we felt necessary and there's always a judgement call on... on our part, hindsight is always 20/20 and the way I look at it I could have maybe...have been a little bit more specific on the software, but to us it didn't seem like the most ...the area where the defense would insist more. The interception points, we felt that we did not need...we...what we covered is...it doesn't give out the location of a given unit, we felt that was...the...eh...on that question, the case was made on that. Since it doesn't give out any information, useful information to the defense...eh... there's no need to go there but... so we...but we are able to say this to the court, on that specific question, we have realized that our colleague, Maître Lacy, raised a valid and interesting point, how can we convince ourselves that the interception then took place in this country? Mr. Flynn said in the second part of his testimony: ``it was``. Theans... reaction of Me Lacy was: ``we have to take your word for it``. The answer was: ``yes``. Our contention on that is... it doesn't need to stay that way... and the court can, certainly does have the power ...eh...and we believe if this remains an issue with the court, should ask Mr. Flynn to either come back to the court, or have us deposit an affidavit on the location of the interception points. We know the answer having discussed it with Mr. Flynn but...

Justice Michael STOBER:No. It's your objection, if you want to call him back, you'll ask me to have him back, otherwise I'm going to decide on what I have in front of me.

Maitre Robert ROULEAU: I understand that, but the...the...

Justice Michael STOBER: For the interceptions points...and correct me if I'm wrong but...they're not looking for the place where the equipment is kept, the software is kept. They wanna know the pathway, where a particular PIN to PIN message was captured, where was intercepted...

Maitre Robert ROULEAU: Exactly! Where was the software operate and where do you install equipment.

Reasons for redactions, December 2, 2014, ex parte transcript

Justice Michael STOBER: Well...Where does it operate...weather it operates here in Laval or in Ottawa I don't think that's.....

Maitre Robert ROULEAU: Yeah, but where...

Justice Michael STOBER: That's not what they want...

Maitre Robert ROULEAU: What they want is where on the pathway... is the data intercepted.

Justice Michael STOBER: But that could be different for every message.

Maitre Robert ROULEAU: It's not. There's...Mr. Flynn testimony on this would be to tell the court that those interception points are in Canada and they are with certain providers.

Justice Michael STOBER: Do you think I have that evidence in front of me?

Maitre Robert ROULEAU: No. And on that question, are they situated in Canada, it's a fairly simple process for the court to be satisfied that that is the case. Eh...

Justice Michael STOBER: Well...how do I know that's the case? He didn't say so. He vaguely said so...generally...without giving any specifics. At one point, I made a comment...anyway...go ahead.

Maitre Robert ROULEAU: Yes yes and I understand that and that's why the Supreme Court of Canada and this...this process that were engaged in is relatively, relatively speaking, a new thing and that is why the Supreme Court said that in certain instances where the defense want to raise certain issues, they can submit questions to the Judge to bring to the witness ex parte. The thing is this issue of the location points in Canada was raised after the ex parte, in the cross-examination of Mr. Flynn so therefore it's hard for us to foresee that this would become an issue, in all honesty, we didn't see it as an issue when we started because...the points were the interception points where they are, because they can give us information on the location of the devices...so what we covered was...does it give that information? The answer is: no. And we left it at...there.

Reasons for redactions, December 2, 2014, ex parte transcript

Justice Michael STOBER: So you are saying that you weren't aware that they were gonna raise where the interception points where in the pathway...you didn't know that, which is why it wasn't raised with the witness. Okay. The software, I understand...firstly, what I just said, it's that your position?

Maitre Robert ROULEAU: Yes. That would see the argument of it might not being in Canada...We...we hadn't seen...that was not part...written clearly in the motion.

Justice Michael STOBER: Alright. Okay.

Maitre Robert ROULEAU: That they wanted to know the interceptions points was clear. But not that they want to know it because that's the only way to know that it's within the boundaries of this country...we couldn't see that...it wasn't written. What they did write was: ``because it will give us the opportunity to see if a given device is in a certain location`` and all the evidence has: ``no you can't do that``...so we answered with motion that...we had in front of us.

Justice Michael STOBER: Alright. On this software, from your comment before, do I understand that with the...the nature of the software...they're not really delving into that?

Maitre Robert ROULEAU: Well...eh...

Justice Michael STOBER: In your opinion?

Maitre Robert ROULEAU: It...it...what is clear is that they've...Me Lacy hasn't come back with the visit to the Special ``I`` in Ottawa. That obviously doesn't interest him anymore and from his representations yesterday, I haven't heard him insist on the necessity for the defence...on the interception software...we've settled the P2P question...that's been settled but on the interception software...Mr...Maitre Lacy hasn't made it a point of saying: ``we need access to that software``. So I....

Justice Michael STOBER: And then there's the question of RIM being involved or not.

Reasons for redactions, December 2, 2014, ex parte transcript

Maitre Robert ROULEAU: Yes.

Justice Michael STOBER: Everything that's been presented to me...eh...in public hearings...suggests that it's known publicly, that RIM is involved.

Maitre Robert ROULEAU: Yes. On that question if I may, eh...it is true and obviously from twenty-five...R 25.9...this is Bollick from the IT specialists of the Canadian Government, it does say and it's pretty obvious that government itself is concerned with the security of the devices that every federal and many provincial civil servants use in their daily communications...our e-mail servers are run through BlackBerry and the notion of using PIN to PIN is somewhat known, although I must confess, I had never been...I wasn't a party to that before this case and I had a BlackBerry before and didn't even know myself that PIN to PIN...what PIN to PIN was...but one must admit that is something that is....

Justice Michael STOBER: You didn't know that your BlackBerry had a PIN number?

Maitre Robert ROULEAU: No.

Justice Michael STOBER: You had a Blackberry and you did...you didn't do BBM messages?

Maitre Robert ROULEAU: No. Strictly e-mail.

Justice Michael STOBER: No texting?

Maitre Robert ROULEAU: No texting.

Justice Michael STOBER: Ok...cause it's publicly known, you can texting, you can do...this is in evidence in front of me, publicly. You can do texting, you can do...BBM which is BlackBerry Messenger and the apparatuses have a PIN number. It's publicly known...all this.

Maitre Robert ROULEAU: Yes I know, but right now you know that I'm not the most technologically savvy person in the world...but...

Reasons for redactions, December 2, 2014, ex parte transcript

Justice Michael STOBER: But that's not a criticism of you...its...

Maitre Robert ROULEAU: No...No...I know...

Justice Michael STOBER: I'm just referring to what's in front of me and what's publicly known.

Maitre Robert ROULEAU: That's where I want to raise...maybe...eh...the caveat...it's out there, but to what extent is all of that known in the criminal circles? And on that, we need to refer on Mr. Flynn's testimony that the court can weigh and...but I'm just saying that ...you have to...balance this with...parts of Mr. Flynn's testimony that says [REDACTED]

Justice Michael STOBER: [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] but be that as it may, is that aspect an investigative technique?

Maitre Robert ROULEAU: This is where...the...the process that we...we underwent is...eh...where I need to refer to the process that we underwent. Having that in mind, and what I'm gonna do, I'm...I'm...I'll give to the court... the new version of what is proposed and that aspect we took into account and that aspect of the Global Key [REDACTED]
[REDACTED] we took out the redaction of that. Now...we did do it everywhere this was mentioned for the following reason and if I may...eh...this is...of course...this...the...your Lordship's copy...working copy...eh...we...I have one...you have one and my colleagues have one so we can all follow...

Justice Michael STOBER: Okay. So...the parts that are in grey are the parts that were redacted that you are removing?

Reasons for redactions, December 2, 2014, ex parte transcript

Maitre Robert ROULEAU: Yes. Exactly. The yellow is what we propose...stays redacted. In some areas there is a lot that we took out from the redaction in others...it...it...it stayed the same but...

Justice Michael STOBER: I think that...rather than go through the grey which you're gonna un-redact, you decided amongst yourselves that the crown...to do that...I'm going through it as we speak and there's an awful lot of excerpts that you want to keep redacted...and we can go through each one right now...and you'll have to justify that with me, but before we do that, you've indicated that...um...you weren't aware when Mr. Flynn testified about certain issues that the defense was contesting. For example what you said earlier, this morning, on interception points.

Maitre Robert ROULEAU: The location of the interception points, within the boundaries of this country.

Justice Michael STOBER: Okay. And whether or not they're attempting to...eh...uncover more information with respect to the software the RCMP uses to intercept. You weren't sure if that was something that they wanted.

Maitre Robert ROULEAU: Yeah.

Justice Michael STOBER: It's also, the question of the involvement of RIM and that's something that they do wanna know and I've already given you certain comments of what I've heard publicly...and at the risk of being repetitious, there's other areas in the document that I've referred to in my opening comments of this hearing...eh...some of them which took a certain amount of space in this transcript and testimony of Mr. Flynn [REDACTED]
[REDACTED] but you're gonna have to explain to me...if those areas...relate to the investigative techniques, in this case. If they're not pertinent and they were never used, for example [REDACTED]
[REDACTED]

(11:45 end of first audio file)

Reasons for redactions, December 2, 2014, ex parte transcript

(11:45 beginning of second audio file)

Justice Michael STOBER:

[REDACTED]

Maître Robert ROULEAU:

[REDACTED]

Justice Michael STOBER:

[REDACTED]

Maître Robert ROULEAU:

[REDACTED]

Justice Michael STOBER:

[REDACTED]

Maître Robert ROULEAU:

[REDACTED]

Justice Michael STOBER:

[REDACTED]

Maître Robert ROULEAU:

[REDACTED]

Justice Michael STOBER:

[REDACTED]

Maître Robert ROULEAU:

[REDACTED]

Justice Michael STOBER:

[REDACTED]

Maître Robert ROULEAU:

[REDACTED] they are asking for software interception points and implication of BlackBerry, that's the information, at the end of the day

Justice Michael STOBER: Well, if the witness refers to police investigative technique that was not used in this case, was used in another unrelated case, there may be an argument that it's not pertinent here. Why should some technique that wasn't used in this case be disclosed, particularly if there's privilege issues attached to it...but they didn't use it, and it has no bearing on the evidence that you're going to present for the crown, because these are techniques that weren't carried out in the conduct of the investigation of this case. But...I'm repeating what I've said but many of the things he said I don't have a link, it's not for me to do that work. I'm listening and I ask questions but there's a limit and it's not for me to ask him every time he raises something: "was it used in this case"?

Justice Michael STOBER:

there are quite a few
pages are you saying that
that can be un-redacted now because its already
...public?

Reasons for redactions, December 2, 2014, ex parte transcript

Maître Robert ROULEAU: It...in...in some areas we've done that exercise to try to split certain aspects of a given question and I think we should work to the point where we should look at the...the...transcript...

Justice Michael STOBER: Were going to do that but...um...on certain excerpts in the transcript if you're telling me, which is what I understood earlier, [REDACTED] if you verify with them and they come and tell me, later, that's that not something that they need information on...um...then it's not an issue, if all counsel agree with that.

Maître Robert ROULEAU: I suspect though that if I do...do that the answer will be: ``oh, were interested in everything``. My...our contention was to take into account that what interest them is what is in their motion and what they have pleaded in front of you: the software and the interception points and the relative implication of BlackBerry. We're ready to address these points and I think if...

Justice Michael STOBER: Just a moment...Well, their motion includes in the relief requested, they're asking for, number one: an order directing that the crown provide any disclosure that they are refusing to disclose on the basis of investigative privilege. Number two is a visit for a demonstration for the RCMP offices in the manner of interception, including a demonstration of the software used to manage the interceptions. So, with respect to number two, I understand there will be a demonstration of the software with respect to...um...management after its acquired, after its intercepted. Correct?

Maître Robert ROULEAU: Exactly. What is being referred to as the P2P.

Justice Michael STOBER: But you're not going to give them a demonstration as to the manner of interception.

Maître Robert ROULEAU: Exactly.

Justice Michael STOBER: In your view, are they still asking for that, or there have been discussions about that?

Reasons for redactions, December 2, 2014, ex parte transcript

Maitre Robert ROULEAU: From the submissions that they've made...eh...in court...eh...our understanding is...as far as the software is concerned...and then I have to recollect of the...how my colleague ended yesterday...but his written motion still asks for it. He did not emph...put any emphasis on that the other day...maybe that question I can address my colleague.

Justice Michael STOBER: I think there's a lot of questions you can sit with him outside the court, when we're not proceeding and you can clarify this. But his number two is still there. Inspector Flynn, in his ex parte hearing referred to...eh...very generally, how these interceptions take place, there is a reverse process, but that's in his public report as well. What I'm suggesting you do and what I've suggested yesterday, you have to go through everything that's been provided publicly, his report...his written report which is an exhibit here and all of the other material including his public testimony. If that material is the same in whole or in part, as some or all of his ex parte testimony, then there's no reason to redact it.

Maitre Robert ROULEAU: And we have done that. We have done that, for example the relative use of BlackBerry [REDACTED]

Justice Michael STOBER: I don't understand from his testimony and reading this un-redacted transcript what relates to the police investigation in this specific case. Sir, in other words, the question: "sir, what was the technique utilised in this particular case for the purpose of investigating and intercepting PIN to PIN messages. What did the police do?" Answer. Next question: "why is it, in your opinion, subject to investigators privilege?". He went in a lot of directions and generalities and vagueness. If you wanna call him back, you can do that, but with what I have now...

Maitre Robert ROULEAU: And I understand that and I accept the courts comments, without any...I feel at ease with what's been done, given the fact and I could be....wrong on this but the whole question of BlackBerry's relative importance, otherwise the underling questions are [REDACTED]

that question...wasn't part of their original motion as we read it on that....

Justice Michael STOBER: Well, the first section of his request for relief is quite broad. So there's a few ways we can do this. Firstly...and it's a suggestion because there's a time factor as well. And with...what are they? 71...72 motions and voir-dires, etcetera which...the majority... Maître Gauthier mentioned are very detailed and...eh...very detailed motions that will take some time, we've already seen from some of the motions we've done already...they take time, both by the defense and by the crown. This case is requiring of me, because I've been assigned as case management judge, to manage the time appropriately and I find that, I'm and not gonna repeat what I've said with respect to other motions where before coming to the court...eh...verifications could have been made...eh...instead of raising...eh...defense raising arguments and I find out that the crown is not objecting to that and it shouldn't be for the court to have to intervene, while the defense lawyer is gonna present an argument, a lengthy argument and then the court says: does the crown object to that ? No. Well...the defense lawyer should have been told that in advance so he can curtail his argument and the court should have been advised as well. So, with respect to this, you're telling me on certain issues that you don't know what the defense position is. Well... you should find out. Secondly, rather than give me initially a transcript that's completely, almost completely blacked out, I think the exercise in reviewing Mr. Flynn's testimony and all the public documents and his public testimony should have been reviewed before...eh...providing the initial redacted copy. And I would've given you a lot of leeway and time because you're busy with a lot of other motions and we certainly would have done that with the consent of the defense, there's other motions that are ongoing and I would've given you enough time to do that instead of coming back with a second one, by second one I mean it's the second redacted copy and now today, after my remarks yesterday you're coming back with a third redacted copy...eh...and we're dealing with another ex parte hearing now. I think this process could be done more expeditiously because this morning we could be proceeding on another motion ...eh...and you could be having discussion after court hours with your colleagues from the defense...eh... as to what they really want and if necessary, you could have Mr. Flynn come back ex parte and if you felt that there were certain information that you weren't aware of, from the defense side, before he's in ex parte testimony, that you are aware of now, or you can ask me, to have him come back and complement or supplement his testimony in ex parte hearing. But I

Reasons for redactions, December 2, 2014, ex parte transcript

mean, just for myself, having read the un-redacted copy and the two redacted copies, you've redacted a lot of things that have been stated or written publicly and a lot of question marks go off for me, as to whether or not a lot of the material redacted, has any bearing on this investigation....was it a technique used here? If not, and you may have another argument, because I did say and I interrupted Mr. Flynn at the public part of his testimony and I asked him to answer the question, because very often he went into a lot of other directions that weren't in response to the question. You'll have to examine this un-redacted copy if you feel he went into areas that had nothing to do with this investigation. So having said that, we can continue now and go through this document page by page. It's an exercise that it will take time and I'm prepared to do it with you. And if I agree with you, I agree with you. If I don't, you're gonna have to explain why you feel its privileged and why it should be redacted. If you feel you need more information, with respect to the defense counsel position or from your own witness, you may want him back, ask me.

Maitre Robert ROULEAU:Ok...um...

Justice Michael STOBER:You want to talk with your colleagues?

Maitre Robert ROULEAU:Just...yeah...just a minute or two...we don't have to interrupt or anything...I'll just...uh...step out of the witness box...

Justice Michael STOBER:You can go to the back of the room and I'll wait on the bench. Thank you.

Maitre Robert ROULEAU:Here...est-queca va monsieurLanoue?...Alright, just wanted to make sure that the system wasn't out. Here's...um...

Justice Michael STOBER: Just so you know, for the record, while you had your discussions, I saw you left the room, I remained on the bench nobody came in the room and nobody was here except for the RCMP officer, Mr. Lanouewho's operation the machine and there were no words pronounced in your absence. Go ahead.

Maitre Robert ROULEAU: Thank you. Here is what we ask of the court if the court sees...sees fit. We think this would be the best way to go about the questions that are in front of the court... and

Reasons for redactions, December 2, 2014, ex parte transcript

we appreciate the courts time and consideration, these are difficult matters and the procedure is often...often problematic. As an example in SHARQc file where...the testimonies were more lengthy, it took 30 days in court of audition to settle an issue of disclosure. I'm not saying we should take 30 days but I'm just...I'm pointing out the fact that ...these issues are often complicated. But if we can make them simpler, we should try to do that and this is ...this goes in the sense of our sug...sug...suggestion. So, I will ask this court to have the opportunity to call Mr Flynn back ex parte. We have taken this courts comments...ça a pas tombé dans les oreilles d'un sourd...it didn't fall into a deaf's man ear....if that can be translated in that way, I'm not sure at all...ah...we will be directing specific questions on the three issues that we feel are the issues that the defense want communications on, the interception points, the software...description of the software used and the relatively implication, if any, implication of BlackBerry in the interception process. Before this....

Justice Michael STOBER: Because I don't even know that....from his testimony...

Maitre Robert ROULEAU: True.

Justice Michael STOBER: I'm referring to...it's not clear from Mr. Flynn ex parte testimony as to the extent, if any, of RIM's involvement in the interception process. So how can I rule on that if I don't even know.

Maitre Robert ROULEAU: [REDACTED] but...let's not get ahead of ourselves...The court is absolutely right in saying that the witness wasn't specific enough on those points. I can only agree, but before we hold this hearing, we will ask, inspiring ourselves of Bazir of the Supreme Court, ask that the defense be given and we will discuss this with the defense before. But we will ask that the court ...asks the defense in view of the points that are points of contention, that we can resume to them saying these are the three issues you want communication on...do you have questions that the court can direct the witness in the course of this ex parte hearing to help you make useful submissions to this court in determining... the existence of the privilege or not, on these particular issues.

Justice Michael STOBER: I'm gonna allow you to do that, to come back with Mr. Flynn...um...the evidence is crucial evidence for the

Reasons for redactions, December 2, 2014, ex parte transcript

crown and its crucial evidence for the defence, because the whole case relies on this type of PIN to PIN evidence... but to me when a witness is being brought in an ex parte hearing like this, the crown is aware of what investigative techniques have been used it should be confirmed with the witness before the court, he used techniques 1,2,3,4,5...um... and the witness should go through each one ,elaborate....give enough detail to the court so the court understands the importance the relevancy and why, if any, should there be any privilege attached to that investigative technique. You read the transcript as well as I have... and you're an experienced counsel and I think you...read as I did, the vagueness and generality in a lot of questions and whyit's unclear whether or not in this investigation, certain techniques were utilised. But coming back in front of me in a later ex parte hearing you'll have the advantage of sitting with defence counsel, once you have more information perhaps you can sit with defence counsel and perhaps streamline what it is they want, but it might be hard for them to know what they want because they don't know what the witness said. So, you could have a discussion with them...eh...I think they do have an idea ...eh...from what I heard on their final argument more or less what they want...eh...you can clarify that, get further specifics and have the witness come back ex parte. And when the witness comes back, because you know what he's gonna say, I don't, control your witness so that he doesn't go off in areas that are totally irrelevant, just stop him. And I'm gonna allow you to do that. I don't want to hear about irrelevant things to this inquiry to this hearing, unless you feel it's important for me. By postponing the hearing you'll also have a chance to re-verify the 27 page transcript from his ex parte hearing that already took place and to review...I will not repeat them now...to review the areas that I've already mentioned...as to whether or not the crown feels that many of these areas that have been redacted in the testimony have already been made public. They are already out there, either in front of this court by the public testimony of Mr. Flynn, by various documents that have been filed including his report, or they are circumstances that are known or could be known to the general public ...and if you're not sure about that that's something you can ask him as to whether or not point one, two, three of these things that...eh...could be generally known to the public. I believe a question somewhat similar to that was asked by Mr. Lacy and his answer was that, well he couldn't speak for different people in the public. However, an experienced police officer, an Inspector who's been with the RCMP for many years, who's experienced in this particular field, he certainly knows...eh...if certain things, are available to the public. But he has to be on top of what criminal organizations know or don't know. He has

Reasons for redactions, December 2, 2014, ex parte transcript

to know whether or not certain things can be downloaded, for example, in a completely other area that has nothing to do with this case, we've all read newspaper articles of the abilities to learn how to make a bomb online. People go and download that information. A police detective who's been in the bomb squad will know what's available to the public, whether or not it's a secret or not. Same thing for the material here, [REDACTED]

[REDACTED] are these things that could...generally be known to the public. He would know that. If it's known anyway, why...why is it a secret? And as you all know, police investigation techniques are developed over the course of time.

Maitre Robert ROULEAU:What was...what might have been privileged 10 years ago, might not be today and the advancement of the technology is ongoing...that's a given...that's obvious. But I just to point out to the court that Mr. Flynn has already in his testimony said that in the field, [REDACTED]

[REDACTED]

Justice Michael STOBER:There are certain things that he may say or may hint that he...may have said, that aren't necessary. Well, you know...eh... [REDACTED] Well, that's not part of the police technique, it's not...eh...it's not a police technique in investigating crime. You'll have to determine, is that something I really need to know, or rule on? He's the one that said that. All I need to know are what are the techniques that were utilised by the police in this case and why should they be privileged.

Maitre Robert ROULEAU:I understand...I understand that...eh...perfectly.

Justice Michael STOBER:But I'm asking you to...in order to be expeditious...and if I have to I'll even repeat it again because it's happened over and over not just in this motion but in other motions where time has not been utilised properly because there's a lack of communication between the crown and

Reasons for redactions, December 2, 2014, ex parte transcript

the defense, where things are contested or raised, where we find out later that there could've been an agreement ...eh...between counsel. Um...so I ask you to meet with defense counsel with respect to the issues that you're gonna bring back in front of me. I ask you to review in detail...line by line, page by page this transcript of ...Mr. Flynn first time... on his ex parte hearing and look at what he said on the public part, in examination in chief and in cross-examination, in conjunction with all the other exhibits that were filed as well as his report...um...you may have a different opinion on what you're redacting after you do that exercise. Because I've looked at it in detail and I'd prefer the crown do that in detail...presents something to me and then we go further. If there's a privilege that is really in the public interest, it's not known to the public, police need it in order to conduct investigation of crime and by disclosing that technique that's not known to the general public, people could be in danger or criminals would be able to avoid being detected ...and I have specifics on that, it may be good basis for an argument of this type of case by case privilege. Take a look at this document. So is there anything else that you would like to do today? On the ex parte hearing.

Maitre Robert ROULEAU:No. We would be ready to resume with Maitre Labelle's submissions and were ready to plead that...

(12:16 end of second audio file)

(12:16 beginning of third audio file)

Justice Michael STOBER: So...in terms of what to place today in the ex parte hearing...eh...basically, you provided me with an... I don't know if you're gonna give that now, or you're going to wait, you may wait, I don't know...eh... but in terms of the content of what took place here in terms of disclosing this I suppose you'll get a transcript ...

Maitre Robert ROULEAU: Yes.

Justice Michael STOBER: ...and the...you'll decide what should go public and what shouldn't and then I'll take a look at that at the appropriate time and of course it will be translated. But please meet with defense counsel, please review the material and you'll discuss dates when you wanna have

Reasons for redactions, December 2, 2014, ex parte transcript

him come back, do you have an idea? Are we talking a week...before Christmas ...after...

Maitre Alexis GAUTHIER: We will...if I may...we will find out within the hour and we will get back to you with dates, asap. And it will be quick. We won't...we don't want to lose weeks on this.

Justice Michael STOBER: Ok. Because the motions are lined up one after the other.

Maitre Alexis GAUTHIER: Yeah.

Justice Michael STOBER: And what I understand, they evaluated about 3 weeks...I think ...with the....

Maitre Robert ROULEAU: Garofoli motion.

Justice Michael STOBER: Yeah. But from the material I have received, it may very well take longer.

Maitre Alexis GAUTHIER: Yes.

Justice Michael STOBER: I don't know. Ok.....anything else? I'm willing to hear you, we're here, we're set up, if there's anything else you wish to address on this...

Maitre Robert ROULEAU: No. The next step would be...Mr. Flynn's testimony and our discussion with the defense...

Justice Michael STOBER: On the comments I made with respect to the transcript? Certain areas that need....you wanna wait or do you wanna...

Maitre Robert ROULEAU: I just want to maybe point out to the court and this can be...debated more when...when we do the actual review, but in our conception of what we do here, what we're trying to protect under the investigative privilege, is what the defense asked for. That does not make it so, that all the testimony that is made pursuant to that motion would...only be redacted if that itself comprises a investigative technique privilege. It might be that for

Reasons for redactions, December 2, 2014, ex parte transcript

other reasons we don't want information to get out but...we can address that when we do the actual review...

Justice Michael STOBER: Depends...does the other information have any pertinence to this case?

Maitre Robert ROULEAU: And it might be that our position is that it has... no bearing or relevance to their defence andand....therefore it's not interesting to them...

Justice Michael STOBER: Well...well...one has to be careful about that. If you feel it's not interesting to the defence, doesn't mean it may not be interesting for them and like Mr. Lacy said, at the end of the day I'm the gatekeeper with respect to that.

Maitre Robert ROULEAU: Exactly.

Justice Michael STOBER: But if a police officer in the course of his ex parte testimony gives examples of cases...eh...involving techniques that weren't utilised here, at all, you might have something to say about that. There's a question of relevance or pertinence. And at the end of the day, I'll have to decide.

Maitre Robert ROULEAU: Yes...But that being said, I think this covers what we could...what we can do today...in this hearing...

Justice Michael STOBER: So, I'm pleased to hear that you're gonna meet with the defence counsel to try to streamline the issues and with the information that they know now, perhaps they can indicate what direction they're going...you already know some of the things that they want...um...the interception points and the pathway there is an issue in Canada or outside Canada, that you said you weren't aware earlier and there's the issue of the software to intercept you may wanna get more details...eh...cause I seem to understand from your remarks that you didn't feel that they were ...attempting to delve into that....

Maitre Robert ROULEAU: They haven't....

Reasons for redactions, December 2, 2014, ex parte transcript

Justice Michael STOBER: But you could...you don't have to answer me...you can look into that. The involvement of RIM seems to me they want that.

Maitre Robert ROULEAU: Clearly.

Justice Michael STOBER: And...all right. But I don't have...as I said before, testimony as to the nature of that involvement in the ex parte testimony of Mr. Flynn.

Maitre Robert ROULEAU: That's true.

Justice Michael STOBER: And whether or not this is something that could be known to the public, is already it out there?...If somebody punches in a computer, Mr. Flynn would know this...eh...what RIMs involvement would be...eh...they're gonna get some kind of an answer...and...I'm certainly not gonna do that, I'm gonna base myself on the evidence that I hear. But as I said before, as a police...as an experienced police investigator in his field, he would know what could be available to the public and answer that...I don't know and how could I know is...it's difficult to accept an answer like that from someone in his position, on a question, in an area, that's directly related to his area of expertise. It's almost like someone asking you, the Supreme Court of Canada decisions, can anybody get them online, even if they're not a lawyer? Alright. So we'll stop now...I thank the three counsel for their input today, but before we come back, please go through the material in detail so it's not done by bits and pieces...um...and not just the transcript but everything else. Cause this is something that really should've been done in one hearing and could've been done quite expeditiously.

Maitre Alexis GAUTHIER: Should we resume with a public hearing at quarter to twelve? To set the agenda and see what can be done with the other motions...eh...as soon as possible or we'll get our colleagues to be here...quarter to twelve?

Justice Michael STOBER: Just a moment. Okay, before we get to that Maitre Gauthier, on the...request that you have to...have Mr. Flynn come back on another date, the court agrees with that and we'll accept that request...in the interim, crown counsel will meet with the defense...and have discussions in order to streamline as I stated earlier, the issues, if possible. The other thing is, I'll allow defense

Reasons for redactions, December 2, 2014, ex parte transcript

counsel to cross-examine the witness again...eh...publicly, if they so require. Is there any objection to that?

Maitre Robert ROULEAU: No.

Justice Michael STOBER: So when you have your discussions with them, you can let them know that...and...once they have the transcript that's final, with respect to both hearings, the first one and the second one, they have a transcript with redactions if need be...um...they may want to have witness back then. Publicly.

Maitre Robert ROULEAU: Yeah.

Justice Michael STOBER: There's no objection to that?

Maitre Robert ROULEAU: No.

Justice Michael STOBER: No? You can mention that as well. So...this issue of privilege for investigative techniques could take some time until it's finally concluded.

Maitre Robert ROULEAU: Yeah.

Justice Michael STOBER: So that concludes the...this issue. On the other motions, I'm here in the back Maître Gauthier so...um... we can say quarter to twelve...um...let's say not before quarter to twelve, it's now eleven thirty...uh...when you're ready, if it takes you longer its fine, just have someone, the bailiff come and get me, it will be a quarter to twelve or after and the plan for today will be to hear Maître Labelle... I think he said he will have 45 minutes left on the other motion...

Maitre Alexis GAUTHIER: I think so.

Justice Michael STOBER: Alright. And Maître Rouleau is gonna move...eh...argue after that.

Reasons for redactions, December 2, 2014, ex parte transcript

Maître Alexis GAUTHIER: Yes.

Justice Michael STOBER: Good.

Maître Robert ROULEAU: Ah...ah...I would ask for...in order to do it with...in one procedure...maybe ask for the copy of the...eh...redaction...that I've...

Justice Michael STOBER: So, just for the record, after the interruption with respect to the other hearings that will gonna take place today...eh...Maître Rouleau for the crown gave me a new, third redacted copy that I've looked at briefly to see that there were some additional un-redacted areas...he's asked for it back, so I'm giving it back and I have no copy.

Maître Robert ROULEAU: Thank you....yeah.

Justice Michael STOBER: I only have the redacted copies that were given to me earlier, which defense counsel already have.

Maître Robert ROULEAU: Yeah.

Justice Michael STOBER: That concludes this ex parte hearing. Thank you for your collaboration.

Maître Alexis GAUTHIER: Thank you.

(12:27 End of audio files)

C A N A D A

PROVINCE DE QUÉBEC

DISTRICT DE LAVAL

COUR SUPÉRIEURE

No : 540-01-063428-141

DEVANT L'HONORABLE MICHAEL STOBER, J.C.S.

SA MAJESTÉ LA REINE,

Plaignante

- vs -

VITTORIO MIRARCHI & AL,

Prévenus

COMPARUTIONS :

Me ROBERT ROULEAU,
Me MARIE-CHRISTINE GODBOUT et
Me PAUL ALEXIS GAUTHIER.
Procureurs de la Couronne

Me MICHAEL LACY,
Me FRANK ADDARIO et
Me MAXIME HÉBRARD
Procureurs de la défense - V. Mirarchi

Me MARC LABELLE,
PROCUREUR DE LA DÉFENSE - R. Desjardins

Me ÉMOND - ABSENTE, REPRÉSENTÉE PAR Me POLNICKY,
PROCUREUR DE LA DÉFENSE - S. D'Addario

Me ENGEL,
PROCUREUR DE LA DÉFENSE

Me DOMINIQUE SHOOFY,
PROCUREUR DE LA DÉFENSE - C. Milioto

Me MACDONALD,
PROCUREUR DE LA DÉFENSE - J. Simpson

Me ANIL KAPOOR,
Amicus curiae

LE 30 JUIN 2015,

1 VOICE NON IDENTIFIED :

2 Good morning, sir.

3 THE COURT :

4 Good morning.

5 LA GREFFIÈRE :

6 Ça va pour les interprètes, monsieur le juge.

7 LA COUR :

8 Les interprètes, s'il vous plaît.

9

10 --- INTERPRÈTES ASSERMENTÉS

11

12 THE COURT :

13 So, for Mr. Simpson who I see on video conference,
14 just make sure your earphones are working.

15 L'INTERPRÈTE :

16 Alors, pour monsieur Simpson, on peut vous voir dans
17 la vidéo conférence. Seulement vous pouvez toujours
18 vérifier que le...

19 LA COUR :

20 Alors, est-ce que vous écoutez... vous entendez la
21 traduction?

22 THE INTERPRETER :

23 Can you hear? Can you hear the translation?

540-01-063428-141
June 30th, 2015

PRELIMINARIES

Mr. SIMPSON :

Yes.

LA COUR :

Oui, alright.

L'INTERPRÈTE :

Oui.

THE COURT :

Mr. Desjardins, do you hear the translation of what
I'm saying?

L'INTERPRÈTE :

Monsieur Desjardins, est-ce que vous êtes capable
d'entendre la traduction en français de qu'es-ce que
je dis?

M. DESJARDINS :

Oui, votre Honneur.

THE INTERPRETER :

Yes, your Honour.

LA COUR :

Maître Gauthier, qui est présent.

THE INTERPRETER :

Maître Gauthier is present... who is present?

Me GAUTHIER :

On a monsieur Mirarchi, monsieur Milioto, monsieur
Magistrale. Monsieur Desjardins et monsieur Simpson
au vidéo et comme hier, Racaniello, Fracas,

540-01-063428-141
June 30th, 2015

PRELIMINARIES

1 D'Addario... messieurs Racaniello, Fracas et
2 D'Addario sont absents ce matin.

3 THE INTERPRETER :

4 Mr. Mirarchi, Mr. Milioto, Mr. Magistrale. Mr.
5 Desjardins and Mr. Simpson and as yesterday,
6 Racaniello, Fracas, D'Addario... Mr... and these are
7 absent this morning.

8 LA COUR :

9 D'accord. We don't eat in the courtroom. There is
10 no chewing gum in the courtroom. So, for those
11 perhaps who haven't come here before, who aren't
12 familiar with courtroom decorum, please keep that in
13 mind. Thank you.

14 L'INTERPRÈTE :

15 On ne mange pas dans la salle de cour. On n'a pas
16 de chewing gum. Alors, pour ceux qui ne sont pas
17 encore familiers avec le décorum de la... dans la
18 cour, s'il vous plaît, retenez ça à l'esprit.

19 LA COUR :

20 Est-ce qu'il y a des demandes préliminaires avant de
21 commencer?

22 THE INTERPRETER :

23 Any preliminary remarks.

24 Me LABELLE :

25 De ma part. Voici, monsieur le juge, dans le

540-01-063428-141
30 juin 2015

REPRÉSENTATIONS

dossier de monsieur Desjardins...

THE INTERPRETER :

Yes, from my part. Yes, your Honour, in the file of
Mr. Desjardins...

LA COUR :

Oui.

Me LABELLE :

... il y a eu bien des discussions importantes
(inaudible) qui ont passé par votre suggestion
d'utiliser la facilitation à la Cour supérieure. Je
vais vous demander d'avoir accès à monsieur
Desjardins cet après-midi, là, le plus rapidement
possible afin de finaliser certaines choses.

THE INTERPRETER :

... there were discussions that led to... that
passed through your suggestion to use Superior
Court. I would like to ask you to have access to
Mr. Desjardins this afternoon so that I may finalize
this.

LA COUR :

Ici?

THE INTERPRETER :

Here?

Me LABELLE :

Non, je vais aller à Bordeaux.

540-01-063428-141
30 juin 2015

REPRÉSENTATIONS

1 THE INTERPRETER :

2 No. No, I'm going to go to Bordeaux.

3 LA COUR :

4 (Inaudible) ce n'est pas ici.

5 Me LABELLE :

6 Oui, c'est ça.

7 THE INTERPRETER :

8 Oh yes, true, he's not here.

9 Me LABELLE :

10 Alors, je vais donc vous demander de continuer sine
11 die ma requête 32-A puis selon toute
12 vraisemblance...

13 THE INTERPRETER :

14 So, I'm going to ask you to continue to serve my
15 motion in two parts, according to... in all...

16 Me LABELLE :

17 ... si ça se passe comme prévu, à partir de lundi
18 prochain, nous ne serons plus partie à cette
19 affaire.

20 THE INTERPRETER :

21 ... likelihood, maybe from next Monday we would have
22 taken part in this matter.

23 LA COUR :

24 D'accord. Pour les audiences de...

25

540-01-063428-141
30 juin 2015

REPRÉSENTATIONS

THE INTERPRETER :

For the hearing...

LA COUR :

... ce matin, l'audition de ce matin parce que votre
requête fait partie de ça...

THE INTERPRETER :

... of this morning here because the motion is part
of that...

Me LABELLE :

Oui.

LA COUR :

... est-ce que vous me demandez de reporter le tout
ou est-ce que vous demandez à un de vos confrères de
vous représenter...

THE INTERPRETER :

... and were you... are you asking me to postpone
everything or are you asking one of your colleagues
to represent you...

Me LABELLE :

Oui, c'est ça.

LA COUR :

... et monsieur Desjardins et si jamais vous restez
avec nous...

THE INTERPRETER :

... and Mr. Desjardins and if ever you do stay with

540-01-063428-141
30 juin 2015

REPRÉSENTATIONS

us...

--- TRADUCTION SE FAIT EN MÊME TEMPS, UN TON TRÈS
FORT, TOUS PARLENT EN MÊME TEMPS. DONC
DIFFICILE ET INAUDIBLE PAR MOMENTS.

Me LABELLE :

Ça sera... on pourra bénéficier du travail fait
aujourd'hui. Effectivement, je vais demander à un
de mes confrères, soit de l'Ontario ou d'ailleurs,
de me représenter...

LA COUR :

Les deux.

Me LABELLE :

... mais avant de partir j'aimerais ça leur faire
(inaudible). Alors, bref, il pourrait faire ça ce
matin me représenter et me représenter monsieur
Desjardins aussi ce qui nous permettrait, à monsieur
Desjardins et moi, de se rencontrer pour terminer
des choses.

THE INTERPRETER :

We could actually benefit from the work that is done
today. Indeed, I would like to ask one of my
colleagues to... whether from Ontario or... to
represent me.

540-01-063428-141
30 juin 2015

REPRÉSENTATIONS

1 I would like to do so before I leave and maybe they
2 can do that this morning to represent Mr. Desjardins
3 as well, if you permit Mr. Desjardins and I to meet
4 to discuss certain things.

5 LA COUR :

6 Alors, pour les raisons que vous indiquez, vous ne
7 demandez pas de reporter les auditions (inaudible)
8 ce matin, c'est ça?

9 THE INTERPRETER :

10 So, for the reasons that you indicated, you do not
11 ask to postpone the hearing for this motion today.

12 Me LABELLE :

13 Bien oui.

14 LA COUR :

15 Vous ne demandez pas ça.

16 THE INTERPRETER :

17 You're not asking that.

18 Me LABELLE :

19 Non.

20 THE INTERPRETER :

21 No.

22 LA COUR :

23 D'accord. Qui va prendre votre place aujourd'hui et
24 vous avez l'embarras du choix, là?

25

540-01-063428-141
30 juin 2015

REPRÉSENTATIONS

1 THE INTERPRETER :

2 Who is going to take your place today and you also
3 have... you have a number of choices.

4 Me LABELLE :

5 Oui, je vais prendre maître Lacy parce que c'est mon
6 favori.

7 THE INTERPRETER :

8 I'm going to ask the ones that are here.

9 LA COUR :

10 Ça va.

11 Me LABELLE :

12 You too. Il ne faut pas que les autres s'en
13 formalisent.

14 THE INTERPRETER :

15 They have to do a formal answer.

16 LA COUR :

17 Il faut qu'il accepte. Ça va? Is that alright, Mr.
18 Lacy?

19 L'INTERPRÈTE :

20 Est-ce que c'est...

21 Me LACY :

22 Yes.

23 THE COURT :

24 So, for the... you understood that...

25

540-01-063428-141
30 juin 2015

REPRÉSENTATIONS

Me LACY :

Thank you.

L'INTERPRÈTE :

Vous avez compris alors que maître Labelle...

THE COURT :

... maître Labelle will not be with us today for the hearing of these motions for reasons he gave and he's asked that you would replace him and represent his client for the hearing today and report back to him. Is that satisfactory to you?

L'INTERPRÈTE :

... il ne va pas être avec nous pour ces requêtes, pour les raisons qu'il a déjà mentionnées et puis il a demandé si vous seriez capable de le représenter lui et son client pour les audiences aujourd'hui et aussi de pouvoir les informer plus tard. Est-ce que c'est satisfaisant pour vous?

Me LACY :

It is.

THE COURT :

Thank you. Please note that in the procès-verbal. Alors, vous allez rester... vous allez quitter maintenant.

L'INTERPRÈTE :

C'est... oui. Alors, vous pouvez noter ça au

540-01-063428-141
30 juin 2015

REPRÉSENTATIONS

procès-verbal. So, you have... you will leave right now.

Me LABELLE :

Bien, je vais quitter dès que je vais voir que mon client sort. Bien, c'est parce que là, c'est-à-dire je vais nuire un peu à l'audience et puis il va falloir que la détention...

THE INTERPRETER :

I'm going to leave as soon as I see my client exit. I'll be... it's going...

Me LABELLE :

... vous entendez...

THE INTERPRETER :

... we're going to need the detention to hear us...

Me LABELLE :

... et que vous lui permettiez de s'en aller.

THE INTERPRETER :

... and that you may permit him to exit.

LA COUR :

Bon bien, ça veut dire qu'il faut qu'on suspende la Cour pour...

THE INTERPRETER :

So, we have to suspend...

Me LABELLE :

Ça veut dire qu'il faut faire venir quelqu'un, là.

540-01-063428-141
30 juin 2015

REPRÉSENTATIONS

THE INTERPRETER :

... the hearing right now? No, it's because we have
to bring someone...

Me LABELLE :

Il faudrait s'adresser à la détention.

THE INTERPRETER :

... to address the detention officers.

VOIX NON IDENTIFIÉE :

(Inaudible), maître.

Me LABELLE :

Parce qu'ils vont me demander que ça vienne de vous
et...

LA COUR :

Ça va.

THE INTERPRETER :

Because they're going to ask me that it must come
from you.

THE COURT :

While we're waiting, madam clerk, you verify that
everything translated in the cabin of the
interpreters is taken in Courtlog.

LA CONSTABLE :

Bonjour.

L'INTERPRÈTE :

Pendant qu'on attend, madame la greffière, on

540-01-063428-141
30 juin 2015

REPRÉSENTATIONS

1 peut... vous pouvez vérifier tout ce qui a été dit
2 par les interprètes est... a été traduit...

3 LA GREFFIÈRE :

4 Oui.

5 THE COURT :

6 As if it was done in court.

7 LA GREFFIÈRE :

8 Oui.

9 L'INTERPRÈTE :

10 ... a été traduit. Ça va être capté par le
11 Courtlog, le système Courtlog.

12 THE COURT :

13 Please note that. Oui, bonjour, madame la
14 constable.

15 THE INTERPRETER :

16 Yes, madam constable.

17 LA CONSTABLE :

18 Bonjour.

19 LA COUR :

20 Maître Labelle, vous voulez que votre client...

21 THE INTERPRETER :

22 Maître Labelle, you want your client...

23 Me LABELLE :

24 Oui, je vais devoir rencontrer monsieur Desjardins.

25 J'imagine que vous n'avez pas le temps ce matin,

540-01-063428-141
30 juin 2015

REPRÉSENTATIONS

1 mais si vous pouvez le ramener à son secteur, je
2 vais le voir le plus rapidement possible.

3 THE INTERPRETER :

4 Yes, I would like to meet with Mr. Desjardins. I
5 imagine that you don't have time this morning but if
6 you can bring him to his section, I would like to
7 see him as soon as possible.

8 LA COUR :

9 Alors, je vous demande, madame la constable, de
10 donner suite à la demande de maître Labelle.

11 THE INTERPRETER :

12 So, I'm asking you to follow up on that request from
13 maître Labelle.

14 LA CONSTABLE :

15 Ok, (inaudible).

16 LA COUR :

17 Avez-vous... madame! Madame, qu'est-ce que c'est
18 votre nom?

19 THE INTERPRETER :

20 Madam! Madam, what is your name?

21 Mme DALEA :

22 Dalea.

23 LA COUR :

24 Pardon?

540-01-063428-141
30 juin 2015

REPRÉSENTATIONS

1 Mme DALEA :

2 Dalea, D-A-L-E-A.

3 LA COUR :

4 Oui, ok. Et votre nom de famille?

5 THE INTERPRETER :

6 And your last name?

7 Mme DALEA :

8 C'est Dalea mon nom de famille. Mon prénom c'est
9 Mihaela (ph).

10 LA COUR :

11 Ok, ça va, madame Dalea. Avez-vous compris la
12 demande de maître Labelle?

13 THE INTERPRETER :

14 Okay, very well. Madam Dalea, did you understand
15 Mr. Labelle's request?

16 Mme DALEA :

17 Oui, je vais (inaudible).

18 THE INTERPRETER :

19 Yes, I'm going to ask... I couldn't hear that.

20 LA COUR :

21 Ok, maître Labelle veut qu'il soit retourné à son
22 secteur pour qu'il puisse venir le visiter cet
23 après-midi, aujourd'hui. Ça vous va?

24 THE INTERPRETER :

25 So, maître Labelle wants him to be brought back to

540-01-063428-141
30 juin 2015

REPRÉSENTATIONS

his section so that he may be... visit him this
afternoon today.

Mme DALEA :

(Inaudible).

THE INTERPRETER :

Is that okay?

Mme DALEA :

Oui.

THE INTERPRETER :

Yes.

LA COUR :

Ok. Alors, monsieur Desjardins peut quitter
maintenant.

THE INTERPRETER :

So, Mr. Desjardins, he can exit right away.

Me DALEA :

C'est beau.

LA COUR :

C'est ce que vous voulez, maître?

THE INTERPRETER :

Is that what you want, maître?

Me LABELLE :

Oui.

THE INTERPRETER :

Yes.

540-01-063428-141
30 juin 2015

REPRÉSENTATIONS

1 Me LABELLE :

2 Alors, je vais donc...

3 LA COUR :

4 Bon! Alors, monsieur Desjardins quitte. Il est ici
5 par vidéo conférence. Il quitte.

6 THE INTERPRETER :

7 So, Mr. Desjardins is leaving and here by video
8 conference. He's...

9 LA COUR :

10 Monsieur Simpson reste et maître Labelle va quitter
11 pour les raisons qu'il a données.

12 THE INTERPRETER :

13 ... leaving. Mr. Simpson remains and maître Labelle
14 is going to...

15 Me LABELLE :

16 C'est ça.

17 LA COUR :

18 Et maître Lacy va continuer pour représenter les
19 intérêts de votre client.

20 THE INTERPRETER :

21 ... go for the reasons already mentioned and maître
22 Lacy is going to continue representing you and your
23 client.

24 Me LABELLE :

25 Sans frais, bien sûr.

540-01-063428-141
30 juin 2015

REPRÉSENTATIONS

LA COUR :

Il ne s'est pas engagé à ça.

THE INTERPRETER :

You know he's not engaged to that and...

Me LABELLE :

Très bien. Alors, je vais pouvoir (inaudible) ça
va.

LA COUR :

Ça va. Alors, lundi...

THE INTERPRETER :

So Monday...

Me LABELLE :

(Inaudible) pour être précis, je ne serai pas devant
vous le matin.

THE INTERPRETER :

... I will not be in front of you in the morning.

LA COUR :

Non, non, ça va. Ça va.

Me LABELLE :

Je viendrai faire rapport mardi matin.

THE INTERPRETER :

So, I will come back for Tuesday.

LA COUR :

J'ai compris. Ça va. Merci, maître.

540-01-063428-141
30 juin 2015

REPRÉSENTATIONS

1 THE INTERPRETER :

2 Thank you, maître.

3 Me LABELLE :

4 Merci beaucoup.

5 THE COURT :

6 Go ahead.

7 L'INTERPRÈTE :

8 Allez-y!

9 Me GAUTHIER :

10 So, today...

11 L'INTERPRÈTE :

12 Alors, aujourd'hui...

13 Me GAUTHIER :

14 ... we're here to resume the hearing in relation to
15 R-25 and to begin the one related to R-32 and R-32-
16 A.

17 L'INTERPRÈTE :

18 ... on est ici pour pouvoir continuer avec l'enquête
19 R-25 et pour continuer la requête R-32.

20 Me GAUTHIER :

21 As mentioned previously, we have Mr. Mark Flynn in
22 the building who is ready to testify and Mr. Rouleau
23 is here and it's Mr. Rouleau who will take care of
24 the testimony of Mr. Flynn and I will leave the
25 floor to Mr. Rouleau.

540-01-063428-141
30 juin 2015

REPRÉSENTATIONS

L'INTERPRÈTE :

Comme on l'a déjà mentionné auparavant, on a monsieur Mark Flynn qui est dans la bâtisse qui est prêt à témoigner et maître Rouleau est ici et c'est maître Rouleau qui va prendre soin de son témoignage de monsieur Flynn et je vais laisser la place à maître Rouleau.

Me ROULEAU :

Good morning. We'll be ready, your Lordship, to start with the public part of the testimony of Mr. Flynn on R-32 which won't be very long. There is not much we can do for this witness publicly and at a certain point, I'll be asked you to try to get the Court to have an ex parte hearing pursuant to the public part of his testimony.

L'INTERPRÈTE :

Bonjour. On va être prêt pour commencer avec la partie publique du témoignage de monsieur Flynn, R-32. Ça ne va pas être très long, par exemple. Il n'y a pas beaucoup de choses qu'on peut faire avec ce témoin.

À un certain point, on va après vous demander de faire une audience ex parte, selon ou après la partie publique de son témoignage.

540-01-063428-141
30 juin 2015

REPRÉSENTATIONS

THE COURT :

So, you want to do the public part of R-32 on the MDI.

L'INTERPRÈTE :

Alors, vous allez faire la partie publique de R-32 de IDM.

Me ROULEAU :

Yes.

THE COURT :

And you want to go ex parte on the MDI.

Me ROULEAU :

Yes.

L'INTERPRÈTE :

Puis après ça, vous allez faire... aller ex parte pour le IDM.

THE COURT :

That's understood and that's agreed to by all the parties, including maître Labelle (inaudible) what was said yesterday. Do you also have questions for inspector Flynn on R-25?

L'INTERPRÈTE :

Ça, c'est compris et toutes les parties sont d'accord avec ça, même maître Labelle, comme il l'a déjà mentionné hier. Est-ce que vous voulez aussi... est-ce que vous avez des questions pour

REPRÉSENTATIONS

540-01-063428-141
30 juin 2015

1 l'inspecteur Flynn sur R-25...

2 Me ROULEAU :

3 Yes.

4 THE COURT :

5 ... following the last time.

6 Me ROULEAU :

7 Yes.

8 L'INTERPRÈTE :

9 ... après la dernière fois.

10 THE COURT :

11 And ex parte as well?

12 Me ROULEAU :

13 Yes.

14 L'INTERPRÈTE :

15 Oui. Oui.

16 THE COURT :

17 Alright. Any comments from defence?

18 L'INTERPRÈTE :

19 Il y a des commentaires de la partie de la défense.

20 Me LACY :

21 Well, I just note that Mr. Kapoor is present as
22 well, your Honour, as amicus and...

23 L'INTERPRÈTE :

24 Moi, je vais simplement noter que monsieur Kapoor
25 est présent comme l'amicus...

540-01-063428-141
30 juin 2015

REPRÉSENTATIONS

1 THE COURT :

2 I see.

3 L'INTERPRÈTE :

4 ... et il serait prêt à remplir...

5 Me LACY :

6 ... ready to fill his job. I'm not sure if he's
7 been introduced to the Court formally today...

8 L'INTERPRÈTE :

9 ... ce (inaudible) son travail...

10 THE COURT :

11 Yes, we...

12 Me LACY :

13 ... this morning I think.

14 THE COURT :

15 Okay. But I see him in the courtroom.

16 L'INTERPRÈTE :

17 ... aujourd'hui.

18 Me KAPOOR :

19 Good morning.

20 THE COURT :

21 Good morning, sir, and I take it your accommodations
22 and the food and everything is well in order.

23 L'INTERPRÈTE :

24 Bonjour. Et je comprends que vos accommodations,
25 tout va bien et tout est en ordre?

540-01-063428-141
30 juin 2015

REPRÉSENTATIONS

Me KAPOOR :

Yes, thank you very much. I'm watered and fed.

L'INTERPRÈTE :

Oui, très bien. Merci. J'ai reçu de la nourriture
et puis de l'eau.

THE COURT :

You like (inaudible). Alright. Please proceed.

L'INTERPRÈTE :

Alors, procédez.

THE COURT :

Just before you do so, I asked yesterday and Mr.
Kapoor in your absence, if any of the defence
counsel had questions that they wanted to ask at the
ex parte portion.

In the past, they gave a liste commune. So, I asked
that they give it to you and they probably will have
more after the public portion and depending on the
redacting by the Crown, it might be opportune for
the Crown and you to get together and try to make
some type of a summary of the evidence so the
defence counsel can have some understanding of what
took place.

L'INTERPRÈTE :

Avant de continuer avec ça, j'ai demandé hier,

540-01-063428-141
30 juin 2015

REPRÉSENTATIONS

1 monsieur Kapoor, dans votre absence, il y avait
2 des... des avocats de la défense avaient des
3 questions, s'ils voulaient demander pour la partie
4 ex parte.

5
6 Dans le passé, il y avait une liste de requêtes ou
7 de... alors, ils vont vous soumettre ça, cette
8 liste, et dépendamment du caviardage de la Couronne,
9 ça serait opportun pour les avocats de se mettre
10 ensemble, de se mettre d'accord pour pouvoir arriver
11 à un résumé de la preuve, comme ça, les avocats, ils
12 ont une compréhension de qu'est-ce qui est arrivé.

13 Me KAPOOR :

14 Certainly.

15 THE COURT :

16 Alright. Thank you very much. Go ahead.

17 L'INTERPRÈTE :

18 Très bien.

19 THE COURT :

20 And, madame la greffière, I think this witness is
21 testifying in English.

22 THE INTERPRETER :

23 Madam clerk...

24 Me ROULEAU :

25 Yes, yes, he is. He'll testify in English.

540-01-063428-141
30 juin 2015

REPRÉSENTATIONS

L'INTERPRÈTE :

Ce témoin, il va témoigner en anglais.

VOICE NON IDENTIFIED :

Okay, first of all in English. Okay. Sorry.

THE COURT :

Maître Labelle is not here. So, the only
intervention in French will have is from Mr.
Labelle's representative, Mr. Lacy with some French
perhaps.

L'INTERPRÈTE :

Maître Labelle n'est pas ici. Alors, la seule
intervention en français ça va être par le
représentant de...

VOIX NON IDENTIFIÉE :

Oui, rebonjour.

THE COURT :

Mr. Lacy.

L'INTERPRÈTE :

... maître Lacy qui va peut-être témoigner en
français cette fois-ci.

THE COURT :

So go ahead.

L'INTERPRÈTE :

Qui représente maître Labelle.

540-01-063428-141
30 juin 2015

REPRÉSENTATIONS

Me ROULEAU :

Madam (Inaudible)...

LA GREFFIÈRE :

Oui.

Me ROULEAU :

... can you call Mr. Mark Flynn, inspector Mark
Flynn? He's outside the courtroom waiting for us.

L'INTERPRÈTE :

Est-ce qu'on pourrait appeler l'inspecteur Mark
Flynn qui est à l'extérieur de la salle de cour?

--- COMMENTS ON ANOTHER MATTER NOT RELATED

HAS APPEARED :

MARK FLYNN,

RCMP officer, badge number 02887,

WHO, being duly sworn in, doth
depose and say as follows :

THE COURT :

Good morning, Mr. Flynn. Just before we begin, I'd
like to ask the clerk, on your computer what time is
it?

540-01-063428-141
30 juin 2015

REPRÉSENTATIONS

L'INTERPRÈTE :

Avant de commencer, monsieur Flynn, j'aimerais
demander le Tribunal, selon votre ordinateur, c'est
quelle heure?

THE COURT CLERK :

Nine 51.

THE COURT :

Nine 51. So, the time is compatible with the clock
in front of you, madam clerk?

L'INTERPRÈTE :

Neuf heures 51. Est-ce que c'est... on a...

THE COURT CLERK :

Yes.

THE COURT :

Okay. Because I noticed when I marked the time in
other motions, I listened to recordings in the
Courtlog, it's...

L'INTERPRÈTE :

C'est synchronisé avec l'horloge que vous avez
devant vous, madame la greffière? Oui. Parce que
quand j'étais en train d'écouter les
enregistrements...

THE COURT CLERK :

(Inaudible) five minutes...

540-01-063428-141
30 juin 2015

REPRÉSENTATIONS

1 THE COURT :

2 There was a gap and it's hard to find something.

3 L'INTERPRÈTE :

4 ... il y avait une certaine différence de temps.

5 THE COURT CLERK :

6 But now, we're synchronized. I know (inaudible)
7 five minutes...

8 THE COURT :

9 (Inaudible) synchronized...

10 L'INTERPRÈTE :

11 Mais là, ils sont synchronisés.

12 THE COURT CLERK :

13 It's the same thing.

14 L'INTERPRÈTE :

15 C'est la même chose maintenant.

16 THE COURT :

17 Okay. Go ahead, maître Rouleau. Thank you.

18 L'INTERPRÈTE :

19 Allez-y, maître Rouleau.

20

21 EXAMINATION BY Me ROBERT ROULEAU,

22 For the Crown :

23 Q. Monsieur Flynn, would you please state to the
24 Court...

25 Q.- Monsieur Flynn, expliquez au Tribunal...

540-01-063428-141
June 30th, 2015

MARK FLYNN
Ex.
Me Robert Rouleau

- 1 Q. ... what it is that you do within the RCMP?
- 2 Q.- ... qu'est-ce que vous faites exactement dans la
- 3 GRC?
- 4 A. I am in charge of the tactical operation section...
- 5 R.- Je suis dans les opérations tactiques...
- 6 A. ... and technical investigation services...
- 7 R.- ... les choses (inaudible).
- 8 A. I am in charge of several groups and I'm responsible
- 9 for...
- 10 R. Aussi plusieurs groupes qui sont responsables...
- 11 A. ... electronic and physical surveillance.
- 12 R.- ... de la surveillance physique.
- 13 Q. Given that occupation that you have, do you work
- 14 solely within the RCMP or do you have...
- 15 Q.- Est-ce que vous travaillez juste seulement pour la
- 16 GRC...
- 17 Q. ... relationships with other investigative agencies?
- 18 THE INTERPRETER :
- 19 I can't hear him.
- 20 A. I have broad relationships...
- 21 R. J'ai assez de relations...
- 22 A. ... both with municipal, provincial policing,
- 23 federal policing.
- 24 R. ... avec le provincial, municipal, fédéral.
- 25 A. Human intelligence, (inaudible) intelligence,

540-01-063428-141
June 30th, 2015

MARK FLYNN
Ex.
Me Robert Rouleau

1 (inaudible) both domestically and internationally.

2 R.- Toute l'intelligence humaine, internationale et
3 aussi à la... au Canada.

4 Q. Now, as far as the material that you need to use, do
5 you have knowledge of the relationship that the RCMP
6 has with the providers of these tools?

7 Q.- En ce qui concerne le matériel, est-ce que vous avez
8 une connaissance avec les fournisseurs de cet outil-
9 là?

10 A. Yes, I do.

11 Q. Are you implicated in that area at all?

12 Q.- Est-ce que vous êtes impliqué dans ça, dans cet...

13 A. Yes, I am.

14 R.- Oui, je suis impliqué dans ce domaine.

15 Q. In what capacity?

16 A. So, there is different type of tools. There is
17 working (inaudible) serving providers to develop
18 tools for interception of communication as well as
19 tool manufacturers that develop and market tools
20 that are used for the electronic or physical
21 surveillance.

22 R.- Il y a différents tools puis on travaille avec les
23 fournisseurs de services pour les interceptions des
24 communications et ainsi les personnes qui fabriquent
25 les outils qui sont utilisés pour la surveillance

540-01-063428-141
June 30th, 2015

MARK FLYNN
Ex.
Me Robert Rouleau

physique ou électronique.

A. I work with them both to develop capabilities as well as to discuss how the RCMP utilizes them and how we can also protect the (inaudible) capabilities of those tools.

R.- Je travaille avec eux de faire un développement des capacités et de discuter l'utilisation de la GRC et de protéger aussi (inaudible).

THE COURT :

Q. Just a minute. I'm going to have to ask you to slow down a bit.

A. My apologies.

Q. Mais not for me. You may have forgotten that everything said is being translated in the cabin by the interpreters. So, just take pauses (inaudible) to give them a chance to catch up with you and so (inaudible) possible. Thank you. Go ahead.

L'INTERPRÈTE :

Je vais juste vous demander de prendre une petite pause parce que tout qui est dit par vous, monsieur, est traduit par les interprètes. S'il vous plaît, juste allez un peu plus lentement. Merci.

Me ROULEAU :

Q. In what type or types of investigations are these tools used?

540-01-063428-141
June 30th, 2015

MARK FLYNN
Ex.
Me Robert Rouleau

1 Q.- Dans quel type d'enquêtes est-ce que... les outils
2 utilisés?

3 A. They're used for any type of Criminal Code
4 investigation or any federal statute in Canada.

5 R.- Ils sont utilisés pour toutes sortes d'activités
6 criminelles ou les statuts fédéraux au Canada.

7 Q. You've been a member of the RCMP for how long?

8 Q.- Est-ce que vous étiez membre avec la GRC combien de
9 temps

10 A. Approximately 17 years.

11 Q. And the unit for which you work for, what is it
12 called objectively speaking?

13 Q.- L'unité que vous travaillez pour, ça s'appelle
14 comment? Est-ce qu'il y a un nom?

15 A. It's (inaudible) investigation services branch and
16 the area that I'm in specifically is the tactical
17 operation (inaudible).

18 R.- Les services tactiques, c'est les opérations
19 tactiques que je suis assigné, exact.

20 Q. For how long have you been working there
21 specifically?

22 Q.- Ça fait combien de temps que vous êtes assigné là?

23 A. Since 2002.

24 R.- Depuis 2002.

25 Q. Alright.

540-01-063428-141
June 30th, 2015

MARK FLYNN
Ex.
Me Robert Rouleau

1 Q.- Okay.

2 Q. Are you aware of a device that's generally referred
3 to as an MDI device, an MDI system? Are you aware
4 of that?

5 Q.- Est-ce que vous êtes au courant sur le... pour le
6 dispositif qui a été référé le MDI ou le... MDI, le
7 système MDI, IDM?

8 A. Yes, I am.

9 Q.- Est-ce que vous êtes au courant?

10 R.- Oui.

11 Q. In broad terms...

12 Q.- Maintenant, juste en général...

13 Q. ... what is it?

14 Q.- ... c'est quoi ça exactement?

15 A. The MDI stands for Mobile Device Identifier. It is
16 a tool during investigations when we have either
17 (inaudible) other reasons to identify what cellular
18 equipment, phone, mobile devices that an individual
19 is using, the MDI referred to is a tool that allows
20 us to determine what devices an individual is
21 carrying.

22 R.- Le Mobile Device Identifier, c'est-à-dire un
23 dispositif mobile identifiant. C'est un outil quand
24 on utilise pendant les enquêtes pour identifier ceux
25 que les équipements tiennent, les dispositifs

540-01-063428-141
June 30th, 2015

MARK FLYNN
Ex.
Me Robert Rouleau

mobiles que l'individu utilise. Le IDM c'est un
outil qui détermine quel type de dispositif
l'individu porte avec lui.

A. Frequently we find that the cell phone a person is
using is not always registered in their name. So,
we can't go (inaudible) and say tell me all the
devices that our client has. So, we will need to go
out and surveille the individual and use the
(inaudible) technique to determine what devices
(inaudible).

R.- Plusieurs fois, on trouve... ce n'est pas le
cellulaire qu'il utilise. L'individu n'est pas tout
le temps enregistré... non enregistré. On ne peut
pas aller là et demander donne-moi tous les
dispositifs qu'on utilise. Donc, il faut qu'on
fasse une surveillance et utiliser une technique
spécialisée de déterminer quel dispositif l'individu
porte avec lui.

Q. Technically speaking and I know there is two other
witnesses that are subpoenaed and will address the
technical (inaudible) and the specificities of this
device but what is your knowledge of the technical
aspect of the operation of this device?

Q.- Techniquement parlant, parce que je sais qu'il y a
deux autres témoins qui vont adresser les choses

540-01-063428-141
June 30th, 2015

MARK FLYNN
Ex.
Me Robert Rouleau

nuances, les choses techniques de ce dispositif,
mais votre connaissance de cet aspect technique de
l'opération de ce dispositif en question?

A. I have general knowledge of how the device works and
how to use it. We go out with a combination of
physical surveillance with the electronic
surveillance, being the MDI.

R.- Généralement, j'ai une connaissance générale pour ce
dispositif. On sort avec, en combinaison de
surveillance avec la surveillance électronique, le
MDI ou le IDM.

A. We follow individuals to locations, determine what
(inaudible) their devices are being utilized in that
area, then go to another location or another time,
following that individual again, to determine what
devices are in that area and we continue that
process until the operator is (inaudible) that they
have gone to enough unique locations at enough
unique times to say that the one device that appears
common between those various places is the device
that is being carried by the individual and they're
trying to determine which devices they're carrying
on reasonable grounds.

R.- On suit les individus dans les locations, déterminer
quels dispositifs sont utilisés dans ce secteur.

540-01-063428-141
June 30th, 2015

MARK FLYNN
Ex.
Me Robert Rouleau

Après ça, on va dans une autre location, un autre temps suivant cet individu pour déterminer quel dispositif qu'il utilise. On continue le "procès" jusqu'au moment que l'opérateur a trouvé assez d'informations pour les différents temps, pour voir que le dispositif qui est commun entre les différentes places c'est le dispositif qui est porté par l'individu qu'on essaie de déterminer quel outil il porte sur les motifs raisonnables.

Q. And about the aspect of how the system, the MDI system... is it correct to say system instead of machine?

Q.- L'aspect sur le système, comment est-ce que vous le dites? On dit système?

A. System is correct...

R.- Oui, système. Système c'est correct. C'est exact aussi dit le témoin.

Q. How the MDI system identifies one particular device, technically speaking (inaudible) you worked in that aspect of...

Q.- Comment le IDM identifie un dispositif en particulier, est-ce que vous pouvez expliquer ça, un aspect particulier?

A. So, how it identifies one unique device? You mean the unique device that the person is carrying, is

540-01-063428-141
June 30th, 2015

MARK FLYNN
Ex.
Me Robert Rouleau

1 that what you're asking?

2 Q.- Comment ça le fait, il l'identifie comment, il fait
3 l'identification de ce que la personne porte?

4 Q. Yes. Yes. Yes.

5 Q.- Oui.

6 A. So, the MDI presents the information from each time
7 that somebody goes there to operate it. It's the
8 operator and determine which version of the machine
9 we're talking about, presents the common number
10 (inaudible) various locations.

11 R.- Le IDM présente l'information à chaque fois que la
12 personne fait l'opération. L'opératrice ou
13 l'opérateur détermine quelle version de ce
14 dispositif présente un numéro commun sur les
15 différents lieux.

16 Q. Sorry, well, depending on which version?

17 Q.- Dépendant quelle version?

18 A. Correct.

19 R.- Oui, c'est exact dit le témoin.

20 Q. Okay.

21 Q.- Ok.

22 THE COURT :

23 Q. So, the operator depending on what version of the
24 MDI?

25 Q.- Donc, l'opérateur dépendant quelle version de cet

540-01-063428-141
June 30th, 2015

MARK FLYNN
Ex.
Me Robert Rouleau

1 IDM?

2 A. Correct.

3 R.- Oui, c'est exact dit monsieur Flynn, le témoin.

4 Me ROULEAU :

5 Q. I'll use that as a doorway to another question I
6 wanted to ask.

7 Q.- Je vais utiliser ça comme une autre fenêtre pour
8 demander une autre question ou connexion.

9 Q. Are we talking about...

10 Q.- Est-ce qu'on parle de...

11 Q. ... a single device...

12 Q.- ... un dispositif tout seul...

13 Q. ... as far as in the (concerned) out there, are
14 there more than one...

15 Q.- ... en ce qui concerne le IDM, est-ce qu'il y a
16 d'autres...

17 Q. ... system that is available...

18 Q.- ... d'autres systèmes qui sont disponibles...

19 A. Yes.

20 Q. ... to law enforcement agencies...

21 Q.- ... pour toutes les agences de la loi...

22 Q. ... and within... so, your answer (inaudible) was
23 yes.

24 Q.- Votre réponse était oui.

25 A. Yes, there are multiple versions.

540-01-063428-141
June 30th, 2015

MARK FLYNN
Ex.
Me Robert Rouleau

1 R.- Oui, il y a des versions multiples différentes.
2 Q.- Multiple providers or manufacturers...
3 Q.- Il y a des fournisseurs différents ou des fabricants
4 différents?
5 A. That's correct.
6 Q. And within each manufacturer, are there different
7 models or different capacities? How does that go
8 up?
9 Q.- À l'intérieur de ce fabricant est-ce qu'il y a
10 différents modèles ou différentes capacités?
11 Comment ça marche ça?
12 A. That's correct as well.
13 R.- Oui, ça, c'est exact aussi dit le témoin.
14 Q. So, there are different versions of this machine for
15 every manufacturer?
16 Q.- Il y a différentes versions de ce dispositif pour
17 les fabricants, pour chaque fabricant?
18 A. That's correct.
19 R. Oui, ça, c'est exact?
20 Q. How in the general public...
21 Q.- Comment dans le public général...
22 Q. ... in your understanding...
23 Q.- ... dans votre compréhension... à votre
24 compréhension...
25 Q. ... how there is the existence of these machines?

540-01-063428-141
June 30th, 2015

MARK FLYNN
Ex.
Me Robert Rouleau

1 Q.- ... comment ça se fait elles sont...

2 Q. How well known is this machine in the general
3 public?

4 Q.- ... est-ce que c'était quelque chose connu dans le
5 public général?

6 A. So, there this machine in the general public is
7 often referred to as an "imsicator" (ph) and there
8 is a...

9 R.- Ce dispositif est indiqué comme un indicateur
10 (ph)...

11 THE COURT :

12 Q. A what, I'm sorry?

13 A. Imsicator.

14 Q. Could you spell that?

15 A. I-M-S-I.

16 A.- I-M-S-I.

17 Q. Yes.

18 A. And there is a significant amount of information in
19 the public...

20 R.- Il y a beaucoup d'informations dans le public...

21 A. ... regarding this type of device.

22 R.- ... disponibles en ce qui concerne le dispositif en
23 question.

24 Me ROULEAU :

25 Q. And what about...

540-01-063428-141
June 30th, 2015

MARK FLYNN
Ex.
Me Robert Rouleau

- 1 Q.- En ce qui concerne le...
- 2 Q. ... the MDI system that you use.
- 3 Q.- ... le système IDM que vous utilisez vous-même.
- 4 Q. Is that a system for which the knowledge...
- 5 Q.- Est-ce que c'est un système que la connaissance...
- 6 Q. ... of its capacities are well known to the
- 7 public...
- 8 Q.- ... de ses capacités sont bien connues dans le
- 9 public...
- 10 Q. ... or not?
- 11 Q.- ... ou non?
- 12 Q. What's the situation with...
- 13 Q.- C'est quoi le... c'est quoi la situation actuelle...
- 14 Q. ... the actual mission that you...
- 15 Q.- ... de ce dispositif utilisé...
- 16 THE COURT :
- 17 Q. Well, before he answers that question, do you only
- 18 use one type of system or one type of MDI or there
- 19 are different types that you use?
- 20 Q.- Est-ce que vous utilisez juste un type de système ou
- 21 différents systèmes de IDM?
- 22 A. We have different types of systems that we use.
- 23 R.- On utilise différents systèmes de IDM.
- 24 A. If you're speaking to "Project Clemenza" only...
- 25 R.- Si vous parlez du "Projet Clemenza"...

540-01-063428-141
June 30th, 2015

MARK FLYNN
Ex.
Me Robert Rouleau

1 A. ... that there was one device that was utilised...

2 R.- ... il y avait juste un dispositif qui a été
3 utilisé.

4 Q. So (inaudible) there is only one type of
5 manufacturer, one manufacturer used for the MDI and
6 within that manufacturer as maître Rouleau asked
7 only one version. So, manufacturer X and version Y
8 is by that manufacturer?

9 Q.- Pour cette cause-ci, dit monsieur le juge, il y a
10 juste un type de fabricant, un fabricant qui utilise
11 le MDI et comme maître Rouleau a demandé, est-ce
12 qu'il y a juste une version. Donc, le fabricant et
13 version Y est utilisé par ce fabricant?

14 A. I can say that I believe it was only one
15 manufacturer...

16 R.- Je pourrais vous dire que c'était juste un
17 fabricant...

18 A. ... (inaudible) exactly which version of tool was
19 utilized.

20 R.- ... qui a spécifié quel outil de version a été
21 utilisé.

22 A. I'm not in a position to say that...

23 Q. I'm not asking you which one but is there more than
24 one?

25 R.- Je ne suis pas dans une position.

540-01-063428-141
June 30th, 2015

MARK FLYNN
Ex.
Me Robert Rouleau

1 Q.- Je ne vous demande pas quel, lequel?
2 A. That I do not know.
3 R.- Ça, je ne le connais pas dit le témoin.
4 A. I believe it's only one but I am not certain of
5 that. That would have to come from the...
6 Q. Very well.
7 R.- Je crois que c'est seulement un, mais il faut qu'on
8 vérifie ça.
9 Me ROULEAU :
10 Q. To your knowledge, does... the system that was
11 used...
12 Q.- De votre connaissance, le système qui a été
13 utilisé...
14 Q. ... has the capacities that...
15 Q.- ... a des capacités que...
16 Q. ... are not necessarily known to public
17 (inaudible)...
18 Q.- ... qui ne sont pas nécessairement contenue dans
19 les... dans le public...
20 Q. (Inaudible) that was the gist of my question.
21 A. Yes.
22 Q.- ... public général?
23 R.- Oui.
24 A. There are capacities of our system that are not
25 probably well known.

540-01-063428-141
June 30th, 2015

MARK FLYNN
Ex.
Me Robert Rouleau

1 R.- Il y a des capacités dans le système qui ne sont pas
2 publiquement connues.
3 Q. If...
4 Q.- Si...
5 THE COURT :
6 Q. Excuse me.
7 A. Yes.
8 Q. That are not... you said that are not well known?
9 Q.- Vous avez mentionné qui ne sont pas très connues?
10 Me ROULEAU :
11 Q. So...
12 THE COURT :
13 Q. I just want to be clear on that...
14 Q.- Je veux simplement être clair...
15 Q. ... (inaudible) general answer...
16 Q.- ... pendant votre...
17 Q. ... the capacities...
18 Q.- ... réponse générale...
19 Q. ... of your system...
20 Q.- ... la capacité de votre système...
21 Q. ... in your opinion...
22 Q.- ... dans votre opinion...
23 Q. ... are known a little bit, are known a lot? How do
24 you qualify your answer?
25 Q.- ... c'est... est-ce que c'est bien connu ou pas très

540-01-063428-141
June 30th, 2015

MARK FLYNN
Ex.
Me Robert Rouleau

1 bien connu? Comment est-ce que vous pouvez
2 qualifier votre réponse?
3 A. So, I would say that...
4 R.- Moi, je pourrais dire que...
5 A. ... the main components of the system...
6 R.- ... les composantes principales du système...
7 A. ... are how the device functions...
8 R.- ... c'est de la façon que ça fonctionne...
9 A. ... is known.
10 R.- ... l'instrument est connue.
11 A. There are some unique...
12 R.- Il y a certaines...
13 A. ... capabilities in particular how the device works
14 and does its job...
15 R.- ... capacités uniques de la façon que ça marche et
16 qu'il fait son travail...
17 A. ... that led us to choose that device...
18 R.- ... qui nous ont permis de choisir cet instrument...
19 A. ... that are not publicly known.
20 Q. Not at all?
21 R.- ... qui ne sont pas publiques non plus.
22 A. Not at all.
23 Q.- Pas du tout?
24 R.- Pas du tout.
25

540-01-063428-141
June 30th, 2015

MARK FLYNN
Ex.
Me Robert Rouleau

1 THE COURT :

2 Go ahead.

3 L'INTERPRÈTE :

4 Allez-y.

5 Me ROULEAU :

6 Q. So, Mr. Flynn, we (inaudible) in the disclosure
7 motion certain...

8 Q.- Alors, monsieur Flynn, on est dans... on a entendu
9 pendant le...

10 Q. ... information for which the defence asked an
11 answer to the Crown who raised an investigative
12 privilege technique.

13 Q.- ... la requête des communications, il y a certaines
14 questions et les réponses et il y a eu le privilège
15 d'enquête et c'est technique.

16 Q. So, my question to you is...

17 Q.- Ma question à vous c'est...

18 Q. ... how...

19 Q.- ... comment...

20 Q. Well, the first question...

21 Q.- La première question...

22 Q. ... would revealing the information that is sought
23 by the defence...

24 Q.- ... est-ce que de communiquer les informations...

25 Q. ... which the Crown opposes, would it affect...

540-01-063428-141
June 30th, 2015

MARK FLYNN
Ex.
Me Robert Rouleau

1 Q.- ... est-ce que ça pourrait affecter...
2 Q. ... your capacity as an organisation (inaudible) in
3 the area of criminal investigation?
4 Q.- ... votre capacité comme une organisation de
5 pouvoir...
6 A. Yes, it would.
7 Q.- ... bien remplir vos enquêtes criminelles.
8 Q. And can you say in what aspect...
9 R.- Oui.
10 Q.- Dans quel aspect...
11 Q. ... in general terms affect your day-to-day
12 operations as far as investigative...
13 Q.- ... ça pourrait affecter en général vos opérations
14 jour à jour...
15 Q. ... investigations...
16 Q.- ... dans les enquêtes?
17 A. The disclosure as I understand it is provided...
18 R.- La communication de la preuve que moi, je
19 comprends...
20 A. ... would provide (inaudible) to subjects of
21 investigation...
22 R.- ... ça pourrait révéler au sujet des
23 investigations...
24 A. ... and they could utilize...
25 R.- ... qu'eux, ils pourraient utiliser...

540-01-063428-141
June 30th, 2015

MARK FLYNN
Ex.
Me Robert Rouleau

1 A. ... to determine when they're in surveillance and as
2 such to avoid that surveillance.

3 R.- ... comment est-ce qu'ils étaient ou s'ils étaient
4 enquêté ou surveillé.

5 Q. Another question on that.

6 Q.- Une autre question après ça.

7 Q. This particular system...

8 Q.- Est-ce que ce système...

9 Q. ... can you describe to the Court what its comprised
10 of?

11 Q.- ... en particulier... pourriez-vous le décrire à la
12 Cour de quoi il s'agit?

13 Q. Technically speaking...

14 Q.- De façon technique...

15 Q. ... is there software...

16 Q.- ... est-ce qu'il y a de...

17 Q. ... implicated? (Inaudible), I've never seen one
18 and how it operates, in general terms could you
19 describe to the Court?

20 Q.- ... il y a un logiciel qui est impliqué. Pour
21 quelqu'un qui n'a jamais... ne l'a jamais vu,
22 comment ça marche?

23 Q. If you had brought one in court you would say well,
24 this is...

25 Q.- Si vous en avez un en cour pour démontrer...

540-01-063428-141
June 30th, 2015

MARK FLYNN
Ex.
Me Robert Rouleau

1 Q.- ... ce sont les composantes et...
2 Q. ... these are the parts of this machine but...
3 without going into every detail.
4 Q.- ... sans toucher chaque détail.
5 A. You would see a combination of...
6 R.- Vous allez avoir comme une combinaison de...
7 A. ... hardware, computer systems as well as...
8 R.- ... matériaux, de système logiciel...
9 A. ... software that makes all those components work
10 together.
11 R.- ... les composantes d'ordinateur ainsi que logiciel
12 qui travaille avec les composantes.
13 Q. And, I'm sorry, as per my last question...
14 Q.- Et selon ma dernière question...
15 Q. ... the knowledge of the technical details of how
16 the system operates...
17 Q.- ... la connaissance des détails techniques de la
18 façon que ça marche...
19 Q. ... was your answer...
20 Q.- ... est-ce que votre réponse...
21 Q. ... relevant to the hardware, the software or both
22 when you say that...
23 Q.- ... serait pertinente vers le hardware ou le...
24 Q. ... (inaudible) knowledge of that machine...
25 Q.- ... logiciel ou les deux...

540-01-063428-141
June 30th, 2015

MARK FLYNN
Ex.
Me Robert Rouleau

1 Q. ... and those... every component...

2 Q.- ... et que chaque composante...

3 Q. ... makes a challenge...

4 Q.- ... c'est...

5 Q. ... to your organization...

6 Q.- ... est-ce que ça serait un défi pour votre
7 organisation...

8 Q. ... for... as per your investigative capacities?

9 Q.- ... pour pouvoir... votre capacité d'enquête?

10 A. Yes, it would.

11 R.- Oui, ça serait... oui.

12 THE COURT :

13 I didn't quite get your question in English..

14 L'INTERPRÈTE :

15 Je n'ai pas bien compris votre question.

16 THE COURT :

17 Can you just repeat your question...

18 L'INTERPRÈTE :

19 Pourriez-vous répéter la question?

20 THE COURT :

21 ... (inaudible) the answer...

22 Me ROULEAU :

23 Yes.

24 VOICE NON IDENTIFIED :

25 It wasn't...

540-01-063428-141
June 30th, 2015

MARK FLYNN
Ex.
Me Robert Rouleau

Me ROULEAU :

Oui.

THE COURT :

It's alright. If I don't understand at all, ask...

L'INTERPRÈTE :

Bien, si moi, je ne comprends pas, je veux faire une
autre question.

Me ROULEAU :

Yes.

Q. You described the system as being hardware based but
with a software component...

Q.- Vous avez décrit votre système étant fait de...

Q. ... as a computer based system...

Q.- ... comme un ordinateur, comme...

Q. ... with knowledge of how the system works...

Q.- ... est-ce que la connaissance de savoir comment ça
marche le système...

Q. ... would your answer as per knowledge...

Q.- ... est-ce que votre...

Q. ... of the technical capacities of the system...

Q.- ... si quelqu'un pourrait avoir la connaissance...

Q. ... it would affect your investigative capacities?

Q.- ... de la capacité de ce système pourrait affecter
votre capacité d'enquête?

Q. Does it pertain to only hardware, only software or

540-01-063428-141
June 30th, 2015

MARK FLYNN
Ex.
Me Robert Rouleau

1 both?

2 Q.- Est-ce que c'est seulement pour le hardware ou pour
3 le logiciel?

4 A. I have to apologize. I'm confused with the
5 question.

6 Q. It is... yes, I'm sorry.

7 THE COURT :

8 I think he's asking this...

9 L'INTERPRÈTE :

10 Je pense que qu'est-ce qu'il demande c'est...

11 THE COURT :

12 ... if you'll allow me, maître Rouleau.

13 Me ROULEAU :

14 Yes.

15 THE COURT :

16 Q. You said your system is based on...

17 Q.- Si votre système...

18 Q. ... it's system hardware based device...

19 Q.- ... c'est... est-ce que c'est un...

20 Q. ... that has software components...

21 Q.- ... un instrument qui est basé sur un hardware...

22 Q. ... correct?

23 A. Correct.

24 Q.- ... ou un matériel informatique...

25 Q. It's easier to bring the question into (inaudible).

540-01-063428-141
June 30th, 2015

MARK FLYNN
Ex.
Me Robert Rouleau

1 A. Yes.

2 Q.- ... ou composant... les composants... le logiciel.

3 Q. So, what the Crown is asking if someone were to
4 known how the system worked...

5 Q.- Alors, la Couronne vous demande si quelqu'un
6 pourrait savoir comment ça marche ce système-là...

7 Q. ... the hardware and the software, does that affect
8 your investigative capacities? Is that your
9 question?

10 Q.- ... le hardware puis le logiciel, est-ce que ça
11 pourrait empêcher vos capacités d'enquête.

12 Me ROULEAU :

13 Yes. I believe that... actually I could split it in
14 two.

15 Q. Knowledge, specific knowledge of how the hardware...

16 Q.- Même je pourrais dire la...

17 Q. ... operates does it affect your investigative
18 capacities?

19 Q.- ... si je vous demande une connaissance spécifique
20 de comment ça marche vos instruments...

21 A. Yes.

22 Q.- ... ça pourrait empêcher...

23 Q. And knowledge about...

24 Q.- ... vos capacités d'enquête?

25 R.- Oui.

540-01-063428-141
June 30th, 2015

MARK FLYNN
Ex.
Me Robert Rouleau

1 Q. ... the software or the user interface, is that a
2 problem also for your organization?

3 A. Yes, it is.

4 Q.- Ainsi que l'interface comment ça marche, ça pourrait
5 empêcher vos capacités d'enquête.

6 Q. Okay. Thank you.

7 R.- Oui.

8 Me ROULEAU :

9 At this point, I have nothing further...

10 L'INTERPRÈTE :

11 À ce point-ci, je n'ai pas d'autres choses...

12 Me ROULEAU :

13 ... without going into what we feel we can't get
14 into publicly, your Lordship.

15 L'INTERPRÈTE :

16 ... sans rentrer dans ce qu'on trouve de notre
17 opinion qu'on ne peut pas rentrer sans aller au-delà
18 des privilèges d'enquête.

19 THE COURT :

20 So...

21 L'INTERPRÈTE :

22 Ok. Alors...

23 THE COURT :

24 ... from the public part of this hearing...

25

540-01-063428-141
June 30th, 2015

MARK FLYNN
Ex.
Me Robert Rouleau

L'INTERPRÈTE :

... la partie publique...

THE COURT :

... and the cross-examination (inaudible)...

L'INTERPRÈTE :

... ça serait...

THE COURT :

... is there any questions any counsel would like to
ask at this point?

L'INTERPRÈTE :

... est-ce que vous avez des questions que vous
voulez demander à ce point-ci?

VOICE NON IDENTIFIED :

Just a moment.

THE COURT :

If you need a minute, Mr. Addario, Mr...

L'INTERPRÈTE :

Si vous avez besoin d'un moment...

Me ADDARIO :

Yes. Yes.

THE COURT :

If you need a few minutes, we could take it.

L'INTERPRÈTE :

... on peut toujours prendre une pause, une petite
pause.

540-01-063428-141
June 30th, 2015

MARK FLYNN
Ex.
Me Robert Rouleau

Me ADDARIO :

No, I could probably have a brief submission and if
you're going to (inaudible)...

L'INTERPRÈTE :

Je pense qu'on va avoir une représentation brève...

Me ADDARIO :

... which means that (inaudible) I wonder if the
witness could stand out for a couple of minutes,
your Honour, while we make a brief submission...

L'INTERPRÈTE :

... et on pourrait demander le témoin...

Me ADDARIO :

... and then...

L'INTERPRÈTE :

... de sortir pendant qu'on fait une représentation
brève.

THE COURT :

Mr. Flynn, you're asked to leave the courtroom.

A. Yes.

--- THE WITNESS LEAVES THE COURTROOM.

540-01-063428-141
June 30th, 2015

MARK FLYNN
Ex.
Me Robert Rouleau

Me ADDARIO :

I just... just we're obviously in Mr. Rouleau's world in terms of when it's time to go to the (inaudible) camera. So, we don't have anything to say on that. I just point out that the last series of questions were kind of leading and conclusory and that they're asking the witness for his opinion on what we say your Honour really has to decide which is whether or not revealing the information would make their investigative technique ineffective.

L'INTERPRÈTE :

Je veux laisser mon... on est évidemment dans le... c'est le... on a rien de dire au moment que maître Rouleau, il voit quand est-ce que c'est... quand il allait déjà rentrer en huis clos, mais le fait qu'il demandait l'opinion du témoin, mais ça serait plutôt vous comme juge que vous devez prendre la décision par rapport au privilège d'enquête et c'est technique.

Me ADDARIO :

That's one of the questions that you'll decide in determining whether or not to make disclosure and I didn't object because ultimately it should come out during the (inaudible) matter and during submissions whether or not the conclusion is supported by the

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

evidence that you'll ultimately hear but I didn't want to let the moment pass without making that observation, your Honour.

L'INTERPRÈTE :

Ça serait à vous de décider si vous pouvez faire une communication de la preuve ou non et ça devrait... si ça sort pendant le... la matière ex parte, ces conclusions, vous allez pouvoir conclure, mais je ne voulais pas permettre que le moment passe avant de vous soumettre ces observations.

THE COURT :

Well noted. Thank you for the observations. It's well noted.

L'INTERPRÈTE :

Merci pour vos observations. C'est bien noté.

Me ADDARIO :

Thank you. So, it does appear that we're at a bit of a breaking point. It doesn't appear that there is another witness for the Crown this week, is that correct?

L'INTERPRÈTE :

Alors, il semble qu'on est dans un point important et c'est...

Me ROULEAU :

That is correct.

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

1 Me ADDARIO :

2 Alright. And so it would seem that it's a useful
3 time to point out that the Crown has an additional
4 witness that's being proposed, Jocelyn Fortin and we
5 are as yet waiting for a statement from Jocelyn
6 Fortin, is that correct?

7 L'INTERPRÈTE :

8 ... qu'est-ce qu'ils sont avec... ok, les moments...
9 ça serait important pour la Couronne, il y a un
10 témoin additionnel qui sera proposé, Jocelyn Fortin,
11 jusqu'au moment on attend la déclaration de Jocelyn
12 Fortin. Ça, c'est exact?

13 Me ROULEAU :

14 There is.

15 Me ADDARIO :

16 And i just point that out, your Honour, because if
17 we're to keep this going on the 13th, we should get
18 that statement forthwith so that if Mr. Dubois is
19 not available, we can proceed with Fortin on the
20 13th.

21 L'INTERPRÈTE :

22 J'aimerais juste mentionner ça pour avoir sa preuve
23 le 13, on devrait avoir cette déclaration
24 immédiatement. On ne peut pas l'avoir avant le 10
25 ou le 13.

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

THE COURT :

Okay. So, I agree if there is another statement of this Jocelyn Fortin, we should have a copy of the statement. We were supposed to proceed on the 3rd and 4th and 5th of June. I indicated to the Crown before proceeding to avoid putting the Court in a situation where... to get into a situation that we get another motion where certain details should have been looked at much more diligently before bringing it into the courtroom and inviting (inaudible) obvious responses from the Court which sometimes changes the Crown's position.

L'INTERPRÈTE :

Je suis d'accord que s'il y a une déclaration, on devrait avoir une copie dit monsieur le juge. Est-ce qu'on est supposé de procéder sur les troisième, quatrième, cinquième juin. J'ai indiqué à la Couronne avant que... avant de procéder d'éviter de mettre le Tribunal dans une situation précaire, comme on était dans les autres requêtes, comme le Tribunal a été. Certains détails devraient... ont été examinés avant de les... avant de rentrer dans le Tribunal et éviter... et évitant des réponses du Tribunal qui peuvent changer la position du Tribunal.

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

THE COURT :

You weren't here for those and it was situations that arose and (inaudible) previously. So, I made this comment early in June and the Crown asked not to proceed the 3rd, 4th and 5th of June so that they could review more carefully this motion presented an investigative privilege and your MDI motion and so perhaps certain admissions could be made for the length of the hearing which at that point was scheduled for 16 days could be reduced.

L'INTERPRÈTE :

Vous n'étiez pas ici et il y a des situations qui ont été soulevées dans... donc, j'avais fait ce commentaire en juin et la Couronne m'a demandé de ne pas procéder les 3, 4 ou 5 juin pour faire une révision plus profonde. Cette requête présentée sous le privilège relatif à l'information et la requête sur le IDM. Peut-être certaines admissions peuvent être données ou la longueur de cette requête peut être raccourcie.

THE COURT :

So, since the Crown asked for that and the defence agreed, the Court agreed that we would not sit on the 3rd, 4th and 5th of June, hoping that the motion would be (inaudible) and if it did proceed, it would

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

1 proceed on certain very restricted issues and if the
2 defence needed anything, the Crown has more than
3 enough time to give it.

4 L'INTERPRÈTE :

5 La Couronne a demandé pour ça. La défense a été en
6 accord de ne pas siéger les 3, 4 et 5 espérant que
7 la requête était (inaudible) sur certains aussi avec
8 quelque chose de la défense, il y avait plus que le
9 temps ample pour la Couronne de...

10 THE COURT :

11 So, with that preamble, Mr. Addario, what I would
12 like to know, since the 2nd of June until yesterday
13 what there anything that went on? I don't need to
14 know exactly what but were there meetings or
15 discussions or interactions between the Crown and
16 the defence that made... that validated not sitting
17 on those three days?

18 L'INTERPRÈTE :

19 Avec ce "préambule", monsieur Addario, je voudrais
20 savoir depuis le 2 juin, jusqu'à hier, est-ce qu'il
21 y avait quelque chose qui est survenu, pas des
22 détails? Est-ce qu'il y avait des réunions, des
23 discussions, interactions entre la Couronne et la
24 défense qui ont validé les trois jours de ne pas
25 siéger, les trois jours mentionnés?

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

Me ADDARIO :

Well, the Crown responded to that affidavit that I filed saying what was publicly available, what inspector Flynn just described.

L'INTERPRÈTE :

La Couronne a donné une réponse à cet affidavit que j'avais déposé, ce qui a été publiquement disponible.

THE COURT :

The affidavit by Megan Savard?

L'INTERPRÈTE :

L'affidavit by Megan Savard?

Me ADDARIO :

Yes.

L'INTERPRÈTE :

Oui.

THE COURT :

Yes.

Me ADDARIO :

By essentially acknowledging that, by providing far more than we previously had been provided and I'll ultimately be submitting to you that that was an implicit acknowledgment of an overclaim of privilege and so, we did get a great deal of material but we still don't have this one last piece and it is a

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

1 proposed witness and of course the Dubois illness
2 was something that no one could foresee and no
3 matter how much...

4 L'INTERPRÈTE :

5 Ce que ça donne, ça donne une connaissance qu'il a
6 donné plus qu'on a été fourni avec et
7 ultérieurement, c'était une connaissance implicite
8 de ce privilège revendiqué, mais on avait beaucoup
9 de matériel, mais on n'a pas cette dernière pièce.
10 Ça, c'était un témoin qui est proposé, Dubois la
11 maladie de Dubois n'a été (inaudible) en temps.

12 THE COURT :

13 No, that's... that happens.

14 L'INTERPRÈTE :

15 Ça, c'est des choses qui arrivent dit monsieur le
16 juge.

17 Me ADDARIO :

18 Yes, it happens. So, we (inaudible) of course, I
19 didn't look at that and...

20 L'INTERPRÈTE :

21 Bien, on blâme personne pour ça simplement.

22 THE COURT :

23 No, no, that part is not an issue but we didn't sit
24 for three days that were scheduled...

25

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

L'INTERPRÈTE :

Ce n'est pas une question dit monsieur le juge, mais
on avait trois jours de siégés. On n'a pas siégé...

Me ADDARIO :

Yes.

THE COURT :

... in order for the Crown to give material, at
their request, to the defence to try to reduce the
issues before the Court on these three motions. Was
anything... so basically (inaudible) there were some
things done since early June until yesterday that
did accelerate to some degree the hearings and
reduce the amount of (inaudible).

L'INTERPRÈTE :

... afin de... que la Couronne puisse donner les
documents sur la demande de la défense pour réduire
les questions pour cette requête ici. Donc, il y
avait quelque chose qui était accompli (inaudible)
juin qui a accéléré dans certains degrés les
audiences puis il a réduit le temps nécessaire ici.

Me ADDARIO :

Disclosure was made in response to I'd say the
affidavit that was filed, your Honour, and the Crown
has helpfully offered you a list of outstanding
issues from their point of view. I believe that was

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

given to you.

L'INTERPRÈTE :

Il y avait une divulgation qui a été faite en
réponse de l'affidavit qui a été déposé, votre
Honneur, et la Couronne a vraiment (inaudible) une
liste des choses qui maintenant sont encore à
l'extérieur. Je pense que vous l'avez déjà.

THE CROWN :

Not yet.

Me ADDARIO :

Oh, I'm sorry. I'm sorry. In any event...

L'INTERPRÈTE :

Non. Non.

THE CROWN :

(Inaudible) everybody.

L'INTERPRÈTE :

Dans aucun cas, en tout cas...

Me ADDARIO :

Crown counsel distributed it. I'm happy if he gives
it to your Honour.

L'INTERPRÈTE :

... la Couronne a fait une distribution. Je serais
très heureux si vous aviez une copie de ça.

THE COURT :

Okay.

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

Me ADDARIO :

It's a list of some of the issues that will have to be identified (inaudible) but as I say, the reason I rose to my feet was to make that one observation and to tell you, there is an outstanding statement. It would be most helpful to get it because it doesn't look like we can do any other work in front of your Honour this week and we'd like to (inaudible) on the 13th.

L'INTERPRÈTE :

Et les choses que vous pouvez identifier, mais la raison que je m'ai levé sur mes pieds, c'est de faire cette observation parce qu'il y avait une... en souffrance, il y avait une déclaration en souffrance.

Me ADDARIO :

We now have Mr. Kapoor for that whole week and if Mr. Labelle is not with us that week, we won't need translated versions of the transcript which ought to speed things up for (inaudible) as well and we can just get a little bit of momentum going on this motion, sir. Thank you.

L'INTERPRÈTE :

Je pense, moi, qu'on peut l'avoir cette semaine, monsieur Kapoor. Si monsieur Labelle n'est pas avec

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

1 nous, on n'a pas besoin des traductions, versions.
2 Ça, ça va peut-être libérer les choses (inaudible)
3 et on va avoir un peu d'élan pour aller un peu plus
4 loin.

5 THE COURT :

6 When Mr. Labelle is not with us, it changes
7 (inaudible) with respect to language.

8 L'INTERPRÈTE :

9 Monsieur Labelle n'est pas ici avec... ça change
10 certaines choses la langue.

11 Me ADDARIO :

12 Yes, sir.

13 L'INTERPRÈTE :

14 Oui.

15 Me GAUTHIER :

16 If I may, sir.

17 THE COURT :

18 Yes.

19 Me GAUTHIER :

20 Concerning the last comments that were made, it has
21 been confirmed to me yesterday that Mr. Dubois will
22 not be fit to work until at best the end of summer.

23 L'INTERPRÈTE :

24 Concernant les commentaires qui ont été faites dit
25 maître Gauthier. Maître Addario, j'ai eu des

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

1 nouvelles hier que monsieur Dubois n'est pas dans un
2 état de travail qui lui permet de travailler jusqu'à
3 la fin de l'été.

4 Me GAUTHIER :

5 So, we are currently working as mentioned to my
6 friends, we are currently working on a plan B to
7 replace Mr. Dubois. What was supposed to be the
8 next witness... actually he was supposed to be the
9 first one and in our mind to make sure that the...
10 you know, the Crown's case is presented in an
11 understandable way, we think that Mr. Dubois's
12 testimony should come first. Mr. Dubois won't be
13 available on the week of the 13th or...

14 L'INTERPRÈTE :

15 Donc, on travaille maintenant que j'avais mentionné
16 à mes amis et on travaille sur un plan B pour
17 remplacer monsieur Dubois. Monsieur Dubois était
18 supposé d'être le prochain, suivant. Actuellement
19 il était le premier témoin et afin d'assurer que la
20 Couronne... que la cause de la Couronne est
21 présentée et présentée dans une manière qui est
22 compréhensible, monsieur Dubois c'est le témoin qui
23 devrait être en premier. Monsieur n'est pas
24 disponible le 13...
25

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

1 THE COURT :

2 Can he be replaced?

3 L'INTERPRÈTE :

4 ... ou l'été.

5 Me GAUTHIER :

6 We are trying to find somebody else but it is
7 difficult.

8 L'INTERPRÈTE :

9 Nous, nous essayons de trouver quelqu'un d'autre.

10 THE COURT :

11 But Fortin is not replacing Dubois though?

12 L'INTERPRÈTE :

13 Fortin est-ce qu'il remplace Dubois dit monsieur le
14 juge?

15 Me GAUTHIER :

16 Fortin is testifying on related matters but he was
17 supposed to testify well before Mr. Dubois
18 (inaudible).

19 L'INTERPRÈTE :

20 Fortin, il fait des témoignages sur des sujets
21 relatés, mais il était supposé de faire un
22 témoignage avant, même avant Dubois.

23 THE COURT :

24 When did you know you were calling Fortin?

25

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

L'INTERPRÈTE :

Est-ce que... quand vous étiez au courant que
monsieur Fortin était appelé ici?

Me GAUTHIER :

When did we know? We decided to call Fortin when we
got the supplemental material from our friends at
the end of May.

L'INTERPRÈTE :

Nous, on a été... on a décidé quand on avait eu ce
matériel "parental" de notre ami au fin de mai.

THE COURT :

At the end of May. Is there no statement? A
willsay being prepared?

L'INTERPRÈTE :

De mai. Et il n'y a pas d'autres déclarations qui
ont été préparées?

Me GAUTHIER :

It is forthcoming. The (inaudible) is that since
Mr. Dubois won't be able to testify on the week of
July 13th, and since we might have to make
testify... to ask for Mr. Fortin to testify before
the other witness who would replace Mr. Dubois, we
need to adapt his willsay. That's why it's taking
us more time to be prepared during (inaudible) Mr.
Fortin and we worked that.

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

L'INTERPRÈTE :

C'est quelque chose qui vient immédiatement. Depuis que monsieur Dubois n'est pas disponible de témoigner la semaine du 13 juillet et depuis que peut-être on aurait besoin de demander monsieur Fortin de témoigner avant les autres témoins (inaudible) on devrait adapter tout son témoignage. Donc, ça, c'est la raison que ça prend plus de temps de laisser la déclaration de monsieur Fortin.

Me GAUTHIER :

We are working on it and it will be... and all that we'll disclose to the defence by the end of (inaudible) and they will have more than a week to prepare and we will try to call Mr. Fortin for the week of the 13th but we would prefer to call the replacement of Mr. Dubois first. After the continuation of the testimony of Mr. Flynn on the 13th, we would do Flynn on the 13th and 14th most likely and (inaudible) cross-examination and after that it will be either Fortin or the replacement of Dubois.

L'INTERPRÈTE :

On travaille sur ça et ça va être tout divulgué à la défense jusqu'à la fin de cette semaine et ils auront plus qu'une semaine de faire la préparation

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

1 et on va essayer d'appeler monsieur Fortin pour la
2 semaine du 13, mais on préfère que... appeler le
3 remplacement de monsieur Dubois en premier. Après
4 la continuation du témoignage de monsieur Flynn au
5 13, on va faire Flynn le 13 et le 14, peut-être le
6 contre-interrogatoire et suivant ça, par la suite,
7 le remplacement de Dubois.

8 THE COURT :

9 Is the evidence on this motion going to be finished
10 in July?

11 L'INTERPRÈTE :

12 Est-ce que cette requête avec la preuve devrait être
13 terminée pour le mois de juillet?

14 Me GAUTHIER :

15 If we are able to replace Mr. Dubois, yes, if we are
16 able to replace Mr. Dubois.

17 L'INTERPRÈTE :

18 Si on est capables de remplacer monsieur Dubois,
19 oui, si on est capables de remplacer monsieur
20 Dubois.

21 Me GAUTHIER :

22 But I should stress to the Court that Mr. Dubois...

23 L'INTERPRÈTE :

24 Mais je veux mettre en exergue le point que...
25

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

1 Me GAUTHIER :

2 ... is one of the officer in charge for Special I.
3 He was involved for the IDM throughout (inaudible).

4 L'INTERPRÈTE :

5 ... ça, c'était un des officers sur le Special I qui
6 (inaudible) privé. Il a été impliqué pendant toutes
7 les enquêtes pour le IDM.

8 Me GAUTHIER :

9 So, he was the best person to give a proper expose
10 as to what did take place in (inaudible) concerning
11 the IDM.

12 L'INTERPRÈTE :

13 C'est la meilleure personne à donner une exposition
14 qu'est-ce qui est arrivé avec le IDM.

15 Me GAUTHIER :

16 And it's not somebody that can easily be replaced.

17 L'INTERPRÈTE :

18 Ce n'est pas quelqu'un qui peut être simplement
19 remplacé.

20 Me GAUTHIER :

21 We are looking for it but it's... you know, it's
22 difficult.

23 L'INTERPRÈTE :

24 On cherche quelqu'un, mais c'est difficile pour
25 nous.

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

1 THE COURT :

2 I don't want to split this... these two motions
3 again and split R-25 (inaudible) before Christmas,
4 is that right?

5 L'INTERPRÈTE :

6 Je ne veux pas scinder les deux requêtes une autre
7 fois. On avait fait ça avec R-25. Je pense que ça
8 a commencé juste avant Noël.

9 VOICE NON IDENTIFIED :

10 Yes, sir.

11 L'INTERPRÈTE :

12 Oui, monsieur.

13 THE COURT :

14 And (inaudible) the circumstances beyond anyone's
15 control, (inaudible) for a variety of reasons but I
16 don't want to do it again. I don't want to start
17 and then we have two bail hearings that were
18 announced. One that was supposed to (inaudible).
19 So, you might want to think about this. I don't
20 want to start this for two weeks and then you're
21 going to ask me to put it off until October.

22 L'INTERPRÈTE :

23 Et sous les circonstances... sous les contrôles hors
24 des contrôles des personnes, bien, je ne veux pas
25 faire encore. Je ne veux pas commencer puis on

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

1 va... deux cautions, enquêtes de caution qui ont été
2 annoncées. Une qui devrait prendre sept jours
3 pour... dans l'audience. Donc, peut-être que vous
4 voulez penser à ça. Vous voulez... je ne veux pas
5 commencer pour deux semaines et après ça,
6 (inaudible) jusqu'au mois d'octobre.

7 THE COURT :

8 So, you may want to think and discuss it with your
9 colleagues now. I'm ready to do the ex parte
10 hearing but if the defence doesn't have a copy of
11 the statement today, on July 30th, for someone who
12 knew about it at the end of May, who is going to
13 testify presumably on July 13th, I know they're
14 going to get it. They have to... there is more than
15 one lawyer.

16 L'INTERPRÈTE :

17 Donc, peut-être que c'est mieux de discuter de ça
18 avec vos collègues, de faire l'ex parte et si la
19 défense n'a pas une copie de la déclaration
20 aujourd'hui jusqu'au 30 pour quelque chose que vous
21 avez déjà connu depuis le mois de mai et il va
22 témoigner présumément le 13 juillet. Alors, est-ce
23 qu'ils vont le faire et il y a plus qu'un avocat.

24 THE COURT :

25 I don't want to get an email on Thursday or Friday

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

1 (inaudible) 13th, well, we just got it last night.
2 We're not ready. You can't blame them. So, I'd
3 like you to think about that. We're going to take
4 a break in a minute to allow you to (inaudible).
5 We'll start the ex parte hearing and just in terms
6 of scheduling, these two motions 25 and 32, so that
7 they proceed in an ongoing manner and they're not
8 chopped up again.

9 L'INTERPRÈTE :

10 J'aimerais pas recevoir un courriel jeudi ou
11 vendredi pour me dire on vient de le recevoir hier.
12 On n'est pas prêt pour ça. Alors, j'aimerais que
13 vous pensiez là-dessus. On va prendre une pause
14 dans une minute pour... avant qu'on commence avec
15 l'audience ex parte et aussi par rapport à la cédule
16 des horaires, ces deux requêtes, 25 et 32, qu'on
17 aimerait procéder là-dessus dans une question déjà
18 qui a été commencée.

19 Me GAUTHIER :

20 We're doing our best.

21 L'INTERPRÈTE :

22 On est en train de faire notre mieux.

23 THE COURT :

24 Okay. So...

25

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

1 Me GAUTHIER :

2 But our main guy is at the hospital right now.

3 L'INTERPRÈTE :

4 Mais notre...

5 THE COURT :

6 No, that I know.

7 Me GAUTHIER :

8 So...

9 L'INTERPRÈTE :

10 ... monsieur principal est à l'hôpital maintenant.

11 THE COURT :

12 Having said that, with respect to that, you have to
13 find a replacement. That's unforeseeable and I
14 understand you're looking at it right away but the
15 other matter was not unforeseeable. Fortin is a
16 witness and maître Addario says he doesn't have a
17 willsay.

18 L'INTERPRÈTE :

19 Oui, je comprends, mais par rapport à ça, il va
20 falloir trouver un remplacement. Ça a été... on ne
21 pouvait pas voir ça à l'avance. Je comprends ça,
22 mais l'autre question c'était pas imprévisible.

23 Me GAUTHIER :

24 He's right.

25

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

1 THE COURT :

2 He doesn't know what the person is going to say.

3 Me GAUTHIER :

4 He's right.

5 L'INTERPRÈTE :

6 Monsieur... maître Addario, il dit qu'il ne sait pas
7 qu'est-ce qu'ils vont dire. Mais il a raison.

8 THE COURT :

9 And if he's going to testify the 13th, I'm put in a
10 position...

11 Me GAUTHIER :

12 He won't testify on the 13th, sir.

13 L'INTERPRÈTE :

14 Il ne va pas témoigner le 13.

15 THE COURT :

16 When is he going to testify?

17 Me GAUTHIER :

18 During that week of the 13th because when we will
19 get back to you on the 13th, we will resume with the
20 cross-examination publicly of Mr. Flynn, after we
21 will have provided the transcript for the ex parte.

22 L'INTERPRÈTE :

23 Pendant cette semaine du 13 parce que lorsqu'on va
24 revenir le 13 juillet, on va pouvoir continuer avec
25 le contre-interrogatoire public de monsieur Flynn,

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

1 après qu'on aurait déjà fourni les transcriptions ex
2 parte.

3 THE COURT :

4 (Inaudible) you'll have a statement for Fortin.

5 Me GAUTHIER :

6 As I told you, sir, we are confident that we will
7 get it like the middle of this week.

8 THE INTERPRETER :

9 Quand est-ce que vous allez faire ça? Comme je vous
10 ai dit, je vous ai mentionné que je suis... j'ai la
11 confiance qu'on va pouvoir donner ça pour la fin de
12 la semaine.

13 THE COURT :

14 Okay. So, the plan is to do your ex parte today?

15 Me GAUTHIER :

16 Yes.

17 L'INTERPRÈTE :

18 Alors, on va...

19 THE COURT :

20 Do you feel that you can begin today for Flynn?

21 L'INTERPRÈTE :

22 ... on va finir vous pensez avec l'ex parte
23 aujourd'hui?

24 Me GAUTHIER :

25 In chief, maybe.

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

L'INTERPRÈTE :

En chef, peut-être.

THE COURT :

Well, the ex parte in chief and then Mr. Kapoor.

L'INTERPRÈTE :

En chef, peut-être et après monsieur Kapoor.

Me GAUTHIER :

Thursday.

L'INTERPRÈTE :

Jeudi.

Me GAUTHIER :

We are confident that the ex parte hearing of Mr. Flynn's testimony would be over by the end of the day Thursday.

L'INTERPRÈTE :

On est confiant que l'audience ex parte de monsieur... le témoignage de monsieur Flynn va être fini pour jeudi.

THE COURT :

What's your plan for Friday?

Me GAUTHIER :

Friday, I don't think that there will be much to do.

L'INTERPRÈTE :

Alors, vendredi, je ne pense pas qu'on va...

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

1 THE COURT :

2 Because Friday is a scheduled day for hearing.

3 L'INTERPRÈTE :

4 ... pouvoir faire beaucoup de choses parce qu'on a
5 cédulé ça pour audience.

6 Me GAUTHIER :

7 Right. But if Mr. Dubois would have been here, we
8 would have proceeded on Friday.

9 L'INTERPRÈTE :

10 Oui, mais si monsieur Dubois aurait été présent, on
11 aurait pu continuer.

12 THE COURT :

13 I understand. Alright. So, if we complete it
14 Thursday, we come to Monday.

15 L'INTERPRÈTE :

16 Très bien. Alors, si on complète jeudi puis on
17 saute à lundi, le 13.

18 Me GAUTHIER :

19 The 13th.

20 THE COURT :

21 The 13th.

22 Me GAUTHIER :

23 Yes.

24 THE COURT :

25 By then you anticipate having redacted transcripts.

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

1 L'INTERPRÈTE :

2 Oui, le 13. Alors, on peut déjà anticiper d'avoir
3 une rédaction... non, une transcription caviardée.

4 Me GAUTHIER :

5 Yes.

6 THE COURT :

7 And when do you anticipate the defence will get
8 that? Remember the last time, it was...

9 L'INTERPRÈTE :

10 Oui. Et...

11 Me GAUTHIER :

12 Yes. We...

13 THE COURT :

14 ... it was (inaudible).

15 Me GAUTHIER :

16 We are hoping that the transcripts and they will be
17 disclosed you know as we receive them and as we can
18 redact them, but we foresee that we would be able to
19 provide transcripts towards the end of next week,
20 the week of the 6th.

21 L'INTERPRÈTE :

22 On espère que les transcriptions et elles vont être
23 communiquées aussi au fur et à mesure qu'on les
24 reçoit, pendant qu'elles soient caviardées et si on
25 pourrait déjà fournir les transcriptions début...

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

pour le début de la semaine prochaine, la semaine du
6.

Me GAUTHIER :

So, somewhere around the 9th, the 10th, we will get
to the defence the redacted version of the
transcript of the ex parte session that will have
taken place here, this week.

L'INTERPRÈTE :

Donc, vers le 9, 10 juillet, on va pouvoir voir
le... la défense pourra avoir la transcription de
l'audience ex parte.

THE COURT :

Alright. And after that, there will be a discussion
of the cross-examination of Mr. Flynn...

Me GAUTHIER :

Publicly.

L'INTERPRÈTE :

Alors, après le contre-interrogatoire de...

THE COURT :

... publicly, alright. So...

L'INTERPRÈTE :

... ça serait le public, partie du contre-
interrogatoire.

Me GAUTHIER :

And then the next witness.

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

L'INTERPRÈTE :

Et après ça, on va avoir l'autre témoin.

THE COURT :

So, ex parte Flynn today and Thursday, tomorrow
being a holiday.

L'INTERPRÈTE :

Donc, alors, aujourd'hui et jeudi...

Me GAUTHIER :

Yes.

L'INTERPRÈTE :

... ça va être ex parte sur Flynn.

THE COURT :

We're not sitting Friday (inaudible) what happened
to Mr. Dubois that he's not available. You will
have a statement from Fortin some time mid to late
next week.

L'INTERPRÈTE :

On ne va pas siéger mercredi ni vendredi vu que
"maître" Dubois n'est pas disponible et après, vous
allez donner les transcriptions...

Me GAUTHIER :

No, this week.

THE COURT :

This week.

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

1 L'INTERPRÈTE :

2 Cette semaine.

3 Me GAUTHIER :

4 Yes, by the end of this week we will have something
5 for Fortin...

6 L'INTERPRÈTE :

7 La fin de cette semaine, on va pouvoir déjà donner
8 les transcriptions.

9 THE COURT :

10 By the end of this week.

11 Me GAUTHIER :

12 ... and by the end of next week...

13 THE COURT :

14 You'll have the...

15 L'INTERPRÈTE :

16 Et pour la fin de l'autre semaine...

17 Me GAUTHIER :

18 ... we will have the transcripts.

19 THE COURT :

20 We would have the transcripts...

21 L'INTERPRÈTE :

22 ... je vais avoir les transcriptions.

23 Me GAUTHIER :

24 Yes.

25

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

THE COURT :

... and then we'll come back on Monday, the 13th with the defence cross-examination on the redacted (inaudible) in possession of the redacted transcript of the ex parte hearing.

L'INTERPRÈTE :

Alors, là, on va pouvoir revenir le lundi, 13 avec le contre-interrogatoire sur la défense en possession de la transcription caviardée.

Me GAUTHIER :

Yes.

THE COURT :

That's your plan.

Me GAUTHIER :

Yes.

L'INTERPRÈTE :

C'est ça.

THE COURT :

Alright. Is there any comment by any of the defence counsel on that proposed schedule?

L'INTERPRÈTE :

Y a-t-il des commentaires pour quelques-uns des avocats de la défense pour la cédule qui a été proposée?

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

Me ADDARIO :

No. We are not seeking to break up the voir dire or to adjourn. We want to keep it going. Thank you, your Honour.

L'INTERPRÈTE :

Non, on ne veut pas casser le voir-dire ou de pouvoir freiner qu'est-ce qu'on a déjà commencé.

THE COURT :

Yes. It could happen because Mr. Dubois is not available till the end of the summer.

L'INTERPRÈTE :

Ça pourrait arriver parce que... vu que monsieur Dubois n'est pas disponible jusqu'a la fin de l'été...

THE COURT :

The Crown has to find a replacement.

L'INTERPRÈTE :

... et la Couronne doit trouver un remplacement.

THE COURT :

When are you going to know if there will be a replacement?

L'INTERPRÈTE :

Quand est-ce que vous allez savoir ça?

Me GAUTHIER :

We are currently working on it with the RCMP here in

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

1 Montreal and in Ottawa...

2 L'INTERPRÈTE :

3 On est... présentement on travaille avec la GRC ici
4 à Montréal et aussi à Ottawa...

5 Me GAUTHIER :

6 ... and I can assure you that no, the RCMP is aware
7 of this very issue (inaudible) highest level. So,
8 yes, something is being done right now about it.

9 L'INTERPRÈTE :

10 ... puis je vous assure que la GRC est... ils sont
11 vraiment... c'est quelque chose au niveau le plus
12 haut. C'est quelque chose qu'ils sont en train de
13 régler maintenant.

14 THE COURT :

15 Because it's not impossible hearing that that if
16 they can't find somebody...

17 L'INTERPRÈTE :

18 Parce que ce n'est pas impossible que s'ils ne
19 peuvent pas trouver quelqu'un...

20 THE COURT :

21 ... it very well likely might be split.

22 L'INTERPRÈTE :

23 ... que ça pourrait être très bien séparé.

24 THE COURT :

25 Anything to say about that in the event they can't

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

1 find somebody?

2 L'INTERPRÈTE :

3 Quelque chose à dire là-dessus, s'ils ne peuvent pas
4 trouver quelqu'un?

5 Me GAUTHIER :

6 Yes, we'll play it as it lays.

7 L'INTERPRÈTE :

8 On va pouvoir... on va voir comment ça va se passer.

9 THE COURT :

10 Because there is a risk if we go ahead and...

11 L'INTERPRÈTE :

12 Parce qu'il y a un risque si on continue...

13 THE COURT :

14 ... we finish the week of the 13th.

15 L'INTERPRÈTE :

16 ... et puis on finit la semaine du 13.

17 THE COURT :

18 If nobody can replace Dubois you're going to have to
19 put it over.

20 L'INTERPRÈTE :

21 Si personne peut remplacer Dubois, il va falloir le
22 remettre.

23 Me GAUTHIER :

24 I have a lot of confidence in the RCMP like most
25 Canadians, your Honour.

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

L'INTERPRÈTE :

J'ai vraiment de la... beaucoup de confiance sur la
GRC comme beaucoup... la plupart des Canadiens,
monsieur le juge.

THE COURT :

Well, we see that certain people can be replaced.
For example, today.

L'INTERPRÈTE :

Il y a certaines personnes qui peuvent être
remplacées, par exemple, aujourd'hui.

Me GAUTHIER :

Yes, I saw that. It was astonishing.

L'INTERPRÈTE :

Oui, ça, c'était incroyable.

THE COURT :

Yes, with maître Labelle. Alright. Before we...

Me GAUTHIER :

We can hardly replace maître Labelle.

L'INTERPRÈTE :

Et on ne peut pas vraiment remplacer maître Labelle.

THE COURT :

(Inaudible) go ahead.

Me GAUTHIER :

I mean, sir, this is the document that has been
submitted to all parties and we submit to the Court

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

1 that it outlines the matters that still need to be
2 decided upon in relation to our motions R-25, 32 and
3 32-A.

4 L'INTERPRÈTE :

5 Alors, aussi ça, c'est le document que ça a été
6 soumis pour toutes les parties et on soumet à la
7 Cour que... mais c'est les questions qu'on doit
8 encore décider en ce qui concerne nos requêtes R-25,
9 32 et 32-A.

10 THE COURT :

11 So, you're saying there is no movement on these
12 issues.

13 L'INTERPRÈTE :

14 Alors, vous dites qu'il n'y a pas de mouvement sur
15 ces questions.

16 Me GAUTHIER :

17 Well, there has been some. When you will look at it,
18 sir, you will understand that since the beginning of
19 the procedures, we were able to downsize the matter
20 that needs to be decided upon.

21 L'INTERPRÈTE :

22 Il y a eu déjà quelques mouvements, mais lorsque
23 vous allez regarder ça de plus proche, vous allez
24 voir que depuis le début des procédures, on a pu
25 minimiser la question qui devait être décidée.

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

1 THE COURT :

2 No, that I understand but with the items in your
3 document that you're submitting, there is no
4 movement on those issues...

5 L'INTERPRÈTE :

6 Alors, je comprends ça, mais les items qui sont dans
7 votre document, vous dites qu'il n'y a pas de
8 mouvement sur ces questions.

9 Me GAUTHIER :

10 That we foresee, no.

11 L'INTERPRÈTE :

12 Qu'on prévoit, non.

13 THE COURT :

14 Okay.

15 Me GAUTHIER :

16 So, should we file this?

17 L'INTERPRÈTE :

18 Alors, est-ce qu'on doit le déposer ça?

19 THE COURT :

20 Yes, you can file that and if there is an additional
21 copy for me, I'll take it now.

22 L'INTERPRÈTE :

23 Il n'y a pas de copie pour moi.

24 Me GAUTHIER :

25 We will file it via le... vous avez les cotes avec

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

1 vous, madame la greffière.

2 L'INTERPRÈTE :

3 On va le déposer. You have the marks.

4 LA GREFFIÈRE :

5 (Inaudible).

6 LA COUR :

7 Ce qu'on peut faire. Est-ce que je peux voir le
8 document, madame?

9 THE INTERPRETER :

10 Well, can I see the document?

11 LA GREFFIÈRE :

12 Certainement.

13 THE INTERPRETER :

14 Certainly.

15 THE COURT :

16 Is the next exhibit 33?

17 L'INTERPRÈTE :

18 Est-ce que le prochain exhibit c'est 33?

19 THE COURT CLERK :

20 It would be 33, yes.

21 L'INTERPRÈTE :

22 Oui, ça serait 33.

23 Me GAUTHIER :

24 Maybe we should file it...

25

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

L'INTERPRÈTE :

Peut-être qu'on pourrait le déposer sous...

THE COURT CLERK :

No, 33, we have it. So...

Me GAUTHIER :

Yes. With part of what has been filed in... under
R-32 as well.

L'INTERPRÈTE :

Avec la partie de qu'est-ce qui a été déjà déposé
sous R-32.

THE COURT :

I know but it's not only (inaudible) but it's not
only part of 32. It's part of 25.

L'INTERPRÈTE :

Mais ce n'est pas seulement partie de 32, mais aussi
de 25 donc.

Me GAUTHIER :

It's correct.

THE COURT :

So...

L'INTERPRÈTE :

C'est ça.

Me GAUTHIER :

We have a 33 yet?

REPRESENTATIONS

540-01-063428-141
June 30th, 2015

L'INTERPRÈTE :

On a déjà un 33.

THE COURT CLERK :

We have a 33, yes.

L'INTERPRÈTE :

Oui.

Me GAUTHIER :

So, maybe 34.

L'INTERPRÈTE :

Alors, R-34.

THE COURT :

R-34.

L'INTERPRÈTE :

R-34.

THE COURT CLERK :

R-34.

THE COURT :

The defence already has a copy of the document.

L'INTERPRÈTE :

Est-ce que tout le monde a déjà une copie du
document?

VOICE NON IDENTIFIED :

Yes.

THE COURT :

You do, okay.

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

L'INTERPRÈTE :

Oui.

THE COURT :

I do understand after the exchange we've just had, there is no other questions publicly at this point for inspector Flynn, is that right? Any of the other defence counsel?

L'INTERPRÈTE :

Je comprends alors qu'après l'échange qu'on vient d'avoir, il n'y a pas d'autres questions qui sont publiques à ce point-ci. D'autres... les autres avocats?

VOICE NON IDENTIFIED :

No question.

THE COURT :

You have no questions, alright. So, I understand that with the exception of Mr. Kapoor, the other counsel will be leaving until Monday the 13th, is that right?

L'INTERPRÈTE :

Alors, je comprends qu'à l'exception de maître Kapoor, tous les autres avocats doivent sortir et on va pas se voir jusqu'au lundi, le 13 juillet?

VOICE NON IDENTIFIED :

Yes.

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

THE COURT :

Fine.

L'INTERPRÈTE :

C'est ça.

THE COURT :

So, before we do that, with respect to scheduling that as on my remarks yesterday we can deal with it today or we can deal with it the week of the 13th if there is any... with respect to the fall and the January schedule, presuming things continue in the way they are, if there is any request or comments with respect to dates, I'd like to have them in advance, not a week or two before, if they are known now.

L'INTERPRÈTE :

Alors, avant de faire ça, en ce qui concerne la cédule, on a déjà remarqué hier si on pouvait... on peut déjà toucher ça aujourd'hui ou le 13 par rapport à notre horaire de... si ça continue comme ça de la façon qu'on... s'il y a des requêtes par rapport à des dates, j'aimerais les recevoir à l'avance si c'est déjà connu par rapport au mois de décembre, janvier.

THE COURT :

No comments, okay. So, we'll deal with that on the

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

1 week of the 13th in terms of the fall schedule and
2 perhaps January.

3 L'INTERPRÈTE :

4 Pas de commentaires aujourd'hui. Alors, on va peut-
5 être toucher ça la semaine du 13 en ce qui concerne
6 le... la cédule pour l'automne puis janvier.

7 THE COURT :

8 With respect to the bail hearings that were raised
9 yesterday by maître Émond and...

10 L'INTERPRÈTE :

11 Pour l'enquête caution qui a été demandée hier...

12 THE COURT :

13 ... maître Boro...

14 L'INTERPRÈTE :

15 ... par maître Boro...

16 THE COURT :

17 ... with respect to maître Émond, I was told you
18 sent me an email which I haven't seen yet.

19 L'INTERPRÈTE :

20 ... et maître Émond. Je pense que vous êtes...

21 Me GAUTHIER :

22 I sent you an email.

23 THE COURT :

24 No, no, I was told but I haven't seen it. What are
25 the dates that defence counsel are available?

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

1 L'INTERPRÈTE :

2 Quelles sont les dates que les avocats de la défense
3 sont disponibles?

4 THE COURT :

5 I understand it will be maître Larochelle...

6 Me GAUTHIER :

7 And maître Émond.

8 L'INTERPRÈTE :

9 Maître Larochelle. Oui, et maître Émond.

10 THE COURT :

11 What are the dates they're suggesting?

12 L'INTERPRÈTE :

13 Quelles sont les dates qu'ils suggèrent?

14 Me GAUTHIER :

15 (Inaudible) with... we had thought that we could
16 proceed on this matter on September 10th, 14th and
17 17th.

18 L'INTERPRÈTE :

19 On avait pensé qu'on aurait pu faire cette matière
20 le 10 septembre, 14 septembre et 17 septembre.

21 THE COURT :

22 So, you reduced it to three days.

23 L'INTERPRÈTE :

24 Donc, vous avez réduit ça à trois jours.

25

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

1 Me GAUTHIER :

2 Yes.

3 THE COURT :

4 At this point.

5 L'INTERPRÈTE :

6 Oui. À ce point-ci.

7 Me GAUTHIER :

8 At this point but...

9 L'INTERPRÈTE :

10 À ce point-ci dit maître Gauthier, mais...

11 Me GAUTHIER :

12 ... as mentioned in yesterday's email, sir...

13 L'INTERPRÈTE :

14 ... par contre comme mentionné hier dans les
15 courriels...

16 Me GAUTHIER :

17 ... after having an hearing the two officers that
18 the Crown will put to you they might decide to call
19 four other officers.

20 L'INTERPRÈTE :

21 ... après avoir écouté les deux officiers que la
22 Couronne va soumettre à vous, peut-être qu'ils vont
23 décider d'appeler quatre autres officiers comme
24 témoins...

25

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

1 THE COURT :

2 Alright.

3 Me GAUTHIER :

4 And to which we will object.

5 L'INTERPRÈTE :

6 ... et à ce qu'on va faire une objection.

7 THE COURT :

8 Are your witnesses available those dates?

9 Me GAUTHIER :

10 They are, sir.

11 L'INTERPRÈTE :

12 Est-ce que les dates sont fixes? Oui.

13 THE COURT :

14 Can it not be done in three consecutive days?

15 L'INTERPRÈTE :

16 Est-ce que ça peut être fait pas en trois jours
17 d'affilée?

18 Me GAUTHIER :

19 Unfortunately it can't...

20 L'INTERPRÈTE :

21 Malheureusement, ça n'est pas possible.

22 THE COURT :

23 Alright. I think what we'll do is it doesn't
24 concern the other counsel here but we'll let them
25 know so that they know we will be proceeding with

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

1 other matters. I'm going to look at those dates and
2 we'll also fix a date for maître Roy's motion for
3 Racaniello.

4 L'INTERPRÈTE :

5 Donc, qu'est-ce qu'on va faire dit monsieur le juge,
6 ça ne concerne pas les autres avocats ici, mais on
7 va les libérer pour le moment puis on va procéder
8 avec d'autres matières. Je vais regarder les...
9 donner un coup d'oeil pour les dates et fixer une
10 date pour Racaniello...

11 Me GAUTHIER :

12 Who will be back on Friday morning. So, I suggest
13 that we address these matters all together Friday
14 morning in front of you, here.

15 L'INTERPRÈTE :

16 ... qui va revenir vendredi prochain. Donc, on peut
17 adresser toutes les matières ici vendredi matin.

18 THE COURT :

19 Is maître Émond here as well?

20 Me GAUTHIER :

21 She won't be here but she will be represented by Mr.
22 Boro.

23 L'INTERPRÈTE :

24 Maître Émond ne sera pas ici, mais elle va être
25 représentée par maître Boro.

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

THE COURT :

Alright. Is there anything else that has to be raised from an administrative management point of view before the defence counsel leave today...

L'INTERPRÈTE :

Est-ce qu'il y a d'autres choses qu'on devait soulever pour le Ministère, pour la gérance et tout avant que les avocats de la défense quittent?

Me LACY :

I'm not sure. There is one matter that, if you could accommodate us, your Honour.

L'INTERPRÈTE :

Il y a une matière peut-être que vous pouvez nous accommoder, votre Honneur.

Me LACY :

We'd like to take the time today to visit with our client back at RDP and if you could give a gentle suggestion to be a court staff, they'll make sure they move expeditiously to bring him back once he returns to court for his purposes, our client's purposes today.

L'INTERPRÈTE :

On veut visiter notre client dans le Centre de détention Gouin, si vous donnez une suggestion au staff, aux employés et on peut faire ça vraiment

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

avec vitesse pour les fins de... leurs fins et les
fins de mon client.

THE COURT :

So, you want to visit with your client today at RDP?

L'INTERPRÈTE :

Vous voulez visiter votre client aujourd'hui?

Me LACY :

We've already booked the visit but we're just asking
if the Court transport officers could do their best
to get him back to the institution.

L'INTERPRÈTE :

On a fait déjà une heure... un rendez-vous, mais on
veut que les officiers de transport peuvent l'amener
le plus tôt possible dans l'institution...

THE COURT :

Yes.

Me LACY :

They travel separately from other detainees. So, I
think it's possible as long as your Honour is okay
with...

L'INTERPRÈTE :

... parce qu'ils sont séparés de d'autres détenus.
Je pense que ça sera possible au moins qu'il y ait
une objection de votre Honneur.

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

1 THE COURT :

2 Let's have detention come in.

3 LA GREFFIÈRE :

4 Pouvez-vous aller chercher votre patron, s'il vous
5 plaît?

6 THE INTERPRETER :

7 Please go and get your boss?

8 THE COURT :

9 So, other than that, we'll proceed after the break
10 to the ex parte hearing...

11 L'INTERPRÈTE :

12 Après ça, on va procéder pour l'ex parte,
13 l'audience.

14 THE COURT :

15 ... and all the accused will be gone.

16 L'INTERPRÈTE :

17 Tous les accusés vont partir.

18 THE COURT :

19 All the lawyers will be gone.

20 L'INTERPRÈTE :

21 Tous les avocats vont partir.

22 THE COURT :

23 And, madam clerk, you'll be gone too.

24 L'INTERPRÈTE :

25 Et aussi...

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

THE COURT CLERK :

I will be gone after I turn everything off.

THE COURT :

That's right.

L'INTERPRÊTE :

... madame la greffière, vous allez aller aussi. Je
vais aller juste après que je vais tourner tout...

THE CROWN :

And we will... do you sweep the room?

THE COURT :

We'll make a sweep of the room as we did the last
time.

THE CROWN :

Yes.

THE COURT :

That's right.

L'INTERPRÊTE :

On va faire une surveillance et une sécurisation de
cette salle.

Me ENGEL :

Your Honour, if I understand, you want Mr. Boro here
Friday morning, at 9:30?

L'INTERPRÊTE :

Maître Boro sera ici à 9 h 30, vendredi prochain?

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

1 THE COURT :

2 Well, I didn't insist that he be here.

3 L'INTERPRÈTE :

4 Je n'ai pas insisté qu'il sera ici.

5 THE COURT :

6 Maître Gauthier told me that he was expecting him.

7 L'INTERPRÈTE :

8 Maître Gauthier m'avait dit qu'il va être ici.

9 THE CROWN :

10 That's what he told the Court yesterday.

11 L'INTERPRÈTE :

12 C'est ça qu'il avait dit le Tribunal hier.

13 VOICE NON IDENTIFIED :

14 He told the Court that.

15 THE COURT :

16 Okay. It's not necessary he comes. I can suggest
17 dates for the hearing, the bail hearing and he
18 doesn't necessarily have to be here. He could be
19 represented by one of the other counsel for himself
20 or (inaudible) but...

21 L'INTERPRÈTE :

22 Ce n'est pas nécessaire qu'il vienne. Je pourrai
23 faire des suggestions des dates pour l'enquête de
24 caution. Ce n'est pas nécessaire qu'il sera ici sur
25 les lieux. Il peut être avisé par votre... un des

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

autres avocats...

THE COURT :

... I'm not insisting he be present.

L'INTERPRÈTE :

Je ne fais pas... je n'insiste pas qu'il sera ici
sur les lieux, présent.

THE DEFENCE :

(Inaudible) counsel plan of being here Friday.

THE COURT :

(Inaudible) counsels right here, alright.

L'INTERPRÈTE :

D'autres... donc, ils seront... les autres avocats
seront ici.

THE DEFENCE :

Right. And I won't be here for Mr. Labelle anyway.

L'INTERPRÈTE :

Maître Labelle ne sera pas ici, pour monsieur
Labelle.

THE COURT :

No, but I understand but maître Gauthier can
communicate with yourself and Mr. Boro with respect
to suggesting dates.

L'INTERPRÈTE :

Ça, je le comprends. Maître Gauthier peut
communiquer avec vous et monsieur Boro pour les

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

1 dates suggestives.

2 THE COURT :

3 But if he intends to be here, that's fine.

4 L'INTERPRÈTE :

5 S'il a l'intention d'être ici, ça, ça va aller
6 aussi.

7 LA COUR :

8 Oui.

9 LA GREFFIÈRE :

10 En attendant que le patron arrive, est-ce qu'on peut
11 demander (inaudible) s'ils veulent que leurs clients
12 soient présents le 13.

13 LA COUR :

14 Oui.

15 L'INTERPRÈTE :

16 Inaudible. Inaudible. C'est la greffière qui
17 parle.

18 LA COUR :

19 Allez-y un par un.

20 LA GREFFIÈRE :

21 Alors, pour... qui représente maître Émond
22 aujourd'hui? Maître Polnicky ou maître Engel?

23 THE INTERPRETER :

24 Who represents maître Émond today? Who represents
25 her?

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

1 Me POLNICKY :

2 Parfait. Je vais... I will represent maître Émond.

3 L'INTERPRÈTE :

4 C'est moi qui vais la représenter.

5 LA GREFFIÈRE :

6 Alors, maître Polnicky, est-ce que monsieur
7 D'Addario va être présent le 13?

8 THE INTERPRETER :

9 Maître Polnicky, monsieur D'Addario, will he be
10 present on the 13th?

11 Me POLNICKY :

12 I'm sorry. I do not have instructions in regards
13 to...

14 L'INTERPRÈTE :

15 Je n'ai pas ces instructions-là.

16 LA GREFFIÈRE :

17 En principe, elle dit non.

18 THE INTERPRETER :

19 In principle, he said no says the clerk.

20 Me POLNICKY :

21 Maître Émond has indicated that his presence is not
22 required as what we all suggest.

23 L'INTERPRÈTE :

24 Maître Émond a indiqué que sa présence n'est pas
25 requise.

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

LA GREFFIÈRE :

(Inaudible). Est-ce que vous permettez que ça soit
présence non requise?

THE INTERPRETER :

Will you permit me, says madam...

THE COURT :

So, I understand that's an express request that his
presence is not required.

L'INTERPRÈTE :

Ça, c'est une demande expressive que sa présence
n'est pas requise.

Me POLNICKY :

That is correct, your Lordship.

THE COURT :

(Inaudible).

LA GREFFIÈRE :

Merci, maître Polnicky. Alors, on saute par-dessus
monsieur Desjardins. Steven Fracas.

L'INTERPRÈTE :

Monsieur Steven Fracas.

THE DEFENCE :

His presence is not required, your Honour.

L'INTERPRÈTE :

Alors, la présence n'est pas requise...

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

LA GREFFIÈRE :

Merci.

THE COURT :

Okay. I won't repeat every time. So, for those counsel who request that their clients not be present, it's a request that (inaudible) from attending court on the 13th or the whole week.

L'INTERPRÈTE :

Pour les avocats qui ne sont pas... d'être présents, c'était expressément renoncé, excusé le 13 ou toute la semaine.

THE DEFENCE :

The whole week, your Honour.

L'INTERPRÈTE :

Toute la semaine, votre Honneur.

THE COURT :

Alright. So, granted for the whole week, for the (inaudible) client as well.

L'INTERPRÈTE :

Et c'est accordé pour toute la semaine pour presque tout...

LA GREFFIÈRE :

L'exception, mais il faut que je demande à tous les jours pour les fins de l'enregistrement.

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

1 THE INTERPRETER :

2 I have to ask all of them.

3 THE COURT :

4 That's fine. That's fine.

5 L'INTERPRÈTE :

6 Ça va aller.

7 LA GREFFIÈRE :

8 Voulez-vous parler avec madame et je vais poursuivre
9 ou bien voulez-vous que je poursuive?

10 LA COUR :

11 Oui. Bonjour.

12 THE INTERPRETER :

13 I will... would you like to speak with the lady?

14 Good morning. Now...

15 LA COUR :

16 On va suspendre dans quelques minutes et j'aurai une
17 audience ex parte, huis clos...

18 THE INTERPRETER :

19 ... we will suspend in a few minutes. There will be
20 an ex parte audience which will be in camera...

21 LA COUR :

22 ... et les accusés, les avocats, sauf quelques
23 exceptions, ne seront pas présents.

24 THE INTERPRETER :

25 ... and the accused, the lawyers, except for some

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

exceptions, will not be present.

LA COUR :

Les avocats des accusés, surtout monsieur
Mirarchi...

THE INTERPRETER :

Mr. Mirarchi on all counts...

LA COUR :

... veulent le rencontrer.

THE INTERPRETER :

... want to meet him.

LA COUR :

Monsieur Mirarchi est à Rivière-des-Prairies, ok.
Il va être transporté.

THE INTERPRETER :

Mr. Mirarchi, he's going to RDP to be transported.

LA COUR :

Alors, comme ses avocats viennent de Toronto,
pouvez-vous faire le nécessaire pour que Mirarchi,
les gens qui restent à Rivière-des-Prairies, soient
transportés aussitôt que possible pour que les
avocats puissent le rencontrer cet après-midi.

THE INTERPRETER :

Since the lawyers are coming from Toronto could you
do the outmost to your capacity that these
individuals be brought, transported as soon as

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

possible to the Detention Centre RDP so they could
meet their lawyers respectively this afternoon.

LA COUR :

Ils ont déjà "booké" une heure précise.

VOIX NON IDENTIFIÉE :

(Inaudible).

THE INTERPRETER :

This is inaudible for her right now.

LA COUR :

Surtout monsieur Mirarchi.

THE INTERPRETER :

And for the... at least for... mostly for Mr.
Mirarchi.

VOIX NON IDENTIFIÉE :

(Inaudible).

LA COUR :

Non. Rivière-des-Prairies. Je vais répéter,
madame.

THE INTERPRETER :

Let me repeat, madam.

LA COUR :

Ok. Monsieur Mirarchi est détenu à Rivière-des-
Prairies, RDP, ça va.

THE INTERPRETER :

Mr. Mirarchi is detained at RDP, do you understand?

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

LA COUR :

Il va terminer ici à la cour dans quelques instants.

THE INTERPRETER :

He will terminate here very soon.

LA COUR :

Il y a deux avocats présents qui viennent de
Toronto.

THE INTERPRETER :

There are two lawyers who are present here today
that come from Toronto.

LA COUR :

Ils ont "booké" une rencontre cet après-midi.

THE INTERPRETER :

They have booked a meeting with their client this
afternoon.

LA COUR :

Alors, pour que les avocats (inaudible) pour rien...

THE INTERPRETER :

Now, for the lawyers to meet their client...

LA COUR :

... pouvez-vous faire le nécessaire pour que
monsieur Mirarchi et les autres accusés...

THE INTERPRETER :

... could you do the outmost to your capacity and
the other accused...

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

LA COUR :

... qui restent à Rivière-des-Prairies soient
transportés immédiatement.

THE INTERPRETER :

... who are going to RDP are transported
immediately, are to be transported immediately.

VOIX NON IDENTIFIÉE :

(Inaudible).

LA COUR :

C'est-à-dire qu'il n'y a pas d'attente comme une
heure ou deux heures et les avocats n'attendent pas
là inutilement avant de retourner à Toronto, ça va?

THE INTERPRETER :

So that would mean no delays whatsoever and this
way, the lawyers would not be waiting around. Do
you understand?

VOIX NON IDENTIFIÉE :

(Inaudible).

THE INTERPRETER :

She nods her head. I have... it's inaudible.

LA COUR :

Pouvez-vous vérifier ça et aviser à la greffière,
elle va m'aviser s'il y a un problème...

THE INTERPRETER :

Could you please advise madam register there or the

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

register's office of the situation.

LA COUR :

Est-ce que le fourgon est présent?

THE INTERPRETER :

Is the paddy wagon... is the truck, the transport
wagon ready?

LA COUR :

Ça va. (Inaudible).

Me LACY :

Thank you, your Honour.

THE COURT :

Yes.

Me LACY :

Thank you very much.

THE COURT :

If you see that there is a delay or some problem
while we're suspended, have the bailiff bring me
back to the bench and I'll deal with it right away.

L'INTERPRÈTE :

Si vous voyez qu'il y a un délai ou un problème,
juste l'amener avec la hussière puis on va le
traiter immédiatement.

Me LACY :

Thank you. Thank you.

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

1 THE COURT :

2 Alright. Are there any other counsel in the same
3 position that want to meet their client today?

4 L'INTERPRÈTE :

5 Est-ce qu'il y a d'autres avocats qui veulent avoir
6 un rendez-vous avec leur client?

7 THE COURT :

8 No. Alright. So...

9 L'INTERPRÈTE :

10 Non.

11 THE COURT :

12 ... that's fine.

13 L'INTERPRÈTE :

14 Non.

15 LA GREFFIÈRE :

16 Est-ce que... je vais poursuivre avec les présences
17 pour la semaine du 13.

18 THE INTERPRETER :

19 I will continue with the presence.

20 LA COUR :

21 Merci, madame.

22 THE INTERPRETER :

23 Thank you, madam. I'll continue with the presence
24 sheet.

25

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

LA GREFFIÈRE :

Pour monsieur Milioto, maître Shoofey, vous voulez
que votre client soit là?

THE INTERPRETER :

Maître Shoofey, would you like your client to be
there?

Me SHOOFEY :

Yes, I would like Mr. Milioto to be present on the
13th.

L'INTERPRÈTE :

Oui, j'aimerais que monsieur Milioto soit présent le
13.

LA GREFFIÈRE :

Merci. Mr. Addario, do you want your client to be
present on the 13th?

L'INTERPRÈTE :

Monsieur Addario, est-ce que vous voulez que votre
client serait présent?

Me ADDARIO :

Yes.

L'INTERPRÈTE :

Oui.

Me ADDARIO :

Please.

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

L'INTERPRÈTE :

S'il vous plaît.

LA GREFFIÈRE :

Pour monsieur Racaniello, toujours présence non
requis?

THE INTERPRETER :

For Mr. Racaniello, always presence not required.

THE DEFENCE :

Presence not required. Thank you.

L'INTERPRÈTE :

Présence non requise.

LA GREFFIÈRE :

Merci. Maître MacDonald, je présume que vous voulez
une comparution vidéo pour votre client, Simpson?

THE INTERPRETER :

Maître MacDonald, I presume that you want the...
from video conference that he be present?

Me MACDONALD :

Oui, s'il vous plaît, yes.

L'INTERPRÈTE :

Oui.

LA GREFFIÈRE :

Alors, c'est fait. C'est noté.

THE INTERPRETER :

So, it's noted.

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

LA COUR :

Pour les raisons données par monsieur Desjardins, ce n'est pas nécessaire de demander sa présence.

THE INTERPRETER :

For the reasons from Mr. Desjardins, it's not necessary to go through this exercise...

LA GREFFIÈRE :

Ça sera présence non requise pour l'instant, mais je n'ai pas posé la question.

THE INTERPRETER :

... and his presence is not required for the moment. So, I'm not... I didn't ask the question says madam register.

THE COURT :

Okay. So, we'll take a break now before we continue, maître Rouleau.

L'INTERPRÈTE :

On va prendre une petite pause maintenant avant de continuer.

Me ROULEAU :

Yes.

THE COURT :

If there is anything else... I'm taking a break also. If there is anything else that arises in the minutes that follow, before counsel leave, call me

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

back in.

L'INTERPRÈTE :

S'il y a d'autres choses... je vais prendre une
pause. S'il y a quelque chose qui va se soulever
dans les prochaines minutes, avant que les avocats
quittent, s'il vous plaît, nous appeler.

VOICE NON IDENTIFIED :

Certainly.

L'INTERPRÈTE :

Oui, monsieur.

--- SUSPENSION

--- UPON RESUMING

LA COUR :

... madame.

LA GREFFIÈRE :

Ça va. Merci.

THE COURT :

I just wanted to wait before we did the ex parte,
maître MacDonald, to follow up yesterday, is there
anything else that had to be said about those issues

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

on the Île Vaudry motion.

Me MACDONALD :

Not on my part, your Honour. We're contesting the blood samples and with respect to the compulsive powder, there... as far as I'm concerned, there is no link or direct link between that and the bullets that were found.

THE COURT :

That was my understanding and I understand that... from the admission that was confirmed yesterday the blood... the sample was only taken from one location, off the parking lot on the snow over the grass and that's Simpson's property.

VOICE NON IDENTIFIED :

Sure.

THE COURT :

Yes. That's what I understood. Okay. Is there anything else by the Crown, no?

THE CROWN :

On this issue, no, sir.

THE COURT :

On any of the issues that I raised yesterday.

THE CROWN :

No.

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

1

THE COURT :

2

On the file Vaudry motion...

3

THE CROWN :

4

No, sir.

5

THE COURT :

6

... because you wanted to discuss it?

7

THE CROWN :

8

Yes.

9

THE COURT :

10

So, you have nothing else to say.

11

THE CROWN :

12

No, sir.

13

THE COURT :

14

Alright. Very good. So...

15

Me MACDONALD :

16

Perhaps two other subjects, your Honour, very brief.

17

I've realized that...

18

LA GREFFIÈRE :

19

Je m'excuse. Je veux juste que ça soit noté que

20

votre client n'est pas présent, maître MacDonald.

21

Me MACDONALD :

22

Yes, I... we waived the presence of Mr. Simpson.

23

THE COURT :

24

That's fine.

25

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

1 LA GREFFIÈRE :

2 Merci.

3 Me MACDONALD :

4 With respect to the 13th of July, I've realized that
5 I'm before your colleague, le juge Boucher, on a
6 bail revision in Montreal. So, if that case
7 proceeds, your Honour, I will be replaced here by a
8 colleague.

9 THE COURT :

10 Alright. And you're fine with that?

11 Me MACDONALD :

12 I'm okay with that.

13 THE COURT :

14 And your client is fine with that?

15 Me MACDONALD :

16 Well, I will discuss this with Mr. Simpson but there
17 shouldn't be any problem there.

18 THE COURT :

19 Alright. Okay. If there is an issue, you'll let me
20 know next week.

21 Me MACDONALD :

22 That's right. And one other thing, I've discussed
23 it briefly with maître Gauthier, with respect to la
24 Commission des services juridiques, we need an
25 approximation of the trial length, the duration of

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

1 the trial. I'm not sure if maître Gauthier is ready
2 to put on record...

3 Me GAUTHIER :

4 In front of the jury. In front of the jury?

5 Me MACDONALD :

6 Well, the whole, yes, the trial from the jury...

7 THE COURT :

8 Well...

9 Me MACDONALD :

10 ... selection to the end.

11 THE COURT :

12 Well, first, the preliminary motions, I think you
13 can evaluate yourself if...

14 Me MACDONALD :

15 But they don't count...

16 THE COURT :

17 They don't count then, alright.

18 Me MACDONALD :

19 They start from jury selection to...

20 THE COURT :

21 Alright.

22 Me GAUTHIER :

23 From the jury selection, without any admission, our
24 best estimate is that it is more or less a year.

25

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

1 THE COURT :

2 So, madam clerk, to assist Mr. MacDonald, you can
3 indicate that maître Gauthier for the Crown
4 indicates that if there is no admissions, beginning
5 with jury selection until a projected end of the
6 trial, he evaluates can we say a minimum one year?

7 Me GAUTHIER :

8 We would prefer more or less a year.

9 THE COURT :

10 Okay. Approximately one year. Does that help you,
11 maître MacDonald?

12 Me MACDONALD :

13 Yes, your Honour, very much so. Thank you very
14 much.

15 THE COURT :

16 Alright.

17 Me MACDONALD :

18 Maître Gauthier, thank you.

19 THE COURT :

20 Yes. Alright. And just for Crown and defence on
21 the... following my questions yesterday on the île
22 Vaudry motion, before we break for the summer,
23 you'll have a judgment on that. If at any time you,
24 and I'm prepared to read it in court, if at any time
25 you need to have... you prefer not to wait and you

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

1 need to have just the conclusions without the
2 reasons, all you have to do is ask and I would be
3 prepared to do that sooner but you won't get the
4 reasons until later.

5 Me MACDONALD :

6 Thank you.

7 THE COURT :

8 So, if you... if that's something that you want, you
9 can let me know and I'll have the conclusions as
10 soon as possible with reasons to follow.

11 VOICE NON IDENTIFIED :

12 We appreciate that.

13 THE COURT :

14 So, if there is a request with respect to that, by
15 either Crown or defence, let me know next week and
16 we'll try to have that ready for when you come back
17 with reasons to follow at a later date.

18 VOICE NON IDENTIFIED :

19 Thank you.

20 THE COURT :

21 Okay. Thank you very much for waiting, maître
22 MacDonald.

23
24 --- Me MACDONALD QUITTE LA SALLE.
25

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

1 LA GREFFIÈRE :

2 Monsieur le juge, est-ce que vous pouvez régler la
3 question des interprètes, s'il vous plaît?

4 THE COURT :

5 I don't think we need the interpreters since we're
6 going to be ex parte. Crown, defence, no?

7 Me GODBOUT :

8 We don't, not for this afternoon or not for Thursday
9 since Mr. Desjardins is still a part of this trial.
10 They should be back though on the next day when we
11 have...

12 THE COURT :

13 Monday the 13th.

14 Me GODBOUT :

15 So... or Friday morning.

16 THE CROWN :

17 Friday.

18 THE COURT :

19 Friday morning.

20 Me GODBOUT :

21 Yes.

22 THE COURT :

23 Friday morning.

24 Me GODBOUT :

25 Friday morning.

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

THE COURT :

Well, Friday morning, we're not hearing...

Me GODBOUT :

Maybe just one of them, even if we're not hearing any witnesses. We have maître Boro who is going to be coming in to just set the schedule for the bail hearing.

THE COURT :

Yes. With respect to both of those...

Me GODBOUT :

Exactly, yes.

THE COURT :

Alright. So, just... we just need one interpreter for Friday morning and it will be quite brief, alright, and the interpreters present today, thank you very much for attending...

THE INTERPRETER :

Thank you very much.

THE COURT :

... and for your good work as usual and you're excused for today. Thank you.

--- THE INTERPRETERS LEAVE THE ROOM.

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

1 THE COURT :

2 I just have one question before we commence with the
3 ex parte. I read over R-34 and number 2, the
4 demonstration of the software. I understood that
5 there was some agreement that was taking place to
6 allow the defence to go to the Special I to observe
7 how it's done.

8 Me ROULEAU :

9 Yes. Well, there was... it's a twofold situation.
10 There was a demonstration that was planned. I'm not
11 sure if it took...

12 Me GODBOUT :

13 It hasn't.

14 Me ROULEAU :

15 ... actually took place but it is planned in
16 Montreal as far as the (inaudible) part. So, that's
17 settled. Now, that concern was the interception
18 part of the system based in Ottawa. I discussed
19 this morning with maître Lacy because from comments
20 that he made in court the last time we sat all
21 together, I understood that it wasn't so much a
22 concern for them any more.

23
24 They didn't want to go see rack of computers in
25 Ottawa. It's still there because it was never

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

1 formally said but I discussed it with maître Lacy
2 this morning and he said that he'll make it clear
3 the next time he's in front of the Court.

4 THE COURT :

5 So, it's possible that number 2 might be taken out?

6 Me ROULEAU :

7 Yes.

8 THE COURT :

9 Alright. Okay. And maître Kapoor has a copy of
10 this, hey, R-34?

11 Me KAPOOR :

12 Yes, I do, your Lordship.

13 THE COURT :

14 Alright. Well, as you know from going through the
15 material, the list that was stated was a lot longer?

16 Me KAPOOR :

17 Yes.

18 THE COURT :

19 So, they produced it somewhat. Number 2 may not be
20 there and we'll go ahead. Alright. I got, maître
21 Godbout, the four judgments with respect to bail...

22 Me GODBOUT :

23 Yes.

24 THE COURT :

25 ... but maître Émond refers to R-1, 2, 3 in her

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

1 motion.

2 Me GODBOUT :

3 Yes.

4 THE COURT :

5 Usually these things are filed. I haven't seen it.

6 Me GODBOUT :

7 We haven't either.

8 THE COURT :

9 So, you can speak to her and let her know that
10 Friday, dates will be fixed but the judge would like
11 to have the exhibits that she's referring to because
12 I don't know what they are.

13 Me GODBOUT :

14 Of course, I'll let her know.

15 THE COURT :

16 Yes. Anything else before we commence the ex parte
17 hearing? No. Madam clerk, do you confirm that the
18 special constables made a sweep and verified
19 throughout the courtroom, the public part of the
20 courtroom, the seats where a jury would ordinarily
21 sit, the accused box behind the screen, even around
22 your desk, counsel desk, all the nooks and crannies
23 of the courtroom have been verified?

24 THE COURT CLERK :

25 All the nooks and crannies have been verified, I

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

confirm it. I saw them do it.

THE COURT :

Alright. Very well. So, what we'll do is I would ask you and the bailiff to leave the room and maître Gauthier will let me know who is going to remain.

Me GAUTHIER :

Yes. So, you have constable Christian Dragan from the RCMP who will remain in the room, who will be taking care... he will take care of the recording of the ex parte session. Mr. Anile Kapoor will be there as amicus curiae. The witness, Mr. Mark Flynn, will be there of course.

For the Crown, there will be Mr. Rouleau, Mrs. Godbout and myself and of course yourself, the judge.

THE COURT :

That's fine. So, we're about to embark on an ex parte hearing as we've done in the past with respect to R-25, as well R-32 and R-32-A. For that purpose the proceedings will be conducted in camera, huis clos, and the only persons remaining in the courtroom, other than myself as presiding judge, will be the RCMP officer, Mr. Dragan, for recording purposes and maître Kapoor, amicus curiae, the witness, inspector Flynn and the three prosecutors,

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

1 maître Rouleau, maître Gauthier and maître Godbout.
2 So, I would ask the clerk to shut off all of the
3 official Courtlog recording equipment and if she,
4 the clerk and the bailiff, could leave the
5 courtroom. I predict we'll probably go on for...
6 until 12:30, a quarter to one approximately but no
7 longer than a quarter to one and we'll stop at the
8 appropriate time.

9
10 Maître Rouleau, since you're conducting the
11 examination, you'll pick the appropriate time to
12 stop for the lunch break and we'll decide at what
13 time we reconvene this afternoon.

14 Me ROULEAU :

15 Thank you.

16 THE COURT :

17 Is there any need for the special constable to
18 remain, no?

19 Me ROULEAU :

20 No.

21 THE COURT :

22 No. So, ça va être à huis clos, monsieur, les
23 procédures.

24 LE CONSTABLE :

25 Excellent.

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

LA COUR :

Alors, je vous demanderais, avec la greffière et la
huissière de sortir, et vous pouvez marquer sur la
porte huis clos et vous devez rester à l'extérieur
ou un de vos collègues et personne ne peut rentrer.

LE CONSTABLE :

Parfait.

LA COUR :

Ça vous va.

LE CONSTABLE :

Oui, excellent.

THE COURT :

So, just for Mr. Kapoor, I've asked the constable to
leave the room with the Court staff, the clerk and
the bailiff, and he will have a note on the door
that we're proceeding in camera and no one is
allowed in the courtroom or no one is allowed to
leave the courtroom until we take a formal break.

Anything else, madam clerk?

LA GREFFIÈRE :

J'ai demandé à la Couronne, entre autres, maître
Rouleau, s'il tenait à ce que je revienne pour la
suspension du dîner. Il m'a indiqué que non, qu'il
allait m'informer de la fin et le début de
l'audience.

540-01-063428-141
June 30th, 2015

REPRESENTATIONS

LA COUR :

Ça va. Ça va.

LA GREFFIÈRE :

Ça vous convient?

LA COUR :

Oui, ça me convient parfaitement.

LA GREFFIÈRE :

Alors, je peux débrancher?

LA COUR :

Oui.

LA GREFFIÈRE :

Alors, pour les fins de l'enregistrement, le temps que ça vaut, l'appareil vidéo comparution a été débranché en présence de monsieur Aubut et de maître Godbout. Je vais débrancher le téléphone qui est sur mon bureau. Si je peux arriver... J'ai débranché le fil.

J'ai fait ça et il me reste à fermer l'enregistrement normal. La cabine des interprètes aussi a été fouillée et les fils ont été débranchés là aussi.

Alors, à 11 h 33, j'arrête.

* * * * *

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Je, soussignée, RENÉE C.-DUPRAS,
sténographe officielle, certifie sous mon serment
d'office que les pages qui précèdent sont et
contiennent la transcription exacte et fidèle des
paroles recueillies au moyen de l'enregistrement
mécanique, le tout sans mon contrôle de la qualité
dudit enregistrement, conformément à la loi;

ET J'AI SIGNÉ :

RENÉE C.-DUPRAS,
Sténographe officielle