

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

Nº: (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 IX – SCHEDULE III - DEPOSITIONS

Page 3096 to 3450

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SCHEDULE III
DEPOSITIONS

Investigative Techniques motion

Superior Court Ex Parte hearing at the Laval Courthouse, on 2015-07-23, presided by Superior Court Justice, The Honorable Michael STOBER

10:56 hrs

Justice Michael STOBER: Ça va. Quelle heure Mme Léonard?

Corporal Caroline LÉONARD: Alors il est 10h56. 10:56, start of recording.

Justice Michael STOBER: 10:56 and today's the 23rd of July, 2015, Justice Stober speaking. We're continuing the ex parte hearing on R32. The witness is Jocelyn Fortin and uh... the bailiff and the clerk, all parties have left. The only person who's not part of the ex parte hearing is constable...

Constable Raoul TRINCU: Trincu, Raoul Trincu.

Justice Michael STOBER: Please step forward. Could you spell your last name?

Constable Raoul TRINCU: T-r-i-n-c-u, Trincu.

Justice Michael STOBER: OK. And constable Trincu's here. Have you verified the room constable Trincu?

Constable Raoul TRINCU: Yes...

Justice Michael STOBER: Even the jury box, the accused box and all other seats and all the areas of the room?

Constable Raoul TRINCU: Yes, I verified.

Justice Michael STOBER: Even the interpreter's uh... cabin?

Constable Raoul TRINCU: Yes.

Justice Michael STOBER: And uh... you're satisfied nothing in... inappropriate is in the room?

Constable Raoul TRINCU: I'm satisfied.

Justice Michael STOBER: Thank you. Could you please uh... leave the room, make sure the door is locked and uh... nobody's got a _____ in-camera hearing. Hum _____. Thank you. Constable's left the room. So, we'll follow the same procedure we did uh... the last few days. Uh, I would ask all the parties and persons present to identify themselves. The court log is off, as it has been every other day, we're being recorded by a separate recorder operated by uh, Corporal Léonard of the RCMP. So go ahead.

Corporal Caroline LEONARD: So, Corporal Caroline LÉONARD, uh... recording.

Maître Marie-Christine GODBOUT: Marie-Christine GODBOUT, Crown Counsel.

Maître Alexis GAUTHIER: Alexis GAUTHIER.

Maître Robert ROULEAU: Robert ROULEAU, Crown.

Jocelyn FORTIN: Jocelyn FORTIN, Witness.

Maître Anil KAPOOR: Anil KAPPOR, Amacus.

Justice Michael STOBER: Very well. Mr. Fortin, do you solemnly... could you put up your right hand?

Jocelyn FORTIN: Yes.

Justice Micheal STOBER: Do you solemnly affirm to tell the truth, the whole truth and nothing but the truth?

Jocelyn FORTIN: I do.

Justice Michael STOBER: Thank you, uh... your name?

Jocelyn FORTIN: Jocelyn FORTIN.

Justice Micheal STOBER: Your occupation?

Jocelyn FORTIN: Senior Telecommunications Specialist with the RCMP.

Justice Michael STOBER: Thank you. Um... so, we left off yesterday in the midst of the cross-examination of uh... Mr. Kapoor, the Amacus curae. Mr. Kapoor, please continue.

Maître Anil KAPOOR: Q1. Thank you very much. Sir, you've given some evidence about your uh... experience in the area of MDI devices. Uh... is it fair to say that within your unit, you're the most knowledgeable person about the MDI?

Jocelyn FORTIN: Psst... uh... I would say that would be a fair assumption.

Maître Anil KAPOOR: Q2. And, is it also fair to say that you... y... your colleagues turn to you for uh... assistance on how this device operates?

Jocelyn FORTIN: Psst... that would be correct.

Maître Anil KAPOOR: Q3. And I gather from Corporal Richdale, at least on his experience, you delivered a lecture to him and other... and, and other colleagues of his on cellular theory?

Jocelyn FORTIN: That is correct.

Maître Anil KAPOOR: Q4. And do you give that lecture regularly to new members of the Special "I" unit?

Jocelyn FORTIN: There's different lectures that I give. Um... there's a quick overview that I give to new Special "I" installers. Um... and then, when we have candidates that would follow the full training. Uh... then I would uh... give them a full training session.

Maître Anil KAPOOR: Q5. And when you say the full training session, what... is that in relation to becoming an installer or is that in relation particularly to the MDI use?

Jocelyn FORTIN: Particulir (PH)... particularly to become an MDI operator.

Maître Anil KAPOOR: Q6. OK. And the full training consists of what?

Jocelyn FORTIN: Psst... depending on the technology and uh... uh... that we're training, because from time to time the technology changes. But...

Maître Anil KAPOOR: Q7. Just... just stop you there for a moment.

Jocelyn FORTIN: Yeah.

Maître Anil KAPOOR: Q8. Can I get the full training in relation to the device that was used in this case, prior to the commencement of Clemenza?

Jocelyn FORTIN: OK.

Justice Michael STOBER: Just a minute. Could you repeat that question?

Maître Anil KAPOOR: Q9. Yes. The full training that this witness provided in relation to the device that was used in this case, prior to the commencement of the Clemenza investigation.

Jocelyn FORTIN: So there was, uh... the operators that operated the device on Clemenza. Um... they have been trained using [REDACTED] [REDACTED] One methodology that was used uh... since the beginning was, I would give a full day training per technology on theory, and a full day training on practical exercise and then about half a day on DF'ing, "direction finding" [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED]

Justice Michael STOBER: Q10. You gave [REDACTED] to whom?

Jocelyn FORTIN: The... the ones that already had the full training... the full week of training [REDACTED] Then, I would give them training on uh... [REDACTED]

Justice Michael STOBER: Q11. So those officers who had the full day training on theory, another full day of training on practical exercise, and half a day training on direction finding. You gave them an additional [REDACTED]

Jocelyn FORTIN: Yes, but the... those full days are per technology, [REDACTED] [REDACTED] [REDACTED] [REDACTED] In the case of uh, Montreal, uh... they were asking for training but we couldn't provide uh... training in a timely fashion so they proposed that they would ride along with certified operators for a certain amount of hours and...

Justice Michael STOBER: Q12. When you say Montreal, you're referring to...

Jocelyn FORTIN: Uh... it's Montreal Special "I" so, the... the unit that was...

Justice Michael STOBER: Q13. RCMP officers?

Jocelyn FORTIN: Off... R...RCMP officers.

Justice Michael STOBER: Q14. OK, so if I understand correctly, [REDACTED] [REDACTED]

Jocelyn FORTIN: [REDACTED] The one, is the one I just described where they had a full week of training and then in addition, [REDACTED]

Justice Michael STOBER: Q15. No... just what were [REDACTED]

Jocelyn FORTIN: [REDACTED]

Justice Michael STOBER: Q16. The [REDACTED]

Jocelyn FORTIN: [REDACTED]

Justice Michael STOBER: Q17. OK, so the three things you indicated, full day of theory, full day of practical exercise and a half a day for direction finding. [REDACTED]
[REDACTED]

Jocelyn FORTIN: That's correct.

Justice Michael STOBER: Q18. All right, so if somebody did both, they'd have two days full training theory, two days practical experience and a full day of direction finding.

Jocelyn FORTIN: That's correct.

Justice Michael STOBER: Q19. [REDACTED]
[REDACTED]

Jocelyn FORTIN: We did... [REDACTED]
[REDACTED]
[REDACTED]

Justice Michael STOBER: Q20. How long is that training?

Jocelyn FORTIN: That would be about half a day of training.

Justice Michael STOBER: Q21. [REDACTED]

Jocelyn FORTIN: [REDACTED]

Justice Michael STOBER: Q22. [REDACTED]

Jocelyn FORTIN: Yes.

Justice Michael STOBER: Q23. It... was the same training session?

Jocelyn FORTIN: Yes.

Justice Michael STOBER: Q24. Thank you, please continue.

Jocelyn FORTIN: And then in the case of uh...

Justice Michael STOBER: Q25. But where I... where I had the question to you, referring to Montreal Special "I" RCMP would ride along with the operators. That's where we stopped in the questioning.

Jocelyn FORTIN: That's correct.

Justice Michael STOBER: So I'd ask Maître Kapoor to continue for me.

Maître Anil KAPOOR: Q26. Yes, uh... carry on with what you were about to uh... tell his Lordship about uh, Montreal Special "I".

Jocelyn FORTIN: So, Montreal they uh... for some reason, I don't recall exactly what were the circumstances, but I know that they were losing some operators and they had new employees and we couldn't provide that full week of training to those new employees so what Montreal Special "I" proposed is, those operator would ride along with certified operators for a certain period of time. And then I would then go and spend time to those people that uh... those operators that were not certified yet and spend some times to certify them so uh... assess their training and uh... make sure they were up to our standards and also uh... give them the theory that uh... they would've missed uh... during the um... psst... uh... the ride along so stuff that could've been missed by the certified operator when training uh... those new operators.

Justice Michael STOBER: Q27. Did they get more, less or the same training as your regular operators? Do you know...

Jocelyn FORTIN: Uh... some operators were excellent. I noticed right away that the... and I... I don't think it was the training; it would probably be more the operator itself. So, with operators that I felt that needed more time, I spent more time with them to make sure that uh... their training was all up to par.

Justice Michael STOBER: OK, I'll let you pursue my question.

Maître Anil KAPOOR: Q28. OK. Um... so just picking up where we... where you just stopped. Uh... am I right then that the investigators, or sorry, forgive me, the operators of the MDI who came out of the Montreal Special "I" unit were made up of two kinds. New, on the one hand there were new people that were brought on to the squad, is that correct?

Jocelyn FORTIN: That's correct.

Maître Anil KAPOOR: Q29. And there were folks that have been part of the Montreal Special "I" uh... for some time.

Jocelyn FORTIN: That's correct.

Maître Anil KAPOOR: Q30. Dealing with the second categer (PH)... category of operators that is those who have been there for some time...

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q31. Did they have the benefit of the week long training that you described to his Lordship?

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q32. The ride alongs that you described were for those new operators that had joined the unit and were assigned to this investigation?

Jocelyn FORTIN: That's correct.

(Shuffling of paper)

Maître Anil KAPOOR: Q33. You... mentioned (clears throat) certification.

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR:

Q34. And are you the one who does the certify?

Jocelyn FORTIN:

Um... we spoke about the... the training of those operators.

Maître Anil KAPOOR :

Q35. Uh-huh.

Jocelyn FORTIN:

Some operators always also went [REDACTED] to get their training done by [REDACTED] it was either we went to their facility to get trained...

Maître Anil KAPOOR:

Q36. Yes.

Jocelyn FORTIN:

Or they would come here to provide training.

Maître Anil KAPOOR:

Q37. Or [REDACTED] come here.

Jocelyn FORTIN:

[REDACTED] come here to provide training.

Maître Anil KAPOOR:

Q38. So who does the certification, you [REDACTED]

Jocelyn FORTIN:

Well when it was... [REDACTED] provided the... the training. They were the one giving the training but at the end uh... they would receive a cerfi (PH)... a certificate attesting that they followed [REDACTED] training and uh... they could put that on their file.

Maître Anil KAPOOR:

Q39. Is that what you were referencing a moment ago when you spoke to his Lordship about um... you would spend some time with the r... with those folks who have... who had been involved in the ride alongs and then you would eventually certify them? Is that what you're talking about?

Jocelyn FORTIN:

Psst... the same, [REDACTED] them certificate. But then after, because the training was given by [REDACTED] and I was there every time [REDACTED] provided training to those uh... when [REDACTED] to provide training.

Maître Anil KAPOOR:

Q40. Yes.

Jocelyn FORTIN:

I was always there [REDACTED] to make sure that what was being teach was [REDACTED] And it was not training based on the... [REDACTED]

Maître Anil KAPOOR:

Q41. O... OK, wh...

Jocelyn FORTIN:

So, I was assisting uh, [REDACTED] the training and then at the end of the full week uh... those operators that were in the training were deemed to be certified.

Maître Anil KAPOOR:

Q42. OK, let me just try to make this a bit clearer, at least for my mind. There are two kinds of operators. There are those who had training by the ride alongs...

(Clearing of throat)

Maître Anil KAPOOR:

And those that had the benefit of the one week course that you had described to his Lordship earlier. We canvassed that a moment ago, correct?

Jocelyn FORTIN:

That's correct, but there's three kinds.

Maître Anil KAPOOR:

Q43. OK, I just want to deal with these two first and I'll get to the third in a second.

Jocelyn FORTIN: OK.

Maître Anil KAPOOR: Q44. I want to f... I want to turn your mind to the ride along operators.

Jocelyn FORTIN: OK.

Maître Anil KAPOOR: Q45. Those are the folks that... that w... were newly assigned to Special "I" and the Clemenza investigation.

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: Q46. They're the ones, that for some reason you can't remember now, you were unable to administer the week long training.

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: Q47. You indicated to his Lordship, that you then, after the ride alongs, met with each of these operators and certified them.

Jocelyn FORTIN: That's correct.

Maître Anil KAPOOR: Q48. All right, tell me about that process. And first of all, did you do the certification?

Jocelyn FORTIN: Yes.

(Pouring of water)

Maître Anil KAPOOR: Q49. All right. [REDACTED] involved in the certification?

Jocelyn FORTIN: No.

Maître Anil KAPOOR: Q50. Explain that certification process for his Lordship, if you can please.

Jocelyn FORTIN: For the people that were on the ride alongs?

Maître Anil KAPOOR: Q51. Yes.

Jocelyn FORTIN: So the people that were on the ride along uh... they spent a certain amount of hours, and I don't know how... how many hours, when they felt that their uh... co-workers or the trainers over there, felt that they were ready to get certified. I would spend some time uh... going through the equipment, explaining the features, why we were doing it. Because I didn't want operators that would just push button and wait for a result. I wanted to make sure that they operators understand exactly all the other feature. Psst... uh, I would give them all the literature that the people that got the full week training uh... got, and then I would spend uh... a day or two or maybe more until I'm satis... I was satisfied then (PH) those operator were capable of operating the equipment properly.

Maître Anil KAPOOR: Q52. So... just dealing with the last part you made, you said you would spend a day or two with the operator to make sure that they could operate the equipment properly.

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: Q53. Would that be in the field, during the investigation on Clemenza?

Jocelyn FORTIN: That, I believe happened uh... not only on Clemenza but I do remember that it did happen on Clemenza.

Maître Anil KAPOOR: Q54. OK, I'm focusing only on Clemenza.

Jocelyn FORTIN: Yeah, sure.

Maître Anil KAPOOR: Q55. I don't know about any other brief right now.

Jocelyn FORTIN: The question was open (PH)...

Maître Anil KAPOOR: Q56. Uh... so... so this day or two that you would spend with the operators, it would be in the field, part of the Clemenza investigation, you w... you... you would assess what they were doing.

Jocelyn FORTIN: That's correct.

Justice Michael STOBER: Q57. In other words, they weren't just tests for students. They were actually working as operators.

Jocelyn FORTIN: Yes, so I was...

Justice Michael STOBER: Q58. In the Clemenza investigation.

Jocelyn FORTIN: Yes, I was supervising the operation of the equipment.

Justice Michael STOBER: Q59. Do you have a list of every operator that you trained, every name and whether they were trained with you, in Ottawa, or I believe Orleans is the specific place, with the one week theory, the one week practical experience regarding both uh... formats as a...

Jocelyn FORTIN: Psst...

Justice Michael STOBER: Q60. Just a minute. As well as the additional, half day training [REDACTED] Do you have a list of every officer who took part in that training that was also involved in the Clemenza investigation? That's the first part of my question. The second part, do you have a list of all the officers involved in Clemenza who went to [REDACTED] for training? Officers of course that were involved in Clemenza and were these officers, officers who also received your training in Orleans, that I just referred to? And thirdly, with respect to the ride alongs, did they get any training [REDACTED] and/or at Orleans, the one week, one week and uh... half a day, (shuffling of paper) as well [REDACTED] Cause I understand you've given a general answer regarding the types of training you do, yourself. [REDACTED] does, with your participation, and your participation, not only in Orleans but your further training to ride alongs, these new people. So, I'd like to know if there's a log or um... notes with respect to uh... all of these police... if I can call them students because they're learning how to operate the machine, the device. Uh... so having said that, I'll ask Mr. Kapoor to follow up with that and uh... and continue into other avenues of inquiry that he has.

Jocelyn FORTIN: So, the list um... I know that a list was, like I said before I'm taking care of the technical side. The side of the policies, uh... is being dealt with... by somebody else and I know that such a list exists. Um, I don't know if it's up to date and I can find out but I know that at that timing it was, because uh... I was getting

called many times to operate the equipment on different operation, psst... across the country. And they gave the list to the different Special "I" section across the country, list of certified operators, that they should call before calling me or calling our office to get a... an operator for the system, so I know that a list has been put together at one point.

Justice Michael STOBER:

Q61. You haven't seen it?

Jocelyn FORTIN:

Well I... I remember helping putting that list together as well.

Justice Michael STOBER:

Q62. OK. But if you were to be asked now, uh... which officers, by name, participating in Orl... Orleans, in your training courses, which officers participated [REDACTED] or which officers were part of the ride along and more officers that received the training that you described. Are you able to answer that now or you don't know?

Jocelyn FORTIN:

I wouldn't have that list with me.

Justice Michael STOBER:

Q63. So you can't answer that question.

Jocelyn FORTIN:

I can't answer that question.

Justice Michael STOBER:

Go ahead, Maître Kapoor.

Maître Anil KAPOOR:

Q64. Thank you. So, I wanna, just briefly um... before we move on uh... focus on... (Clears throat) those students that came out of, of... for lack of a better phrase, I'm just gonna call it the ride along program, just so we know what we're talking about, OK?

Jocelyn FORTIN:

Yes.

Maître Anil KAPOOR:

Q65. All right. So those that, that come from the ride along program, um... you say that you would spend a day or two with them in the field, on this investigation to assess their abilities in operating the equipment.

Jocelyn FORTIN:

Some of them I did ride alongs on this investigation.

Maître Anil KAPOOR:

Q66. Uh-huh.

Jocelyn FORTIN:

Some of them... and I don't know if it was on all of them that was on that particular investigation. There were other investigations going on at the same time and I remember uh... doing the ride alongs with one of the student on a different um... psst... project.

Maître Anil KAPOOR:

Q67. All right.

Jocelyn FORTIN:

So... I can't tell you that all of them were trained on that uh... on Clemenza.

Maître Anil KAPOOR:

Q68. I see. So... but it... but it's correct to say that uh... you assessed their abilities in the context of a live investigation?

Jocelyn FORTIN:

That is correct.

Maître Anil KAPOOR:

Q69. And did any of them fail?

Jocelyn FORTIN: No. Because like I said, if I was not satisfied with their level of competencies, I would spend more days with them.

Maître Anil KAPOOR: Q70. So you don't fail people?

Jocelyn FORTIN: Psst... I wouldn't say I don't fail people. Uh... when the training is done, everybody is able to operate the equipment. Uh... and we make sure that everybody can operate it. But, we would uh... select who would be the trainers, future trainer or the person to go do... go to for each department. So basically, when I'm giving training uh... for example in Vancouver, I have my assistant or expert that I have over there.

Maître Anil KAPOOR: Q71. Uh-huh.

Jocelyn FORTIN: Which, when we need uh... more training or there's a new feature coming out.

Maître Anil KAPOOR: Q72. Yes...

Jocelyn FORTIN: And we need to be trained [REDACTED] We would take those expert from each region, take the training [REDACTED] come back [REDACTED] and I would provide that training to uh... the installers in different region and I'll be assisted by that uh... expert from each region.

Maître Anil KAPOOR: Q73. All right.

Jocelyn FORTIN: So that expert... After they're trained, they know which operator can operate uh... the equipment and they're always uh... I know that what they do after, is they uh... example in Vancouver, after they get trained, they're not sending the new trainee on their own right away. They always get a... a, some kind of a r... ride along as well with it so... I wouldn't say I don't fail people, but we s... we recommend uh... we... we acknowledge which operator have the best skills.

Maître Anil KAPOOR: Q74. All right, so it's basically, you will continue to work with a student to get their skill level up to the level that you require to send them out in the field?

Jocelyn FORTIN: That's correct.

Maître Anil KAPOOR: Q75. It won't be the case that the student just can't complete the course for lack of skill. You will work with them so that they can acquire it?

Jocelyn FORTIN: That's correct.

Maître Anil KAPOOR: And to be fair...

Justice Michael STOBER: Why... just a moment... why...

Maître Anil KAPOOR: Sorry.

Justice Michael STOBER: Q76. Why in a case like this uh... a serious investigation like this, would you put in the field for a live investigation, students and not trained officers that have already taken all the courses? Why wouldn't you do that?

Jocelyn FORTIN: I am the trained officer. I am the person that is trained to operate the equipment and I'm making sure that they can operate the equipment.

Justice Michael STOBER: Q77. But they've never done it before?

Jocelyn FORTIN: Well they... they've seen it on the ride alongs. I'm there to make sure that what they're doing with the equipment is correct.

Justice Michael STOBER: Q78. No, I understand, but what... what I'm asking you, because the ending of Mr. Kapoor's question is this morning, you said that in your unit you're the most knowledgeable person regarding the MDI and colleagues turn to you for advice, for example, you taught Richdale. So, in a live investigation as important and serious as this one, why would a live invest... investigation involve students, even if they're supervised? Why wouldn't they involve officers or operators that have been doing this in the field for some time, that didn't need supervision?

Jocelyn FORTIN: Psst... it was the met... the method that was chosen. Another reason is the location for uh... doing training, as well. Because it... when we operate the equipment uh... we didn't want to start operating the equipment anywhere just for the purpose of training. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Justice Michael STOBER: Q79. OK. When you would do these ride alongs, was it one MDI or several?

Jocelyn FORTIN: Just one MDI.

Justice Michael STOBER: Go ahead.

Maître Anil KAPOOR: Q80. When you would do oth... other than a live investigation you also do training um... in situations where there is no active investigation.

Jocelyn FORTIN: That's correct.

Maître Anil KAPOOR: Q81. And you... you deployed the MDI in a practical way for trainees to see how it works and train on it where there is no investigation?

Jocelyn FORTIN: That's correct.

Maître Anil KAPOOR: Q82. All right. And do you know whether that, and... and sorry, and where do those take place?

Jocelyn FORTIN: Psst... we identified location one of them when I gave the training to Ottawa.

Maître Anil KAPOOR: Q83. Yes.

Jocelyn FORTIN: We would do uh... [REDACTED]

Maître Anil KAPOOR: Q84. Sorry is it... [REDACTED]

Jocelyn FORTIN: Yeah, [REDACTED]
[REDACTED]

Maître Anil KAPOOR: Q85. [REDACTED]

Jocelyn FORTIN: [REDACTED]

Maître Anil KAPOOR: Q86. And where is it located?

Jocelyn FORTIN: [REDACTED]

Maître Anil KAPOOR: Q87. [REDACTED]

Jocelyn FORTIN: [REDACTED]

Maître Anil KAPOOR: Q88. OK.

Jocelyn FORTIN: [REDACTED]

Maître Anil KAPOOR: Q89. Uh-huh...

Jocelyn FORTIN: [REDACTED]
[REDACTED]

Maître Anil KAPOOR: Q90. OK.

Jocelyn FORTIN: Hum... so we would use that location uh... we use also the
[REDACTED]

Maître Anil KAPOOR: Uh-huh...

Justice Michael STOBER: Q91. Also, it's in Ottawa?

Jocelyn FORTIN: That's also in Ottawa.

Maître Anil KAPOOR: Q92. And... and these are controlled sites, these aren't public sites?

Jocelyn FORTIN: That's correct.

Maître Anil KAPOOR: Q93. There are no members of the public that are in the... at these sites?

Jocelyn FORTIN: [REDACTED]

Maître Anil KAPOOR: Q94. Yes.

Jocelyn FORTIN: [REDACTED]
[REDACTED]

Maître Anil KAPOOR: Q95. Yes.

Jocelyn FORTIN: It was not done s... s... uh... only at those location. We would do ot... other scenarios as well, in the city.

Maître Anil KAPOOR: Q96. In uh... in... sorry, in wh... when... when was that training taking place?

Jocelyn FORTIN: That would have been at the beginning, what happen is to... to follow the chronology...

Maître Anil KAPOOR: Q97. Yeah.

11:27 hrs

Jocelyn FORTIN: The first sets of trainings, I took it in uh... and other members took it straight [REDACTED]

Maître Anil KAPOOR: Q98. Uh-huh.

Jocelyn FORTIN: Facilities.

Maître Anil KAPOOR: Q99. Uh-huh.

Jocelyn FORTIN: And then after we hired [REDACTED] to give us training...

Maître Anil KAPOOR: Q100. Uh-huh.

Jocelyn FORTIN: And after I followed um... about four or five of those session that they were giving [REDACTED]

Maître Anil KAPOOR: Q101. Uh-huh.

Jocelyn FORTIN: Then I developed or pretty much, followed the same procedure that [REDACTED] using and we were providing our own training. And when we were providing our own training we were trying to [REDACTED]
[REDACTED]

Maître Anil KAPOOR: Q102. And when [REDACTED] you say there was, uh... deployment of the MDI in the community...

Jocelyn FORTIN: That's correct

Maître Anil KAPOOR: Q103. When was that?

Jocelyn FORTIN: I would say that would be around 2006, 2007.

Maître Anil KAPOOR: I see, OK.

Justice Michael STOBBER: Q104. [REDACTED] gave some training in 2006, '07... that would be, that would not be at these um... [REDACTED]
[REDACTED]

Jocelyn FORTIN: We would do some at those location but we would so... also do some in the public.

Justice Michael STOBBER: Q105. OK, just when you mentioned those other trainings the, uh... full day trainings, like the, one... the theory one for practice half a day for um... uh... (Shuffling of paper) The direction finding and the other [REDACTED]

Jocelyn FORTIN: Psst... [REDACTED]
[REDACTED]

Justice Michael STOBBER: Q106. Both, or either or?

Jocelyn FORTIN: Either or. [REDACTED]
[REDACTED]
[REDACTED]

Justice Michael STOBBER: Q107. And for people involved in the Clemenza investigation, when would they have taken this?

Jocelyn FORTIN: They would have been trained in Ottawa.

Justice Michael STOBER: Q108. [REDACTED]

Jocelyn FORTIN: Uh..., out... I... would have to verify that information, maybe for... for some logis... logistic sometime if I had room for students in Vancouver uh... then people would travel to Vancouver and take the training there. But, from my recollection I would say that the people from Montreal have been trained in Ottawa.

Justice Michael STOBER: Thank you.

Maître Anil KAPOOR: Q109. And just to be clear on this, the training that took place in Ottawa, for those operators who were on Clemenza, did that training involved any practical deployment of the MDI in the community?

Jocelyn FORTIN: Psst... the... the one that were not the ride alongs?

Maître Anil KAPOOR: Q110. Yes.

Jocelyn FORTIN: Uh... yes, that would involve the deployment uh...

Maître Anil KAPOOR: Q111. In the community?

Jocelyn FORTIN: In the community or, and I'll have to... and again, we were trying to limit the... the places so, I know the [REDACTED]
[REDACTED]
[REDACTED] I... I remember we asked permission to conduct or run the equipment over there.

Maître Anil KAPOOR: Q112. And, it... and is it... I just want... I want to understand exactly the scope of it, so, those Clemenza invest... uh... operators who obtained their training in Ottawa, for those, were there practical sessions when the MDI was deployed as I say, in the community?

Jocelyn FORTIN: They could have been, I don't remember who exactly took the training uh... [REDACTED] and who took the... the training that I gave.

Maître Anil KAPOOR: Q113. All right.

Jocelyn FORTIN: Because we... when I was giving it we were not going on except those location that I mentioned.

Maître Anil KAPOOR: Q114. That you described, [REDACTED]

Jocelyn FORTIN: Yes, yes.

Maître Anil KAPOOR: Q115. [REDACTED]

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q116. And today, when there's practical training on the MDI for future operators or students as I say, is the MDI being deployed in the community?

Jocelyn FORTIN: I have not give any training for a long period.

Maître Anil KAPOOR: Q117. OK.

Jocelyn FORTIN: The last operators that we uh... we had, we sent them directly [REDACTED]

Maître Anil KAPOOR: All right.

Justice Michael STOBER: Q118. What about the part that involves the [REDACTED] aspects, which is why you [REDACTED] when there was training at [REDACTED] you could train the [REDACTED] uh... with [REDACTED]
[REDACTED]

Jocelyn FORTIN: I'm sorry, I missed the...

Justice Michael STOBER: Q119. The [REDACTED] The future operators who take training only from [REDACTED] am I wrong there?

Jocelyn FORTIN: Uh... the peo... that didn't happen on... it only hap... the people that [REDACTED] usually are the... what we call the train... the... the trainers that would help me...

Justice Michael STOBER: Q120. I see.

Jocelyn FORTIN: Or the master that we have in each division.

Justice Michael STOBER: Q121. Not new students.

Jocelyn FORTIN: But new students it, uh... it... I only happen once and that was I believe in February. We s... we put on a, uh... they [REDACTED] and they sent their student directly [REDACTED] so I was not involved in that training process.

Justice Michael STOBER: Q122. But was there a [REDACTED] for those students?

Jocelyn FORTIN: [REDACTED] they were trained by the operator in BC uh... in Edmonton in this case. [REDACTED]
[REDACTED]
[REDACTED] So it was either we were pulling the equipment back from the field so I can prepare the training or we would send those operators [REDACTED]

(Shuffling of paper)

Justice Michael STOBER: Go ahead.

Maître Anil KAPOOR: Q123. So, given your experience, which you outlined for his Lordship, you understand because you were involved in the investigation on Clemenza, you conducted some sessions, did you not?

Jocelyn FORTIN: That's correct.

Maître Anil KAPOOR: Q124. All right. So you understand that there was a warrant issued uh... that would permit you to employ the MDI in Clemenza.

Jocelyn FORTIN: That's correct.

Maître Anil KAPOOR: Q125. Were you involved at all in assisting in the information to obtain the... the portion that dealt with the MDI?

Jocelyn FORTIN: Not sure I... I understand correctly...

Maître Anil KAPOOR: Q126. Sorry, forgive me it was... it was...

Jocelyn FORTIN: Yes...

Maître Anil KAPOOR: Q127. Ineligibly phrased. The um... information to obtain, you know what that is?

Jocelyn FORTIN: So the grounds to obtain it, like it... wh... what the file's about and stuff like that?

Maître Anil KAPOOR: Q128. OK. Let me start back, do you understand...

Jocelyn FORTIN: OK.

Maître Anil KAPOOR: Q129. Do you know what the phrase, "information to obtain means"?

Jocelyn FORTIN: Yes, "information to obtain", I'm just non't (PH) know... don't know which information you're talking about.

Maître Anil KAPOOR: Q130. OK, so we know, w... w... you know what it is? What... what an "information to obtain is"?

Jocelyn FORTIN: I'm not sure. _____

Maître Anil KAPOOR: Q131. An affidavit?

Jocelyn FORTIN: OK.

Maître Anil KAPOOR: Q132. You understand...

Jocelyn FORTIN: Yeah, yeah, yes. yes.

Maître Anil KAPOOR: Q133. You need to have an affidavit to get a warrant.

Jocelyn FORTIN: Yes, yes.

Maître Anil KAPOOR: Q134. You understand that?

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q135. All right. That's... that's really that's all what it refers to.

Jocelyn FORTIN: OK.

Maître Anil KAPOOR: Q136. OK? In the affidavit there are passages that deal with the MDI.

Jocelyn FORTIN: That's correct.

Maître Anil KAPOOR: Q137. Were you involved in drafting those?

Jocelyn FORTIN: I have been consulted on the draft of those but uh... yes, that would be my involvement.

Maître Anil KAPOOR: Q138. All right, so... you, I'm talking about Clemenza, OK, the warrants on Clemenza.

(Clearing of throat)

Jocelyn FORTIN: OK.

Maître Anil KAPOOR: Q139. And I want to direct you mind to whether or not you assisted the affiant, the person who swore the affidavit, whether you assisted that person in drafting the paragraphs that relate to the MDI?

Jocelyn FORTIN: No, I didn't.

Maître Anil KAPOOR: Q140. Did you... Did you review those paragraphs prior to the execution of the affidavit?

Jocelyn FORTIN: Yes, I did.

Maître Anil KAPOOR: Q141. And for what purpose did you review it?

Jocelyn FORTIN: Because sometimes they... they differ from, uh... location to location. It's supposed to be a set template that has been issued by our policy center or people or, upper management and like I said I don't deal with policies, I would be consulted on the technical side.

Maître Anil KAPOOR: Q142. Uh-huh.

Jocelyn FORTIN: But when I operate the equipment, I always read it because I want to know uh... what are the limitation of the equipment and I've been on operation where the warrant was signed but the judge asked that the data would be destroyed after the collection was done. So that's, was kind of odd but that's the type of thing that could happened in those.

Justice Michael STOBER: But uh...

Maître Anil KAPOOR: My, my question was... sorry.

Jocelyn FORTIN: Yeah.

Justice Michael STOBER: Q143. Just a comment, were you... because you were asked if you reviewed the affidavit prior to execution, did you review the affidavit before it was presented to the judge?

Jocelyn FORTIN: Before it was presented to the judge? No.

Justice Michael STOBER: Q144. When did you see the affidavit?

Jocelyn FORTIN: Before I operate the equipment.

Maître Anil KAPOOR: All right.

Justice Michael STOBER: Go ahead.

Maître Anil KAPOOR: Q145. Thank you. So you did not review the affidavit for accuracy or completeness prior to it being provided to the judge?

Jocelyn FORTIN: No, that wouldn't be my job.

Maître Anil KAPOOR: Q146. OK. And despite your experience and your knowledge, no one came to you and asked you to look at it, did they?

Jocelyn FORTIN: Before they provided it...?

Maître Anil KAPOOR: Q147. That's right?

Jocelyn FORTIN: I'm not dealing with the policies.

Maître Anil KAPOOR: Q148. No, no, no. I... I didn't ask you whether you... You see, you answered the question about whether or not...

Jocelyn FORTIN: OK...

Maître Anil KAPOOR: Q149. You deal with policies. That wasn't the question I asked. The question I asked was, "No one asked you to look at the affidavit prior to its presentment to the judge?"

Jocelyn FORTIN: Not to my recollection.

Maître Anil KAPOOR: Q150. Search your memory, take a moment.

Jocelyn FORTIN: I don't have the... I... I... I couldn't answer.

Maître Anil KAPOOR: Q151. You have no recollection of doing it?

Jocelyn FORTIN: I have no recollection of doing it.

Maître Anil KAPOOR: Q152. And is it fair to stay that your recollection is you did not do it?

Jocelyn FORTIN: That wouldn't be true.

Maître Anil KAPOOR: Q153. OK.

Jocelyn FORTIN: It... I... I don't know if I've done it or not.

Maître Anil KAPOOR: Q154. Have you ever done it?

Jocelyn FORTIN: It would have happened.

Maître Anil KAPOOR: Q155. Prior to presentment to the judge?

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: OK. So...

Justice Michael STOBER: Q156. If you did... if you did review it would you have noted that somewhere?

Jocelyn FORTIN: Wh... what happen is, sometimes I would receive an email, and... they would say that's what we're gonna send for application so, I would see it, sometimes I would read it but I would pass it along to the police officer, the... the regular member that is in charge of our policy.

Justice Michael STOBER: Q157. All right. Did you get an email in this case to look it over?

Jocelyn FORTIN: Not that I can remember and, uh... I can certainly look into my emails but I don't remember receiving this.

Justice Michael STOBER: Go ahead.

Maître Anil KAPOOR: Q158. I just want your evidence to be clear sir, faithful to your recollection. You've indicated to his Lordship and in response to me that you did not review the affidavit prior to presentment, do you remember giving that evidence?

Jocelyn FORTIN: I don't remember reading the affidavit before it went, before, uh... it to be signed. I don't remember.

Maître Anil KAPOOR: Q159. OK, so that's... that's your evidence?

Jocelyn FORTIN: That's... that's my affirmation.

Maître Anil KAPOOR: Q160. All right. Um... and I take it that you don't have an independent recollection of what those paragraphs were in the affidavit, do you?

Jocelyn FORTIN: Psst... I would not...

Maître Anil KAPOOR: Q161. OK...

Jocelyn FORTIN: But I... I would have to, re-read them.

Maître Anil KAPOOR: Q162. Um... one thing I just... I forgot to ask on the training just very briefly, on the week long training that you provide for your potential operators or students...

Jocelyn FORTIN: Uh-huh.

Maître Anil KAPOOR: Q163. Um... I take it you do that yourself, there's [REDACTED] with you?

Jocelyn FORTIN: That's correct.

Maître Anil KAPOOR: Q164. And, is there an exam administered at the end?

Jocelyn FORTIN: It's not an exam but it's a technical task. So, you can call it a practical exam.

Maître Anil KAPOOR: Q165. OK. But not a written exam?

Jocelyn FORTIN: Not a written....

Maître Anil KAPOOR: Q166. They're... they're just required to go through certain tasks to demonstrate a level of proficiency with the machine.

Jocelyn FORTIN: That's correct.

Maître Anil KAPOOR: Q167. All right. Um... also yesterday we talked briefly about your email traffic [REDACTED] remember those convers... that conversation we had?

Jocelyn FORTIN: Yes, I do.

Maître Anil KAPOOR: Q168. Um... and you... y... you're aware of various levels of secrecy protection that the government employs uh... in your business?

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q169. So, for example, f... firstly, are you top secret cleared?

Jocelyn FORTIN: Yes, I am.

Maître Anil KAPOOR: Q170. All right. So you know the classification of protected?

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q171. What does that mean to you?

Jocelyn FORTIN: Well there's different level of protection and I would have to uh... I was not prepared to...

Maître Anil KAPOOR: Q172. All right. So you know that there's a classification of information that is protected?

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: Q173. All right. You under... you understand that that means that you protect information where the unauthorized disclosure could reasonably be expected to cause injury to a non-national interest. You understand that?

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q174. There's another classification called protected A. Are you familiar with that?

Jocelyn FORTIN: Yes.

Justice Michael STOBER: What was the first one, sorry?

Maître Anil KAPOOR: Just simply protected.

Justice Michael STOBER: Protected, OK.

Maître Anil KAPOOR: Q175. OK. The next one I want to canvas your knowledge of is protected A. You're familiar with that notion?

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q176. And you'll agree with me that protected A, is to protect the information, the release of which could cost injury to an individual, organization or government.

Jocelyn FORTIN: That's correct.

Maître Anil KAPOOR: There's then another protective level.

Justice Michael STOBER: Could you repeat that again, protect information that could cause...

Maître Anil KAPOOR: Injury to an individual, organization or government.

Justice Michael STOBER: Thank you.

Maître Anil KAPOOR: Q177. The next is, I want to, uh... uh... ask you about protected B. Like, "Bob", protected B.

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q178. And you're familiar with that notion?

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q179. And that requires you to protect information, the disclosure of which could cause serious injury to an individual, organization or government.

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: Q180. The next level I want to canvas your knowledge of is protected C. Like...

Jocelyn FORTIN: Yeah.

Maître Anil KAPOOR: Q181. Like, "Cathy or Caroline". Um... that will pro... require you to protect information dis... the disclosure of which could cause extremely grave injury to an individual, organization or government.

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: Q182. And the next one, to search your... my knowledge of... is classified, are you familiar with the "Classified" designation?

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q183. And that requires you to protect information, the unauthorized disclosure of which, could reasonably be inspected to cause injury to the national interest, defense and maintenance of the social, political and economic stability of Canada.

Justice Michael STOBER: Can you repeat that again, please?

Maître Anil KAPOOR: Certainly. The disclosure to... to protect information, the unauthorized disclosure of which, could reasonably be expected to cause injury to the national interest, defense and maintenance of the social, political and economic stability of Canada. You're familiar with that designation?

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q184. The next one I want to take your mind to is, "Confidential", you're familiar with that designation of the function (PH)?

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q185. And you'd agree with me that, that protects information, the disclosure of which would be injurious to the national interest.

Jocelyn FORTIN: OK.

Maître Anil KAPOOR: Q186. Do you agree with that?

Jocelyn FORTIN: Yeah.

Maître Anil KAPOOR: Q187. And there are two more, the s... the next one is secret. You're familiar with the "Secret" designation?

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q188. Which requires you to protect information, the disclosure of which, would cause serious injury to the national interest.

Jocelyn FORTIN: OK.

Maître Anil KAPOOR: Q189. Agree with that?

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q190. And you... you're aware of that?

Jocelyn FORTIN: I'm aware of it, but...

Maître Anil KAPOOR: Q191. Right. And you're aware of... I didn't ask you if... huh... beyond whether you're aware or not. You're aware of all the other designations we canvassed already. Are you aware of the other designations we canvassed already?

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: All right. The last one I want to take you to is, "Top Secret".

Justice Michael STOBBER: Just before you do "Top Secret", um... "Confidential" is protection of information, the disclosure of which would be injuries to the national interest, is that right?

Maître Anil KAPOOR: Correct.

Justice Michael STOBBER: And "Secret", is protection of information disclosure of which would...

Maître Anil KAPOOR: Cause serious injury... to the national interest.

Justice Michael STOBBER: All right, go ahead.

Maître Anil KAPOOR: Q192. And the final one is, "Top Secret".

Jocelyn FORTIN: Just, just a...

Maître Anil KAPOOR: Q193. Are you familiar with "Top Secret"?

Jocelyn FORTIN: Your honor? Um, I'm a visual person and right now if I don't have the visual support, all the topics that are mentioned by Mr. Kapoor right now, I cannot remember, I cannot... they're all mixed up, right now so...

Maître Anil KAPOOR: Q194. I... I think I have it...

Jocelyn FORTIN: I would need s... sup... sup... a visual support...

Maître Anil KAPOOR: I think I have it in a visual form if your Lordship would allow me to uh...

Justice Michael STOBER: Q195. OK, while he... while he's looking, you've already indicated that you're aware of... the different designations that he's... asked you. For example, "Protected, Protected B like, "Bob", Protected C like, "Charles", Classified, Confidential and Secret".

Jocelyn FORTIN: Correct.

Justice Michael STOBER: Q196. So, somebody who has "Top Sec..." clear... "Top Secret" clearance who, who's function is what you've described to this court, uh... would be aware of these classifications?

Jocelyn FORTIN: Correct.

Justice Michael STOBER: Q197. So you're aware of what they are?

Jocelyn FORTIN: I'm aware of what they are, but I would have to read the definition again to...

Justice Michael STOBER: Q198. All right...

Jocelyn FORTIN: If you ask me a particular document in which classification it... it ends up...

Justice Michael STOBER: Q199. Right.

Jocelyn FORTIN: I'm not gonna be able to answer if I don't have...

Justice Michael STOBER: Q200. All right, so...

Jocelyn FORTIN: The support.

Justice Michael STOBER: Uh... in case there's a clarification you wish to make to your previous answers, Maître Kapoor will see is... if he has it he could show it to you, go ahead.

Maître Anil KAPOOR: Q201. Let me, let me try this, the last one sir, is "Top Secret".

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q202. OK. And that requires, um... or prohibits the disclosure of information which would... which would be... cause exceptionally grave injury to the national interest. You're familiar with that?

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q203. All right. And this, these are all forms of protection of information that you learned about when you obtained your "Top Secret" clearance?

Jocelyn FORTIN: That's correct.

Maître Anil KAPOOR: Q204. And these are all forms of um... of uh... protection that you occasionally have to refresh when you have your "Top Secret" clearance renewed.

Jocelyn FORTIN: I don't remember having to refresh my clearance.

Maître Anil KAPOOR: Q205. And, I take it, you've been "Top Secret" cleared s... shortly after you joined, Special "I".

Jocelyn FORTIN: I was "Top Secret" clear when I was with Industry Canada.

Maître Anil KAPOOR: Q206. So even... even further back?

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q207. So that was what, 2002?

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q208. OK. So you're well schooled and trained in how to protect information.

Jocelyn FORTIN: I have been trained on it.

Maître Anil KAPOOR: Q209. OK.

Jocelyn FORTIN: But I'm dealing with the technical aspects...

Maître Anil KAPOOR: Q210. Yes, no I understand that. But part of your technical... the technical part of your job, or sorry... part of your job is technical, but it concerns sensitive information.

Jocelyn FORTIN: That's correct.

Maître Anil KAPOOR: Q211. So for example, [REDACTED]
[REDACTED] You're... y... you understand that, right?

Jocelyn FORTIN: To try to understand the level [REDACTED]

Maître Anil KAPOOR: Q212. So am I, but...

Jocelyn FORTIN: No, but... to me [REDACTED] in the middle...

Maître Anil KAPOOR: Q213. Uh-huh.

Jocelyn FORTIN: And they have a product.

Maître Anil KAPOOR: Q214. Yes.

Jocelyn FORTIN: And... that product has been [REDACTED]

Maître Anil KAPOOR: Q215. OK.

Jocelyn FORTIN: So, when you're talking about the [REDACTED]
[REDACTED]

Maître Anil KAPOOR: Q216. Yes.

Jocelyn FORTIN: I'm not sure if you're implying the [REDACTED]
in the background, or [REDACTED] as the basic level where the product that we're using is not involved.

Maître Anil KAPOOR: Q217. But let me just go to... you had all those emails that you filed um... but my question is relating [REDACTED]

Jocelyn FORTIN: OK.

Maître Anil KAPOOR: Q218. I... I'm... I'm focusing [REDACTED] Um... and I'm focusing... I, as I understand it. My colleagues are seeking to protect the fact of [REDACTED]
[REDACTED].. in so far as it deals with the MDI device. That's what I understood.

Jocelyn FORTIN: Yes, but...

Maître Anil KAPOOR: Q219. And, and so what...

Jocelyn FORTIN: You [REDACTED]

Maître Anil KAPOOR: Q220. I... uh... I'm not... I'm not asking you about [REDACTED] but [REDACTED]
[REDACTED]

Jocelyn FORTIN: You mentioned it, I don't know.

Maître Anil KAPOOR: Q221. Well, you s... you talked about some [REDACTED] that's the evidence we've heard.

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q222. Your colleague uh, F... Flynn said that.

Jocelyn FORTIN: OK.

Maître Anil KAPOOR: Q223. OK. So what I want to focus you though, this... [REDACTED] that you're... that you want to protect, the RCMP wants to protect, um... you're dealing with technical information that reveals [REDACTED]
[REDACTED]

Jocelyn FORTIN: That's correct.

Maître Anil KAPOOR: Q224. OK. And none of it was subject to any of the classifications we've talked about.

Jocelyn FORTIN: When I send those email internally, I would use "Entrust", which is I believe...

Justice Michael STOBER: Q225. You used what, sorry?

Maître Anil KAPOOR: Sorry...

Jocelyn FORTIN: "Entrust Encryption"...

Maître Anil KAPOOR: Q226. Sorry, I didn't... I didn't ask you about internal emails you sent. I asked you about whether the emails were impressed with this level of confidentiality. That was the question.

Jocelyn FORTIN: That is the question but to fully answer the question...

Maître Anil KAPOOR: Lord, I'd ask you to direct the witness to answer the question, please?

Justice Michael STOBER: Q227. OK, uh... yesterday, M... Mr. Fortin, you were asked questions with respect to various emails between yourself and [REDACTED] Mr. Desjardins uh... among others. Um... do you recall that?

Jocelyn FORTIN: I recall that.

Justice Michael STOBER: OK, and um... you've had "Top uh, Secret" clearance since 2002. You've already indicated that you were aware of all the classifications um... in the Canadian government, "Protected, Protected B, Protected C, Classified, Confidential, Secret and Top Secret". They've been read to you, I believe they were shown to him on a computer screen?

Maître Anil KAPOOR: I did, but I can't show it to him if he won't...

Justice Michael STOBER: Q228. It can be showed to you on a computer screen, but you're familiar with the titles of the different um... "Protected" uh... designations issued by the federal government. Correct?

Jocelyn FORTIN: Correct.

Justice Michael STOBER: Q229. So, what the lawyer's asking you is the following. You... you've testified that there's an attempt to protect [REDACTED] about the obtaining of the MDI device. Correct?

Jocelyn FORTIN: Correct.

Justice Michael STOBER: Q230. It's part of the reason why we're here.

Jocelyn FORTIN: Yes.

Justice Michael STOBER: Q231. Um... and in the context of the Crown, which includes the RCMP's request to have these techniques privileged including the MDI, the type of MDI, the manufacturer, the features, etc... Um, Mr. Kapoor's asked you questions about various emails that went back and forth, that were presented yesterday and that have been filed in evidence. So now, he's asking you questions with respect to these emails uh... if they had any of these protection, "Protection A, B"... there is no A, "Protection, protection B, C, Classified, Confidential, Secret and Top Secret". That's what he's asking you, and they weren't. Why not? Because the contents of the emails uh... the RCMP and the Crown are attempting to keep confidential. Do you understand...?

Jocelyn FORTIN: Yes.

Justice Michael STOBER: Q232. What I am saying to you?

Jocelyn FORTIN: Yes.

Justice Michael STOBER: All right, so... with that in mind uh, Maître K... Kapoor, please continue your questions.

Maître Anil KAPOOR: Yes.

Justice Michael STOBER: And I'm gonna asking you to answer his questions as best you can. Thank you.

Maître Anil KAPOOR: So, none of those emails...

Maître Alexis GAUTHIER: I'm... I'm sorry, uh... I'm sorry. Uh, I... I think that Mr. Fortin would want to... to make a comment about what you've just said. He would have something to add, and to the questions of Mr. Kapoor...

Justice Michael STOBER: Well, how do you know that?

Maître Alexis GAUTHIER: Well, he was just on the verge of saying something when Mr. Kapoor was resuming his questioning. So I would... I would ask...

Justice Michael STOBER: OK...

Maître Alexis GAUTHIER: The Court to let Mr. Fortin make this comment if... if it's possible.

Maître Anil KAPOOR: L... I... I... I... let... let me ask the question. I'm gonna give you an opportunity to say what you want to say, sir. I don't mean to be unfair to you I'm notwithstanding (PH) the reaction from my colleagues.

Justice Michael STOBER: Just... just before you do that uh, Maître Kapoor. Uh, Maître Gauthier we're in a cross-examination here, and uh... I asked the witness if he understood the context and the background of the questions upon a request from the Amacus, for the Court to direct the witness. I did that. Um... you've asked your question in Examination in Chief. Maître Kapoor is now asking questions and the witness can answer. If there's

something you wish to address and redirect, we will do so. Please continue.

Maître Anil KAPOOR: Q233. Thank you. So, none of those emails had any of these designations that we've just canvassed. Correct?

Jocelyn FORTIN: That's correct.

Maître Anil KAPOOR: Q234. All right. Now you... I understand that you had some internal email correspondence with your colleagues at the RCMP.

Jocelyn FORTIN: That's correct.

Maître Anil KAPOOR: Q235. And it's your position that those were transmitted over an internal email server.

Jocelyn FORTIN: Yes, and that would be using "Entrust Encryption".

Maître Anil KAPOOR: Q236. Right. So, your position is that the internal emails are encrypted and can't be determinant or sorry, can't be hacked into sort of speak. Is that your position?

Jocelyn FORTIN: I'm not saying they cannot be hacked into.

Maître Anil KAPOOR: Q237. Oh, I see.

Jocelyn FORTIN: Because they're only... I believe uh... protected up to protected A. Psst... an Entrust certificates are used and issued for the RCMP mailing system and cannot be issued to third party outside the RCMP.

Maître Anil KAPOOR: _____...

Justice Michael STOBER: Q238. So... so what you're saying is the... the "Entrust" is it "Entrust", E-n-t-r-u-s-t?

Jocelyn FORTIN: Correct.

Justice Michael STOBER: Q239. OK, so that's for an internal email if you send uh... an email to police officer Desjardins.

Jocelyn FORTIN: Correct

Justice Michael STOBER: Q240. It has an additional level of protection.

Jocelyn FORTIN: That we could use.

Justice Michael STOBER: Q241. Yeah, and did you?

Jocelyn FORTIN: Most of the emails are pertinent, sometimes it could happen, we would not use it but... when it's very sensitive information I would certainly always use the encryption.

Justice Michael STOBER: Q242. Right. So the emails that were presented yesterday, where any of those entrusted?

Jocelyn FORTIN: The emails were sent [REDACTED] from what I recall.

Justice Michael STOBER: Q243. No, but emails between you and Desjardins, there are some?

Jocelyn FORTIN: Yes, I would have to verify that information, but I would have, I would have encrypted them.

Justice Michael STOBER: All right.

Maître Anil KAPOOR: Q244. How could you verify it? How...? Sorry forgive me, how would you verify it?

Jocelyn FORTIN: Because when I open my mailing archive...

Maître Anil KAPOOR: Q245. Uh-huh.

Jocelyn FORTIN: They will still be encrypted and I would need my access card and a password to be able to read them.

Maître Anil KAPOOR: Q246. Uh-huh. So it's not apparent on the document filed, is that what you're saying?

Jocelyn FORTIN: I don't think it would be apparent on the document.

Maître Anil KAPOOR: Q247. Um... so, you may have encrypted the internal emails.

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: Q248. All right. But you know, don't you! It was part of your training as a... you've had "Top Secret" clearance. You know that when dealing with sensi...

11:58 hrs

Maître Anil KAPOOR: _____ information that leaves the RCMP, there's a way to do it securely. Right? Are you aware of that?

Jocelyn FORTIN: I'm not sure which system you are talking about?

Maître Anil KAPOOR: Q249. But, uh... do you know whether there's a way to deliver information out of the RCMP, securely?

Jocelyn FORTIN: To who?

Maître Anil KAPOOR: Q250. Just... do you know if there's a way?

Jocelyn FORTIN: There are ways.

Maître Anil KAPOOR: Q251. All right.

Jocelyn FORTIN: But, if I can explain.

Maître Anil KAPOOR: Q252. No... Sir, let me just... let me just ask you a question...

Jocelyn FORTIN: I... I would like to explain...

Maître Anil KAPOOR: Q253. Let me just ask you the question. There are ways, right? Would you agree with that?

Jocelyn FORTIN: There are ways...

Maître Anil KAPOOR: Q254. To deliver information securely out of the RCMP?

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q255. All right.

Jocelyn FORTIN: But...

Maître Anil KAPOOR: Q256. One way is, you could use it t... you could use the equ... the equivalent of a dip bag. You know what a dip bag is?

Jocelyn FORTIN: No.

Maître Anil KAPOOR: Q257. OK. You don't know that. Hum, in terms of electronic, communications, are you aware of any secure ways to deliver it outside of the RCMP?

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q258. All right. And can you tell me what you understand those ways to be?

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q259. Then, please tell me what they are.

Jocelyn FORTIN: If we're communicating with other agency, we have a higher protected system called "[REDACTED] (PH)".

Maître Anil KAPOOR: Q260. Yes.

Jocelyn FORTIN: That we use to send emails with a high level of protection. But if we want to use and communicate with partners that are not on that [REDACTED] (PH) system, the only way to encrypt a document, that was approved by the RCMP...

Maître Anil KAPOOR: Q261. Uh-huh.

Jocelyn FORTIN: At that date...

Maître Anil KAPOOR: Q262. Uh-huh.

Jocelyn FORTIN: Was the Entrust system.

Maître Anil KAPOOR: Q263. Uh-huh.

Jocelyn FORTIN: There was other ways to encrypt, like PGP.

Maître Anil KAPOOR: Q264. Yes.

Jocelyn FORTIN: But the PGP is not approved to be used by the RCMP mailing system.

Maître Anil KAPOOR: Q265. Uh-huh.

Jocelyn FORTIN: And you cannot install PGP. So if you want to communicate with a third party via emails, you would not be able to use encryptions or protect your email.

Maître Anil KAPOOR: Q266. All right. So your point is, that you cannot protect email correspondence [REDACTED] is that your point?

Jocelyn FORTIN: My point is, I didn't have the technical, uh... options to be able to protect it.

Maître Anil KAPOOR: Q267. Right.

Jocelyn FORTIN: But if we go back to the emails that we were... we looked yesterday...

Maître Anil KAPOOR: Q268. Uh-huh.

Jocelyn FORTIN: You can see that a lot of emails that were returned were, "Sorry I missed your call, following your call". Most of the stuff that I was dealing with [REDACTED] I was trying to do it on the phone when it was sensitive.

Justice Michael STOBBER: Q269. Which... which phone, do you remember?

Jocelyn FORTIN: Regular phone.

Maître Anil KAPOOR: Q270. Just a regular landline?

Jocelyn FORTIN: Regular landline.

Maître Anil KAPOOR: Q271. So you weren't using a Sturges phone or anything secure communications?

Jocelyn FORTIN: No, because that would need them to have secure phone. And I can't have a secure phone with all the manufacturer and, uh... person that I deal with.

Maître Anil KAPOOR: Q272. But these folks are [REDACTED]

Jocelyn FORTIN: I'm dealing with [REDACTED] to get the equipment, I'm not dealing with the... [REDACTED]

Maître Anil KAPOOR: Q273. No, no, no but, [REDACTED] you know that.

Jocelyn FORTIN: What do you mean, it's [REDACTED]

Maître Anil KAPOOR: Q274. [REDACTED]
[REDACTED]
[REDACTED] you know that.

Jocelyn FORTIN: They manufacture...

Maître Anil KAPOOR: Q275. Or maybe you don't know that.

Jocelyn FORTIN: I know they, they have... [REDACTED]

Maître Anil KAPOOR: Q276. OK, um...

Jocelyn FORTIN: But it's not [REDACTED]

Maître Anil KAPOOR: Q277. OK. But you're having... certainly [REDACTED] concerned about this, are they? They're sending you open emails, right?

Jocelyn FORTIN: They're sending me open emails?

Maître Anil KAPOOR: Q278. So for example, exhibit 32.16.

Jocelyn FORTIN: Let... let... let me rephrase that.

Maître Anil KAPOOR: Q279. To...

Jocelyn FORTIN: Let me rephrase that. They're sending emails, but they have [REDACTED]
[REDACTED] They won't use [REDACTED]
[REDACTED] So they are... [REDACTED]
[REDACTED]
uh...

Maître Anil KAPOOR: Q280. Sorry, is that in these emails?

Jocelyn FORTIN: No.

Maître Anil KAPOOR: Q281. Oh, so then what are you referencing, something else that we've not talked about? Let me show you 32.16.

Jocelyn FORTIN: Yeah.

Maître Anil KAPOOR: Q282. You'll agree with me that references, this is from [REDACTED]

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q283. Just to let you know, [REDACTED]

Jocelyn FORTIN: Correct...

Maître Anil KAPOOR: Q284. And we're [REDACTED] That's what it says, right?

Jocelyn FORTIN: I'm talking three days, because of the...

Maître Anil KAPOOR: Q285. But I'm not though, I'm asking about 32.16.

Jocelyn FORTIN: OK... Sure.

Maître Anil KAPOOR: Q286. That's what it says, right?

Jocelyn FORTIN: That's what it says.

Maître Anil KAPOOR: Q287. All right. So this concept [REDACTED] in relation [REDACTED] is passing over via public email system. Can we agree on that sir?

Jocelyn FORTIN: That is... that is correct.

Maître Anil KAPOOR: Q288. All right, good. Now, did I get this wrong...? I may have gotten this wrong 'cause I can't take notes while I'm asking the questions. But did you say yesterday, and I may have gotten this wrong, that... that the concept [REDACTED]

Jocelyn FORTIN: To my knowledge, that's not public.
(Shuffling of paper)

Maître Anil KAPOOR: Q289. To show you a document sir, it's from uh... treasure trove (PH) of information called "Wikipedia".

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: A copy for your Lordship. And I don't know if uh... Lord, whether you're taking a separate exhibited copy, but I have one for your markup and one for an exhibited copy. So...

Justice Michael STOBER: OK, I think uh... as far as that's concerned, I think I had mentioned it to Maître Gauthier there should be a separate list of... of package of documents for the, uh... court. Now, I'm not doing it and I'm looking at my documents so perha... perhaps Maître Godbout, do you have this?

Maître Marie-Christine GODBOUT: We have one, so if my colleague had the... to be marked-up copy, maybe I could take it...

Jocelyn FORTIN: Sir...

Maître Marie-Christine GODBOUT: And put it in our...

Jocelyn FORTIN: Thank you.

Maître Marie-Christine GODBOUT: In our file.

Justice Michael STOBER: So we'll just mark uh... mark the number...

Maître Marie-Christine GODBOUT: Thank you, Maître Kapoor.

Justice Michael STOBER: Of the exhibit and the date of this file, and uh...

Maître Marie-Christine GODBOUT: We will.

Justice Michael STOBER: By whom, if you haven't done it already.

Maître Marie-Christine GODBOUT: We'll provide a listing.

Justice Michael STOBER: And uh... it's fine. So this will be the 32 point...

Maître Anil KAPOOR: 25 by my count. I don't know if that's correct or not.

Justice Michael STOBER: 25. Maître Godbout, is that right?

Maître Marie-Christine GODBOUT: It is.

Justice Michael STOBER: Thank you. Go ahead.

Maître Anil KAPOOR: Q290. All right. Now sir, I just... I want... this is something from [REDACTED] it's about [REDACTED] you see they had the... psst... uh... title there, sir?

Jocelyn FORTIN: Uh-huh.

Maître Anil KAPOOR: Q291. And you'll see at the bottom of the first page, and forgive me my Lord, these pages aren't numbered. Hum... [REDACTED] Do you see that, sir?

Jocelyn FORTIN: Yes, I do.

Maître Anil KAPOOR: Q292. And then, you'll see that [REDACTED]

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q293. And the first is, [REDACTED] Do you see that, sir?

Jocelyn FORTIN: Yeah.

Maître Anil KAPOOR: Q294. OK. And then there are other things that are listed there, some things which are not... which your device didn't do. [REDACTED] your device did not do that. Am I correct?

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: Q295. Uh... for example, [REDACTED] Correct?

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: Q296. Hum... [REDACTED]
[REDACTED]

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: Q297. All right. But certainly [REDACTED] data is something that your device did do.

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: Q298. All right. And then I want to move you down, passed the [REDACTED]
[REDACTED] So you'll see then, the description [REDACTED]
[REDACTED] do you see that heading?

Jocelyn FORTIN: Yeah.

Maître Anil KAPOOR: Q299. All right. So when you read this... just take a moment to read this paragraph, um... then I'll ask you a couple questions about it sir, let me know when you've done uh... reading it.

Jocelyn FORTIN: I'm done.

Maître Anil KAPOOR: Q300. Thank you. So, this describes um... [REDACTED] in so far as it describes [REDACTED]
[REDACTED]

Jocelyn FORTIN: So...

Maître Anil KAPOOR: Q301. Is that correct?

Jocelyn FORTIN: Are we talking about the [REDACTED] or we're talking what the actual device can actually do?

Maître Anil KAPOOR: Q302. I'm talking about the language that's used here, under [REDACTED] And I'm suggesting to you that it describes [REDACTED] and [REDACTED] That's what I'm suggesting to you.

Jocelyn FORTIN: That's the definition that is written [REDACTED]

Maître Anil KAPOOR: Q303. Right. But what I'm saying to you though is, that is also what your device did.

Jocelyn FORTIN: That's also how we use the device.

Maître Anil KAPOOR: Q304. Right, it actually [REDACTED]

Jocelyn FORTIN: We used it in [REDACTED]

Maître Anil KAPOOR: Q305. Right. But it does, I mean, what's the difference between saying, [REDACTED] and "we used it in [REDACTED] [REDACTED]? I mean if... if I'm missing something about the particulars about that, please let me know.

Jocelyn FORTIN: The [REDACTED] right now, you have nothing listed there that it could collect [REDACTED]
[REDACTED]
[REDACTED] This is not listed here [REDACTED]

Maître Anil KAPOOR: Q306. Sorry, m... for a moment, I'm focusing [REDACTED]
[REDACTED] If I didn't make that clear, I was directing your mind on
the [REDACTED] 'Cause as I
understand it, [REDACTED] used in this case, and the
[REDACTED] not, is that correct?

Jocelyn FORTIN: That's correct.

Maître Anil KAPOOR: Q307. All right, so can we focus on [REDACTED] for a
moment?

Jocelyn FORTIN: Sure.

Justice Michael STOBER: Q308. OK, OK, just a moment Mr. Fortin has questions related to
[REDACTED] capabilities, he asked you to take the
time to read it, you said that you were... you were done, you're
ready.

Jocelyn FORTIN: OK, I...

Justice Michael STOBER: He wasn't asking you about [REDACTED] So, go ahead
with your question.

Maître Anil KAPOOR: Q309. Thank you. So, you... when you t... use the MDI, not in
your... in this case, I don't [REDACTED]
[REDACTED]
right?

Jocelyn FORTIN: That's correct.

Maître Anil KAPOOR: Q310. Or frequencies maybe, however you want to describe it,
right?

Jocelyn FORTIN: That's correct.

Maître Anil KAPOOR: Q311. OK. [REDACTED]
[REDACTED]

Jocelyn FORTIN: That's correct.

Maître Anil KAPOOR: Q312. So... so to the extent that this paragraph reveals that, it's
consistent with what you did in your case?

Jocelyn FORTIN: That would be consistent with... with what we did.

Maître Anil KAPOOR: Q313. Right. The... th... there were some differences and we're
gonna get to the differences as we get along in this piece (PH),
all right. But what I want to mark for you is, what is the
commonality um... that's... that... that's available, when we talk
about [REDACTED]

Jocelyn FORTIN: OK.

Maître Anil KAPOOR: Q314. And the way [REDACTED] is described here, I mean
leaving aside [REDACTED] It accurately describes,
although perhaps not as completely, but accurately describes
what you did in employing [REDACTED] in this case.

Jocelyn FORTIN: Can I just...

Maître Anil KAPOOR: Q315. Yes...

Jocelyn FORTIN: Take a moment to uh...

Maître Anil KAPOOR: Q316. Ter... certainly, take your time.

Jocelyn FORTIN: Read? Thank you.

12:42:53 to 12:44:26 - (No conversation, shuffling of paper, sniffing and clearing of throat)

Jocelyn FORTIN: OK. Do you... do you want me to read the whole thing or just the portion?

Maître Anil KAPOOR: Q317. No, no, no, I just thought you'd... Sorry, you said you wanted to read... I'm sorry, to give you a moment to read it, so I was giving you a moment to read it.

Jocelyn FORTIN: OK.

Maître Anil KAPOOR: I don't, uh... the...

Justice Michael STOBER: You're still dealing [REDACTED] capabilities?

Maître Anil KAPOOR: Yes, I am. And...

Justice Michael STOBER: Q318. OK, just... just before you go on Mr. Fortin, _____ the document you have here, it's taken from the internet, [REDACTED] [REDACTED] The information contained in this document, were you aware that this was in the public domain, this material?

Jocelyn FORTIN: Yes, I was.

Justice Michael STOBER: All right, please continue.

Maître Anil KAPOOR: Q319. So to... so, you were aware that this description of [REDACTED] [REDACTED] was in the public domain?

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q320. All right. And so, when you testified yesterday or at some point, that [REDACTED] was not public, to be fair to you, you meant all the details of how the RCMP employs [REDACTED] in this investigation, is that what you meant?

Jocelyn FORTIN: Exactly.

Maître Anil KAPOOR: Q321. All right. But that distinction wasn't made in your affidavit was it?

Jocelyn FORTIN: Which part of the affidavit?

Maître Anil KAPOOR: Q322. Well the... the affidavit uh... well the affidavit doesn't [REDACTED]

(Shuffling of paper)

Jocelyn FORTIN: My affidavit is dealing with the technique that we used.

Maître Anil KAPOOR: Uh-huh.

Justice Michael STOBER: What was the affidavit marked as?

Maître Anil KAPOOR: Uh... 32... 30... 30... 32...

Maitre Alexis GAUTHIER: 14...

Maître Anil KAPOOR: 14.

Justice Michael STOBER: Q323. Can you refer to your affidavit, it's the document you filed yesterday; you were questioned on it, when you went through the paragraphs, some were red and some were black.

Jocelyn FORTIN: Yes.

Justice Michael STOBER: OK. Just to distinguish that from the affidavit you referred to earlier with Maître Kapoor.

Maître Anil KAPOOR: Thank you. Yes, thank you.

Justice Michael STOBER: _____.

Maître Anil KAPOOR: Q324. Thank you. All right, let's go to... back to the question. This description in this [REDACTED] under the heading [REDACTED] albeit, it is not a complete description of what you did. It only goes so far, but it's accurate to what you did. Correct?

Jocelyn FORTIN: This portion is accurate.

Maître Anil KAPOOR: Q325. That's what I'm saying just this portion is all...

Jocelyn FORTIN: Just this portion.

Maître Anil KAPOOR: Q326. It's all I'm taking it to.

Jocelyn FORTIN: OK.

Maître Anil KAPOOR: Q327. For example, the other stuff doesn't really matter. Like uh... [REDACTED] I mean that's none... that didn't happen in this case, right? [REDACTED] that didn't happen in this case, right?

Jocelyn FORTIN: That's correct.

Maître Anil KAPOOR: Q328. All right. So, as far as this goes, it is accurate to what you did?

Jocelyn FORTIN: That's correct.

Maître Anil KAPOOR: Q329. All right. You have no problem releasing language, like this... say that what you did [REDACTED] capabilities.

Jocelyn FORTIN: No, I would have a problem releasing that.

Maître Anil KAPOOR: Q330. OK, even though, even though it doesn't... I'm not asking for the other details that... that... that...

Jocelyn FORTIN: Yeah...

Maître Anil KAPOOR: Q331. That this does not reference.

Jocelyn FORTIN: Yeah.

Maître Anil KAPOOR: Q332. OK, good. Thank you.

(Shuffling of paper)

Jocelyn FORTIN: Just to make sure, I said I would not be comfortable, I would not release...

Maître Anil KAPOOR: Q333. Yes, you say, "you have a problem"...

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q334. Uh, "releasing that".

Jocelyn FORTIN: OK.

Justice Michael STOBER: Q335. Wait, so just to be more specific, the material [REDACTED] capabilities, you said that this material is the same as what's in your affidavit, 32.14, but notwithstanding that, and the fact that it's uh... that... and the fact that it's in a public domain, you have a problem releasing this information in your affidavit, is that right?

Jocelyn FORTIN: That is correct.

Maître Alexis GAUTHIER: Sir, _____ it's uh... 12:15, uh... we... we have I don't know how much time, how much longer my friend needs. Uh... but if he... he needs more time, maybe we could take eventually a break, this witness has...

Maître Anil KAPOOR: Yeah, sorry...

Maître Alexis GAUTHIER: Has... has started...

Maître Anil KAPOOR: Um... uh... I'm sorry, Mr. Fortin. Yes, if... if you need a break, j... uh... then just sort... yes, I'm happy to take a break, give the witness an opportunity to take a break.

Justice Michael STOBER: Do you need a break, sir?

Jocelyn FORTIN: I don't need a break, I just... ju... I'm just... would like to know, how much more time you... you... you think... it would be...

Justice Michael STOBER: Well, that's a question that I would ask.

Maître Anil KAPOOR: Well I'm...

Jocelyn FORTIN: Yeah, sorry, your Honor.

(Chuckles)

Justice Michael STOBER: You might be here for a long time, but if you need a break or if you're not comfortable, if you need to sit or you need a break for whatever reason, uh... you need something to drink, just say so, otherwise, we'll continue. If you need a break, we'll stop right now.

Jocelyn FORTIN: I don't need a break at this point.

Justice Michael STOBER: All right, when you do, please let me know and you'll have a break.

Jocelyn FORTIN: Thank you.

Justice Michael STOBER: But in any event, it's 12:15. We're not gonna on for that much longer.

Maître Anil KAPOOR: No.

Justice Michael STOBER: We'll be having one shortly.

Maître Alexis GAUTHIER: Thank you, sir.

Maître Anil KAPOOR: Thank you, my Lord.

Justice Michael STOBER: Go ahead.

Maître Anil KAPOOR: Q336. Um... so, I want to now turn your mind to [REDACTED] technique that you devised.

Jocelyn FORTIN: Yeah.

Maître Anil KAPOOR: Q337. And... (Clearing of throat) When you devised this technique, did you sort of test it out in the field [REDACTED]

Jocelyn FORTIN: You mean like, when you devise...

Maître Anil KAPOOR: Q338. Like you came up with the idea [REDACTED]

Jocelyn FORTIN: Yes, yes.

Maître Anil KAPOOR: Q339. OK. And what I'm wondering is, before you used it in an investigation, did you test it?

Jocelyn FORTIN: Yes, we tested it.

Maître Anil KAPOOR: Q340. And when you tested it, where did you test it, in the field on [REDACTED]

Jocelyn FORTIN: We tested [REDACTED]

Maître Anil KAPOOR: Q341. Cell phones, sorry. Um... but... but just so that I understand this technique though, I thought [REDACTED] a technique whereby you uh... I kind of may get this wrong, you uh... [REDACTED]

Jocelyn FORTIN: [REDACTED]

Maître Anil KAPOOR: Q342. [REDACTED] am I correct with that?

Jocelyn FORTIN: That would be correct.

Maître Anil KAPOOR: Q343. [REDACTED]

Jocelyn FORTIN: [REDACTED]

Maître Anil KAPOOR: Q344. Directly?

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q345. All right. [REDACTED]

Jocelyn FORTIN: I'm not sure I understand you.

Maître Anil KAPOOR: Q346. So in other words, it... when you [REDACTED]

Jocelyn FORTIN: Yes...

Maître Anil KAPOOR: Q347. The [REDACTED]

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q348. You're seeing not only [REDACTED]
[REDACTED]

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q349. And the trick here, is to [REDACTED]
[REDACTED]

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: Q350. And you want to [REDACTED]
[REDACTED]

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: Q351. And [REDACTED]

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: Q352. Right. So to accomplish that, after you [REDACTED]
[REDACTED]
[REDACTED]

Jocelyn FORTIN: Yes, but... I don't need to be... to be [REDACTED]
[REDACTED]

Maître Anil KAPOOR: Q353. OK.

Jocelyn FORTIN: [REDACTED]
[REDACTED]

Maître Anil KAPOOR: Q354. I see, OK.

Jocelyn FORTIN: But I could have [REDACTED]
[REDACTED]

Maître Anil KAPOOR: Q355. I see. So the chronology in... there's no magic in the
chronology here?

Jocelyn FORTIN: No.

Maître Anil KAPOOR: Q356. You could... you could [REDACTED]
[REDACTED]

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: Q357. I understand, OK. So when you did the test on these... so,
prior to using them in an investigation, when you tested it, uh...
do you recall when that was?

Jocelyn FORTIN: Psst... I don't recall when that was.

Maître Anil KAPOOR: Q358. Would it have been uh... like, certainly it was before
Clemenza?

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q359. And when you did test it, where did... did you test it in
the community?

Jocelyn FORTIN: No, I tested it at uh, [REDACTED] Prior (PH)...

Maître Anil KAPOOR: Q360. [REDACTED]

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: OK.

Justice Michael STOBER: Q361. Again, [REDACTED]

Jocelyn FORTIN: [REDACTED] yes.

Maître Anil KAPOOR: Q362. And that's what we described earlier as the control site?

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: Q363. OK. [REDACTED] I think you described it as...

Jocelyn FORTIN: An... [REDACTED]

Maître Anil KAPOOR: Q364. [REDACTED]

Jocelyn FORTIN: [REDACTED]

Maître Anil KAPOOR: Q365. OK. And have you done any testing on the... on the [REDACTED] That is to say, does it have any [REDACTED]? Uh... is there any uh... [REDACTED]? Has that been discussed at all, I mean uh... uh... examined at all?

Jocelyn FORTIN: [REDACTED]
[REDACTED]

Maître Anil KAPOOR: Q366. OK. Um... so, as a theoretical model, you don't see any... [REDACTED]

Jocelyn FORTIN: No.

Maître Anil KAPOOR: Q367. As a result [REDACTED]

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: Q368. Right, but it's not been studied particularly?

Jocelyn FORTIN: [REDACTED]
[REDACTED]

Maître Anil KAPOOR: Q369. But it's not been studied?

Jocelyn FORTIN: It's not been studied.

Maître Anil KAPOOR: Q370. OK. (Shuffling of paper) Um... very briefly bef... and we're coming up to 12:30, but very briefly, I want to talk about [REDACTED] that's referenced in your affidavit.

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: And my Lord, the paragraphs in... in his affidavit where he deals with this, uh... can be found at paragraphs 22 through to 27, and for clarity on the record it's um... uh, EP32.16.

Maître Alexis GAUTHIER: 14, sir.

Maître Anil KAPOOR: 14, sorry.

(Shuffling of paper and whispering)

Maître Anil KAPOOR: Q371. So... (Clearing of throat) This um... [REDACTED] that you've described and you've set out uh... I guess one version of [REDACTED] on paragraph 25, do you see that there?

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q372. This is publically available information, that is the... the [REDACTED] is all publically available.

Jocelyn FORTIN: [REDACTED]

Maître Anil KAPOOR: Q373. Yeah, so it's... it's all public domain. The part though, that you're concerned about, is that [REDACTED]

Jocelyn FORTIN: That's one concern.

Maître Anil KAPOOR: Q374. OK, what... wh... what... what's another concern?

Jocelyn FORTIN: [REDACTED]

Maître Anil KAPOOR: Q375. OK, the.. [REDACTED] sir.

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q376. All right, so not... sorry... huh... The fact of [REDACTED] [REDACTED] is what concerns you?

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: Q377. All right. But apart from that, your use of [REDACTED] [REDACTED] as a concept, is publically available?

Jocelyn FORTIN: [REDACTED]

Maître Anil KAPOOR: Q378. So protecting [REDACTED] [REDACTED] would meet your concern?

Jocelyn FORTIN: I'm not sure I...

Maître Anil KAPOOR: Q379. Protecting... let me rephrase that. If we were to protect only the [REDACTED] [REDACTED] that would meet your investigative technique concern?

Jocelyn FORTIN: The fact that I'm using that technique is what I would like to protect.

Maître Anil KAPOOR: Q380. So you say, the fact that you're using the [REDACTED] [REDACTED] is an investigative technique?

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q381. Although, I've understood from some of the publically available literature anyway, that... [REDACTED] [REDACTED] [REDACTED]

Jocelyn FORTIN: [REDACTED] [REDACTED]

Maître Anil KAPOOR: Q382. Uh-huh. So, so... in... in other words what I'm saying is, [REDACTED]
[REDACTED]

Jocelyn FORTIN: Uh-huh.

Maître Anil KAPOOR: Q383. [REDACTED]

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: Q384. Just like the use [REDACTED]

Jocelyn FORTIN: Yes, but the [REDACTED]

Maître Anil KAPOOR: Q385. No, no, no. I... I appreciate that.

Jocelyn FORTIN: OK.

Maître Anil KAPOOR: Q386. But I'm not asking you whether it's... if it's all... uh... [REDACTED]
[REDACTED]

Jocelyn FORTIN: [REDACTED]

Maître Anil KAPOOR: Q387. Right. So I guess what I'm asking you is, the fact that the RCMP uses in the... in its MDI [REDACTED]
[REDACTED]
[REDACTED]

Jocelyn FORTIN: ____...

Maître Anil KAPOOR: Q388. Or, your MDI ____ MDI.

Jocelyn FORTIN: Y... I'm not... I'm not sure, you said hardly, that I...

Maître Anil KAPOOR: Q389. [REDACTED]

Jocelyn FORTIN: [REDACTED]

Maître Anil KAPOOR: Q390. That's right.

Jocelyn FORTIN: [REDACTED]

Maître Anil KAPOOR: Q391. ____...

Jocelyn FORTIN: [REDACTED]

Maître Anil KAPOOR: Q392. OK.

Jocelyn FORTIN: [REDACTED]

Maître Anil KAPOOR: Q393. Right.

Jocelyn FORTIN: So when you use [REDACTED]
[REDACTED]

Maître Anil KAPOOR: Q394. OK, uh... and, to... to be fair, I'm uh... to be fair to you, I'm not ask... I... I'm... I'm... I'm asking that the... [REDACTED]
[REDACTED]

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q395. Be protected. But the [REDACTED]
[REDACTED] That's what I'm putting to you today.

Jocelyn FORTIN: So in other words, we would reveal that we are [REDACTED]

Maître Anil KAPOOR: Q396. Uh-huh.

Jocelyn FORTIN: But we would not reveal that we're [REDACTED]

Maître Anil KAPOOR: Q397. That's right.

Jocelyn FORTIN: [REDACTED] is useless.

Maître Anil KAPOOR: Q398. Or... or... or not, whatever... whatever inferences are drawn from it. What I'm putting to you is, um... the key here is you don't want to release [REDACTED] [REDACTED] certainly right?

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q399. Because most often, you are when [REDACTED]

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: Q400. And you don't want to reveal that [REDACTED] [REDACTED] we'll talk about that in a minute, but...

Jocelyn FORTIN: OK.

Maître Anil KAPOOR: Q401. You don't want to reveal [REDACTED] right?

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: Q402. OK. So I'm saying if we protect that but release the fact that you use the [REDACTED] I'm gonna suggest to you, that can be done securely without compromising those interests, the interests of [REDACTED] [REDACTED] That's my question to you.

Jocelyn FORTIN: That would not be accurate.

Maître Anil KAPOOR: Q403. You... you would... you would say...

Jocelyn FORTIN: I would not agree.

Maître Anil KAPOOR: Q404. You would not agree?

Jocelyn FORTIN: I would not agree.

Maître Anil KAPOOR: Q405. You say it compromises it.

Jocelyn FORTIN: If you... if you say that we're [REDACTED]

Maître Anil KAPOOR: Q406. Yeah.

Jocelyn FORTIN: That automatically means we're [REDACTED] Otherwise, why would you use [REDACTED]

Maître Anil KAPOOR: Q407. OK. Your position is, revealing that you use [REDACTED] [REDACTED]

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: Q408. That's your position.

Jocelyn FORTIN: That's my position.

Maître Anil KAPOOR: Q409. It doesn't mean... it doesn't reveal that [REDACTED] does it?

Jocelyn FORTIN: It doesn't mean... it... it doesn't reveal [REDACTED]

Maître Anil KAPOOR: Q410. All right. (Shuffling of paper) If I can get one more _____, one more _____ to give him this, before we break. Oh yes, um... you said that uh... if you knew that [REDACTED] [REDACTED] so to answer my friend's questions, [REDACTED] [REDACTED]

Jocelyn FORTIN: No.

Maître Anil KAPOOR: Q411. OK, so maybe I misunderstood that part.

Jocelyn FORTIN: [REDACTED]

Maître Anil KAPOOR: Q412. Yes.

Jocelyn FORTIN: [REDACTED] [REDACTED]

Maître Anil KAPOOR: Q413. OK. Um... but you'd... you referenced [REDACTED] [REDACTED] [REDACTED]

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: Q414. And... and... and... and so, what would [REDACTED] seek to detect?

Jocelyn FORTIN: The [REDACTED] itself.

Maître Anil KAPOOR: Q415. All right, OK. So you could [REDACTED] [REDACTED]

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: Q416. And then, naturally, [REDACTED]

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: Q417. And so, in terms of determining your [REDACTED] [REDACTED]

Jocelyn FORTIN: No.

Maître Anil KAPOOR: Q418. Have you ever [REDACTED]

Jocelyn FORTIN: No.

Maître Anil KAPOOR: Q419. So your point, when you say that it'd be [REDACTED] [REDACTED] [REDACTED]

Jocelyn FORTIN: When I wrote... re... uh... read uh... [REDACTED] [REDACTED]

Maître Anil KAPOOR: Q420. Uh-huh.

Jocelyn FORTIN: It is [REDACTED]

Maître Anil KAPOOR: Q421. Yes, but what I'm asking you is whether you've done it?

Jocelyn FORTIN: No.

12:29 hrs

Maître Anil KAPOOR: Q422. And, you... so you have... so you [REDACTED]
[REDACTED]

Jocelyn FORTIN: That's correct.

Maître Anil KAPOOR: All right. Uh, I have about uh... 20 minutes um... left I think, depending on witness and it is 12:30, I'm happy to subject to everybody else my Lord in your schedule, um... come back a little bit earlier, say at 1:30 to complete it, so that we could start at 2:00 with uh, Corporal Richdale, subject to your direction and my friend's comments.

Justice Michael STOBER: How do you feel about that Mr. Fortin? It's about 12:30, is an hour enough for you?

Jocelyn FORTIN: Yes, that's fine. Thank you.

Justice Michael STOBER: Crown?

Maître Alexis GAUTHIER: Yes, sir.

Justice Michael STOBER: OK. _____. All right, so uh... same direction to you, I gave you yesterday, you're free to go. I just want to address the lawyers for a moment.

(Shuffling of paper and unidentified sounds)

Justice Michael STOBER: OK, we had restricted the issue somewhat on 32.4 of the document, so um... I just... uh, Mr. Kapoor, when uh... uh... you prepare something for me for final argument, we discussed it yesterday, perhaps in writing would be helpful. Um... what I'd like to know, um... because with respect to the MDI there's a lot of um... some headings that the Crown wishes to maintain privilege over unless their position changes after the hearing. Um... so I think we'd have to make a list of everything we want to keep privileged, it might be 25 different items.

Maître Anil KAPOOR: Uh-huh.

Justice Michael STOBER: OK, so that's something that uh... you might consider. _____ in uh... it's the same fashion.

Maître Anil KAPOOR: Yes.

Justice Michael STOBER: And then give your position with respect to each one and to tie into the testimonies and also _____ of the testimonies, you'll be uh... _____.

Maître Anil KAPOOR: Yes, thank you.

Justice Michael STOBER: All right. So we'll come back at 1:30, uh, I'll be here so, uh... not here and I'll be in the back uh... _____ if um... there's any

change in the schedule, just advise the bailiff and she'll come let me know, all right? Have a good, _____.

Maître Marie-Christine GODBOUT: Thank you.

Corporal Caroline LÉONARD: So, 12:31.

Justice Michael STOBER: 12:31...

Corporal Caroline LÉONARD: 12:31 my Lordship.

Justice Michael STOBER: So you can turn it off.

13:37 hrs

Corporal Caroline LÉONARD: Starting recording 13:37... 13:37.

Justice Michael STOBER: 13:37, so _____, Maître Gauthier the room was sealed at lunch time?

Maître Alexis GAUTHIER: It was.

Justice Michael STOBER: **Q423.** OK so, we're gonna begin now, the... with the continuation of the um... cross-examination of Maître Kapoor just before I attend the witness on this ex parte hearing. Before he come in, I just have one question, I read all of your affidavit _____ 32.14, paragraph 47, just think about... just uh... with respect to _____

(Shuffling of paper)

Jocelyn FORTIN: Yes.

Justice Michael STOBER: **Q424.** You say _____

Jocelyn FORTIN: Mobile devices.

Justice Michael STOBER: Go ahead, Maître Kapoor.

Maître Anil KAPOOR: Thank you, I wonder if I could have... I... um... ask my colleague to uh... just bring up the uh...

Maître Marie-Christine GODBOUT: Uh-huh.

(Shuffling of paper and incomprehensible whispering)

Maître Anil KAPOOR: **Q425.** Documents. Lord, this would be um... exhibit, by my note anyway, EP32.11 which is the spreadsheet.

(Shuffling of paper)

Maître Anil KAPOOR: The un-vetted spreadsheet. I just had a very few questions about... about something in here. Thank you. Have you got that in front of you, sir?

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR:

Q426. All right. So I wanted to ask you um... me, if you wish it bring up the vetted version as well, but I gotta suggest to you, if you recall, and my friends can confirm this.

(Clearing of throat)

Maître Anil KAPOOR:

That... column D that you see on the screen which is entitled band, do you see that, sir?

Jocelyn FORTIN:

Yeah.

Maître Anil KAPOOR:

Q427. That's been um... redacted to the defense, do you recall that?

Jocelyn FORTIN:

Yes.

Maître Anil KAPOOR:

Q428. OK. And... what I wanted to ask you sir is, is it not common knowledge that (Clears throat) [REDACTED]
[REDACTED]

Jocelyn FORTIN:

It is one of the band, [REDACTED]

Maître Anil KAPOOR:

Q429. Yes and it also transmits does [REDACTED]

Jocelyn FORTIN:

Maître Anil KAPOOR:

Q430. [REDACTED]
[REDACTED]

Jocelyn FORTIN:

That's correct.

Maître Anil KAPOOR:

Q431. All right. But, this is known sir, and what I'm asking you is why... why does this get redacted, I'm not seeking to lift, let's say for example, column E which [REDACTED]
[REDACTED]

Jocelyn FORTIN:

Uh-huh.

Maître Anil KAPOOR:

Q432. But why redact B... and uh... sorry D, column D, when it's commonly known that one of the frequencies [REDACTED]

Jocelyn FORTIN:

Psst... because it... [REDACTED]
[REDACTED]
[REDACTED].

Maître Anil KAPOOR:

Q433. Right... and that's the reason?

Jocelyn FORTIN:

That's the reason.

Maître Anil KAPOOR:

OK. Um... can you also turn to column S, if you can scroll to S or N have the... the charge.

Justice Michael STOBER:

Q434. So, just... so you're saying you're [REDACTED]
[REDACTED]
[REDACTED]

Jocelyn FORTIN:

Correct.

Justice Michael STOBER:

Q435. And you want that protected and not disclosed?

Jocelyn FORTIN:

Because uh... I don't want... [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]

Justice Michael STOBER: Q436. But how m... how many are there?

Jocelyn FORTIN: [REDACTED]

Justice Michael STOBER: Q437. [REDACTED]

Jocelyn FORTIN: [REDACTED]

Maître Anil KAPOOR: Q438. So in column 5 um... this column as I understand it is released publicly.

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: Q439. And so in this column you indicate the bands that are supported, correct?

Jocelyn FORTIN: By the device.

Maître Anil KAPOOR: Q440. But... but... when you say device sir, which...

Jocelyn FORTIN: By the cellular device.

Maître Anil KAPOOR: Q441. The cellular device [REDACTED]

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: Q442. OK. So, uh... [REDACTED]
[REDACTED] the IMEI and the IMSI.

Jocelyn FORTIN: I... I... I missed the question, sorry.

Maître Anil KAPOOR: Q443. So you... [REDACTED]
[REDACTED]

Jocelyn FORTIN: [REDACTED]

Maître Anil KAPOOR: Q444. Right. That's right, just uh... identifiers.

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: Q445. OK. So, this shows what... what... what... what bands are supported by the phones that... for whom you're obtaining identifiers.

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: Q446. And that's released to the defense?

Jocelyn FORTIN: That's correct.

Maître Anil KAPOOR: Q447. So the defense would know that to get something from one of these, let's just take the first one or second one, I'm s... s... sorry the second one...

(Clearing of throat)

Maître Anil KAPOOR: The third one for sure um... [REDACTED]
[REDACTED]

Jocelyn FORTIN: That is what that column uh... is saying.

Maître Anil KAPOOR: Q448. Right. [REDACTED]
[REDACTED]
[REDACTED]

Jocelyn FORTIN: Psst... from that column?

Maître Anil KAPOOR: Q449. Yeah.

Jocelyn FORTIN: Um... I would say that's a fair statement.

Maître Anil KAPOOR: All right. _____... Sorry...

Justice Michael STOBER: Q450. It's not just... it's not just from that column that they know about. That's common knowledge.

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: Q451. OK, I'd like to now take you to AI and AJ of the un-vetted version.

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q452. Yes, OK. And I don't know if I got the note right sir, or my recollection of your evidence is correct, does AI, that column, the heading [REDACTED]
[REDACTED]

Jocelyn FORTIN: [REDACTED]

Maître Anil KAPOOR: Q453. OK.

Jocelyn FORTIN: [REDACTED]
[REDACTED]
[REDACTED]

Maître Anil KAPOOR: Q454. All right, so can you, can we just, with reference to the... I guess it's the second column on this screen. If you can walk us through this uh... so that I could better understand it and where um... first of all, is this data from the phone?

Jocelyn FORTIN: This data is from the phone.

Maître Anil KAPOOR: Q455 [REDACTED]

Jocelyn FORTIN: [REDACTED]

Maître Anil KAPOOR: Q456. All right [REDACTED]
[REDACTED]
[REDACTED]

Jocelyn FORTIN: That information there?

Maître Anil KAPOOR: Q457. Yes.

Jocelyn FORTIN: That's a really... [REDACTED]
[REDACTED]
[REDACTED]

Maître Anil KAPOOR: Q458. I see [REDACTED]
[REDACTED]
[REDACTED]

Jocelyn FORTIN: That's correct.

Maître Anil KAPOOR: Q459. [REDACTED]

Jocelyn FORTIN: [REDACTED]

Maître Anil KAPOOR: Q460. OK, so can you break down the numbers for us and tell me what they mean?

Jocelyn FORTIN: [REDACTED]
[REDACTED]
[REDACTED]

Maître Anil KAPOOR: Q461. OK.

Jocelyn FORTIN: This data is in there but we don't use it.

Maître Anil KAPOOR: Q462. OK.

Jocelyn FORTIN: The first portion...

(Clearing of throat)

Jocelyn FORTIN: [REDACTED]

Maître Anil KAPOOR: Q463. Yes.

Jocelyn FORTIN: [REDACTED]
[REDACTED]

Maître Anil KAPOOR: Q464. OK, so that sig...

Jocelyn FORTIN: [REDACTED]

Maître Anil KAPOOR: Q465. Signifies what?

Jocelyn FORTIN: [REDACTED]
[REDACTED]

Maître Anil KAPOOR: Q466. OK.

Jocelyn FORTIN: [REDACTED]
[REDACTED]

Maître Anil KAPOOR: Q467. All right.

Jocelyn FORTIN: [REDACTED]
[REDACTED]
[REDACTED]

Maître Anil KAPOOR: Q468. I see.

Jocelyn FORTIN: Reversed, so they're...

Maître Anil KAPOOR: Q469. Oh, I see.

Jocelyn FORTIN: [REDACTED]
[REDACTED]

Maître Anil KAPOOR: Q470. I see.

Jocelyn FORTIN: [REDACTED]
[REDACTED]

Maître Anil KAPOOR: Q471. Uh-huh.

Jocelyn FORTIN:

[REDACTED]
[REDACTED]

Maître Anil KAPOOR:

Q472. [REDACTED]

(Clearing of throat)

Maître Anil KAPOOR:

Of the communication.

Jocelyn FORTIN:

That's correct.

Maître Anil KAPOOR:

All right. And...

Justice Michael STOBER:

Q473. Are any of these numbers, do they show in the cell phone? [REDACTED]
[REDACTED]
[REDACTED]

Jocelyn FORTIN:

[REDACTED]
[REDACTED]

Maître Anil KAPOOR:

Q474. [REDACTED]
[REDACTED]

Jocelyn FORTIN:

That's correct.

Maître Anil KAPOOR:

Q475. And it's the same modality that is to say, [REDACTED]
[REDACTED]
[REDACTED]

Jocelyn FORTIN:

That's correct.

Maître Anil KAPOOR:

Q476. [REDACTED]
[REDACTED]
[REDACTED]

Jocelyn FORTIN:

This is how the... the... the format is.

Maître Anil KAPOOR:

Q477. OK. And then similar to... [REDACTED]
[REDACTED]

Jocelyn FORTIN:

That's correct.

Maître Anil KAPOOR:

Q478. All right. So, both of these columns are redacted, you recall that?

Jocelyn FORTIN:

Correct.

Maître Anil KAPOOR:

Q479. OK. And of course the column I and column J which are IMSI and IMEI respectfully... respect... respect...

(Clearing of throat)

Maître Anil KAPOOR:

Are n... are not redacted.

Jocelyn FORTIN:

Correct.

Maître Anil KAPOOR:

Q480. OK. So can you explain to me sir, why [REDACTED]
[REDACTED]
[REDACTED]

Jocelyn FORTIN:

[REDACTED]
[REDACTED]
[REDACTED]

Maître Anil KAPOOR: Q481. So the concept being not that this reveals anything about the functioning of the MDI, [REDACTED]
[REDACTED]
[REDACTED]

Jocelyn FORTIN: That's correct.

Maître Anil KAPOOR: Q482. And you want to suppress [REDACTED]

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: OK. Thank you, that's... this can now be turned off, I'm done with the... with... with the light show.

Justice Michael STOBER: Which... which... what... before you turn it off...

Maître Anil KAPOOR: Sorry...

Justice Michael STOBER: Just... while it's in front of you, which ones are redacted? Just repeat that again?

Maître Anil KAPOOR: I... I can assist my Lord, the ones that are subject to the... with the, uh... correction, but AI and AJ are redacted.

Justice Michael STOBER: OK.

Maître Anil KAPOOR: And then previously we discussed D, which also is redacted but although the... the heading for D is not redacted. The heading for AI _____

Justice Michael STOBER: AJ, it...

Maître Anil KAPOOR: R is redacted, the heading is redacted.

(Shuffling of paper)

Justice Michael STOBER: Very well, go ahead.

Maître Anil KAPOOR: Thank you. Um, I'll just let my friend uh... turn off the light shield. OK.

Jocelyn FORTIN: So I can close this?

Maître Anil KAPOOR: Q483. Yes, I don't need it certainly. (Shuffling of paper) Thank you, um... you mentioned in your evidence the [REDACTED]
[REDACTED] do you remember that?

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q484. And, did I get my... was my note corrected [REDACTED]
[REDACTED] was not employed in this case?

Jocelyn FORTIN: I don't believe I used that feature.

Maître Anil KAPOOR: Q485. OK.

Jocelyn FORTIN: Um... I don't know about the other operators.

Maître Anil KAPOOR: Q486. Would we be... would we know whether, by looking at the data, for example, would... the un-vetted data, would one know whether [REDACTED] was employed?

Jocelyn FORTIN: Psst... um... it'll be difficult, it might be indication but it... it'll be difficult.

Maître Anil KAPOOR: Q487. How would we know uh... whether [REDACTED] was employed versus [REDACTED]

Jocelyn FORTIN: With the data?

Maître Anil KAPOOR: Q488. Or just somehow, is there something, some record kept or some way we... we could learn that?

Jocelyn FORTIN: I don't think you would be able to tell..
(Shuffling of paper)

Jocelyn FORTIN: With the data was (PH).

Maître Anil KAPOOR: Q489. OK. Um... the ques... uh... so... the reason I ask you this question is because you say or you said the other day, that one of the drawbacks [REDACTED] and I think an answer to his Lordship's questions was that it could [REDACTED]
[REDACTED]

Jocelyn FORTIN: Psst... yes.

Maître Anil KAPOOR: Q490. And of course that would create... some... [REDACTED]
[REDACTED]

Jocelyn FORTIN: Correct, yeah.

Maître Anil KAPOOR: Q491. All right.

Jocelyn FORTIN: I just want to clarify this.

Maître Anil KAPOOR: Q492. ____.

Jocelyn FORTIN: This, we've been told that it could... could... could [REDACTED] I don't have any examples and I have no... and... and I don't know any uh... incidences where it did...

Maître Anil KAPOOR: Q493. OK.

Jocelyn FORTIN: Happen.

Maître Anil KAPOOR: Q494. And I take it you... were you advised of this by one of your partners?

Jocelyn FORTIN: That was [REDACTED]

Maître Anil KAPOOR: Q495. [REDACTED] advises you of this, it would have been in these educational sessions or otherwise?

Jocelyn FORTIN: That would be... I don't know if they have a formal slide on it. I... I remember learning it from them.

Maître Anil KAPOOR: Q496. OK.

Jocelyn FORTIN: But it was ma... basically uh... [REDACTED]
[REDACTED]
[REDACTED]

Maître Anil KAPOOR: Q497. OK, when you [REDACTED]

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: Q498. All right. Now that didn't happen in this case?

Jocelyn FORTIN: That didn't happen in this case.

Maître Anil KAPOOR: Q499. OK. And is it your understanding that the... the... the... the problem of a [REDACTED]
[REDACTED]

Jocelyn FORTIN: And, then again, that was not something that was pointed out as being... it was just mentioned as it could be a drawback.

Maître Anil KAPOOR: Q500. OK.

Jocelyn FORTIN: Of using it but it was not stressed that we couldn't use it.

Maître Anil KAPOOR: Q501. I see. Um... now, in the spring of 2011, if... if I can take your mind back to that timeframe, if you... if you can, was...

Jocelyn FORTIN: What... which date, sorry?

Maître Anil KAPOOR: Q502. 2011, say the spring.

Jocelyn FORTIN: OK.

Maître Anil KAPOOR: Q503. OK, 2011. Um... was this a known consequence to y... to... to your knowledge [REDACTED] Potential consequence, forgive me.

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q504. OK, thank you. Um... now um... oh sorry, and just to sort of um... round the circle on that, uh... was this part of your educational instruction based on the theoretical side uh... of uh... uh... the... the deployment of this MDI device?

Jocelyn FORTIN: That is something that I could mention in a... in a training but I don't I have a formal slide or something formal uh... uh... on this.

Maître Anil KAPOOR: Q505. Yeah, the reason I ask that question sir, is 'cause I remember, and it's just a memory 'cause I didn't get it, 'cause I'm not taking notes for my examination is that um, I... I thought you said that you... that you teach to use [REDACTED]
[REDACTED] or maybe I misheard you.

Jocelyn FORTIN: [REDACTED]

Maître Anil KAPOOR: Q506. Now, I... I... I'd like to take you now, just sort of uh... to... to conclu... to conclude um... _____um... psst... I want to focus on um... uh, I guess the easiest way to deal with this would be for you pull up your uh... affidavit which I believe is 32.14. And if I could have you turn to appendix A.

(Shuffling of paper and clearing of throat)

Maître Anil KAPOOR: So you have appendix A there, sir.

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q507. And you will see the...the... the head... heading Query?

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q508. And underneath it, of course, you've got uh... the various technologies, GSM and so on. Do you see that there, sir?

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q509. I'd like to direct you to GSM which is [REDACTED]
[REDACTED]

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q510. And, we discussed yesterday briefly that [REDACTED]
[REDACTED]

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: Q511. And I want to ask about whether or not uh... to your understanding there are s... [REDACTED]
[REDACTED]

Jocelyn FORTIN: Not sure I understand what... what...

Maître Anil KAPOOR: Q512. [REDACTED]
[REDACTED]

Jocelyn FORTIN: Well, this table uh... shows that uh... in query mode, column [REDACTED]

Maître Anil KAPOOR: Q513. Yes, OK, um... so that much is in common?

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q514. And is that where the commonality ends and their functionality, [REDACTED]
[REDACTED]

Jocelyn FORTIN: They all have different features.

Maître Anil KAPOOR: Q515. Uh-huh.

Jocelyn FORTIN: They have, all have their different ways of operating.

Maître Anil KAPOOR: Q516. Yes.

Jocelyn FORTIN: Um... the ones that I know the most is, [REDACTED]
[REDACTED]

Maître Anil KAPOOR: Q517. I see.

Jocelyn FORTIN: But the rest of them um... sometimes we... I would evaluate it. But I wouldn't be able to remember what were the exact settings that I would be able to use on the other devices.

Maître Anil KAPOOR: Q518. Can I, uh... suggest this you sir, [REDACTED]
[REDACTED]
[REDACTED]

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q519. Um... so I'll just start with [REDACTED] Would you agree with me that both of them operate to [REDACTED]
[REDACTED]

Jocelyn FORTIN: Psst... that is correct in the query mode.

Maître Anil KAPOOR: Q520. And I'm... yeah, I'm only... I'm only dealing with query, I'm not...

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q521. Dealing [REDACTED]

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q522. They both [REDACTED]

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: Q523. And... they.. [REDACTED]
[REDACTED]

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: Q524. And um... they are both attempting to obtain the IMSI and the IMEI of mobile phones [REDACTED]

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: Q525. They also um... [REDACTED]
[REDACTED]

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q526. And, as there was... and they both also [REDACTED]
[REDACTED]

Jocelyn FORTIN: That's correct.

Maître Anil KAPOOR: Q527. And they both [REDACTED]
[REDACTED]

Jocelyn FORTIN: That's correct.

Maître Anil KAPOOR: Q528. And they both [REDACTED]
[REDACTED]

Jocelyn FORTIN: That's correct.

Maître Anil KAPOOR: Q529. And you agree with me that this step that is at.. [REDACTED]
[REDACTED]
[REDACTED]

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: Q530. Just stopping there, it... it's as far as we gotten, do you know whether as far as the other... other...

Justice Michael STOBBER: _____ ten minutes to nine.

Maître Anil KAPOOR: [REDACTED] whether they would operate similarly? As far as we've gone.

Jocelyn FORTIN: At... at this date, I don't know it and I'd like to talk about [REDACTED]
[REDACTED]

Maître Anil KAPOOR: Q531. Uh-huh.

Jocelyn FORTIN: Um... because [REDACTED]

Maître Anil KAPOOR: Q532. Uh-huh.

Jocelyn FORTIN: [REDACTED] I don't know if they change the way they're operating.

Maître Anil KAPOOR: Q533. Uh-huh.

Jocelyn FORTIN: [REDACTED] they didn't have that function built-in.

Maître Anil KAPOOR: Q534. Which function?

Jocelyn FORTIN: [REDACTED]

Maître Anil KAPOOR: Q535. Uh-huh.

Jocelyn FORTIN: [REDACTED]

Maître Anil KAPOOR: Q536. Uh-huh.

Jocelyn FORTIN: To their equipment.

Maître Anil KAPOOR: Q537. OK.

Jocelyn FORTIN: [REDACTED]

Maître Anil KAPOOR: Q538. So... they needed the intermediary of [REDACTED]
[REDACTED]

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: Q539. And [REDACTED]
[REDACTED]

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: Q540. All right. So leaving aside [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Jocelyn FORTIN: I know devices that are not listed in there.

Maître Anil KAPOOR: Q541. Uh-huh.

Jocelyn FORTIN: That doesn't do [REDACTED]

Maître Anil KAPOOR: Q542. OK.

Jocelyn FORTIN: [REDACTED]
[REDACTED]

Maître Anil KAPOOR: Q543. All right. But those are devices you've not listed here.

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: Q544. OK. Of the ones you've listed here, we can agree that [REDACTED]
[REDACTED]
[REDACTED]

Jocelyn FORTIN: I can only spoke [REDACTED]

Maître Anil KAPOOR: Q545. All right. And then... and then...

Jocelyn FORTIN: [REDACTED] uh... sorry.

Maître Anil KAPOOR: Q546. I'm sorry.

Jocelyn FORTIN: I... I just saw that [REDACTED]

Maître Anil KAPOOR:

Q547. Yeah.

Jocelyn FORTIN:

Maître Anil KAPOOR:

Q548. OK. Um... so they... so [REDACTED] not do a uh... [REDACTED]

Jocelyn FORTIN:

That's correct.

Maître Anil KAPOOR:

Q549. OK. And do they operate with the systems of a... [REDACTED]

Jocelyn FORTIN:

Pssr... no, you have to... well you would if you want to... if... if you want to use [REDACTED]

Maître Anil KAPOOR:

Q550. Uh-huh.

Jocelyn FORTIN:

Maître Anil KAPOOR:

Q551. [REDACTED]

Jocelyn FORTIN:

Maître Anil KAPOOR:

Q552. All right. Um... [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Jocelyn FORTIN:

That's correct.

Maître Anil KAPOOR:

Q553. And... carrying on then... [REDACTED]
[REDACTED]
[REDACTED]

Jocelyn FORTIN:

They have that feature, both have that feature.

Justice Michael STOBER:

Q554. Sorry, do they have what?

Maître Anil KAPOOR:

Jocelyn FORTIN:

Maître Anil KAPOOR:

Q555. Yes.

Jocelyn FORTIN:

Justice Michael STOBER:

Maître Anil KAPOOR:

Q556. And it's... it sometimes referred to as just [REDACTED]

Jocelyn FORTIN:

Maître Anil KAPOOR:

Q557. OK.

Jocelyn FORTIN:

Maître Anil KAPOOR:

Q558. [REDACTED]
[REDACTED]

Jocelyn FORTIN:

Correct.

Maître Anil KAPOOR:

Q559. So I want to then to take you, [REDACTED]
[REDACTED]
[REDACTED]

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: Q560. OK. And then... [REDACTED]
[REDACTED] which was described in exhibit 32.11A by your colleague uh, Corporal Richdale.

Jocelyn FORTIN: This is one of the feature that [REDACTED]

Maître Anil KAPOOR: Q561. OK, and to be fair, [REDACTED] may have other features as well but they certainly do this.

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: Q562. OK. And of course, this may be obvious but of course both secure the data that is the... or obtain the data that is the IMSI and the IMEI from the mobile phones [REDACTED]

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: Q563. And both similarly uh... [REDACTED]
[REDACTED]

Jocelyn FORTIN: Eventually, yes.

Maître Anil KAPOOR: Q564. In some instances, for example, we heard some evidence from Corporal Richdale that during the execution of the mo... uh, MDI in this investigation, [REDACTED]
[REDACTED].

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q565. And [REDACTED]

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: Q566. OK. And... of course, he was speaking [REDACTED]
[REDACTED]
[REDACTED]

Jocelyn FORTIN: It doesn't um... it usus (PH)... it uses and I have to think to make sure that here's no other feature [REDACTED]
[REDACTED]

Maître Anil KAPOOR: Q567. OK. [REDACTED]
[REDACTED]
[REDACTED]

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q568. [REDACTED]
[REDACTED]

Jocelyn FORTIN: [REDACTED]

Maître Anil KAPOOR: Q569. Yeah. [REDACTED]

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: OK.

Justice Michael STOBBER: Q570. [REDACTED]
[REDACTED]

Jocelyn FORTIN: That's in [REDACTED]

Justice Michael STOBER: Q571. And [REDACTED]

Jocelyn FORTIN: [REDACTED]
[REDACTED]

Justice Michael STOBER: Q572. Is that... is that the [REDACTED]
[REDACTED]

Jocelyn FORTIN: No.

Maître Anil KAPOOR: Q573. So what we've covered thus far, [REDACTED]
[REDACTED]
[REDACTED]

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: Q574. All right, I now want to turn your mind to the unique features [REDACTED] you've testified to, just so that we understand. One of them, and I'm focusing sir, only on how it was deployed in this case. There may be others today uh... and previously but I'm... I want to focus only about this case, OK?

Jocelyn FORTIN: OK.

Maître Anil KAPOOR: Q575. All right. One of them is your use [REDACTED] you have described in your evidence.

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: Q576. That is something that um... you do as an investigator for the RCMP [REDACTED]
[REDACTED]

Jocelyn FORTIN: That's correct.

Maître Anil KAPOOR: Q577. S... does that happen [REDACTED]
[REDACTED]

Jocelyn FORTIN: We would [REDACTED]

Maître Anil KAPOOR: Q578. OK. [REDACTED]
[REDACTED]

Jocelyn FORTIN: That's correct.

Maître Anil KAPOOR: Q579. OK. Another example [REDACTED]
[REDACTED] uniqueness, at least as I understand your evidence is [REDACTED]
[REDACTED]

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: Q580. And focusing on [REDACTED]
[REDACTED]

Jocelyn FORTIN: [REDACTED]

Maître Anil KAPOOR: Q581. Uh-huh.

Jocelyn FORTIN: That could be changed.

Maître Anil KAPOOR: Q582. Yes.

Jocelyn FORTIN: And same would be [REDACTED]

Maître Anil KAPOOR: Q583. OK. [REDACTED]
[REDACTED]

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: Q584. And it's an investigator's choice?

Jocelyn FORTIN: By default, we use [REDACTED] I have not played with that.

(Shuffling of paper)

Maître Anil KAPOOR: Q585. OK.

Jocelyn FORTIN: [REDACTED]

Maître Anil KAPOOR: Q586. And am... am... am I right then the [REDACTED]
[REDACTED]

Jocelyn FORTIN: I'm not sure [REDACTED]

Maître Anil KAPOOR: Q587 [REDACTED]

Jocelyn FORTIN: [REDACTED]

Maître Anil KAPOOR: Q588. Turning now to the [REDACTED]
[REDACTED]
[REDACTED]

Jocelyn FORTIN: That's also the case [REDACTED]

Maître Anil KAPOOR: Q589. And that's part [REDACTED] that we discussed a mo... a moment ago.

Jocelyn FORTIN: That's correct.

Maître Anil KAPOOR: Q590. All right. Another aspect that's unique, at least as I appreciate it is [REDACTED] given some evidence about how you devise this technique.

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q591. That is something that is again as I say an [REDACTED]
[REDACTED]

14:08 hrs

Jocelyn FORTIN: That's correct.

Maître Anil KAPOOR: Q592. And I think you may have even [REDACTED] doesn't know you're doing that.

Jocelyn FORTIN: Well...

Maître Anil KAPOOR: Q593. Not that they should, I'm just...

Jocelyn FORTIN: No, no, no. It's... it's not something that they teach uh... I told him but... that's...

Maître Anil KAPOOR: Q594. So we've... we... w... we've dealt with [REDACTED] what else... what other um... particular unique uh... aspects of this uh... uh... of the deployment of the MDI were there?

Jocelyn FORTIN: Uh... f... from the chart?

Maître Anil KAPOOR: Q595. Or f... yeah, I just wanna be sure, his Lordship understands uh... this sort of u... the unique portion of the deployment of the... of the MDI in this case as opposed to a more generic deployment like [REDACTED] so on.

Jocelyn FORTIN: Um... I'm not sure I follow, I'm sorry.

Maître Anil KAPOOR: Q596. All right, so... what would there be, that you would... what would you do with that... with a [REDACTED] that you wouldn't do with any other piece of equipment? Any other brand.

Jocelyn FORTIN: I don't know what the other ones would be capable or not capable of.

Maître Anil KAPOOR: Q597. [REDACTED] you know.

Jocelyn FORTIN: [REDACTED] I know.

Maître Anil KAPOOR: Q598. OK, so what would you do with [REDACTED] you would not do with [REDACTED] What is peculiar about [REDACTED]

Jocelyn FORTIN: [REDACTED]

Maître Anil KAPOOR: Q599. [REDACTED] I forgot [REDACTED] we're at [REDACTED] that was the other one, I knew there was one more. [REDACTED] is a uniquely [REDACTED]

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: Q600. OK. Otherwise m... what we've just reviewed is common to both, your deployment on [REDACTED] equipment as it would be on [REDACTED]

Jocelyn FORTIN: Well, there's differences with [REDACTED]

Maître Anil KAPOOR: Q601. (Mumbling) But, a... at least what we've said is common to both?

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q602. There were different things you could do with [REDACTED] correct?

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: Q603. Different functionalities you could employ with [REDACTED]

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: Q604. But what... but what you did [REDACTED]

(Clearing of throat)

Maître Anil KAPOOR: Of [REDACTED]

Jocelyn FORTIN: Yes.

Maître Anil KAPOOR: Q605. You can do with [REDACTED]

Jocelyn Fortin, July 23, 2015, ex parte transcript

Jocelyn FORTIN: Correct.

Maître Anil KAPOOR: All right.

(Unidentified sounds)

Maître Anil KAPOOR: Just... just one moment, my Lord.

Justice Michael STOBER: Take your time.

(Pause)

Maître Anil KAPOOR: Those are my questions thank you. I... I... I thank you, sir.

Justice Michael STOBER: Maître Gauthier?

Maître Alexis GAUTHIER: No redirect, sir.

Justice Michael STOBER: Because at a certain point...

(Unidentified noise)

Justice Michael STOBER: During the cross-examination, I wanted to allow Mr. Kapoor to continue um... if you have any _____ question but, you stood up and said that the witness wanted to say something, and I said, "Wait till redirect." So if there's anything whatsoever, now's the time.

Maître Alexis GAUTHIER: No, thank you, sir.

Justice Michael STOBER: Q606. All right, um... so thank you Mr. Fortin, you understand you'll have to be back here, will be... probably in... will be in September. But you're under the same directive not to discuss your evidence with anybody even the prosecutors or anybody else, and if any time there's a need for something, I'm sure the Crown will come and ask direction, but at this point you can't speak to anybody about the content of your evidence or anything about this case. Is that understood?

Jocelyn FORTIN: Understood.

Justice Michael STOBER: OK, thank you. I think you said this was your first time testifying _____.

Maître Alexis GAUTHIER: He was.

Justice Michael STOBER: Quite a first time testifying.

(Chuckling)

Justice Michael STOBER: So I appreciate your presence and the uh... the time it took and uh... you're excused, you're free to go.

Jocelyn FORTIN: Thank you.

Maître Marie-Christine GOUBOUT: Thank you very much Mr. Fortin.

Maître Alexis GAUTHIER: Thank you.

Maître Anil KAPOOR: Thank you, Mr. Fortin.

Maître Alexis GAUTHIER: So I guess sir, that we might need about uh... 10, 15 minutes to gather everybody uh... including the Offence _____, the Defense,

the accused and uh... the witness, the next one, so... you could stop the recording.

Maître Caroline LÉONARD: Yes, 14:13. 14:13 of re... s... end of recording, I'm sorry.

Maître Marie-Christine GODBOUT: _____...

Maître Caroline LÉONARD: End of recording.

C A N A D A

C O U R S U P É R I E U R E

Chambre criminelle

PROVINCE DE QUÉBEC

DISTRICT DE : LAVAL

CAUSES NO : 540-01-063428-141

ÉTAPE : REQUÊTE (SUITE)

PRÉSENT : L'HONORABLE MICHAEL STOBER, J.C.S.

SA MAJESTÉ LA REINE,

Plaignante,

-C.-

VITTORIO MIRARCHI & ALS

Accusés

NOM DES PROCUREURS :

Me ROBERT ROULEAU

Me ALEXIS GAUTHIER

Me MARIE-CHRISTINE GODBOUT

Procureurs de la Couronne

Me FRANK ADDARIO

Me MICHAEL LACEY

Me WILLIAM THOMPSON

Me MAXIME HÉBRARD

Me MACDONALD

Procureurs de la défense

Me ANIL KAPOOR

Amicus curiae

DATE D'AUDITION : Le 23 juillet 2015

TRANSCRIPTION REMISE : Le 18 septembre 2015

FICHER : 540-01-063428-141-2015-07-23

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1 REQUÊTE (SUITE)

2 **LA COUR (L'HONORABLE MICHAEL STOBER, J.C.S.)**

3 Good morning. You can indicate please the
4 presences, maître Gauthier?

5 **Me ALEXIS GAUTHIER,**

6 **Procureur de la Couronne :**

7 Yes so in the box we have monsieur Fracas, Mr.
8 Mirarchi, Mr. Addario, Mr. Magistrale and Mr. Milioto.

9 I spoke with Mr. Addario and he indicated that if
10 we are able to complete the ex parte this morning of
11 Mr. Fortin, this morning, the defence will want to
12 start with the public cross-examination of Mr. Richdale
13 this afternoon at two (2:00pm) and we are ready to do
14 so Sir, if you agree to this.

15 **LA COUR :**

16 Of course I agree to that and we'll continue
17 tomorrow if it's not finished.

18 **LA COURONNE (Me ALEXIS GAUTHIER) :**

19 That's what Mr. Addario indicated, that yes, in all
20 likelihood we will continue the public cross-
21 examination of Mr. Richdale tomorrow morning. He
22 doesn't know of course exactly how long they will need
23 for Mr. Richdale, but in all likelihood we will
24 complete tomorrow with Mr. Richdale.

25 **LA COUR :**

Josh Richdale July 23, 2015 transcript

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1 Okay. So that's fine. So with respect to the
2 accused that are present, they'll return at two o'clock
3 (2:00pm)?

4 **LA COURONNE (Me ALEXIS GAUTHIER) :**

5 That is my understanding, yes they will come back
6 at two (2:00pm) this afternoon. That's what we came to
7 agree with Mr. Addario when I spoke with him this
8 morning.

9 **LA COUR :**

10 Is Mr. Simpson supposed to be on the
11 videoconference?

12 **LA COURONNE (Me ALEXIS GAUTHIER) :**

13 He will be there this afternoon at two (2:00pm).

14 **LA COUR :**

15 All right. I don't recall that he was dispensed
16 this morning?

17 **LA COURONNE (Me ALEXIS GAUTHIER) :**

18 No, but for this morning I'm not sure Sir. But
19 this afternoon he will be there and I saw Mr...

20 **LA COUR :**

21 Macdonald?

22 **LA COURONNE (Me ALEXIS GAUTHIER) :**

23 ... Macdonald a few minutes ago and I explained to
24 him what was the agenda and he was fine with all this
25 and the arrangement that we had taken.

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1 LA COUR :

2 So he knew that Mr. Simpson would not be here this
3 morning, we wouldn't be doing anything publicly this
4 morning and he confirmed with you that Simpson would be
5 present by videoconference this afternoon?

6 LA COURONNE (Me ALEXIS GAUTHIER) :

7 We didn't speak about the presence of Mr. Simpson
8 via video for this morning.

9 LA COUR :

10 All right. Anything else publicly?

11 LA COURONNE (Me ALEXIS GAUTHIER) :

12 Publicly Sir, no. We would want them to... for maybe
13 a ten (10) minute recess just to arrange the room, make
14 a small sweep of the room and that will be it, we will
15 be ready in ten (10) minutes.

16 LA COUR :

17 Yes, that's fine.

18 Mr. Kapoor?

19 Me ANIL KAPOOR :

20 Yes?

21 LA COUR :

22 Give me a general evaluation, time lines?

23 Me ANIL KAPOOR :

24 I'll be done this morning, so I will be able to
25 start Mr. Richdale, Mr. Richdale I will start with.

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1 LA COUR :

2 A good part of the morning you need?

3 Me ANIL KAPOOR :

4 Yes, hard to predict, it depends on the answers but

5 I think I'll be done well before lunch.

6 LA COUR :

7 Understood. So we'll take a short break, just have
8 the bailiff come and get me when you're ready. Thank
9 you.

10 LA COURONNE (Me ALEXIS GAUTHIER) :

11 Thank you.

12 SUSPENSION DE L'AUDIENCE

13 REPRISE DE L'AUDIENCE PUBLIQUE

14 LA COUR :

15 Good afternoon. Mr. Macdonald, this morning the
16 accused were present, for some reason your client
17 wasn't here. They all came in the room but the only
18 thing we did was we postponed until this afternoon, in
19 your absence and in the absence of your client, that
20 was that was done. Any comment?

21 Me MACDONALD,

22 Procureur de la défense :

23 No comment Your Honour.

24 LA COUR :

25 All right, that's fine with you?

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1 LA DÉFENSE (Me MACDONALD) :

2 Yes.

3 LA COUR :

4 All right. Before we begin the public cross-
5 examination of Mr. Richdale, are there any comments on
6 the schedule for the fall?

7 LA DÉFENSE (Me FRANK ADDARIO) :

8 Yes. So Your Honour mentioned the October dates.
9 So we have twenty-eighth (28th), twenty-ninth (29th) of
10 September.

11 LA COUR :

12 Booked.

13 LA DÉFENSE (Me FRANK ADDARIO) :

14 And then thirty (30), thirty-one (31) and two (2)
15 are...

16 LA COUR :

17 Out.

18 LA DÉFENSE (Me FRANK ADDARIO) :

19 ... out.

20 LA COUR :

21 I suggested they be out, yes.

22 LA DÉFENSE (Me FRANK ADDARIO) :

23 Yes as well as seven (7) through nine (9). But if
24 we have business, we can do it as far as we're
25 concerned, on five (5) or six (6) of October.

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1 LA COUR :

2 That's right.

3 LA DÉFENSE (Me FRANK ADDARIO) :

4 As well as thirteen (13) through sixteen (16).

5 LA COUR :

6 Yes, I was told that for the balance of this
7 hearing on R-25 and R-32 we needed another four (4)
8 days, including today. And we booked -- including
9 argument -- and we booked in September eight (8), nine
10 (9), eleven (11), eighteen (18), twenty-eight (28),
11 twenty-nine (29). One never knows with the
12 questioning, it could go over, it could be a lot more,
13 the argument could be more. But we do have those six
14 (6) days booked and if need be, we'll prolong to
15 October, that's all.

16 So with respect to the dates that I suggested, is
17 there any other comment? No? All right. So then I'm
18 going to fix the schedule as follows.

19 Firstly I want to make it clear and state for the
20 record that there were some inevitable delays because
21 of Mr. Addario, no fault of his own, coming on the file
22 and needing time to prepare and that's expected and the
23 proper thing. But in June, there were approximately
24 three (3) weeks we didn't sit. The Crown asked for
25 some more time so we avoided the last few days, the

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1 first week of June. We have two (2) bail reviews that
2 are scheduled for the fall.

3 I made it very clear to maître Hémond who
4 represents D'Addario, that I was able to do those the
5 week of the seventh (7th), fourteenth (14th) and twenty-
6 first (21st) of June. And I also was able to do that
7 the week of the sixth (6th) of July, the court was
8 available. However, she is working on this motion with
9 maître Larochelle who was not available any of those
10 dates. So we didn't use those dates.

11 And then maître Boro, for Racaniello, indicated
12 that he was filing a bail review that was initially
13 filed months ago and maître Engel who is co-counsel
14 said that it was going to be presented to the Court of
15 Appeal instead to strike it from the role, which we
16 did.

17 Then maître Engel came back and indicated he was
18 putting it back on the docket in front of me and it
19 wasn't presented until... I believe madam Clerk it was in
20 June, is that correct?

21 **Mme LA GREFFIÈRE :**

22 Yes, (inaudible) of June.

23 **LA COUR :**

24 Right. And I indicated to him that I was free to
25 do that similarly, the weeks of the seven (7), fourteen

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1 (14), twenty-one (21) of June and the week of the six
2 (6) of July. Mr. Boro indicated that he could not and
3 the week of the sixth (6th) of July he was at a course
4 in Edmonton. Which is why we have the hearing for
5 Racaniello on the third (3rd) and fourth (4th) of
6 September, and the hearing for D'Addario on the tenth
7 (10th), fourteenth (14th) and seventeenth (17th) of
8 September. I just wanted to make that precision for
9 the record.

10 So the following dates, I repeat, are fixed for
11 September with respect to this motion 25, and the other
12 motion 32: eight (8), nine (9), eleven (11), eighteen
13 (18), twenty-eight (28) and twenty-nine (29). One
14 never knows, as we go along there always are
15 fluctuations in the schedule as we go along, certain
16 things are inevitable. And the Court will continue to
17 make every effort to accommodate counsel and their
18 various schedules as we did for Mr. Macdonald this week
19 and as we certainly go out of our way to do for counsel
20 who come from out of town, whether it be Ottawa or
21 Toronto, since we're in Laval or Montreal.

22 We will not be sitting on the thirtieth (30th) of
23 September, with the first (1st) or second (2nd) of
24 October, dates I've already indicated, nor will we sit
25 on the seventh (7th), eighth (8th) and ninth (9th) of

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1 October. And it could be on the sixth (6th) of October
2 if we sit, we'll depart earlier. We might make it a
3 very late morning, sit till one (1:00pm)/one thirty
4 (1:30pm) so that we can complete the day earlier. We
5 also won't sit on the twenty-third (23rd) of September,
6 but the other days of that week are available, twenty-
7 one (21), twenty-two (22), twenty-four (24), twenty-
8 five (25) of September.

9 Any questions? No? Any objections to the proposed
10 schedule? Crown?

11 **LA COURONNE (Me ALEXIS GAUTHIER) :**

12 Nothing Sir.

13 **LA COUR :**

14 Defence?

15 **LA DÉFENSE (Me FRANK ADDARIO) :**

16 No. I believe on the previous day we were this
17 week, Your Honour, we went through the challenges we
18 had with Mr. Kapoor and his schedule. I think
19 basically his last day with us on this would be on the
20 eighteenth (18th) if I'm not mistaking.

21 **LA COUR :**

22 Yes, Mr. Kapoor has indicated that he has another
23 matter that's beginning in October and he's addressed
24 us with respect to that. Only in very exceptional
25 circumstances would we ask him to come for a day in the

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1 week of the twenty-first (21st) because he'll need that
2 week of his other matter.

3 **LA DÉFENSE (Me FRANK ADDARIO) :**

4 Right.

5 **LA COUR :**

6 And I've also asked him to prepare his position in
7 writing. Hopefully -- and I would expect we can get
8 him to come and give his position orally as well -- but
9 I would like his position with respect to any of the
10 number of issues that have been raised, what if
11 anything he feels should be released, what he feels
12 should remain redacted and covered by privilege and his
13 evaluation of the various testimonies, public, private,
14 and how they relate to the various issues so I have his
15 assistance on those points.

16 So I do expect something in writing. Of course if
17 he presents something in writing on the *ex parte*
18 portion, it will have to be sealed. Any other comments
19 with respect to the schedule or anything else?

20 **LA DÉFENSE (Me FRANK ADDARIO) :**

21 None here Sir.

22 **LA COUR :**

23 Very well. So that's the schedule for the upcoming
24 period. If there is anything else that arises in an
25 unforeseeable way that we're not aware of now with

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1 respect to anybody's schedule, please proceed in the
2 usual way, let us know and we'll certainly make every
3 effort to accommodate everybody, Crown and defence and
4 of course the court as well. And we also try to
5 accommodate our very excellent clerk and her staff.
6 Thank you.

7 Q. So Mr. Richdale, step forward please.

8 LA COUR :

9 Just before we begin, madam Clerk, maître Gauthier,
10 could you just repeat the presences because we're in a
11 public portion now with testimony.

12 LA COURONNE (Me ALEXIS GAUTHIER) :

13 Yes. We have Mr. Simpson by way of a video link.

14 LA COUR :

15 Just before you go on.

16 Q. Mr. Simpson, have you heard everything today?

17 A. Yes I did Sir.

18 Q. Okay.

19 Go ahead maître Gauthier.

20 LA COURONNE (Me ALEXIS GAUTHIER) :

21 And present in the courtroom we have Mr. D'Addario,
22 Mr. Milioto, Mr. Mirarchi, Mr. Fracas and Mr.
23 Magistrale.

24 LA COUR :

25 Okay, go ahead, madam Clerk.

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JOSH RICHDALE
CONTRE-INTERROGATOIRE
Me FRANK ADDARIO

1 **JOSH RICHDALE**
2 Caporal RCMP - Matricule # 51823
3 Assermenté

4 **PREUVE DE LA COURONNE**

5 **CONTRE-INTERROGÉ PAR Me FRANK ADDARIO,**
6 **Procureur de la défense :**

7 Q. Hi, good afternoon. You were involved in the use of
8 the IDM technique on January eleventh (11th) two
9 thousand and twelve (2012)?

10 A. I believe that's correct.

11 Q. Okay. Do those electronic notes look familiar?

12 A. Yes they do Your Honour.

13 **LA COUR :**

14 Do you want to produce this, Mr. (inaudible)?

15 Q. I hand them to our excellent clerk...

16 Your Honour, I mentioned to Mr. Macdonald that we
17 would be using the monitor today and I believe he'll
18 address you about Mr. Simpson's position.

19 **LA DÉFENSE (Me MacDONALD) :**

20 I don't think Mr. Simpson is able to see the
21 monitors Your Honour. But I discussed with Mr. Simpson
22 this question might arise and I think Mr. Simpson
23 waives the opportunity to be able to follow today but I
24 will brief him on the material that is presented today.

25 **LA COUR :**

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JOSH RICHDALÉ
CONTRE-INTERROGATOIRE
Me FRANK ADDARIO

- 1 So you think he's okay. Then we'll make sure.
- 2 Q. Mr. Simpson, do you hear me?
- 3 A. Yes I can Your Honour.
- 4 Q. Okay. So similarly to the other day, there's going to
- 5 be at least one document if not more produced, that are
- 6 going to be displayed on the computer screen here in
- 7 court. You know you had a right to be here in court,
- 8 physically present like the others, you know that?
- 9 A. Yes I know.
- 10 Q. But you chose to appear by videoconference, correct?
- 11 A. Correct Sir.
- 12 Q. Okay. So are you expressly waiving, you're renouncing
- 13 your right to see these documents at the same time
- 14 they're presented in open court?
- 15 A. Right.
- 16 Q. So are you expressly renouncing? In other words you're
- 17 not...
- 18 A. I'm renouncing the viewing of the video.
- 19 Q. Of the documents that are being filed in court, that
- 20 are on the screen that you can't see from where you
- 21 are?
- 22 A. No I can't.
- 23 Q. Okay. But you are renouncing your right to see them on
- 24 the screen?
- 25 A. Yes I'm renouncing.

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CONTRE-INTERROGATOIRE
Me FRANK ADDARIO

1 Q. All right.

2 Is that fine with you maître Macdonald?

3 **LA DÉFENSE (Me MacDONALD) :**

4 Yes Sir.

5 **LA COUR :**

6 Okay.

7 Q. Your lawyer says it's fine with him and he will come
8 and brief you with respect to these documents. In case
9 there is other documents today, is your position the
10 same? If there is other documents produced on the
11 computer screen today, is your position the same as
12 what you've just said?

13 A. Same, same, same position.

14 Q. All right.

15 Anything else Mr. Macdonald?

16 **LA DÉFENSE (Me MacDONALD) :**

17 No Your Honour.

18 **LA COUR :**

19 All right, very well. Please go ahead. Thank you
20 for bringing it to my attention.

21 **LA DÉFENSE (Me FRANK ADDARIO) :**

22 Q. These are typed written notes in relation to the use of
23 the IDM technique on January eleventh (11th) twenty-
24 twelve (2012)?

25 A. That's correct.

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- 1 Q. And the time of day record or described is between
2 twelve thirty-four (12:34pm) and nineteen fourteen
3 (19:14)?
- 4 A. That's correct.
- 5 Q. And do the notes record the time that the device, the
6 IDM device was activated?
- 7 A. It's the approximate time that the device was activated
8 Your Honour.
- 9 Q. You're making the note about the device?
- 10 A. No, I made these notes Your Honour.
- 11 Q. And what does that mean "*approximate time*"?
- 12 A. So there, when I'm typing on the computer the note of
13 what time I was starting for a particular reading, the
14 machine would have a time stamp of when it actually
15 begins to associate with each number that is identified
16 by the machine. So there might be a slight delay from
17 the time I start the actual readings to when the
18 numbers start appearing in the data base. But it's
19 very, very minimal the delay between when I said I
20 started.
- 21 Q. It's within a minute or so?
- 22 A. Oh yes, for sure yes.
- 23 Q. And the notes also show the cellular network that's
24 being scanned?
- 25 A. Yes it's... yes, the particular protocol.

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- 1 Q. So if we look at twelve thirty-four (12:34pm), the
2 entry there, it shows you're into GSM with Rogers as
3 the network?
- 4 A. That's correct.
- 5 Q. And twelve forty-three (12:43pm) it shows Bell, is that
6 Bell and Telus?
- 7 A. That's correct. That is a term that the RCMP or we
8 chose as they share the same network.
- 9 Q. That was in Quebec they share the same network?
- 10 A. That's correct.
- 11 Q. And at thirteen o'one (13:01) then there is a CDMA
12 scan, that would be using the IDM to scan a different
13 network, is that right?
- 14 A. It's the CDMA protocol.
- 15 Q. I said network but protocol is the correct way to
16 describe it, right?
- 17 A. That's correct.
- 18 Q. And then at fourteen twenty-two (14:22) it's GSM
19 Rogers, so you'd be using that GSM to scan... sorry, the
20 IDM to scan that protocol at that time?
- 21 A. That's correct.
- 22 Q. And same with the rest of these entries on this page
23 and the following pages, is that right?
- 24 A. That's correct Your Honour.
- 25 Q. And then the notes also referred a location. For

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- 1 example at twelve thirty-four (12:34pm) we see the
2 Sports Bar behind on rue Louvois.
- 3 A. That's correct.
- 4 Q. Do you see that? At thirteen o'one (13:01) then we see
5 the same location, actually it goes on for seventeen
6 (17)... twenty-seven (27) minutes or so.
- 7 A. Yes. I believe that the first part of that, the date
8 and the name Sports Bar would be part of what you would
9 call the session tag which we have discussed in the
10 public, which is an identifier for us to associate the
11 numbers that were obtained at that location.
- 12 Q. And can you tell me, is that where you're situated?
13 Where you're situated or where you're attempting to
14 capture?
- 15 A. The... sorry?
- 16 Q. What does that location describe?
- 17 A. So the location is the... the Sports Bar is a reference
18 to the session tag and then the second part is... I
19 cannot remember if that's where I was located or where...
20 I believe that's where our location was Your Honour.
- 21 **LA COUR :**
- 22 Q. The Sports Bar?
- 23 A. No, where it says on rue Louvois.
- 24 **LA DÉFENSE (Me FRANK ADDARIO) :**
- 25 Q. So I'm going to clarify that. Then rue Louvois is

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- 1 where you're located and Sports Bar is the session tag
2 which is a description that you give to the period
3 you're using the IDM?
- 4 A. That's correct.
- 5 Q. And Sports Bar might or might not describe the area
6 where you're going to capture the IMSI/IMEI
7 information?
- 8 A. That's correct. It's the... knowing how I wrote these
9 notes, I know that that was the particular location.
10 But that's also part of the session tag which could be
11 anything. So this particular 2012-01-11 Sports Bar, I
12 believe if we were to check the data base, that would
13 be the name of the session tag and it also describes
14 approximately where the person of interest was as well.
- 15 Q. Okay. So in general, each session is given a tag to
16 describe where you're located?
- 17 A. That is correct.
- 18 Q. Or sorry where you're capturing?
- 19 A. That's correct.
- 20 Q. And then it's also given a description about where
21 you're located?
- 22 A. Not necessarily.
- 23 Q. The first thing I mentioned is more important than the
24 second?
- 25 A. Meaning?

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1 Q. Where you're capturing is more important than where
2 you're located?

3 A. That's correct. It's the session tags meant for us to
4 be able to sort the captured numbers so that we can
5 associate what numbers were obtained at which area.
6 But it doesn't necessarily mean it's a correlation
7 between the actual location, it's simply a term that we
8 choose. In this particular time, it references the
9 Sports Bar where the location was, but it doesn't have
10 to. And a description of where we are is not necessary
11 in the notes, it's something that I chose to add on
12 this particular... at this time.

13 Q. Okay, that sounds very subjective. So you're saying
14 there is no rules about how you describe either the
15 session tag or the location?

16 A. That's correct. The session tag is simply for us to
17 associate all the numbers that are obtained in a
18 certain area with a particular name. Generally it will
19 be something similar to where our location is, so it's
20 easier to see.

21 Q. But there is no best practice that you should always
22 describe where you're capturing information and where
23 you're located when you're capturing it?

24 A. There is none?

25 Q. No best practice?

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1 A. There is not. For these particular readings there was
2 not.

3 Q. I didn't ask you about these readings.

4 A. Okay.

5 Q. Is there a best practice?

6 A. Now there is a best practice where we will associate
7 the location with the session tag. So we will describe
8 our location in our notes, so that we know what a
9 session tag is associated to.

10 So to explain that better, Your Honour, I will give
11 an example. If I was doing a reading at my place,
12 before we had this best practice I might say "*Josh*
13 *Richdale's house*". Now, every time I want to go back
14 to Josh Richdale's house, I'm going to have to have
15 that tag written in there, Josh Richdale's house.

16 So now we could just say maybe "house" and then
17 have a description of where house is. So in your notes
18 now you will write house is the session tag and then
19 you write, Josh Richdale's house located at whatever
20 address. So we could now associate better exactly the
21 location is with the session tag. And the session tag
22 is simply something we use to search the numbers.

23 Q. And is there a particular reason that in these entries
24 you wouldn't use something more specific?

25 A. It's because there is always physical surveillance with

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- 1 us and they have surveillance reports and they will
2 indicate where the person has been and they're
3 responsible for keeping track of all that
4 documentation.
- 5 Q. Fair. So if I were to check the physical surveillance
6 reports, they would give a more precise location of
7 where the IDM has been operated?
- 8 A. Not where the IDM has been operated but where the
9 person of interest is located.
- 10 Q. So that's the Sports Bar or some other equivalent areas
11 that's going to be the description of the session tag?
- 12 A. That's correct.
- 13 Q. Then if we look over to the next page and look at the
14 entry after, here again you record similar information
15 at each of these locations. You've got a session tag
16 at his residence, near residence of Colapelle. That is
17 residence near residence of Colapelle on Leonard?
- 18 A. That's correct.
- 19 Q. So those again are the categories at his residence, the
20 session tag "*near residence of Colapelle*" is your
21 general location?
- 22 A. I believe that's how it is. Again if we were to
23 actually look at the data base and see the session tag,
24 we would be able to see exactly where that would end.
25 So I believe with confidence that 2012-01-11

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- 1 *athisresidence* -- without a space as I wrote it --
2 would be the name of the session tag and then the
3 second part would be where we were.
- 4 Q. And has the best practice about recording the session
5 tag and the location of the operator changed since
6 twenty-twelve (2012)?
- 7 A. It has, it has.
- 8 Q. By using geolocation data now?
- 9 A. No, they're not.
- 10 Q. Okay. Could you just tell His Honour how the best
11 practice has changed?
- 12 A. So as I mentioned Your Honour, we will choose a word
13 for a location, something that is simple, and then we
14 will have a description of that location. So again for
15 example, if we were to maybe do this particular reading
16 again, it might just say "*residence*" as the session tag
17 and then our description of that would be either the
18 address of the person of interest which would be Mr.
19 Colapelle and explain that that is also his residence.
20 We would probably not include our location as part of
21 our notes.
- 22 Q. Okay. I'm going to break this next question up in two
23 (2) parts. Is there a geolocation information on the
24 device?
- 25 A. There can be, there is the option to have that.

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1 Q. Okay. And it's something for the moment that hasn't
2 been disclosed to me, is it recorded during the
3 session?

4 A. Yes. If the device is picking up our location and if
5 we have it hooked up.

6 Q. Okay. So twenty-twelve (2012), did you have it hooked
7 up?

8 A. Yes. There were times because I remember looking in
9 the data base for those blank entries. So again, those
10 blank entries depend on whether we were actually
11 getting a position from the GSP or not. And there was
12 a time where we didn't have it and I can't remember
13 when we added it and I remember that I had an antenna
14 and I added it. So I know I did but I don't know when
15 that was.

16 Q. Mr. Fortin might be able to help me with that?

17 A. No, I don't think so because it was just the machine
18 allows for it but it's not something that's necessary
19 for us and it's not something that we were using to
20 analyze our particular data. And it's just an option
21 on the device to have that.

22 Q. Like it's an option on my iPhone?

23 A. Correct.

24 Q. And you, are you able to tell us today when you added
25 that function to the IDM device?

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1 A. I cannot tell you exactly when that was. But as
2 mentioned, I know that some of the times on here did
3 have that.

4 Q. What's on here?

5 A. Oh sorry, on some of the readings we did have that
6 feature.

7 Q. On some of the readings on January eleventh (11th)?

8 A. For the purpose of the... all of the persons of interest
9 that we were working on, sometimes it was there.

10 Q. Sometimes during Project Clemenza?

11 A. That's correct.

12 Q. You did have geolocating...

13 A. Yes.

14 Q. ... readings from the IDM device when you were using it?

15 A. That's correct.

16 Q. And you're not able to tell me which sessions you did,
17 which sessions you didn't?

18 A. I could if I looked at the data bases.

19 Q. It will show in one of those columns that have not been
20 disclosed?

21 A. That's correct.

22 Q. Okay. The paragraph after the last entry at nineteen
23 fourteen (19:14), do you see that?

24 A. Yes.

25 Q. "*Richdale believes...*" you're writing about yourself in

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- 1 the third person there?
- 2 A. That's correct.
- 3 Q. Good. And that is you indicating that there is a
- 4 possible hit but you're not comfortable concluding that
- 5 there was a hit. Do I get that right? Impossible to
- 6 confirm, I'm sorry.
- 7 A. That's correct. So for me to explain that I would say
- 8 I had a number that I identified that would potentially
- 9 belong to Mr. Colapelle but I didn't feel I had enough
- 10 grounds to say with certainty that that number was in
- 11 his possession.
- 12 Q. And so that's... and so you don't move it from possible
- 13 to confirmed?
- 14 A. No, in this particular session I did not, I believe.
- 15 Q. And is that his real number?
- 16 A. Pardon?
- 17 Q. Go ahead, you read the paragraph.
- 18 A. Do you mind if I review just...
- 19 Q. Of course not, take your time, take as long as you
- 20 need.
- 21 A. Yes Your Honour, I remember. I didn't find a particular
- 22 device that I confirmed with a hundred... with my
- 23 reasonable grounds to give to the investigators during
- 24 these readings.
- 25 Q. And do you still have a copy of your affidavit in front

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1 of you?

2 A. I can...

3 Q. 32.10, your honour. 32.4?

4 A. Actually I believe I only have a copy of the embedded
5 one, did you have a copy of the good one? Thank you.

6 Q. So I'm just going to direct your attention to
7 paragraphs 24 through 34.

8 A. Yes.

9 Q. Now was that what you were describing as the method in
10 your last paragraph of those typed notes that I just
11 directed you to?

12 A. That's correct. And Your Honour, I believe that the...
13 yes, Your Honour it's... that is it.

14 LA COUR :

15 Q. Is this in the file, this document you...

16 LA DÉFENSE (Me FRANK ADDARIO) :

17 I'm going to ask it is.

18 LA COUR :

19 So let's file it. Madam Clerk what's the next?

20 Mme LA GREFFIÈRE :

21 32.7.

22 LA COUR :

23 32.7.

24 Q. So just the last question, Mr. Richdale, he asked in
25 your affidavit which is marked 32.4, is that the method

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1 you referred to. What he means, is that the method you
2 referred to in 32.7 page 2, the typed written
3 paragraph, that was the question.

4 A. It would be the combination, Your Honour, of paragraphs
5 24 through 34.

6 Q. So your answer is yes, paragraphs 24 to 34, is that
7 right?

8 A. Yes, that's correct.

9 Q. Go ahead please.

10 **LA DÉFENSE (Me FRANK ADDARIO) :**

11 Q. So you were attempting to identify an unknown device in
12 the possession of Mr. Colapelle, known person?

13 A. That's correct.

14 Q. And you could not confirm on that particular day?

15 A. That is correct.

16 Q. And could I ask you this, since we touched on the topic
17 of good practice and we've had a look of your entries
18 for that day, I think you'd agree with me that it's a
19 good practice to create a record of factors relevant to
20 the effectiveness of the device and its operation on
21 any given session?

22 A. We do not do that, Your Honour, but I don't think that
23 would be a necessary factor. The reason I say that is
24 because I don't know what would indicate that... give us
25 an indication that it might not be working correctly,

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- 1 aside from the fact that we would not be identifying
2 cellular devices.
- 3 Q. Well we'll come to that in a moment. You yourself have
4 already told us that there are factors that prevent the
5 device from successfully capturing IMEI/IMSI numbers.
- 6 A. That's correct.
- 7 Q. And some are environmental relating to whether... some
8 are environmental relating to buildings at that
9 location.
- 10 A. That's correct. And those particular things that you
11 just mentioned are with reference to the range.
- 12 Q. Yes. So that would be a factor that would impede the
13 successfull confirmation of the number of the
14 telephone?
- 15 A. That's correct.
- 16 Q. And you're saying to me that it's not a good practice
17 to record that when you have an unsuccessful session in
18 confirming a number?
- 19 A. That is correct. And I would say that it's because we...
20 when -- we're examining our data, so the numbers that
21 have been identified, again with the query mode it
22 collects all the cellular devices that are in a
23 particular area. So we don't have a defined exact
24 radius that's set, we don't have exact shape of the way
25 the devices are attached or attracted or obtained by

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1 our device.

2 So that being said Your Honour, if we were in here
3 trying to obtain all the devices here and I want to
4 identify Your Honour's phone, I might be able to obtain
5 phones up to madam Clerk, but I might not be able to
6 obtain yours because, for example, your desk is in the
7 way.

8 **LA COUR :**

9 Q. Maybe it's because I don't have one.

10 A. Or exactly. So for us to see that the machine is..
11 assuming that I have obtained everyone else's cellular
12 device and perhaps not the device that I thought might
13 belong to you for other readings, it's not for me to
14 say that there is a mistake in the machine that did not
15 obtain your device, because I was able to obtain other
16 devices.

17 But if Your Honour, if I completed a reading and I
18 obtained zero (0) devices, I would have a concern that
19 there is something that's not functioning correctly
20 with the machine.

21 **LA DÉFENSE (Me FRANK ADDARIO) :**

22 Q. But if you... You just told us the other day that there
23 are these factors and you confirmed them again today.

24 A. That's correct.

25 Q. But now you're saying that you can't assign any

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- 1 particular value to them during any session?
- 2 A. That is correct.
- 3 Q. And so someone attempting to determine the reason why
- 4 you had an unsuccessful session couldn't say "*it could*
- 5 *have been this or it could have been that*" because you
- 6 yourself haven't gone through that exercise during the
- 7 session?
- 8 A. I... yes.
- 9 Q. That's what you just told us, right?
- 10 A. Yes, that would make sense.
- 11 Q. So there is no value associated to those particular
- 12 environmental factors, their consideration, that you've
- 13 been told about by the scientist that exists but you
- 14 don't know how important it is?
- 15 A. Well I do understand the importance and I do, as an
- 16 operator, all operators know that these factors can
- 17 impede obtaining particular...
- 18 Q. On what date did it impede during the project?
- 19 A. Well that's a thing I can't tell you, where that... It's
- 20 generally with the range that those factors are coming
- 21 into effect. So if the person of interest is within
- 22 the range, there is a high likelihood we'll obtain a
- 23 known device in our data base and that's what we're
- 24 trying to do. The device identifies mobile devices, it
- 25 doesn't try to exclude devices or it's not being used

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- 1 to identify devices that were not obtained.
- 2 Q. Sure, you're out there to identify devices.
- 3 A. That's correct.
- 4 Q. And you are not out there to have unsuccessful sessions
- 5 I assume?
- 6 A. That is correct.
- 7 Q. And so you go out there to get as close as you can
- 8 under the best conditions?
- 9 A. That is correct.
- 10 Q. And I take it your training, the training you did get
- 11 was about range and conditions?
- 12 A. It's not a specific training that's given to... They
- 13 don't explain to you how to overcome those. It's
- 14 explained and common senses the operator to understand
- 15 that those will affect the range. But it's just
- 16 factors that affect radio frequency in cellular devices
- 17 and those are just problems that one has to deal with
- 18 as an operator and just a mobile cellular user. So I
- 19 mean, if your cell phone is deep within in a concrete
- 20 building, you will not have access to the cellular
- 21 network and vice-versa, if you're, you know, on the
- 22 outside, you might not... the cell network can't see that
- 23 particular device either.
- 24 Q. Are you saying that your training does not include
- 25 specific training about minimizing extrinsic factors

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1 that might reduce the success of a session?

2 A. It does in a sense that it's explained and that the
3 theories of radio frequency are explained and that you
4 know what those limiting factors are. But I guess to
5 answer a specific training to make sure that that
6 doesn't affect what you're doing, it's always going to
7 affect the transmission of cellular devices and that's
8 just... it's just a fact of radio transmission Your
9 Honour.

10 Q. So but there is no best practice or requirement that
11 you record the conditions on any given session so that
12 later on someone else can test the hypothesis that you
13 went out there to try to proof?

14 A. The hypothesis being?

15 Q. We've got a known person with a known device number,
16 we're going to try to capture, that would be one
17 hypothesis.

18 A. That's the... exactly. So our notes will indicate and
19 that's particularly why I would write that note, to
20 show and help potentially the next operator to see
21 where potentially we were doing readings so that if
22 they go back, they can kind of get an idea of where we
23 were and with reference to the person of interest and
24 either see if the devices that we believe are in his
25 possession come up again or if potentially they aren't

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- 1 seen again in our data base.
- 2 Q. Okay. I'm not criticizing you, don't get the wrong
3 impression.
- 4 A. No I don't, no.
- 5 Q. I'm just trying to understand the method and how
6 scientific it is or how subjective it is and how much
7 feel there is to it or how much objectivity there is to
8 it. And what I hear you saying is that the operator is
9 told about the general problems with radio frequency
10 and then directed to go out and use common sense in
11 both their query and the DF mode.
- 12 A. Yes, that is...
- 13 Q. Did I get that right?
- 14 A. That is correct. But... that's fair to say.
- 15 Q. And would you at least give me this, that the quality
16 and completeness of the information obtained by the
17 operator depends on how well the operator takes his or
18 her opportunities to take a reading?
- 19 A. That would make sense as well.
- 20 Q. And the training that you got, did it precede the first
21 time you went out on your own as an operator with an
22 IDM device in (inaudible)?
- 23 A. Did the training that I received?
- 24 Q. Yes.
- 25 A. The in-house training that I received preceded.

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1 Q. And was that in-house the six (6) ride-alongs?

2 A. Yes Your Honour, that was the ride-alongs and... yes it
3 was the ride-alongs Your Honour.

4 **LA COUR :**

5 Q. When were they?

6 A. I couldn't tell you the exact dates. They were not
7 necessarily just in this file, but I would be
8 potentially the driver of the vehicle riding with the
9 operator.

10 **LA DÉFENSE (Me FRANK ADDARIO) :**

11 Q. There is a manual associated with this device, isn't
12 there?

13 A. Yes, I believe there is a manual, yes. It's not... it's
14 not something that I, as an operator... I don't have that
15 particular manual.

16 Q. In your hands?

17 A. But it exists.

18 Q. You were never required to read it before?

19 A. No, I've seen the manual but it's not a requirement to
20 read the manual.

21 Q. You know it's in the office?

22 A. I know that Mr. Fortin has a copy.

23 Q. Excellent. Just before I leave this issue of recording
24 external factors or what I've been calling
25 environmental factors, to your knowledge, were any of

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1 the other operators recording those factors during the
2 sessions?
3 A. Not that I know of Your Honour. It's not... it's not
4 something that we would record. Again, we're not
5 recording -- and I say this in general -- but with
6 almost a hundred percent (100%) certainty that it's not
7 something we record, explaining why we would not obtain
8 a number. And it's because there is other factors as
9 well, perhaps at the time the phone was turned off, so
10 we don't know why we weren't able to pick up or obtain
11 a particular device at any given reading.
12 Q. But it's not just that though, it could also be the
13 other side called success, so.
14 A. Success as in?
15 Q. You could have a day where you capture a significant
16 number of phones and I'm asking you whether there was
17 any either operator curiosity or institutional
18 curiosity about environmental factors?
19 A. No.
20 Q. To your...
21 A. And that's again... it's a... I mean, when we obtain the
22 data, we see. And if you look at all the data bases
23 there, they're very similar in the sense that they have
24 obtained very... numerous amount of numbers. So as an
25 operator, we feel that the machine is obtaining numbers

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- 1 in the particular location, so the environment, the
2 environmental factors aren't preventing numbers at that
3 location from being obtained.
- 4 Q. That's trusting the machine?
- 5 A. Well that's knowing that our machine is obtaining
6 numbers.
- 7 Q. Maybe we're talking of (inaudible), but if it's
8 obtaining a hundred and thirty-six (136) numbers, that
9 doesn't mean there wasn't a hundred and seventy (170)
10 available.
- 11 A. That is correct.
- 12 Q. Likewise, if it's obtaining six (6), you don't know
13 whether eight (8) are available or five hundred and six
14 (506) are available?
- 15 A. That's very... that's exactly it Your Honour.
- 16 Q. Right, okay. And what I'm getting at is, in trying to
17 understand whether there is any either operator
18 curiosity or institutional curiosity as to
19 environmental factors. For example, is the range noted
20 from the target or the person in possession of the
21 phone each and every time?
- 22 A. No, it's not.
- 23 Q. Or are the settings on the device noted each and every
24 time?
- 25 A. No they're not.

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- 1 Q. Would you know any structural obstacles each and every
2 time?
3 A. No.
4 Q. Okay. In relation to all of those questions would any
5 of your colleagues do so to your knowledge?
6 A. That's not a standard procedure. I can't say for sure
7 that they would not but that's not a standard procedure
8 at all.
9 Q. You've told us the other day that as an operator, that
10 you used the relative signal strength indicator in the
11 data base to approximate where a phone is relative to
12 the MDI?
13 A. It can be used to do that, yes.
14 Q. Did you do that?
15 A. For my particular... for these particular readings?
16 Q. No, in general in this project.
17 A. I can confidently say that no, it's not... that's not
18 something that I myself use regularly and I don't
19 believe or I can say with confidence I did not use it
20 for the readings in this particular file.
21 Q. And you've indicated that it's an indicator?
22 A. That is correct.
23 Q. And could you just tell His Honour how an operator
24 would use the RSSI to make a conclusion about
25 identifying a device?

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- 1 A. Yes Your Honour. So if you remember, the RSSI is a
2 value, it's a negative value. And the closer it is to
3 zero (0) is an indicator that the signal strength is
4 higher and the further away it is from zero (0) is an
5 indicator that the signal strength is lower. And as a
6 general indicator, you can use that to help you
7 determine, with other things such as where that person
8 of interest is located, to help you determine if you're
9 close to the cellular device or not.
- 10 Q. In reviewing the transcript of the *ex parte* proceeding,
11 I noticed that you and Mr. Kapoor had an exchange about
12 failed vs. inconclusive searches for particular
13 devices, do you remember that?
- 14 A. That's correct.
- 15 Q. And I just wanted to get my own definition about each
16 of those straight with you, okay?
- 17 A. Yes.
- 18 Q. So that's what I'm going to ask you about now, okay?
19 When you refer to an inconclusive result -- you still
20 have your affidavit in front of you?
- 21 A. I do.
- 22 Q. Okay. So when you refer to an inconclusive result, you
23 mean a scenario in which you've got enough information
24 from a target's phone but not enough to meet your
25 reasonable grounds standard for a positive

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- 1 identification, have I got that right?
- 2 A. No, I would correct you and I would say that any time
- 3 we're unable to identify a cellular device, it would be
- 4 considered an inconclusive result and not a failed
- 5 result.
- 6 Q. It's not what I just said?
- 7 A. I believe you asked if we had potential cellular
- 8 devices that... and we were unable to confirm those, that
- 9 they would be confirmed as inconclusive. But I would
- 10 say that any time that we're not able to identify any
- 11 association or any number it would be considered
- 12 inconclusive and not failed.
- 13 Q. That's the... that's where you ended on with Colapelle on
- 14 this date in Exhibit 32.7?
- 15 A. That is correct.
- 16 Q. And is that the process you're describing in paragraphs
- 17 24 to 34 of your affidavit?
- 18 A. With the process that I had completed?
- 19 Q. Yes.
- 20 A. Yes, that is correct.
- 21 Q. And so that's inconclusive?
- 22 A. That is correct.
- 23 Q. So we're on the same page there about this?
- 24 A. Yes.
- 25 Q. And then if I could just move now to failed which was a

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1 term that Mr. Kapoor used with you. When I say failed,
2 I'm referring to a reading in which the phone that the
3 investigators believed was present is not appearing in
4 the data collected by the MDI.

5 A. Okay, I see what you're trying to say, yes. No, I
6 would still consider that as an inconclusive result.

7 Q. And maybe you could just tell His Honour why you would
8 consider that inconclusive as opposed to failed.

9 A. As I mentioned, Your Honour, with the machine there is
10 a range as well as other factors that would determine
11 if that cellular device is... the information is obtained
12 by a machine. And if there is a known device that we
13 are unable to obtain that information or find it, it
14 could either be out of range, the cellular device could
15 be turned off, the person of interest could potentially
16 not have that phone in his possession on those
17 particular readings or there might not be a SIM card
18 inside that phone.

19 Those factors are some that would prevent a
20 cellular device from being obtained by our machine. So
21 to say that it was failed because we weren't able to
22 get it on that particular reading, you could say that,
23 but in general it would be an inconclusive result
24 because you could potentially work more than either try
25 and find that number at other locations or try readings

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- 1 on other days to see if you're able to confirm that
2 device.
- 3 Q. But failed is my language. It's a fail because you
4 don't know why you failed?
- 5 A. That's correct, we don't know why we weren't able to
6 obtain that.
- 7 Q. Where it would be an inconclusive example that we had
8 with Colapelle. You do know why, you just couldn't get
9 that final reading?
- 10 A. No, that's not necessarily the case either. Because
11 that particular number potentially is not Mr.
12 Colapelle's number, so I mean to... it's just the same
13 circumstances really. That would be a known number
14 we're trying to identify, that we couldn't. And if we
15 had another known number that we could identify, it's
16 the same thing.
- 17 Q. All right. Let's maybe come at it a different way
18 because I see that you and I are not going to agree on
19 the meaning of failed and you want anything were the
20 theory is not confirmed to be inconclusive.
- 21 A. Well, again I understand... you can use the term "failed"
22 in the sense that you didn't obtain the number. But
23 failing by that sense does not mean that either that
24 person was not in possession until such time where you
25 are one hundred percent (100%) conclusive that he is

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1 not...

2 Q. How do I prove that? How do I prove I've never been to
3 Moscow?

4 A. That's... again, like I said, our device is meant to
5 identify numbers. If after a certain amount of time we
6 can no longer identify that number, we would tell the
7 investigators that we... if that number does not appear
8 to be in that person's possession.

9 Q. All right. Let's take a hypothetical and see what
10 adjective you put on it, inconclusive or failed.
11 Imagine that the MDI device picks up the IMSI and IMEI
12 associated to a phone in the possession of the target,
13 you're with me?

14 A. Yes.

15 Q. And it's at a particular time and at a particular
16 location, so he's at point A.

17 A. Okay. And to clarify, we know and we've identified
18 that this phone is his phone?

19 Q. Yes.

20 A. Okay.

21 Q. And so that means that the... and the phone is within the
22 range of your device at point A?

23 A. That's correct.

24 Q. And it means that the environmental factors that you
25 and I have been discussing weren't operating to prevent

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- 1 the IDM from working?
- 2 A. That's correct.
- 3 Q. And it means that the IDM was successfully scanning the
- 4 cellular network that the phone was using?
- 5 A. Sorry?
- 6 Q. The protocol.
- 7 A. Correct.
- 8 Q. Now assume that person with phone number 1 had a second
- 9 phone in his backpack or in his pocket, okay?
- 10 A. Yes.
- 11 Q. Same time, and it's turned on and it's using the same
- 12 cellular network.
- 13 A. Yes.
- 14 Q. Would you expect the IDM to capture the IMEI/IMSI from
- 15 that phone?
- 16 A. Yes you would.
- 17 Q. Under ordinary circumstances?
- 18 A. Yes.
- 19 Q. And it seems obvious that environmental factors
- 20 wouldn't prevent you from doing it?
- 21 A. That's correct.
- 22 Q. And if the IDM didn't capture the IMEI/ISM from that
- 23 second cellular phone... ISM... I can hear somebody
- 24 whispering...
- 25 A. IMSI.

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1 Q. You know what I meant?

2 A. I do, I understand what you were saying.

3 Q. We didn't need his help, okay. So assuming that your
4 IDM device doesn't pick up the identifying numbers from
5 the second phone, the factors are he doesn't have that
6 phone?

7 A. So again Your Honour, at this point we would not
8 necessarily know he has a second phone. If we've
9 concluded with reasonable grounds to identify the first
10 phone, we would present that information to the
11 investigators. And then at some point the investigators
12 came back to us and they'd said that they are sure he
13 has another device or that they know he's talking on
14 another device that they are unaware of, we would
15 potentially go out and try more readings.

16 So I would still say that's inconclusive because we
17 didn't obtain, you know, that particular device. It's
18 not... again, we don't know what where, how many devices
19 we're looking for, so potentially that device may have
20 been obtained at one location and it wasn't obtained at
21 another and that might not give us enough to determine
22 that he has both those devices in his possession.

23 Q. Sure, but in my example your investigators have told
24 he's got two (2) phones.

25 A. Okay.

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- 1 Q. And they're both one and they're both operating on the
2 same network.
- 3 A. Correct.
- 4 Q. And you pick up one but not the other, I'm asking how
5 you would describe that?
- 6 A. So we would... I would still describe that as
7 inconclusive and I would tell the investigators "if
8 you're sure he has a second device, you have the option
9 for us to continue trying more readings and trying to
10 identify this device, or we can try another day, wait
11 till he travels to other locations." Again I would say
12 that it is inconclusive with the potential of more work
13 that needs to be done to try and identify that device.
- 14 Q. Now the BlackBerry devices have a pin identifier, is
15 that right?
- 16 A. It's correct.
- 17 Q. And I'm going to be referring now to your will-state
18 that you produced earlier this month. Do you have that
19 with you?
- 20 A. Yes I do Your Honour. It's this particular document?
- 21 Q. It's called *Reimburses MDI*.
- 22 A. Yes, yes.
- 23 Q. And the pin identifier's built right into the hardware
24 of the device, am I right about that?
- 25 A. Yes, that's correct.

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- 1 Q. And it doesn't change?
- 2 A. The IMEI number does not change.
- 3 Q. And the pin associated with a given BlackBerry device
- 4 doesn't change?
- 5 A. My understanding is that it is associated with the IMEI
- 6 number.
- 7 Q. There's nothing the user can do to change that?
- 8 A. I'm not a hundred percent sure, I don't know of...
- 9 Q. Are you aware of anything a user can do to change that
- 10 pin number?
- 11 A. I'm not familiar enough with BlackBerry devices to know
- 12 if that can be done at all.
- 13 Q. Are you aware of any basis for thinking the IMEI on the
- 14 BlackBerry device can change?
- 15 A. No there is... with my experience -- and I have more
- 16 knowledge about the IMSI and IMEI numbers -- that
- 17 number, I don't know how it would be changed.
- 18 Q. Now the IMSI associated with that comes with a SIM
- 19 card.
- 20 A. That's correct.
- 21 Q. And you told us several days ago that generally the
- 22 user can replace the SIM card in his or her BlackBerry
- 23 with a different SIM card.
- 24 A. That is correct.
- 25 Q. And changing the SIM card causes the IMSI for the

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- 1 device to change to reflect the new SIM card.
- 2 A. That is correct.
- 3 Q. And are you aware that if a particular SIM card is
- 4 inserted at different times in different BlackBerrys,
- 5 the IMSI from that SIM card would be associated with
- 6 different IMEIs over time?
- 7 A. Sorry, I'm going to have to get you to clarify that
- 8 question.
- 9 Q. I take it out of this device and put it in another
- 10 device.
- 11 A. Yes.
- 12 Q. It's going to originally be associated with the IMEI
- 13 for this device and later associated with the IMEI for
- 14 that device.
- 15 A. Yes, at each point. So there's going to be...
- 16 Q. Yes.
- 17 A. To the network, from the network's side it would be
- 18 associated with whatever device it's inserted in.
- 19 Q. Okay. And that RIM will know that eventually?
- 20 A. It did and they should know that like right away on the
- 21 network.
- 22 Q. And I take it you know enough about BlackBerrys to know
- 23 that the IMEI and the pin are associated?
- 24 A. I'm aware of that, yes.
- 25 Q. And so that if I take the SIM card and remove it from

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1 phone A to phone B, it's going to be associated with
2 the pin and IMEI in phone A and then later that SIM
3 card, if inserted in phone B, would be associated with
4 a subsequent pin and IMEI?

5 A. I believe that's how it works, that's correct.

6 Q. And the MDI captures both the IMSI and the IMEI or
7 their equivalents for all phones that it -- I'm going
8 to say -- observes in its vicinity?

9 A. That's correct.

10 Q. And am I right in thinking that you never get one or
11 the other, you always get both?

12 A. Yes it... yes, you get the device that the SIM is in. So
13 you would get the IMSI and the associated IMEI with
14 whatever device it is in.

15 Q. And am I right in thinking that you as an operator are
16 equally interested in both pieces of data?

17 A. Yes that is correct.

18 Q. Okay then, I'm gonna show an example from this project.
19 I'm just taking you through and get your help in
20 understanding some things, are you willing to do that?

21 A. Yes, no problem.

22 Q. All right. Here is the date of September twenty-one
23 (21) two thousand and eleven (2011).

24 **LA COUR :**

25 Are you filing this?

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- 1 LA DÉFENSE (Me FRANK ADDARIO) :
- 2 Right now it's to assist Your Honour, and if it
- 3 seems right, we'll file Sir.
- 4 LA COUR :
- 5 All right.
- 6 LA DÉFENSE (Me FRANK ADDARIO) :
- 7 Q. If we just go to the second page there. Now this
- 8 report on this screen wasn't authored by you but by
- 9 someone JSL. Is that Jean-Sébastien Lauzon?
- 10 A. Yes, that's the only other person who those letters are
- 11 an acronym for their name, yes, that's an operator.
- 12 Q. He is an operator?
- 13 A. Yes.
- 14 Q. And to your knowledge he worked on this project?
- 15 A. Yes.
- 16 Q. And are you familiar with reports of this nature?
- 17 A. With this particular report...
- 18 Q. No, are you familiar with reports of this nature?
- 19 A. Meaning?
- 20 Q. You've seen this kind of report before?
- 21 A. The first time and only time I've seen this is for the
- 22 disclosure for this project.
- 23 Q. And we both know that you reviewed that very recently?
- 24 A. That's correct.
- 25 Q. So the answer to my question is yes, you've seen this?

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- 1 A. Yes, yes, sorry, yes, yes I have.
- 2 Q. And this, the example on the screen here that says *MDI*
3 *operator notes for September twenty-one (21), targeting*
4 *V. Mirarchi in Laval, Quebec, three (3:00pm) to four*
5 *fifty-five pm (4:55pm)* seems to be a report recording
6 the MDI technique being used in Laval on September
7 twenty-one (21) two thousand eleven (2011).
- 8 A. That's correct.
- 9 Q. And the targeted technique is Mr. Mirarchi?
- 10 A. Correct.
- 11 Q. And the time frame within which the technique is used
12 is three (3:00pm) to four fifty-five (4:45pm)?
- 13 A. Correct.
- 14 Q. All right. We just go to the next slide, I'm at these
15 red arrows, but this is a sheet that you're familiar
16 with?
- 17 A. Yes.
- 18 Q. And this is roughly how the data would be captured and
19 stored for analysis?
- 20 A. That's correct.
- 21 Q. And then it's ultimately uploaded to an Excel spread
22 sheet for disclosure purposes?
- 23 A. Correct.
- 24 Q. And organizing for the lawyers on the case who are not
25 engineers?

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- 1 A. That's correct.
- 2 Q. And I know you've looked at these spread sheets because
- 3 you had to review them to prepare this will-state in
- 4 early July didn't you?
- 5 A. That's correct.
- 6 Q. And on the screen is an excerpt from one of those
- 7 spread sheets of file MMR1A September twenty-one (21)
- 8 with columns A to K reproduced?
- 9 A. Yes.
- 10 Q. And starting on the left side you've got date and time
- 11 of the data capture?
- 12 A. Yes.
- 13 Q. And then the network provider?
- 14 A. Yes.
- 15 Q. Then the IMSI number and the IMEI number captured?
- 16 A. That's correct.
- 17 Q. And then it lists the carrier associated with the
- 18 phone?
- 19 A. That is correct.
- 20 Q. And on this excerpt we see an example of a T-mobile
- 21 carrier phone which is a US provider, right?
- 22 A. That's correct.
- 23 Q. They're using the Rogers' wireless network shown with
- 24 that thick red arrow?
- 25 A. Correct.

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1 Q. And on the first page of that excerpt we see the use of
2 the MDI technique at four forty-four (4:44pm)?

3 A. Correct.

4 Q. Now on page 2 of the document, the list of IMSI/IMEI
5 captures continues for four forty-four (4:44pm), all on
6 that page?

7 A. Correct.

8 Q. And we see that each of the IMEI/IMSI captured at that
9 moment in time represents a different mobile device?

10 A. Correct.

11 Q. You would mix that duplicate IMSI/IMEI numbers?

12 A. Yes, potentially. You would have... in this list you
13 mean? There would potentially be devices that were
14 seen or obtained and saved in this data base multiple
15 times.

16 Q. Multiple times in one minute?

17 A. In one session.

18 Q. In one minute?

19 A. Yes.

20 Q. Okay. You've seen that more than once?

21 A. Yes.

22 Q. Until you have to eliminate those as just machine
23 duplications?

24 A. There is... no, basically the... on a technical level, the
25 way that the machine operates, there is potential that

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1 a device will be obtained more than once in a
2 particular reading.
3 Q. Okay. But let me just close that off, is there any
4 investigative significance in that to you?
5 A. No.
6 Q. It's just the machine capturing it more than once?
7 A. That is correct.
8 Q. And then on page 3 on the screen, it's simply a
9 continuation of the same type of data that's captured
10 during the session at four forty-four (4:44pm)?
11 A. That's correct.
12 Q. And then if you go to the next page, page 4, we see
13 about halfway down the page that continued interception
14 of IMSI/IMEI into the next minute, sixteen forty-five
15 (16:45)?
16 A. Correct.
17 Q. And then on the next page we see the continued
18 interception through to next minute, four forty-six
19 (4:46pm)?
20 A. Correct.
21 Q. And so the spread sheet suggests the device was
22 capturing information continuously for roughly a three
23 (3) minute period, from four forty-four (4:44pm)
24 through the four forty-six (4:46pm)?
25 A. Correct.

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Me FRANK ADDARIO

1 Q. And... I added them up, you don't have to do that, but
2 assuming my arithmetic is correct, if I got a hundred
3 and thirty-six (136) different mobile devices, that
4 would be the sum total of what the device is... the IDM
5 is capturing during that three (3) minute period when
6 it's being operated?

7 A. That is correct.

8 Q. Within its range?

9 A. Correct.

10 Q. All right. Now on the next page, the next slide which
11 is headed *BlackBerry device pin 26CA1E1F*, the left hand
12 column is an excerpt of a document entitled *Source*
13 *document RIM Canada* and it's got a disclosure document
14 identifier. You see that?

15 A. Yes.

16 Q. And we know from your July six (6), we'll say that
17 you've seen this RIM document before?

18 A. Yes.

19 Q. And I take it you know that documents weren't all from
20 RIM but came in response to a lawful production order
21 from the police?

22 A. That is correct.

23 Q. And the document information provides basic subscriber
24 information and device history in relation to RIM
25 device?

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- 1 A. That is correct.
- 2 Q. And the device in question here is the one with pin
3 26CA1E1F?
- 4 A. That is correct.
- 5 Q. And each BlackBerry device, as we've already agreed,
6 has this unique IMEI number?
- 7 A. Yes.
- 8 Q. And they... that's depicted there on the screen?
- 9 A. That is correct.
- 10 Q. And RIM also maintains a record of the MSI or SIM card
11 history for the device, is that your understanding?
- 12 A. Yes, that's my understanding.
- 13 Q. And here the SIM card history on the bottom left shows
14 that on June thirteen (13), the first SIM card was in
15 the device as represented by the IMSI that's being
16 highlighted now?
- 17 A. That appears to be correct, yes.
- 18 Q. And then on July twelve (12) there is a new SIM card
19 put in, inserted in the device?
- 20 A. Correct.
- 21 Q. And again on November fifteen (15)?
- 22 A. Yes.
- 23 Q. Am I reading that information from...
- 24 A. Yes, that's the way I would interpret that information
25 as well.

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- 1 Q. And so using that history, it appears that the SIM card
2 associated, the IMSI associated with that device
3 between July twelve (12) and November fourteen (14) is
4 the one on the right hand side of the slide?
- 5 A. Yes.
- 6 Q. The one then again, 60A5.
- 7 A. Yes, I see what you're pointing, yes.
- 8 Q. Am I reading that correctly?
- 9 A. Correct.
- 10 Q. And the phone was associated with T-Mobile based on
11 carrier information which we know roamed on the Rogers'
12 network in twenty-eleven (2011)?
- 13 A. Correct.
- 14 Q. You already saw that when we looked at the spread
15 sheet, right?
- 16 A. Yes. Yes.
- 17 Q. And with the knowledge of the IMEI number for the
18 BlackBerry device with this pin number and knowledge of
19 what the IMSI that was on September twenty-one (21),
20 you'd be able to compare those numbers as against the
21 MDI session on September twenty-one (21) between four
22 forty-four (4:44pm) and four forty-six (4:46pm)?
- 23 A. Sorry I just lost... So you basically... just so I
24 rephrase, you're asking if I compare those numbers with
25 the data that I've taken?

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- 1 Q. Now knowing what the IMEI number for the device is and
2 knowing what the IMSI number was on September twenty-
3 one (21), you'd be able to compare those numbers as
4 against the data for the MDI session on September
5 twenty-one (21) between four forty-four (4:44pm) and
6 four forty-six (4:46) to see if data from that device
7 was captured during the session targeting Mirarchi?
- 8 A. Yes, but I... just to clarify there, I don't necessarily
9 know if... just from looking at this it doesn't
10 necessarily say what the SIM card was in that device on
11 that particular day. And I don't...
- 12 Q. Well I thought we just agreed that when you change it,
13 it's recorded by the...
- 14 A. I believe that it... Sorry, I can't speak to how that is
15 logged in their system, I don't know if they have the
16 SIM card at every single day that it sees a new SIM
17 card or if it identifies a SIM card for a particular
18 first time that it saw that SIM card and associates
19 that. I don't have the answer for that question.
- 20 Q. Sorry, how did you put your will-say together if you
21 didn't have that information?
- 22 A. How did I?
- 23 Q. Yes.
- 24 A. Because what I was able to do is just look for devices
25 and SIM cards that were associated with Mr. Mirarchi

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1 throughout the course of the investigation and look
2 into the data base.

3 Q. Honestly?

4 A. Pardon?

5 Q. Honestly?

6 A. Yes.

7 Q. You didn't make the assumption that RIM is tracking the
8 SIM cards continuously?

9 A. No I did not.

10 Q. You don't have that information?

11 A. No I do not.

12 Q. So can you show me where in your will-state it says
13 that you made the assumption that Mr. Mirarchi had the
14 SIM card but you didn't draw that information from RIM?

15 A. Well I reviewed these documents and a report by the
16 investigators and I saw numbers that were associated to
17 Mr. Mirarchi throughout the course of the
18 investigation, and those are the numbers that I used to
19 compare with the data that was obtained on that
20 particular date.

21 Q. But you're telling me now that you relied on
22 information from investigators in preference to
23 information from RIM?

24 A. They were based on these exact reports and I did see
25 the pin reports as well.

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- 1 Q. Yes, okay. So maybe... okay, maybe the way to deal with
2 this is we'll get... maybe the Crown will stipulate right
3 now that I'm correct, okay? Maybe we'll get Inspector
4 Flynn back here to explain how RIM locates these SIM
5 cards. But can you just assume for the purpose of my
6 question that RIM continuously locates the SIM card?
- 7 A. I don't know if they do or not.
- 8 Q. Can we go back at least to your agreement with me
9 earlier that the IMEI doesn't change?
- 10 A. I believe that the IMEI does not change and again I'm
11 not a hundred percent (100%) with the BlackBerry
12 devices, but I'm fairly confident that the pin is
13 associated with a specific IMEI.
- 14 Q. You know from your analysis of the data that the IMEI
15 for this pin number, 26CA1E1F, was not captured during
16 the session on September twenty-one (21), between four
17 forty-four (4:44pm) and four forty-six (4:46pm), right?
- 18 A. I would have to double check the data.
- 19 Q. Take your time.
- 20 A. Can you go back to the... because I don't have the actual
21 associated pin number on here?
- 22 Q. We could just look at your will-state.
- 23 A. Well that's what I mean, I don't know if I have that.
- 24 Q. Let's start with your will-say. In your will-state do
25 you say anywhere that the IMEI for this pin number is

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1 captured during the time frame?

2 A. No I do not see it.

3 Q. Now do you need to see the data?

4 A. Yes because I need to see what we determined Your
5 Honour, that the pin is associated with an IMEI, so I
6 would see what that pin is on this sheet and look for
7 that particular IMEI. And then I would look to see...

8 Q. I'm sorry, what did you... I'm sorry, was that not the
9 purpose of your will-say?

10 A. My purpose for the will-say was to show that there were
11 devices that were found eventually to be known by the
12 investigators throughout the course of the
13 investigation, that were obtained by our machine but we
14 were unable with reasonable grounds to say that Mr.
15 Mirarchi had that device in possession.

16 Q. So if you wanted to look at the original data, I'm
17 happy to show it to you and then I'm going to ask you
18 the same question again. You know from your analysis
19 of the data, I must suggest to you you knew well before
20 you came to court today, that the IMEI for pin 26CA1E1F
21 was not captured during the time frame of four forty-
22 four (4:44pm) to four forty-six (4:46pm) on September
23 twenty-one (21) two thousand and eleven (2011).

24 A. I could not say that specific number. All I analyzed
25 were the IMEI and IMSIs and because that's the data

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1 that's obtained by the MDI device.
2 Q. What would you need to answer my question accurately
3 and honestly?
4 A. Well if I had the data and I looked at the associated
5 IMEI to pin number 26CA1E1F, I would look in the data
6 base to see if that solicited IMEI was found.
7 Q. I thought, like just five (5) minutes ago we went
8 through all the data.
9 A. Well I don't... well I can see if it's... if that IMEI here
10 is not listed in my data here.
11 Q. It's definitely not in your will-say.
12 A. Then it was not picked up by the MDI.
13 Q. Okay. So we (inaudible) that?
14 A. Yes.
15 Q. Do you want to see your data?
16 **LA COURONNE (Me ALEXIS GAUTHIER) :**
17 I'm sorry but we are not following here. Maybe
18 it's...
19 **LA COUR :**
20 Who's not following?
21 **LA COURONNE (Me ALEXIS GAUTHIER) :**
22 Us here. There is something that we don't
23 understand.
24 **LA COUR :**
25 I think the...

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1 Q. Mr. Richdale, are you following?

2 A. I just understand that he wanted me to see the
3 associated IMEI and pin that were there and confirm
4 that when I looked in the data base for that particular
5 date, it was not found. And I can say that if that
6 particular IMEI was not listed in these two (2) tables,
7 it was not found on that date.

8 Q. Well, he established that it's not in your will-say,
9 the IMEI for the pin number that he refers to on the
10 September twenty-one (21) date. So then you were going
11 to go to the...

12 A. Because when I analyzed the data, Your Honour, I was
13 looking at the IMEI and IMSI numbers but I didn't
14 examine the... there is a list of associated pins as well
15 and I didn't associate the pin with the IMEI. But if
16 that particular IMEI that he has associated with the
17 pin...

18 Q. I'd rather, on this point, that Mr. Addario follow up
19 with his questioning. So he left it that it's not in
20 your will-say, so then you said it's not captured and
21 you wanted to verify something.

22 A. No it was just... I guess I answered the question. It
23 was... he was asking if that particular pin was captured
24 on that date and I said that if that IMEI is not listed
25 in this here, then that's the analysis I did and that

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1 it should not be in that data base on that date.

2 Q. Okay.

3 So just in terms of your remark maître Gauthier,
4 *j'ai repris*, I took over that question again and his
5 answer, just so that we're all on the same page. So
6 you can note it if you want to come back in redirect.

7 Go ahead Mr. Addario.

8 LA COURONNE (Me ALEXIS GAUTHIER) :

9 Yes but my comment about a break is still standing.

10 LA COUR :

11 You want to have a break now?

12 LA COURONNE (Me ALEXIS GAUTHIER) :

13 Well it's fifteen (15) to four (3:45pm), yes. This
14 witness has started almost two (2) hours ago so we
15 would ask for... maybe the Court could ask the witness if
16 he wants...

17 LA COUR :

18 Well the Court... yes, the Court did that the other
19 day and the witness isn't shy to ask but at a certain
20 point in a cross-examination publicly, I don't want to
21 interrupt a certain line of questioning in the middle
22 on a particular point.

23 Q. Firstly, do you need a break right away?

24 A. No, Your Honour.

25 Q. All right.

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1 So at a certain point, when you've finished a
2 certain area, Mr. Addario, I'd ask you to stop before
3 you start a new area and we'll take a short break.

4 **LA DÉFENSE (Me FRANK ADDARIO) :**

5 Q. I feel like I've wrestled the word yes out of you and
6 if you are more comfortable, I'm happy to give you
7 these slides back.

8 A. No sorry, maybe I was just misunderstanding. But just
9 that associate... you were asking about the pin
10 particularly and I've explained that I'm not a hundred
11 percent (100%) sure but I believe that's only
12 associated with the IMEI. So if the question was if
13 that IMEI was in the data base, I examined that and if
14 it's not listed here, then I did not find that in the
15 data base.

16 Q. And when you say "here" you mean in your will-state
17 which His Honour has not seen?

18 A. Yes, that's correct.

19 Q. And so what I'm asking you to therefore state clearly
20 for the record, is that the IMEI for the... during the
21 four forty-four (4:44pm) and four forty-six (4:46pm)
22 session, the IMEI 8453 was not captured?

23 A. And that was on? The day of the reading was?

24 Q. September twenty-one (21).

25 A. I do have that.

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1 Q. At four forty-four (4:44pm)?

2 A. Hold a second, oh sorry, no, my mistake, my mistake,
3 sorry. I was looking at the wrong column here. Okay,
4 between that time it was not captured.

5 Q. Thank you. And if it was, you would have put it in
6 your will-say, am I right?

7 A. That's correct.

8 **LA DÉFENSE (Me FRANK ADDARIO) :**

9 Okay, this is a good point at which to break, Your
10 Honour.

11 **LA COUR :**

12 I just have one question.

13 Q. The other day you mentioned factors that could
14 interfere with the capturing of the identification of
15 the cell phone?

16 A. Yes.

17 Q. Yes. Do you know, other than reception, do you know
18 what the various impacts, what various impacts could
19 these factors have on the types of data that you get?
20 What kind of interference or any other impact could
21 these various factors have on the types of things
22 you're looking for? Are you familiar with all of them?

23 A. Your Honour I would say with confidence that the only
24 thing that's going to affect is whether we get the
25 information or not. I've not seen from my experience,

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1 any data bases with extremely bizarre results that
2 would show that the data had been manipulated by some
3 sort of external factor. But based on the fact of the
4 way that my understanding of cellular communications
5 work, you either have that good communication where you
6 are able to see what is being transmitted by the
7 cellular device or interference that will prevent that
8 transmission of cellular information. And if our
9 machine is not getting what is expected, then I've
10 never seen that in our data base.

11 Q. Have you done testing in high density areas like in the
12 Bell Centre in Montreal or in a metro station before
13 you go downstairs or even when you go downstairs? Have
14 you ever done testing in an area with a lot of people?

15 A. We have Your Honour.

16 Q. With targets, with known people and/or known phones?

17 A. Yes. And the results are as expected in high density
18 area, we'll obtain more cellular devices, that's the
19 result that we've gotten with the machine in those
20 areas.

21 Q. I'll leave it at that for now.

22 Okay we'll take a break, how much time Mr. Addario?

23 **SUSPENSION DE L'AUDIENCE**

24 **REPRISE DE L'AUDIENCE**

25 **LA COUR :**

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- 1 Go ahead.
- 2 **LA DÉFENSE (Me FRANK ADDARIO) :**
- 3 Thank you.
- 4 Q. Thank you for coming back. You know Sir that during
- 5 this investigation, pin communications were being
- 6 intercepted by specialized (inaudible) investigation?
- 7 A. Yes.
- 8 Q. And I take you know that disclosure has been made of
- 9 the pin interception history in relation to each pin or
- 10 BlackBerry device intercepted?
- 11 A. Yes.
- 12 Q. And on the screen now is an excerpt of the document
- 13 that the prosecution calls the murder calendar. You've
- 14 seen that before?
- 15 A. I have not seen this before.
- 16 Q. Okay. There is no dispute about what it is, the Crown
- 17 is relying on it in this case and it attributes
- 18 identities to users of BlackBerry devices and includes
- 19 the substance of the communication as intercepted,
- 20 okay?
- 21 A. Okay.
- 22 Q. And it depicts the day and time of messages the pin
- 23 devices were communicated and the messages that were
- 24 either being sent or received.
- 25 A. Yes.

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1 Q. Okay?

2 A. Okay.

3 Q. And this excerpt which is related to September twenty-
4 one (21) two thousand and eleven (2011) suggests that
5 on that day, the user of the device 26CA1E1F which is
6 the pin and the IMEI we've been referring to this
7 afternoon, was communicating with other people between
8 four forty-four (4:44pm) and four forty-six (4:46pm).
9 Do you see that?

10 A. Yes.

11 Q. And this was the date and time period that the MDI
12 technique was being used on Mr. Mirarchi and the data
13 was being captured by the MDI device in Laval, right?

14 A. Correct, yes. Yes, that location was... I'm not sure
15 about the exact location of where the operation was,
16 but I agree that's there that it was captured at that
17 time.

18 Q. Okay. And that is the very time that we just agreed
19 before we broke that the MDI device did not capture the
20 IMEI associated with the BlackBerry device 26CA1E1F,
21 right?

22 A. Correct.

23 Q. On the next slide you'll see a table representing the
24 compilation of the data and I want to take you through
25 it and just make sure I'm reading it correctly. We put

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- 1 this together from data that you saw a few weeks ago
2 when you were preparing your will-say, okay?
3 A. Yes.
4 Q. And the column starting on the last time was the MDI
5 used, the targeted network provider, the messages
6 intercepted on the BlackBerry device, the IMEI captured
7 and the IMSI captured. You follow on that?
8 A. Yes.
9 Q. And that summarizes what you and I just went through on
10 the September twenty-one (21) date.
11 A. Yes.
12 Q. And could we go through this type of exercise every
13 time the MDI was used on every target or every targeted
14 device?
15 A. I suppose we could.
16 Q. If we had surveillance information, the RIM information
17 and the raw data created by the MDI?
18 A. Yes.
19 Q. And where there are contemporaneously interceptive in
20 communications that comparison can be either taken the
21 same way that we've done this afternoon?
22 A. Yes.
23 Q. All right. So taking the murder calendar together with
24 the information we've looked at, I want to put these
25 propositions to you and you tell me if I've got it

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- 1 wrong, okay?
- 2 A. Yes.
- 3 Q. Between four forty-four (4:44pm) and four forty-six
4 (4:46pm) on September twenty-one (21) twenty-eleven
5 (2011), the device is being used to target Vittorio
6 Mirarchi?
- 7 A. Correct.
- 8 Q. The technique lead to the interception of IMSI and IMEI
9 data between those three (3) minutes.
- 10 A. Correct.
- 11 Q. It's now alleged he's in possession of a BlackBerry
12 device with the pin 26CA1E1F with an IMEI of
13 3542590438453 on that date at that time.
- 14 A. Correct.
- 15 Q. You know that to be true because you've reviewed the
16 data to prepare your will-state, right?
- 17 A. Correct.
- 18 Q. And on that date the device had a SIM card in it
19 associated with the IMSI provided by RIM to the police,
20 MIN6085.
- 21 A. Correct.
- 22 Q. And the BlackBerry with the pin 26CA1E1F was being used
23 contemporaneously when the police were using the MDI
24 seeing the messages that were intercepted by special
25 eye on that date at that time.

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- 1 A. Correct.
- 2 Q. Okay then, if we look at the next slide...
- 3 A. Sorry just... just go back one second there. That, the
- 4 confirmation you had that SIM card in it associated
- 5 with that particular IMSI, is that coming from the data
- 6 from the BlackBerry sheet that you showed me in the
- 7 history or is that what was determined to be the actual
- 8 IMSI that was found in that communication?
- 9 Q. If you go back to your... well it's two (2) sources, one
- 10 is RIM and I have your earlier answer that you're not
- 11 entirely certain that it tracks contemporaneously all
- 12 IMSI transactions, is that right?
- 13 A. Yes, I don't know the answer to that.
- 14 Q. And we know as well from looking at your will-state
- 15 that you have the IMSI ending in 60A5 attributed to
- 16 that IMEI on that very same date, about three (3) hours
- 17 earlier.
- 18 A. Yes.
- 19 Q. So there is two (2) ways that we get out that IMSI.
- 20 A. Okay.
- 21 Q. Are you comfortable agreeing with the last or the
- 22 second last proposition now?
- 23 A. I feel comfortable agreeing with that, yes.
- 24 Q. Thank you. So taking the murder calendar and the data
- 25 we've looked at, I'm going to suggest that between four

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1 forty-four (4:44pm) and four forty-six (4:46pm)... maybe
2 I'll just go to some questions.
3 Although the BlackBerry that's been used at the
4 time as the MDI technique, the MDI didn't capture the
5 IMEI associated with that device, that's fair, isn't
6 it?
7 A. Yes.
8 Q. And I take it you'd agree that there are four (4)
9 reasons why there could have been, I call it a failure,
10 you call it inconclusive on the part of the MDI to
11 capture the IMSI/IMEI, am I right?
12 A. I agree with... I agree with the reasons that you have
13 listed there, it's possible reasons. There are more
14 reasons potentially why that device might not have been
15 obtained by our machine.
16 Q. Okay, let's start with one. We can rule out number 1
17 if the device was on, correct?
18 A. That's correct.
19 Q. (Inaudible) reason?
20 A. Yes.
21 Q. So number 2, the target's not in possession of the
22 device and not using it, that's a true negative?
23 A. That's correct.
24 Q. Somebody just made a mistake, attributed to the person
25 incorrectly. Somebody said "Josh Richdale will be

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- 1 *standing at the corner of Sherbrooke and Mountain with*
2 *a certain device at four forty-four (4:44pm)" and they*
3 *were wrong. And then you went with the IDM to try to*
4 *capture it and of course you didn't capture it because*
5 *Josh Richdale didn't have it.*
6 A. Correct.
7 Q. So true negative.
8 A. Correct.
9 Q. O.K. 3, the device is out of range.
10 A. Correct.
11 Q. And 4, are reasons over which you claim investigative
12 privilege, am I right?
13 A. Correct.
14 Q. If 1 and 3 were ruled out and we wanted to test whether
15 number 4 was a reason, would we need that information
16 that's claimed to be part of investigative privilege?
17 A. Would you need to know 1 and 3?
18 Q. No, we can rule out 1 and 3. We also not need to rule
19 out number 4 in order to settle on number 2, the true
20 negative.
21 A. So you're asking if...
22 Q. It's kind of argumentative actually the question. My
23 point is simply that if we can establish for His Honour
24 that the device was not off, the cellular device was
25 not off and the IDM was not out of range, then we're

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- 1 left with two (2) possibilities.
- 2 A. That's correct.
- 3 Q. That seems inarguable. And the real question is how do
- 4 we test number 4?
- 5 A. Again it's... even number 2 I feel is the same as number
- 6 4 or number 3, even number 1. We're not in a position
- 7 with that device to determine why we do not get a
- 8 phone.
- 9 Q. But you appreciate that the exercise of a criminal
- 10 prosecution is different than the use of a IDM device
- 11 at the side of a road by a police investigator?
- 12 A. Sorry?
- 13 Q. Well we're doing this in this court room.
- 14 A. Right.
- 15 Q. And doing it in a trial proceeding is different than
- 16 what you might do...
- 17 A. In this...
- 18 Q. ... in using the devices and operating them.
- 19 A. I don't understand what you're...
- 20 Q. They're completely different exercises.
- 21 A. Basically...
- 22 Q. One involves proof and the other involves
- 23 investigation.
- 24 A. Correct.
- 25 Q. One involves testing hypothesis according to your

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1 standard, another involves testing in according to the
2 court's standard.
3 A. Yes.
4 Q. Fair?
5 A. Fair.
6 Q. Right. And if His Honour thinks we need to eliminate
7 number 4 in order to get number 2, that would be proper
8 for him to address, right?
9 **LA COURONNE (Me ALEXIS GAUTHIER) :**
10 I object Your Honour, asking opinions here. It
11 shouldn't be asked to this witness.
12 **LA DÉFENSE (Me FRANK ADDARIO) :**
13 Q. In the next line...
14 **LA COUR :**
15 If you have an objection, could you address it to
16 me and not to maître Addario?
17 **LA COURONNE (Me ALEXIS GAUTHIER) :**
18 It was addressed to you Sir.
19 **LA COUR :**
20 I saw you looking at defence counsel.
21 **LA COURONNE (Me ALEXIS GAUTHIER) :**
22 I'm sorry Sir.
23 **LA COUR :**
24 Thank you.
25 **LA COURONNE (Me ALEXIS GAUTHIER) :**

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1 It was addressed to you.

2 **LA COUR :**

3 Thank you. When you have an objection, state

4 "objection."

5 **LA COURONNE (Me ALEXIS GAUTHIER) :**

6 Objection Sir.

7 **LA COUR :**

8 Thank you. Do you have anything to say on the

9 objection?

10 **LA DÉFENSE (Me FRANK ADDARIO) :**

11 I'm happy to move along, Your Honour.

12 **LA COUR :**

13 All right, go ahead.

14 **LA DÉFENSE (Me FRANK ADDARIO) :**

15 Q. In the next line, I've reproduced an excerpt from the

16 redacted transcript involving an exchange between you

17 and Mr. Kapoor and this is along the same theme as I've

18 just been questioning you. Mr. Kapoor is putting to

19 you that when there is an... do you remember this

20 exchange?

21 A. Well...

22 Q. Take a moment.

23 A. If you don't mind.

24 **LA COUR :**

25 While he is examining that, I can write quickly but

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1 not that fast. The other documents, the propositions
2 and the questions, since they're on record, would you
3 have a copy for me?

4 **LA DÉFENSE (Me FRANK ADDARIO) :**

5 Of course.

6 **LA COUR :**

7 Thank you.

8 **Me ANIL KAPOOR :**

9 Maybe Mr. Addario can be friendly and give the
10 *amicus* a copy.

11 **LA COUR :**

12 Well just a minute. I think I can... I didn't
13 realize it was in the same document I had before. I
14 didn't realize it. I didn't realize it was already in
15 this document. Thank you, I have it.

16 **LA COURONNE (Me ALEXIS GAUTHIER) :**

17 Well would it be filed?

18 **LA COUR :**

19 It's not filed at this point, so that's up to
20 defence.

21 **LA DÉFENSE (Me FRANK ADDARIO) :**

22 I will be asking to file it just because we
23 referred to it so extensively. It's not itself
24 evidence but it would be fair to anybody trying to read
25 this or (inaudible).

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1 LA COUR :
2 Is that .8, 32.8 madam Clerk?
3 Mme LA GREFFIÈRE :
4 Um-hum, yes.
5 LA COUR :
6 All right, 32.8.
7 LA DÉFENSE (Me FRANK ADDARIO) :
8 Second to last page I think Your Honour has and
9 that the Crown and other counsels have, (inaudible)
10 into the record.
11 Mme LA GREFFIÈRE :
12 Is it the same document or not?
13 LA DÉFENSE (Me FRANK ADDARIO) :
14 I'll check to change that part. It just wasn't
15 shown on the screen, the second last page so we're not
16 proposing to make that part of the record. The
17 questions were asked (inaudible).
18 LA COUR :
19 Do you want this back?
20 LA DÉFENSE (Me FRANK ADDARIO) :
21 Sure.
22 Q. All right, did you have a chance to review that?
23 A. Yes Your Honour.
24 Q. And am I right in thinking that the blacked out answers
25 are part of the fourth proposition that I put to you on

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1 the previous slide?

2 A. That is correct.

3 **LA DÉFENSE (Me FRANK ADDARIO) :**

4 Your Honour, I'd like to stop there for the day.

5 We are... Mr. Gauthier can speak for himself but when we

6 spoke with him last night he required overnight and

7 today to get us the last portion of the redacted

8 transcript. We haven't got it yet, I'd like to see it

9 before I complete my examination of Caporal Richdale.

10 **LA COUR :**

11 Okay that's fine.

12 **LA DÉFENSE (Me FRANK ADDARIO) :**

13 I hope we can get it tonight so we can do it

14 tomorrow morning.

15 **LA COUR :**

16 Q. I just... I just want to understand something.

17 A. Yes Your Honour.

18 Q. Earlier this afternoon, at least this is the way I

19 noted it so correct me if I noted it incorrectly. On

20 this pin number 26CA1E1F, Mr. Addario referred you to

21 your will-say and he looked at certain data and he said

22 on September twenty-one (21) that pin number was not

23 captured, correct?

24 A. He asked between a specific time period, Your Honour.

25 Q. Right. So on the time period that he referred to, I

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- 1 believe it was within minutes before and after four
2 forty-four (4:44pm), that pin number was not captured
3 by the MDI?
- 4 A. Correct, it would be the IMEI associated with it.
- 5 Q. The pin number is linked to the IMEI which is, you've
6 explained, like the serial number?
- 7 A. It's correct.
- 8 Q. That was not captured?
- 9 A. Correct.
- 10 Q. So on the calendar which is entitled *Excerpt of murder*
11 *calendar* which is on the screen now, it refers to the
12 twenty-first (21st) of September and sixteen forty-four
13 (16:44) which is the time frame and it refers to the
14 pin number and it attributes a message to that pin
15 number. Take me through that if the MDI didn't pick
16 that up.
- 17 A. So the machine, again it's meant to obtain all the
18 numbers within an area. So the reason it might not
19 have obtained that particular number that we have
20 disclosed publicly is because the phone could have been
21 off which we see here it was not the case, and he was
22 not in possession of that particular device. But
23 again, if that was true, then that number 2 does not
24 exist and the third would be the device is out of
25 range.

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1 Q. And this, since the MDI doesn't pick up content, this
2 content would have been picked up otherwise through
3 different authorizations, correct?

4 A. That's correct.

5 Q. All right.

6 LA COUR :

7 So tomorrow nine thirty (9:30am), is that all
8 right?

9 LA DÉFENSE (Me FRANK ADDARIO) :

10 Nine thirty (9:30am) is great Your Honour.

11 LA COUR :

12 Just I'd like to have an evaluation, do you feel
13 you'll be done tomorrow or do you feel that it might go
14 on? As you wish, just to have an idea.

15 LA DÉFENSE (Me FRANK ADDARIO) :

16 I'm pretty sure I'll be done tomorrow.

17 LA COUR :

18 Okay. Any of the other lawyers have questions or
19 are going to tomorrow? No? Okay. I wish everybody a
20 good night, see you tomorrow, nine thirty (9:30am).

21

22 CAUSE REPORTÉE AU 24 JUILLET 2015 DEVANT L'HONORABLE
23 MICHAEL STOBER, J.C.S.

24 FIN DE L'AUDIENCE

25

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CONTRE-INTERROGATOIRE
Me FRANK ADDARIO

1 Je, soussignée, DANIELÈ F. TASSÉ (# 289078-0),
2 sténographe officielle bilingue, certifie sous mon
3 serment d'office que les pages qui précèdent sont et
4 contiennent la transcription fidèle des témoignages
5 rendus dans cette cause, dont l'enregistrement audio a
6 été effectué hors de mon contrôle et est au meilleur de
7 la qualité dudit enregistrement.

8 Le tout conformément à la loi.

9 Et j'ai signé,

10

11

12 *Danièle F. Tassé, s.o., o.c.r.*

13 DANIELÈ F. TASSÉ,

14 Sténographe officielle bilingue

15

16

C A N A D A	C O U R S U P É R I E U R E
	Chambre criminelle
PROVINCE DE QUÉBEC	
DISTRICT DE :	LAVAL
CAUSES NO :	540-01-063428-141
ÉTAPE :	REQUÊTE (SUITE)
PRÉSENT :	L'HONORABLE MICHAEL STOBER, J.C.S.
SA MAJESTÉ LA REINE,	
Plaignante,	
-C.-	
VITTORIO MIRARCHI & ALS	
Accusés	
NOM DES PROCUREURS :	
Me ROBERT ROULEAU	
Me ALEXIS GAUTHIER	
Me MARIE-CHRISTINE GODBOUT	
Procureurs de la Couronne	
Me FRANK ADDARIO	
Me MICHAEL LACEY	
Me WILLIAM THOMPSON	
Me MAXIME HÉBRARD	
Me MACDONALD	
Procureurs de la défense	
Me ANIL KAPOOR	
Amicus curiae	
DATE D'AUDITION :	Le 24 juillet 2015
TRANSCRIPTION REMISE :	Le 18 septembre 2015
FICHIER :	540-01-063428-141-2015-07-24

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CONTRE-INTERROGATOIRE
Me FRANK ADDARIO

1 **PREUVE DE LA COURONNE**
2 **CONTRE-INTERROGÉ PAR Me FRANK ADDARIO,**
3 **Procureur de la défense :**
4 Yes Your Honour.
5 Q. Good morning.
6 A. Good morning.
7 Q. The way we left off yesterday was in reviewing an
8 example of the use of the IDM on September twenty-one
9 (21), do you recall that?
10 A. Yes.
11 Q. And then we compared it with the interception of some
12 in-communications that were provided by RIM to
13 investigators with your agency?
14 A. Yes.
15 Q. And as I understood your evidence, you told His Honour
16 it's possible to do the same comparison for each and
17 every session that the IDM was used, provided you had
18 that same information from RIM and the extrinsic
19 evidence about the device?
20 A. Correct.
21 Q. What I'd like to do this morning is take you to some
22 examples from the same date and also look at another
23 date, hopefully with all the same data.
24 A. Yes.
25 Q. Okay? So if we could just go to the second slide, this

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1 material -- by the way Caporal, just well, we get the
2 material out, it is all from the disclosure, okay?

3 A. Yes.

4 Q. So if you can just take it and let see otherwise for
5 Mr. Gauthier that I've reproduced it faithfully by his
6 copy (inaudible) put it in my own editorial.

7 A. Yes.

8 Q. So we'll start with some other time frames when the
9 investigator used the MDI technique on September
10 twenty-one (21), twenty-eleven (2011). Can you see
11 that calendar on your screen?

12 A. Yes I can.

13 Q. And I'm going to ask you to assume your colleagues on
14 Project Clemenza make accurate and truthful notes, fair
15 enough?

16 A. That's fair.

17 Q. And so if they didn't, His Honour can devalue the
18 hypothesis I'm putting to you this morning.

19 A. It's fair.

20 Q. But I'm going to start from the assumption that they
21 made these notes intending them to be accurate and
22 truthful.

23 A. Okay.

24 Q. And on the screen are the surveillance notes related to
25 Vic Mirarchi on September twenty-one (21), the

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- 1 surveillance, it looks in the top right hand corner,
2 started at seven am (7:00am) that day, am I reading it
3 correctly?
4 A. Correct.
5 Q. And the notes on the screen are for one sixteen
6 (1:16pm) till one forty-three (1:43pm), are also
7 depicted there?
8 A. That's correct.
9 Q. And they provide investigative information about where
10 the target was during the surveillance part of the IDM
11 technique process.
12 A. Correct.
13 Q. And today the target is V. Mirarchi.
14 A. Correct.
15 Q. All right. And you, I take are bilingual?
16 A. Yes.
17 Q. Okay. The notes suggest that at one sixteen (1:16pm)
18 he parked in front of a particular address at boul.
19 Ste-Rose, 409?
20 A. Correct.
21 Q. A residence?
22 A. Correct.
23 Q. And he goes in and he's in there until one forty-three
24 (1:43pm)?
25 A. Correct.

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- 1 Q. And he's in there with a colleague or friend, unknown
2 person?
- 3 A. Correct.
- 4 Q. And then if we just look at the next slide, on the
5 screen here I've put part of the MDI data base for the
6 session conducted while he's at boul. Ste-Rose in that
7 residence, under surveillance during a period of time
8 that we just reviewed on the previous slide.
- 9 A. It's correct.
- 10 Q. Are you with me so far?
- 11 A. Yes.
- 12 Q. And again, I'm asking you to assume your colleagues are
13 recording accurate and truthful notes about where they
14 were and what they were doing, fair?
- 15 A. Yes.
- 16 Q. And what we can see is that the IMEI that we were
17 looking at yesterday, the one ending in 8453 associated
18 with the device 26CA1E1F was captured during this
19 session, correct?
- 20 A. Correct.
- 21 Q. Highlighted on the screen?
- 22 A. Yes.
- 23 Q. And you and I notice this because you've seen this data
24 before?
- 25 A. Yes, it's what we reviewed.

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- 1 Q. You looked at it less than three (3) weeks ago?
- 2 A. That's correct.
- 3 Q. Right, the Crown asked you to prepare a will-say about
- 4 Mirarchi and the IMEI attributed to him?
- 5 A. Yes.
- 6 Q. And this IMEI on this date was part of your review?
- 7 A. That's correct.
- 8 Q. And it's obvious then that the device with that IMEI
- 9 pin 26CA1E1F was capable of being captured?
- 10 A. Correct.
- 11 Q. And during this session it's clear the device was not
- 12 configured in a way to avoid being captured, otherwise
- 13 it would not appear in the data base.
- 14 A. That's correct.
- 15 Q. And during this session the person with this device
- 16 wasn't doing anything to avoid capture by the IDM
- 17 successfully?
- 18 A. It appears not.
- 19 Q. And if standing alone, if I understood your evidence
- 20 from yesterday, this wouldn't be sufficient to amount
- 21 to confirmation that the target, Mr. Mirarchi, was in
- 22 possession of the device because you can't eliminate
- 23 the possibility someone else didn't capture a range of
- 24 the MDI at the time he was holding the BlackBerry or
- 25 cell or whatever has the IMEI?

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1 A. Yes, that's fair to say because we would be trying to
2 identify a device for Mr. Mirarchi at this time and we
3 would use multiple sessions to make that analysis.

4 Q. Right. So to move from a possibility to a confirmation
5 you need more instances of the device being captured at
6 different locations?

7 A. Exact, yes. So if I understand you correctly, just
8 using this data alone, as an operator that would not
9 know that device, you would not be able to determine
10 that belonged to Mr. Mirarchi.

11 Q. In fact that's what paragraphs 24 to 34 of your
12 affidavit that we looked at yesterday are all about?

13 A. Correct.

14 Q. Multiple identifications in order to get reasonable and
15 probable grounds to identify someone.

16 A. That's correct.

17 Q. And you know from your review of the data that this is
18 the only time the device with that IMEI pin was
19 captured throughout the surveillance day?

20 A. I'd have to double check that but... With that...

21 Q. Would your will-say help?

22 A. Yes, for sure.

23 Q. Go ahead, have a look at your will-say.

24 **LA COUR :**

25 While we're doing that, is the pin number in this

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1 document, you referred to the IMEI?

2 **LA DÉFENSE (Me FRANK ADDARIO) :**

3 It's not in here Your Honour, we did it yesterday
4 so it's in Exhibit 32.7. It's on about the seventh
5 (7th) slide, I'll just show you the page Your Honour,
6 where the pin is associated with the IMEI.

7 **LA COUR :**

8 Thank you.

9 **LA COURONNE (Me ALEXIS GAUTHIER) :**

10 It was filed under 8.

11 **LA COUR :**

12 32.8, page 8.

13 **LA DÉFENSE (Me FRANK ADDARIO) :**

14 32.8, thank you Mr. Gauthier, thank you Your
15 Honour.

16 A. It's correct.

17 Q. That's the only time?

18 A. On that particular day, yes.

19 Q. On that day, that that IMEI pin was captured. So if we
20 could just go now to the next page then. On the screen
21 is another time frame from September twenty-one (21),
22 this is three twenty (3:20pm) to three twenty-three
23 (3:23pm) on the same day?

24 A. Yes.

25 Q. And this is a period of time where the MDI technique

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1 was being used, it looks like from three (3:00pm) to
2 four fifty-five (4:55pm). Do you recall seeing that
3 yesterday?

4 A. This particular set of data?

5 Q. No, the... this would be the second page of yesterday's
6 exhibit.

7 A. Yes.

8 Q. And your colleague was the operator that day? It
9 appears from his notes that the session was roughly two
10 (2) hours long, three (3:00pm) to four fifty-five
11 (4:55pm).

12 A. It's correct.

13 Q. And would I be right in thinking -- forgive me if I
14 asked you this yesterday -- that anyone who has this
15 data can go through the same exercise we did yesterday
16 by comparing the data captured by the MDI with the
17 IMEI/pin to determine if there is a match?

18 A. It's correct.

19 **LA COUR :**

20 Q. Mr. Richdale, is it possible for somebody to change the
21 IMEI number in their device?

22 A. In the data base?

23 Q. In the cell phone.

24 A. I don't know of any way that it can be done. It might
25 be possible but I don't... with my experience I've never

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1 seen it and I don't know that it is actually possible
2 to change that.

3 Q. Okay.

4 **LA DÉFENSE (Me FRANK ADDARIO) :**

5 Q. Just following up on His Honour's question, if someone
6 could do that, then there would be no reliability in
7 associating devices.

8 A. Correct, you'd be going by the IMSI number, trying to
9 find SIM cards and accounts.

10 Q. And the IMSI we know could be changed.

11 A. That is correct.

12 Q. So that would make the BlackBerry an empty vessel for
13 whatever someone wanted, however someone wanted to
14 change it if both can be changed?

15 A. Yes, there would be... I mean, that's part of the
16 protocol for the communication, so there would be an
17 associated number. Again we're talking hypothetically
18 but I don't... again, if the pin's associated with that,
19 the pin might not work as well, so there is a lot of
20 whatifs with regard to the change of an IMEI. But
21 again, I've never seen it and I don't think it's
22 possible to... in my opinion it's not possible.

23 Q. You've never been told about an IMEI being switched?

24 A. No.

25 Q. Thank you. On the screen, on the next slide is the

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- 1 same time frame we were just looking at on the third
2 slide, it's the second of five (5) Excel pages of MDI
3 data seized during the three twenty (3:20pm) to three
4 thirty (3:30pm) session.
- 5 A. Yes.
- 6 Q. Three twenty-three (3:23pm) session, that's a three (3)
7 minute session. And we see three twenty (3:20pm) to
8 three twenty-one (3:21pm) here, is that right?
- 9 A. Correct.
- 10 Q. And as we go through the next slides, 3 to 5, we can
11 the data captured during that period of time, a number
12 of different apparent devices are captured?
- 13 A. Correct.
- 14 Q. We see more of the same on the next slide regarding
15 three twenty-one (3:21pm) to three twenty-three
16 (3:23pm)?
- 17 A. Correct.
- 18 Q. And here on the last slide, we finish with three
19 twenty-three (3:23pm)?
- 20 A. Correct.
- 21 Q. And you looked at this data when you prepared your
22 will-say less than three (3) weeks ago?
- 23 A. Correct.
- 24 Q. And as with the data we analyzed yesterday for four
25 forty-four (4:44pm) to four forty-six (4:46pm), that

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- 1 three (3) minute window, the IMEI pin 26CA1E1F now
2 attributed to Mr. Mirarchi was not captured during this
3 period of time either, three twenty (3:20pm) to three
4 twenty-three (3:23pm)?
- 5 A. That's correct.
- 6 Q. And that's another three (3) minute window over an hour
7 earlier. Am I right about that?
- 8 A. Yes.
- 9 Q. On the next slide is an excerpt of the same so-called
10 murder calendar that we looked at yesterday and this
11 calendar excerpt shows that the RCMP were intercepting
12 communications between fifteen twenty-two (15:22) and
13 fifteen twenty-three (15:23), correct?
- 14 A. Correct.
- 15 Q. Can you see that clearly?
- 16 A. Yes.
- 17 Q. That's three twenty-two (3:22pm) and three twenty-three
18 (3:23pm)?
- 19 A. Yes.
- 20 Q. And the BlackBerry device we see being intercepted in
21 this excerpt is 26CA1E1F device, correct?
- 22 A. Correct.
- 23 Q. With the IMEI we reviewed already?
- 24 A. Correct.
- 25 Q. And so that's two (2) discrete time frames when the MDI

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1 technique is being used and the IMEI pin at the murder
2 calendar puts in Mr. Mirarchi's possession and the IMEI
3 is not captured, am I right?
4 A. That's correct.
5 Q. And he is, just to circle back, under your colleagues'
6 surveillance and he's their target that day?
7 A. Correct.
8 Q. If we look at the next slide, moving to a different
9 time frame on the same day, four thirty-four (4:34pm)
10 to four thirty-seven (4:37pm), on the screen is a
11 familiar typed excerpt from the MDI data base.
12 A. Correct.
13 Q. And on this screen are there captures at four thirty-
14 four (4:34pm)?
15 A. Yes.
16 Q. And if we just go to the next slide, the review
17 captures data four thirty-four (4:34pm) to four thirty-
18 five (4:35pm), see where it's highlighted?
19 A. Oh yes, sorry, yes.
20 Q. The minute changes, it's a little difficult to see,
21 it's in the bottom left.
22 A. Yes, I see it.
23 Q. And then the next page, the next slide is four thirty-
24 five (4:35pm) to four thirty-six (4:36pm), the spread
25 sheet recording all of the devices captured and the

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- 1 corresponding IMSI and IMEIs?
- 2 A. Yes.
- 3 Q. On the next slide the spread sheet continues through
- 4 four thirty-seven (4:37pm)?
- 5 A. Yes.
- 6 Q. It's highlighted there at the bottom of the screen.
- 7 And then on the final slide of that session, this is
- 8 the last print out of the data base, and again the IMEI
- 9 associated with the pin device 26CA1E1F is not captured
- 10 during this session on this date.
- 11 A. Correct.
- 12 Q. And you know that because you did the analysis less
- 13 than three (3) weeks ago.
- 14 A. Yes, to produce this document, that is right.
- 15 Q. Yes. And that would be another example where the
- 16 technique on your definition was inconclusive?
- 17 A. Yes. I think we're comparing two (2) different things.
- 18 Because the way that the operator was working at the
- 19 time, was trying to identify devices, whereas this
- 20 document was to show that known devices that were known
- 21 to be in possession throughout the course of
- 22 investigation, were identified at some point, but not...
- 23 the reasonable grounds of the operator were not there
- 24 to say that those devices were in their possession.
- 25 Q. Yes, inconclusive.

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Me FRANK ADDARIO

- 1 A. It was like two (2) different... The results were
2 inconclusive by Mr. Lauzon in his readings, yes.
- 3 Q. Okay. Are they conclusive by your readings?
- 4 A. They were... No, no, they were not conclusive to say
5 that these devices were in Mr. Mirarchi's possession
6 either.
- 7 Q. Right.
- 8 A. All this document was showing is that known devices
9 were within the vicinity of the person of interest when
10 we went back and once those devices were identified.
- 11 Q. Well I would call it a fail. Would you prefer that to
12 describe the attempt to link the surveillance, the
13 device and the individual?
- 14 A. Are you talking about Mr. Lauzon's readings or the
15 document that I produced?
- 16 Q. Mr. Lauzon's readings.
- 17 A. I would say those were inconclusive because Mr. Lauzon
18 could potentially do more readings to try identify the
19 devices that... because the readings were inconclusive,
20 he didn't have enough grounds to say that at that time
21 he believed Mr. Mirarchi was in possession of the
22 device, at which point we would continue more locations
23 to either try and find the device or decide that the
24 investigators no longer want to continue with trying to
25 identify it.

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1 LA COUR :

2 Q. Whatever words you're using, between time A and time B
3 there was an MDI operator that had a target who was
4 under surveillance and they had certain identifiers and
5 they didn't pick him up.

6 A. That's correct.

7 Q. All right.

8 Q. That's correct Your Honour but it's just, that happens
9 all the time. And in an ideal circumstance with the
10 operation of the machine, we would try, we'd directly
11 go for three (3), two (2)/three (3) readings and go for
12 that one common denominator. But that doesn't always
13 happen, we don't always pick up the device with every
14 reading and that's why there's multiple locations that
15 are used and multiple readings that are completed in
16 order to try and really narrow down one common device
17 that's picked up at multiple sessions where it's known
18 that the person of interest is.

19 And that's why there's analysis that's, with all
20 the data and multiple locations, that's never... where
21 readings are completed. So there is no doubt that all
22 the devices again in one area, not all the devices are
23 always going to be picked up. That's why we're doing
24 these multiple, multiple sessions.

25 Q. All right.

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CONTRE-INTERROGATOIRE
Me FRANK ADDARIO

1 LA DÉFENSE (Me FRANK ADDARIO) :

2 Q. Can we look at the next slide on? On the screen now
3 Sir is another excerpt from the murder calendar created
4 by the Crown in this case. And the excerpt shows a
5 communication at sixteen thirty-five (16:35), four
6 thirty-five (4:35pm)?

7 A. Correct.

8 Q. The time frame on the MDI is being used, where the
9 calendar alleges pin 26CA1E1F with the IMEI we're
10 already identified, is in communication with another
11 pin, correct?

12 A. Correct.

13 Q. And so we know the device is powered on, correct?

14 A. Correct.

15 Q. It's being used in your IMSI captures doing its work.

16 A. Correct.

17 Q. And with the device on apparently being used, the
18 murder calendar alleges this device is in Mr.
19 Mirarchi's possession, you can see that?

20 A. Yes.

21 Q. And yet...

22 A. Well that's... so that's a picture of Mr. Desjardins
23 using that first pin there, 27...

24 Q. He's using the first.

25 A. Okay.

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- 1 Q. And the second...
- 2 A. Oh I see, yes sorry.
- 3 Q. ... attributed to Mr. Mirarchi, you see that?
- 4 A. Correct, yes.
- 5 Q. And yet we've already seen that when the technique is
- 6 used to target him, that pin with the IMEI 26CA1E1F was
- 7 not captured. Is that fair?
- 8 A. That's fair.
- 9 Q. And I'm just going to ask you some questions, they'll
- 10 seem repetitive of yesterday.
- 11 A. Um-hum.
- 12 Q. We know that the BlackBerry is being used at the time
- 13 as the MDI session and it doesn't capture the IMSI or
- 14 IMEI associated with that device.
- 15 A. Yes.
- 16 Q. And as we reviewed yesterday, there are four (4)
- 17 possible reasons why.
- 18 A. Correct.
- 19 Q. And one of those reasons is something, number 4 on the
- 20 screen, over which you and your colleagues are claiming
- 21 privilege.
- 22 A. Correct.
- 23 Q. And were we to go through the same exercise with other
- 24 examples where the device is attributed to an
- 25 individual in this case, yet the review of the data

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1 shows no air capture, we would have... well at least
2 those four (4) possible explanations.
3 A. Yes, that's fair to say.
4 Q. On the next slide, I want to move to another date,
5 December nineteen (19) twenty-eleven (2011). And what
6 you'll see there Sir, on the screen is an excerpt from
7 the MDI data base for that date. Do you recognize
8 that?
9 A. Yes.
10 Q. And I knew that was kind of a trick question because I
11 know you looked at it for the purpose of preparing your
12 July fifth (5th) will-say, because it's an MDI session
13 involving Mr. Mirarchi, right?
14 A. Yes.
15 Q. And we can see from the captures from the time frame
16 eight forty-six (8:46pm) to eighty forty-eight
17 (8:48pm), that's the session length?
18 A. It appears so on that page, yes.
19 Q. And a number of devices are captured?
20 A. That's correct.
21 Q. And I've highlighted a capture on the screen, the last
22 entry.
23 A. Yes.
24 Q. Do you see that? Okay. Would you just note that IMEI
25 there?

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- 1 A. Yes, yes.
- 2 Q. Okay. And I added on the screen that this IMEI is
3 associated with Mr. Mirarchi's work phone.
- 4 A. Okay.
- 5 Q. I'll just take you to another slide to give you a basis
6 for that session, but it's not my invention, it comes
7 from the disclosure, okay?
- 8 A. Yes.
- 9 Q. All right. So we'll go to the next slide and on the
10 left side of the screen is a RIM production order
11 information similar to what we've reviewed yesterday.
- 12 A. Yes.
- 13 Q. And you've seen this RIM production order information
14 many times I assume?
- 15 A. Yes.
- 16 Q. And it provides IMEI information in relation to pin
17 2812D3666 together with an IMSI history.
- 18 A. Yes.
- 19 Q. And there's those suggestions that the IMSI change it
20 all, but in any event we know the IMEI is constant.
- 21 A. Yes.
- 22 Q. And on the right side of the screen is an excerpt from
23 the Crown identification calendar for Mr. Mirarchi
24 where they assert that the same pin, 2812D3666 is a
25 device used by Mr. Mirarchi and registered to a company

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1 he worked for.

2 A. Yes...

3 Q. Take a moment to read it.

4 A. Yes.

5 Q. The highlighted, the last sentence is highlighted, just

6 to help you out.

7 A. Yes, I see, yes.

8 Q. So I want you to assume for the purpose of my question,

9 the Crown is alleging in this case that the device was

10 in his possession on the December nineteen (19) twenty-

11 eleven (2011).

12 A. Yes.

13 Q. So the IMEI as noted, 358566041085703, the IMEI that

14 was captured on December nineteen (19) at eight forty-

15 eight (8:48pm) when he's been targeted by the MDI

16 session on wireless protocol network. You're following

17 on that?

18 A. Yes.

19 Q. And that would be not surprising if that device is in

20 his possession. He was being targeted by the MDI, he's

21 in range, you'd expect the MDI to capture the IMEI

22 information if the network protocol being scanned

23 corresponded with the protocol for the device?

24 A. Correct.

25 Q. All right. Now on the screen now is an excerpt of the

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- 1 identification calendar which the Crown relies on in
2 this case. Have you seen the identification calendar
3 in this case?
4 A. No, I have not.
5 Q. All right. Just take my word for it that I've
6 reproduced it faithfully.
7 A. That's fair.
8 Q. I haven't changed it at all. And there is two (2) pins
9 or devices identified as being used by Mr. Mirarchi.
10 The first is 27DB5BB.
11 A. Yes, okay I see it, yes.
12 Q. And the second one, I'm going to try to make it a
13 little clearer for you, is 281AD1354.
14 A. Yes, I see that.
15 Q. And they are corresponding communications on both
16 devices on the ID calendar. Do you see that?
17 A. Yes.
18 Q. And the time frame is twenty-thirty-two (20:32) to
19 twenty fifty-one (20:51), so eight thirty-two (8:32pm)
20 to eight fifty-two (8:52pm).
21 A. Yes.
22 Q. And we know the IDM was successfully in making captures
23 during eight forty-six (8:46pm) and eight forty-eight
24 (8:48pm) based on previous slides we've looked at.
25 A. Yes.

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1 Q. And you know from your analysis as reflected in your
2 July five (5) will-say that neither of those devices
3 were captured?

4 A. In that time frame you're talking about?

5 Q. Correct.

6 A. Well I had the... I need to double check that IMEI,
7 that's what I use, not the actual pin, the associated
8 pin with the IMEI but...

9 Q. You want to see the spread sheet for that day?

10 A. Yes. Well if you have the associated IMEI with that
11 particular pin, I can confirm that.

12 Q. You can do it from your will-say?

13 A. I can but I just don't know what the associated IMEI is
14 for each particular pin.

15 Q. We may be able to get you the spread sheet. Incoming.

16 A. Yes. Your Honour, I would be in agreance if, you know
17 like the data that you've mentioned is all fair and
18 that those pins are associated with IMEIs, that it was
19 not obtained with...

20 Q. I think what we're going to do is get... Mr. Thompson has
21 it up on his screen, we'll get him to show it to Mr.
22 Gauthier and the witness at the same time. I think
23 we'd probably wrestle an agreement on...

24 **LA COURONNE (Me ALEXIS GAUTHIER) :**

25 That's okay.

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1 A. Yes. Yes for that particular one. For pin 28181D34, I
2 agree it was not found by the MDI on that particular
3 date. And the other pin...
4 **LA DÉFENSE (Me FRANK ADDARIO) :**
5 Q. 27DB5BB.
6 A. BB5BB.
7 Q. 27DB5BB.
8 A. I think it's DB5BB.
9 **LA COUR :**
10 That's a pin number?
11 **LA DÉFENSE (Me FRANK ADDARIO) :**
12 Yes Sir.
13 Q. If you look at the top of the screen, in yellow.
14 A. As well for pin number 27DBB5BB, the associated IMEI
15 was not found by our machine on those particular days.
16 Q. And again without being repetitive...
17 **LA COUR :**
18 That's December nineteen (19)?
19 **LA DÉFENSE (Me FRANK ADDARIO) :**
20 Yes Sir.
21 Q. The failure to capture the IMEI pin could be for any
22 one of the four (4) reasons that we've reviewed?
23 A. That is correct.
24 Q. And one of those reasons is something we can't know
25 about?

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1 A. That is correct.
2 Q. That's all I have, thanks very much.
3 **LA DÉFENSE (Me FRANK ADDARIO) :**
4 Madame Clerk has a copy of today's PowerPoint Your
5 Honour, I'd ask that she made (inaudible).
6 **Mme LA GREFFIÈRE :**
7 32.9.
8 **LA COURONNE (Me ALEXIS GAUTHIER) :**
9 32.9?
10 **Mme LA GREFFIÈRE :**
11 Yes, please.
12 **LA COUR :**
13 So that would be the document that's left on the
14 bench, the 32.9?
15 **Mme LA GREFFIÈRE :**
16 Yes, please.
17 A. Sorry, I think I have the original perhaps or is it
18 just mine? Okay.
19 **LA DÉFENSE (Me FRANK ADDARIO) :**
20 That's 32.8.
21 A. Oh sorry.
22 **LA COUR :**
23 Q. Mr. Richdale, don't argue with the clerk, you won't
24 win.
25 Maître Gauthier, any questions in redirect?

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JOSH RICHDALÉ
CONTRE-INTERROGATOIRE
Me FRANK ADDARIO

1 LA COURONNE (Me ALEXIS GAUTHIER) :

2 Could we ask for a five (5)/ten (10) minute recess?

3 LA COUR :

4 Considering that this is the only remeaning work to
5 do today, I think I'll give you more time so you can
6 review what... whether or not you're going to have more
7 questions and I'll leave the examination in chief
8 opened as well. After we break perhaps Mr. Addario
9 might or may not wish to continue. So...

10 Me MACDONALD,

11 Procureur de la défense :

12 Your Honour?

13 LA COUR :

14 Yes?

15 LA DÉFENSE (Me MACDONALD) :

16 I may have a few questions for the witness if it's
17 allowed.

18 LA COUR :

19 Yes of cours it's allowed.

20 LA DÉFENSE (Me MACDONALD) :

21 Should I do it from here or?

22 LA COUR :

23 What we'll do though, we'll do it after the break,
24 is that all right?

25 LA DÉFENSE (Me MACDONALD) :

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1 Fine.

2 LA COUR :

3 And that way we'll leave the examination with the
4 cross-examination we just heard open. If it's
5 complete, then we'll start with yourself and any other
6 defence counsel that have questions and then the Crown
7 will ask questions in redirect, all right?

8 LA DÉFENSE (Me MACDONALD) :

9 Very well.

10 LA COUR :

11 It's ten twenty (10:20am), any recommendation for
12 time? I'll give you as much as you need because it's...

13 LA COURONNE (Me ALEXIS GAUTHIER) :

14 Ten (10) minutes is fine, it's perfect. If you
15 want more we don't have any objection, there is nothing
16 else to do today, so.

17 LA COUR :

18 No, I have no particular desire to remain in Laval
19 if it's not necessary.

20 LA COURONNE (Me ALEXIS GAUTHIER) :

21 All right. I'm sure our friends from Toronto will
22 agree with you.

23 LA COUR :

24 All right. So it's ten twenty (10:20am), how about
25 we take a fifteen (15) minute break?

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Me MACDONALD

1 LA COURONNE (Me ALEXIS GAUTHIER) :
2 Thank you.
3 LA COUR :
4 And if you need more time, just advise the bayliff.
5 SUSPENSION DE L'AUDIENCE
6 REPRISE DE L'AUDIENCE
7 Mme LA GREFFIÈRE :
8 JOSH RICHDALÉ
9 Under the same Oath
10 LA COUR :
11 Mr. Addario, are you still... you're done?
12 LA DÉFENSE (Me FRANK ADDARIO) :
13 Thank you Sir, I have completed my examination.
14 LA COUR :
15 Thank you very much. Mr. Macdonald, go ahead.
16 CONTRE-INTERROGÉ PAR Me MACDONALD,
17 Procureur de la défense :
18 Thank you Sir.
19 Q. Caporal Richdale, in the course of your training as an
20 operator for the MDI device, you mentioned having
21 participated in what you called ride-alongs.
22 A. That's correct.
23 Q. Can you tell us approximately how many?
24 A. I think I mentioned six (6) but it's... it's about that
25 many but I can't think of... at least, at least that.

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1 LA COUR :

2 Q. Between what dates?

3 A. No. I do not know the days Your Honour. Again, it
4 wasn't just for this particular project, it was through
5 other projects prior to... when these were completed, so.

6 LA DÉFENSE (Me MACDONALD) :

7 Q. Could we pinpoint it down to two eleven, two thousand
8 eleven (2011)?

9 A. Yes, that's...

10 Q. We can?

11 A. For sure.

12 Q. Okay.

13 A. That's because I joined the specialized section in
14 December of twenty-ten (2010), so throughout the course
15 of twenty-eleven (2011) is when I would have started my
16 ride-alongs with the machine.

17 Q. And you started as... when did you actually start
18 operating the device itself as the main operator?

19 A. As the main operator, in... again, if I remember
20 correctly -- because I saw it in my notes when I was
21 preparing for this -- I believe it was in November or
22 December of twenty-eleven (2011), I had completed some
23 operations on my own, but not...

24 Q. Okay.

25 LA COUR :

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CONTRE-INTERROGATOIRE
Me MACDONALD

1 Mr. Macdonald, as operator you're referring to the
2 MDI, correct?
3 **LA DÉFENSE (Me MACDONALD) :**
4 Yes Sir.
5 **LA COUR :**
6 Q. That's what you understood?
7 A. Yes.
8 Q. Good. So as a main operator in November two thousand
9 eleven (2011), can we say then that your work in the
10 present investigation as an MDI operator, was it your
11 first time as an operator?
12 A. For this particular investigation?
13 Q. Yes.
14 A. As the primary operator?
15 Q. Yes.
16 A. No it was not, it was not the first time I was by
17 myself doing readings.
18 Q. Okay.
19 A. I had worked on another project where I was the primary
20 operator for the device.
21 Q. When was that?
22 A. That was in... like I said it was either in November or
23 December of twenty-eleven (2011).
24 Q. And when did you begin as the main operator in this
25 investigation?

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1 A. I believe the first time that I operated it myself was
2 in January of twenty-eleven (2011).

3 Q. January of twenty-eleven (2011)?

4 A. Sorry, twenty-twelve (2012), my mistake.

5 Q. Go ahead.

6 **LA DÉFENSE (Me MACDONALD) :**

7 Q. Now, either as a ride-along or a primary operator, was
8 any of your work done in Ontario?

9 A. Yes it was Your Honour, yes it was.

10 Q. As a ride-along or as a...

11 A. As a primary operator.

12 Q. Primary operator. And was that done in Ottawa?

13 **LA COURONNE (Me ALEXIS GAUTHIER) :**

14 If these questions are related to another project,
15 there will be an objection on the relevance of these
16 questions.

17 **LA DÉFENSE (Me MACDONALD) :**

18 Okay. I'll rephrase the question, Your Honour.

19 Q. In Project Clemenza or Inertie, you're aware of these
20 two (2)...

21 A. Not... the name of that project... I know for sure that's
22 not the project that... I don't think that was the
23 project I was working. It sounds familiar but the one
24 I'm thinking of specifically where I was the primary
25 operator was another project.

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Me MACDONALD

- 1 Q. Okay the one that to you sound familiar, is it Clemenza
2 or Inertie?
- 3 A. I know Clemenza, I do not know...
- 4 Q. You don't know Inertie, okay. I'll put to you a very
5 general question. Whether be it in Ontario or Quebec,
6 to your knowledge, again either as a ride-along or as a
7 main operator, was my client Mr. Jack Simpson ever a
8 target to your knowledge?
- 9 A. I don't believe so, not for... not for Project Clemenza,
10 from the documents that I've reviewed. And I have
11 never worked on Mr. Simpson.
- 12 Q. Okay. And of course if he was a target, that
13 information should be logged as you mentioned in your
14 testimony...
- 15 A. That's correct.
- 16 Q. ... of July seventeenth (17th). Thank you Sir.
- 17 **LA COUR :**
- 18 Do any of the other defence counsel have questions?
19 Mr. Gauthier, redirect?
- 20 **LA COURONNE (Me ALEXIS GAUTHIER) :**
- 21 No question Sir, thank you.
- 22 **LA COUR :**
- 23 All right.
- 24 Q. Mr. Richdale, that's all.
- 25 A. Thank you.

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Me MACDONALD

1 Q. I will give you the same direction I've given you
2 before, not to discuss your evidence with anyone
3 whatsoever.

4 A. That's correct.

5 Q. You understand me?

6 A. Yes Your Honour.

7 Q. Thank you very much for your attendance.

8 Me ROBERT ROULEAU,

9 Procureur de la Couronne :

10 Your Lordship, I'm sorry, we were just... I believe
11 Mr. Richdale's testimony is finished.

12 LA COUR :

13 Um-hum.

14 LA COURONNE (Me ROBERT ROULEAU) :

15 He is not to come back to testify.

16 LA COUR :

17 That's right.

18 LA COURONNE (Me ROBERT ROULEAU) :

19 Right. So the warning given to the witnesses are
20 given because of the fact that they might come back in
21 cross-examination. So if I wanted for example to
22 discuss Mr. Richdale's testimony as we often do, I
23 think it was a mutual work on this skill, that skill, I
24 mean, he's off the hook, I can do that?

25 LA COUR :

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540-01-063428-141
Le 24 juillet 2015

JOSH RICHDALÉ
CONTRE-INTERROGATOIRE
Me MACDONALD

1 Right.

2 LA COURONNE (Me ROBERT ROULEAU) :

3 There is no real reason to give him the warning as
4 far as his work.

5 LA COUR :

6 You think that he can go and talk to Mr. Fortin who
7 is coming back in September?

8 LA COURONNE (Me ROBERT ROULEAU) :

9 No, no. Because Mr. Fortin is prohibited from
10 talking to anyone, including Mr. Richdale obviously.

11 LA COUR :

12 So you're asking me, with respect to the direction
13 I gave, that the prosecutor should be able to speak to
14 him?

15 LA COURONNE (Me ROBERT ROULEAU) :

16 Yes.

17 LA COUR :

18 All right. So that's... just restrict your comments
19 to that. Any comment?

20 LA DÉFENSE (Me FRANK ADDARIO) :

21 Not the restriction Your Honour. That's actually
22 what I was going to say.

23 LA COUR :

24 Q. So with respect to the direction I've given and in view
25 of the comments of maître Rouleau and Mr. Addario, if

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1 the Crown wishes to speak to you, that's fine. You can
2 speak to the prosecutors but you're not to speak to any
3 other witness or anyone else involved that's coming to
4 testify on these motions unless I'm asked for a
5 specific dispensation by any of the counsel.

6 Is that too wide a net for you, maître Rouleau?

7 **LA COURONNE (Me ROBERT ROULEAU) :**

8 No, no, that covers of course Mr. Fortin who is
9 upcoming and that's it.

10 **LA COUR :**

11 Okay.

12 A. Yes Your Honour.

13 **LA COUR :**

14 Defence, any comments?

15 **LA DÉFENSE (Me FRANK ADDARIO) :**

16 None Your Honour.

17 **LA COUR :**

18 Q. Understood?

19 A. Yes.

20 Q. All right. Have a good month of August.

21 A. Thank you.

22 **LE TÉMOIN EST LIBÉRÉ**

23 **LA COUR :**

24 We'll be back then on September the third (3rd).

25 Firstly when we fixed this schedule I indicated that

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1 next week I'm available. I understand we can't proceed
2 because Mr. Kapoor is not available but I'm available.
3 So if there is any need for case management issues next
4 week, the courtroom is available, I'm available and you
5 reach me and I'll come here and we'll address whatever
6 issues have to be addressed at that time.

7 If I don't hear from you, we'll be back here on the
8 third (3rd). When I say "we", I'm referring to those
9 involved in the motion for release Racaniello which is
10 scheduled for the third (3rd) in the court and we also
11 have dates fixed in fourteen (14), seventeen (17) for
12 the same reason but this time for D'Addario.

13 With respect to the present motion, we'll all be
14 back here on the eight (8), nine (9), eleven (11),
15 eighteen (18), twenty-eight (28) and twenty-nine (29).
16 If necessary and if more dates are required we'll fix
17 them at the appropriate time.

18 With respect to my request to the *amicus* that Mr.
19 Kapoor, a written argument, I'll ask if there can be
20 some type of an agreement on the facts with the Crown,
21 perhaps some public portion and an *ex parte* portion and
22 if there are differences on the agreed statement of
23 facts, then you'll indicate what the differences are.
24 And the other things I requested the other day, your
25 position with respect to witnesses heard, public,

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1 private, and the list of things that we've all heard
2 that the Crown... the items that the Crown is requesting
3 privilege and your position on each one. Okay?

4 Me ANIL KAPOOR :

5 Yes.

6 LA COUR :

7 All right, I appreciate that. And I appreciated
8 very much your participation in this hearing. I find
9 that all counsel should be aware, I found it quite
10 useful and quite helpful, you were very well prepared
11 and that shouldn't go unnoticed.

12 So I wish everybody a very good month of August.

13 LA COURONNE (Me ALEXIS GAUTHIER) :

14 Sir, there would be two (2) small issues to take
15 care of.

16 LA COUR :

17 Okay.

18 LA COURONNE (Me ALEXIS GAUTHIER) :

19 The first one is related to the affidavit filed by
20 Mr. Fortin in the public session. The (inaudible) very
21 affidavit you will remember that we have replaced it
22 and madam Clerk would want to...

23 LA COUR :

24 Yes, you're right.

25 LA COURONNE (Me ALEXIS GAUTHIER) :

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1 ... to have the permission to remove it officially
2 from the record and I guess she is looking forward to
3 destroy this piece of evidence, so.

4 LA COUR :

5 All right. So could you identify the number given
6 again?

7 LA COURONNE (Me ALEXIS GAUTHIER) :

8 Yes, it's R-32.6.

9 LA COUR :

10 Okay. So R-32.6 is the affidavit of Mr. Fortin
11 that he had originally filed and apparently it's the
12 wrong...

13 LA COURONNE (Me ALEXIS GAUTHIER) :

14 He has replaced it.

15 LA COUR :

16 Yes. If you'll allow me, I'm getting there.

17 LA COURONNE (Me ALEXIS GAUTHIER) :

18 Sorry Sir.

19 LA COUR :

20 The Crown produced the wrong version of Mr.
21 Fortin's affidavit, so we've agreed to replace it with
22 the appropriate version. So the former 32.6, is that
23 right, 32.6?

24 Mme LA GREFFIÈRE :

25 32.6 which was produced on the twenty-first (21st)

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1 of July.

2 LA COUR :

3 Okay, will be removed and replaced by the new
4 version, 32.6, we'll keep the same numbering. All
5 defence counsels are aware of that? Do you have the
6 new version?

7 LA DÉFENSE (Me FRANK ADDARIO) :

8 Yes.

9 LA COUR :

10 All right. Do you want to keep the old version in
11 the sealed envelop or we'll just give it back to the
12 Crown?

13 Me MICHAEL LACY,

14 Procureur de la défense :

15 It was just an error, it would be better to just
16 give it back to the Crown.

17 LA COUR :

18 Okay. So everybody agrees with that? All right.
19 So the old version we'll have it remitted back to the
20 Crown, madam Clerk, with the consent of all defence
21 counsels, you can indicate that for the record, and
22 we'll replace it with the new 32.6 which is the
23 corrected version and I think it was just an oversight
24 on the part of the Crown.

25 LA COURONNE (Me ALEXIS GAUTHIER) :

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1 Sorry.

2 **LA COUR :**

3 That's fine, yes. Second issue?

4 **LA COURONNE (Me ALEXIS GAUTHIER) :**

5 The second issue is about the standing order
6 regarding Mr. Fortin, that he should not discuss his
7 evidence with anyone. And it's related to the report
8 that was asked by the Court to be produced by Mr. Flynn
9 concerning the issues that are still... that need to be
10 decided by the Court. And these issues are mentioned
11 in R-34. We got a rough date from Mr. Flynn, he's
12 working on this report.

13 **LA COUR :**

14 32.4?

15 **LA COURONNE (Me ALEXIS GAUTHIER) :**

16 No, R-34.

17 **LA COUR :**

18 R-34?

19 **LA COURONNE (Me ALEXIS GAUTHIER) :**

20 Yes. The remaining issues that need to be decided
21 by the Court are mentioned in the document filed under
22 R-34. And they are related to the motions R-25 and R-
23 32.

24 **LA COUR :**

25 All right.

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1 LA COURONNE (Me ALEXIS GAUTHIER) :

2 Okay. So Mr. Flynn is working on this.

3 LA COUR :

4 Okay.

5 LA COURONNE (Me ALEXIS GAUTHIER) :

6 He has indicated to us that his report would be
7 more easy for him to produce if he would be allowed to
8 speak with Mr. Fortin about it. We have discussed this
9 with our colleagues from the defence and they are
10 deciding that there is no objection for these two (2)
11 gentlemen to speak together for the sole purpose of
12 producing this report that was asked by the Court
13 regarding R-34.

14 LA COUR :

15 Defence counsel, any comment?

16 LA DÉFENSE (Me FRANK ADDARIO) :

17 That's entirely correct, Your Honour.

18 LA COUR :

19 Is that agreed with everybody else, all the other
20 counsels?

21 LA DÉFENSE (Me FRANK ADDARIO) :

22 Yes.

23 LA COUR :

24 Yes? All right. So for the purposes of producing
25 this report 34, I'll allow that these two (2) witnesses

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1 speak. Is it possible to do that in the presence of
2 one of the prosecutors?

3 **LA COURONNE (Me ALEXIS GAUTHIER) :**

4 I think that it could be... it will be difficult Sir,
5 to do that, given they are in Ottawa, we're here, our
6 vacations are coming up so...

7 **LA COUR :**

8 Okay. Is that something that is insisted upon by
9 the defence?

10 **LA DÉFENSE (Me FRANK ADDARIO) :**

11 I don't think so Your Honour.

12 **LA COUR :**

13 All right. So the two (2) officers can either meet
14 or communicate with respect to the preparation of this
15 report but they are not to discuss the content of their
16 testimony in any way, shape or form other than the
17 specific questions that arise regarding that report.
18 Is that sufficient for the Crown?

19 **LA COURONNE (Me ALEXIS GAUTHIER) :**

20 It is Sir.

21 **LA COUR :**

22 Is that sufficient for the defence? Okay. You
23 mentioned two (2) points, is there a third one?

24 **LA COURONNE (Me ALEXIS GAUTHIER) :**

25 No, I don't think so.

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1 LA COUR :

2 Very well.

3 LA COURONNE (Me ROBERT ROULEAU) :

4 That's why he mentioned two (2).

5 LA COUR :

6 That's right, I pay attention.

7 LA COURONNE (Me ALEXIS GAUTHIER) :

8 Oh yes. No, there were three (3).

9 LA COUR :

10 No actually there were two (2).

11 LA COURONNE (Me ALEXIS GAUTHIER) :

12 Just to mention that this report will be disclosed
13 to the defence as soon as possible as well as the
14 redacted transcript of Mr. Fortin's ex parte testimony.
15 We hope that we will be able to disclose these before...
16 at the end of July. So if I get it next week, we hope
17 we will be able to do this.

18 LA COUR :

19 That's all right. And of course you will send
20 copies to maître Kapoor?

21 LA COURONNE (Me ALEXIS GAUTHIER) :

22 Of course.

23 LA COUR :

24 With respect to... well for myself, I'd ask you to
25 send it not here but send it to the *Palais de Justice*,

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1 please send it to my office there when it's ready.

2 **LA COURONNE (Me ALEXIS GAUTHIER) :**

3 Um-hum. Yes.

4 **LA COUR :**

5 Anything else?

6 **LA COURONNE (Me ALEXIS GAUTHIER) :**

7 No, that's it. Thank you.

8 **LA DÉFENSE (Me FRANK ADDARIO) :**

9 His third maybe, I think about fourth. So just
10 when you were reading out the schedule, so just a wild
11 guess, I think we'll spend the eight (8) cross-
12 examining Fortin. And subject to something
13 unforeseeable, we'd like to use those other three (3)
14 days reserved, keep those other three (3) days for
15 certain for argument or potentially for declaring about
16 other agreed facts or of possible evidence.

17 We propose in any case to go directly into argument
18 without any delay if we conclude the evidence because
19 of our concern about losing Mr. Kapoor.

20 **LA COUR :**

21 You think the cross-examination could be completed
22 in a day?

23 **LA DÉFENSE (Me FRANK ADDARIO) :**

24 We do.

25 **LA COUR :**

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1 All right, very good.

2 **LA DÉFENSE (Me FRANK ADDARIO) :**

3 We'll do our very best and of course... yes, and
4 particularly because we're going to have the transcript
5 well in advance and time to think about what's really
6 vital to the arguments we want to make.

7 **LA COUR :**

8 At the same time, I'd ask the Crown to meet with
9 maître Kapoor or at least to talk to him. There is a
10 lot of time now until we meet next time. If there are
11 areas in which there could be an agreement to lift some
12 of the redacting, I'd ask you to consider that in
13 advance, not at the last minute, not once everybody's
14 here. If it's going to be done, give them time.

15 **Me ANIL KAPOOR :**

16 Can I just address you briefly on the issue of
17 submissions?

18 **LA COUR :**

19 Yes.

20 **Me ANIL KAPOOR :**

21 It strikes me that the prosecutors, they have a
22 burden here to establish that the privilege is made
23 out.

24 **LA COUR :**

25 Um-hum.

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1 Me ANIL KAPOOR :

2 I think perhaps a most efficient way to deal with
3 this would be -- subject to your direction of course --
4 would be to have the prosecutors deliver to me their
5 submissions. I will then prepare my submissions in
6 response. There may be commonalities in their rendering
7 of the facts, I'm happy to discuss with them the
8 rendering of the facts. But I do think that they are
9 to stick out their legal position so I can respond to
10 assist you to evaluate their legal position. I think
11 that... and I can speak to my friends about arranging a
12 schedule, we don't need to trouble you with that. But
13 I think that should be the order in which we do it
14 subject to your direction.

15 LA COUR :

16 I think that's fine. I'll leave the mechanics of
17 that up to you and the Crown.

18 Me ANIL KAPOOR :

19 Yes.

20 LA COUR :

21 But the different items, the list of items that are
22 privileges being... -- for which the privileges is being
23 sought should be listed and the Crown would be
24 requesting privilege and your position would be...

25 Me ANIL KAPOOR :

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1 Absolutely.

2 **LA COUR :**

3 ... with respect to the facts of... on the two (2)
4 hearings, that's something you could get together and
5 could speed it up quite a bit, particularly concerning
6 your schedule the week of the twenty-first (21st) of
7 September and afterwards in October.

8 **Me ANIL KAPOOR :**

9 Yes absolutely. And I think we can certainly get
10 those submissions done over this hiatus period. And we
11 don't need to be fast about it, Mr. Addario's cross-
12 examination, we'll be able to adjust to that in our own
13 submission.

14 **LA COUR :**

15 All right.

16 **Me ANIL KAPOOR :**

17 Thank you.

18 **LA COUR :**

19 Okay. Maître Gauthier, I have a question for you.
20 In the cross-examination this calendar, this so-called
21 murder calendar that was presented, is that the type of
22 thing that forms the basis of your motion for jury
23 aids, is that it?

24 **LA COURONNE (Me ALEXIS GAUTHIER) :**

25 Yes it's correct.

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1 LA COUR :
2 Okay. Anything else, maybe the fifth? All right.
3 LA DÉFENSE (Me MACDONALD) :
4 I will take the fifth Your Honour. You're...
5 LA COUR :
6 You'll take the fifth or you'll plead the fifth?
7 LA DÉFENSE (Me MACDONALD) :
8 I'll plead Sir.
9 LA COUR :
10 Go ahead.
11 LA DÉFENSE (Me MACDONALD) :
12 Your île-Vaudry judgement Your Honour, I think
13 about seeking your authorization to retain...
14 LA COUR :
15 No, no, you'll get a written copy.
16 LA DÉFENSE (Me MACDONALD) :
17 Loud and clear, thank you.
18 LA COUR :
19 You'll get a written copy. Is there something in
20 particular? Is there a portion that you...
21 LA DÉFENSE (Me MACDONALD) :
22 No, not really. Some of my friends have...
23 LA COUR :
24 I'm here today, if there is a portion you need
25 revisited, I have my notes with me and...

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1 LA DÉFENSE (Me MACDONALD) :

2 No nothing, nothing in particular, thank you Your
3 Honour.

4 LA COUR :

5 Okay. What I'll try to do, wait for the end of
6 August if that's convenient, I'll try to get out like I
7 did before, an unrevised copy that you can all look
8 over and it will be modified very little. All right?
9 Does that help you?

10 LA DÉFENSE (Me MACDONALD) :

11 Yes Sir.

12 LA COUR :

13 All right.

14 LA DÉFENSE (Me MACDONALD) :

15 Thank you.

16 LA COURONNE (Me ROBERT ROULEAU) :

17 Your Lorship, before the Court suspends, can I ask
18 for... we don't need to spend more than two (2)/three (3)
19 minutes. We seem to have a (inaudible) with the dates
20 that were fixed. As you know we try to divide the work
21 amongst us and some of us are available all the time,
22 some of us are not available on some days. And given
23 that Mr. Kapoor's agenda, my colleague's agenda... there
24 seems to be... there might be a problem with one day that
25 was fixed.

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1 LA COUR :
2 What day?
3 LA COURONNE (Me ROBERT ROULEAU) :
4 It would be the eleventh (11th), actually, given the
5 fact that we probably will be meeting on that day, it
6 creates a difficulty for us. But I don't think it's
7 unresolvable so if we have a few minutes with my
8 colleagues...
9 LA COUR :
10 You want me to withdraw for a few minutes?
11 LA COURONNE (Me ROBERT ROULEAU) :
12 Yes.
13 LA COUR :
14 All right.
15 LA DÉFENSE (Me FRANK ADDARIO) :
16 Would this be something we could resolve by email
17 over the next couple of weeks?
18 LA COURONNE (Me ROBERT ROULEAU) :
19 I don't think so.
20 LA COUR :
21 Okay. In any event I'm here, so I'll step out.
22 LA COURONNE (Me ROBERT ROULEAU) :
23 It doesn't need to be long, my Lord.
24 LA COUR :
25 Okay.

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1 LA COURONNE (Me ROBERT ROULEAU) :

2 Thank you Your Honour.

3 LA COUR :

4 Could you just advise the bayliff when you're
5 ready?

6 SUSPENSION DE L'AUDIENCE

7 REPRISE DE L'AUDIENCE

8 LA COURONNE (Me ROBERT ROULEAU) :

9 So Your Lordship, we've ironed out the difficulty,
10 difficulty being my not being able to be here on the
11 eleventh (11th). But what we agreed to do is keep the
12 schedule as it is. We believe that foreseeably on the
13 eleventh (11th), most likely it will be my colleagues
14 that will be pleading which is not ideal that I not be
15 there but I will have pleaded. But we agreed to
16 exchange the gist of our argumentation beforehand, so
17 therefore I can have my colleagues' rendition of what
18 went on on the other hand. And the written arguments
19 that will be exchanged, complete on the eighteenth
20 (18th).

21 LA COUR :

22 It's not just that. You can listen to them in the
23 court log.

24 LA COURONNE (Me ROBERT ROULEAU) :

25 Yes but... of course, technically I could do that but

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1 since I'm not there on the eleventh (11th) and we're
2 back on the eighteenth (18th) it's... We believe the way
3 we figured out to do things makes it so that...

4 **LA COUR :**

5 Maître Rouleau?

6 **LA COURONNE (Me ROBERT ROULEAU) :**

7 Yes?

8 **LA COUR :**

9 In a lot of the motions I had to decide with the
10 ones that involved testimony, I've been going through
11 the court log and Mr. Macdonald and maître Gauthier
12 probably noticed in the last judgement I just rendered,
13 there is a lengthy narration of the facts that, in my
14 view, had to be done and that involved listening to the
15 court logs.

16 **LA COURONNE (Me ROBERT ROULEAU) :**

17 Of course. But this is argumentation. As well I'm
18 preparing for some pleadings that... and I won't be
19 assisting to my colleagues' pleadings, so therefore if
20 I want to come back afterwards, it's a bit... it creates
21 that complication.

22 **LA COUR :**

23 So having said all that, the bottom line is the
24 eleventh (11th) was a date that was fixed, it was
25 mentioned a few times last week, but you're asking now

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1 that we don't sit that day?

2 **LA COURONNE (Me ROBERT ROULEAU) :**

3 No, no, no. As I mentioned when I started, it
4 doesn't change the schedule. We ironed out the
5 technical...

6 **LA COUR :**

7 So what are you asking me?

8 **LA COURONNE (Me ROBERT ROULEAU) :**

9 To be excused on the eleventh (11th).

10 **LA COUR :**

11 Oh your presence?

12 **LA COURONNE (Me ROBERT ROULEAU) :**

13 Yes.

14 **LA COUR :**

15 Absolutely, it's granted.

16 **LA COURONNE (Me ROBERT ROULEAU) :**

17 Okay, thank you.

18 **LA COUR :**

19 In the same vein, I'd like to know, the three (3)
20 of you are part of the Crown team, could you give me
21 the names as we speak today, on July twenty-four (24),
22 who the others are?

23 **LA COURONNE (Me ALEXIS GAUTHIER) :**

24 So us three (3) here.

25 **LA COUR :**

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1 Yes.
2 LA COURONNE (Me ALEXIS GAUTHIER) :
3 Julie-Maude Greffe.
4 LA COUR :
5 Yes.
6 LA COURONNE (Me ALEXIS GAUTHIER) :
7 Geneviève Rondeau-Marchand and Frédérique Le
8 Colletter.
9 LA COUR :
10 All right.
11 LA COURONNE (Me ALEXIS GAUTHIER) :
12 But not all counsels are working full time on this
13 case. Some of us are, others are not.
14 LA COUR :
15 So who are the counsels that are working full time
16 on the case, the three (3) of you?
17 LA COURONNE (Me ALEXIS GAUTHIER) :
18 No. Maître Godbout, maître Greffe and myself.
19 LA COUR :
20 All right, thank you. Any other comments before we
21 adjourn? So I wish everybody a very good month of
22 August.
23 Mme LA GREFFIÈRE :
24 Thank you Sir.
25 LA COUR :

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1 Thank you all for your work and your presence and
2 we'll see you on the eighth (8th) of September with
3 respect to this motion and the other motion that's
4 involved, on the third (3rd). Thank you.

5 **Mme LA GREFFIÈRE :**

6 Et pour la présence des accusés, monsieur le Juge?

7 **LA COURONNE (Me ALEXIS GAUTHIER) :**

8 Oh yes, madam Clerk had mentioned it to me, it's my
9 fault, I totally forgot. So I believe that on the
10 third (3rd) and the fourth (4th) the only accused that
11 we would need is Mr. Racaniello, yes?

12 **Me MAXIME HÉBRARD,**

13 **Procureur de la défense :**

14 Yes, that's right.

15 **LA COURONNE (Me ALEXIS GAUTHIER) :**

16 All right. And for the hearing of these motions,
17 so the eighth (8th), the ninth (9th), the eleventh (11th)
18 and the eighteenth (18th), I think that all the accused
19 that are here today should be there as well on these
20 four (4) days.

21 **LA COUR :**

22 And the twenty-eighth (28th) and twenty-ninth (29th)
23 if need be.

24 **LA COURONNE (Me ALEXIS GAUTHIER) :**

25 All right.

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1 **Mme LA GREFFIÈRE :**
2 Mr. Simpson always..
3 **LA COUR :**
4 Okay, madam Clerk, let's go through the list with
5 the exception of Desjardins of course, let's go through
6 the list. Before you do that -- I'm sorry -- Mr.
7 Macdonald, there were documents today shown on the
8 screen, is your position the same? You've renounced
9 and your client has renounced of course as he did
10 yesterday?
11 **LA DÉFENSE (Me MACDONALD) :**
12 It was a general waiver yesterday, Your Honour.
13 **LA COUR :**
14 It was a general waiver?
15 **LA DÉFENSE (Me MACDONALD) :**
16 Yes.
17 **LA COUR :**
18 Q. And that was your understanding too Mr. Simpson?
19 A. Yes it is.
20 Q. Okay.
21 And you can put that in the record please? All
22 right, go ahead name by name.
23 **Mme LA GREFFIÈRE :**
24 Mirarchi?
25 **LA DÉFENSE (Me MAXIME HÉBRARD) :**

VITTORIO MIRARCHI
540-01-063428-141
Le 24 juillet 2015

DISCUSSION DE PART ET D'AUTRE

1 Yes, Mr. Mirarchi wants to be there.
2 **Mme LA GREFFIÈRE :**
3 Milioto?
4 **LA DÉFENSE (Me MAXIME HÉBRARD) :**
5 Yes.
6 **Mme LA GREFFIÈRE :**
7 Fracas?
8 **LA DÉFENSE (Me MAXIME HÉBRARD) :**
9 Yes.
10 **Mme LA GREFFIÈRE :**
11 Racaniello?
12 **LA DÉFENSE (Me MAXIME HÉBRARD) :**
13 No.
14 **Mme LA GREFFIÈRE :**
15 Mr. Simpson par video comparution?
16 **LA DÉFENSE (Me MACDONALD) :**
17 Yes please.
18 **Mme LA GREFFIÈRE :**
19 Magistrale?
20 **LA DÉFENSE (Me MAXIME HÉBRARD) :**
21 Yes.
22 **Mme LA GREFFIÈRE :**
23 D'Addario?
24 **LA DÉFENSE (Me MAXIME HÉBRARD) :**
25 Yes.

VITTORIO MIRARCHI
540-01-063428-141
Le 24 juillet 2015

DISCUSSION DE PART ET D'AUTRE

1 **Mme LA GREFFIÈRE :**

2 Thank you.

3 **LA DÉFENSE (Me FRANK ADDARIO) :**

4 And we will need the presence of Mr. D'Addario of
5 course for his bail hearing on the tenth (10th), the
6 fourteenth (14th) and the seventeenth (17th) of
7 September. And he will be the only accused on these
8 days.

9 **LA COUR :**

10 All right.

11 **Mme LA GREFFIÈRE :**

12 Thank you.

13 **LA COUR :**

14 Okay. If there is any other changes at the end of
15 August, you could advise the clerk who...

16 **LA DÉFENSE (Me FRANK ADDARIO) :**

17 Absolutely.

18 **LA COUR :**

19 ... and myself and we'll deal with it then.

20 **LA DÉFENSE (Me FRANK ADDARIO) :**

21 Yes Sir.

22 **LA COUR :**

23 All right, so before I get up and down again, is
24 there anything else?

25 **LA DÉFENSE (Me FRANK ADDARIO) :**

Josh Richdale, July 24, 2015, transcript

VITTORIO MIRARCHI
540-01-063428-141
Le 24 juillet 2015

DISCUSSION DE PART ET D'AUTRE

1 I don't think so.

2 **Mme LA GREFFIÈRE :**

3 Not on my part.

4 **LA COUR :**

5 All right.

6 **CAUSE REPORTÉE AU 8 SEPTEMBRE 2015 DEVANT L'HONORABLE**
7 **MICHAEL STOBER, J.C.S.**

8 **FIN DE L'AUDIENCE**

9 -----

10

11 Je, soussignée, **DANIÈLE F. TASSÉ** (# 289078-0),
12 sténographe officielle bilingue, certifie sous mon
13 serment d'office que les pages qui précèdent sont et
14 contiennent la transcription fidèle des témoignages
15 rendus dans cette cause, dont l'enregistrement audio a
16 été effectué hors de mon contrôle et est au meilleur de
17 la qualité dudit enregistrement.

18 Le tout conformément à la loi.

19 Et j'ai signé,

20

21

22 *Danièle F. Tassé, s.o., o.c.r.*

23 **DANIÈLE F. TASSÉ,**

24 Sténographe officielle bilingue

25

BAN ON PUBLICATION AND BROADCASTS

C A N A D A
PROVINCE OF QUEBEC
DISTRICT :

LAVAL

COURT : **SUPERIOR COURT**
(Criminal Jurisdiction)
CITY : **LAVAL**

CASE NO : **540-01-063428-141**

STAGE : **MOTIONS FOR DISCLOSURE (cont'd)**

PRESENT : **THE HONOURABLE JUSTICE MICHAEL STOBER, S.C.J.**

NAME OF THE PARTIES :

THE QUEEN,

Plaintiff,

v.

VITTORIO MIRARCHI,

Accused.

NAME OF THE ATTORNEYS :

Me ROBERT ROULEAU
Me ALEXIS GAUTHIER
Me MARIE-CHRISTINE GODBOUT
ATTORNEYS FOR THE CROWN
Me FRANK ADDARIO
Me MICHAEL LACY
Me MAXIME HEBRARD
ATTORNEYS FOR THE DEFENCE
Me ANIL KAPOOR
AMICUS CURIAE ATTORNEY

DATE OF HEARING :

September 9th, 2015

TRANSCRIPTS REMITTED :

October 6th, 2015

Original

540-01-063428-141
September 9th, 2015

Preliminaries

1 (CASE CONTINUED FROM JULY 24th, 2015)
2 (THE ACCUSED IS PRESENT AND DETAINED)
3 (EXCLUSION OF WITNESSES IS ORDERED)
4 (BAN ON PUBLICATION AND BROADCASTS)

5 PRELIMINARIES

6 On the ninth (9th) day of the month of
7 September, in the year two thousand and fifteen
8 (2015):

9 BY THE COURT

10 (THE HONOURABLE JUSTICE MICHAEL STOBER,
11 S.C.J.)

12 (...) a message yesterday from Maître Godbout about
13 starting later. And my assistant, who had written
14 back, asking if you needed more time to avoid what
15 happened yesterday where we needed a large break
16 in the middle of the morning. I didn't get a follow-up.
17 Was there a follow-up to that?

18 BY Me MARIE-CHRISTINE GODBOUT

19 ATTORNEY FOR THE CROWN

20 No. I thought Madam... (inaudible)... email was clear
21 that you would be starting at ten o'clock (10:00)
22 unless we advise otherwise after her email. That's
23 how I understood it. So, that's why you didn't hear
24 from the Crown or, I guess from the Defence as well.

25 BY THE COURT

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September 9th, 2015**

Preliminaries

1 Okay. All right. I asked her to... because I wanted a
2 confirmation by four fifteen (16:15) if it was ten
3 (10:00) or ten thirty (10:30) or later.

4 BY THE CROWN (Me Godbout)

5 Oh, sorry.

6 BY THE COURT

7 All right. I understand. Okay. And I understand it was
8 to look at Mr. Kapoor's argument?

9 BY THE CROWN (Me Godbout)

10 That's correct.

11 BY THE COURT

12 So, it's interesting, everybody else saw it but I don't
13 have it.

14 BY Me ANIL KAPOOR

15 AMICUS CURIAE ATTORNEY

16 Well, you have... it's ready, today, this morning. And
17 I wasn't able to provide it...

18 BY THE COURT

19 That's okay.

20 BY Me KAPOOR

21 ...otherwise...

22 BY THE COURT

23 No. It's all right.

24 BY Me KAPOOR

25 ...because of in secure... So, I have a sealed copy of

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Preliminaries

1 it for you.

2 BY THE COURT

3 Fine. Thank you.

4 BY Me KAPOOR

5 Which if I can just provide it to you. I don't know if

6 the practice... and I guess we can address this in

7 close, but the practice as to exhibit those

8 submissions or not, but you have a copy there, Sir.

9 BY THE COURT

10 Okay. All right. So, before we start this hearing, just

11 to follow up where we were yesterday. Maître

12 Gauthier, you made a comment, this is with respect

13 to a release hearing for Racaniello. You made a

14 comment about my résumé of the chronology of

15 procedures and facts. And I raised it to ascertain that

16 the summary of the facts was correct because no

17 evidence was produced, no agreed fact... statement

18 of facts was produced. And you made a reference to

19 me including in that July 20th, my judgment this past

20 summer, where I excluded evidence in the Simpson's

21 matter. And you were inferring certain things that I

22 wasn't comfortable with. Understand that Defence

23 counsels, Maître Boro and Maître Engel, in that

24 motion raised material change in circumstances, one

25 of which is the delay and the sentence that the

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Preliminaries

1 accused would potentially receive in the event he was
2 found guilty. And the argument being that he would
3 have served his sentence. The other material change
4 in circumstances being raised by the Defence was
5 that judgment, that there's... it may or may not have
6 an impact on the evidence. And that's something that
7 they may raise on the next date because we haven't
8 finished the argument. It's entirely pertinent in my
9 view for the Court to include that since it's being
10 raised by the Defence's material change in
11 circumstances. So, your inferences were unclear, but
12 I think you were suggesting something. Do you have
13 something to say about that?

14 BY Me ALEXIS GAUTHIER

15 ATTORNEY FOR THE CROWN

16 Um...

17 BY THE COURT

18 You understand what I just said? That the judgment
19 relates to a Defence's argument about a material
20 change in circumstances. So, what was your problem
21 with me including that?

22 BY THE CROWN (Me Gauthier)

23 Well, Sir, based on what you just said, we don't have
24 any more comment to make about the inclusion of
25 that.

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Preliminaries

1 BY THE COURT

2 I understand. But what were you saying yesterday?
3 Because I had the distinct impression that there was
4 something else you were saying.

5 BY THE CROWN (Me Gauthier)

6 Well, Sir...

7 BY THE COURT

8 What was it?

9 BY THE CROWN (Me Gauthier)

10 You want me to repeat that...

11 BY THE COURT

12 No. I want to know why you raised that yesterday.

13 BY THE CROWN (Me Gauthier)

14 Well, we don't want the Court to... if we decided to
15 challenge the jurisdiction, it was only on a question
16 of law. And that's it.

17 BY THE COURT

18 Okay. The point that I made is that you...

19 BY THE CROWN (Me Gauthier)

20 And then that's the only reason why we did it.

21 BY THE COURT

22 Okay. But why would you stand up and indicate you
23 had a problem with me mentioning in my proposed
24 résumé of the chronology the fact that I rendered that
25 judgment on Île Vaudry on July 20th? Why did you

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Preliminaries

1 stand up and raise that?
2 BY THE CROWN (Me Gauthier)
3 Because we don't want the Court to think that we
4 tried to go into another forum...
5 BY THE COURT
6 Yeah.
7 BY THE CROWN (Me Gauthier)
8 ...for that decision. That's it. We don't want the Court
9 to... (inaudible)... that and to suggest that.
10 BY THE COURT
11 Yeah. So...
12 BY THE CROWN (Me Gauthier)
13 That's the only reason why I mentioned it.
14 BY THE COURT
15 Okay. So, what you're saying is you stood up
16 yesterday because you think that I put that in my
17 judgment in order to say that the Crown's position
18 indicating the Court had no jurisdiction was because
19 you didn't want to do it in front of me because I
20 rendered that decision? Is that basically what you
21 were saying?
22 BY THE CROWN (Me Gauthier)
23 We...
24 BY THE COURT
25 Let's be frank about it.

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Preliminaries

1 BY THE CROWN (Me Gauthier)
2 We just wanted...
3 BY THE COURT
4 Is that what you were saying?
5 BY THE CROWN (Me Gauthier)
6 Yes, Sir. We just wanted to make that clear.
7 BY THE COURT
8 Yeah. Um-hum. Okay. Before I go further and I'm
9 raising it today because it just happened yesterday
10 and I thought about it and your remarks made me
11 uncomfortable, with what I've said this morning, it's
12 entirely pertinent in my view to put it in there
13 because of the arguments by Maître Engel and Maître
14 Boro that the judgment had an impact on the
15 evidence which may create a material change in
16 circumstance. That's something that you can argue;
17 that notwithstanding the judgment, there is no
18 material change in circumstance in the evidence. But
19 because of the Defence's argument, the judgment and
20 the chronology in my view had to be there. Do you
21 agree?
22 BY THE CROWN (Me Gauthier)
23 I don't agree that it should have an impact. But based
24 on what you just said this morning, yes, I can see
25 why it can have some relevancy to the debate that

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Preliminaries

1 you will have to rule.

2 BY THE COURT

3 Yeah. I understand your argument that it has no
4 impact, and you'll make that argument. But in terms
5 of the chronology of the different things that
6 happened, with respect to that judicial interim
7 release hearing, it related to an argument raised by
8 the Defence. They're raising that it has an impact. I
9 put the date of the judgment also to show that it was
10 after the judgment rendered with respect to 11b). I
11 think it was entirely pertinent. So, you jumped up and
12 presumed that I put that in because your position was
13 that I have no jurisdiction... that I have no
14 jurisdiction was... you thought I was presuming that
15 you just didn't want to do it in front of me. And
16 that's... you've agreed today that that's what you
17 were raising yesterday. I have a lot of difficulty with
18 that. And the fact that you didn't see the other point
19 that I raised this morning, I have a lot of difficulty
20 with that argument.

21 I also have difficulty with the fact that in February
22 2015, precisely February 25, I listened, as you know I
23 have the transcript of the CourtLog, and you
24 specifically agreed that this Court had jurisdiction as
25 the trial judge under 523(2)a), which is why on July

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Preliminaries

1 3rd you agreed with me and Boro that only a half day
2 was needed. Nothing was stated about a new position
3 that you're now challenging jurisdiction. And then I
4 find out last Thursday September 3rd, the first day
5 that we're proceeding in this, you spent a whole day
6 arguing jurisdiction and I only found out about that
7 the week before. My impression, since February 25th,
8 is that jurisdiction wasn't an issue. And I raised this
9 with your colleague Maître Rondeau-Marchand and,
10 correct me if I'm wrong, this wasn't a last minute
11 decision from what I understood in her arguments,
12 that you're changing your view after looking at the
13 law on jurisdiction.
14 So, I just wanted to make those comments. And I
15 know that the dates I put and the summaries attached
16 to those dates were agreed to by you and the
17 Defence yesterday, but I thought of your comment
18 and I don't agree with what you said; that there's an
19 inference there; that I put that in my summary
20 because the Court would have been of the view that
21 the Crown didn't want to do it in front of me. That
22 might be in your head. That might be something
23 you're thinking. And maybe there's more to it than
24 that. My intention in putting it in there was to include
25 a date that had relevance to an argument by the

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Preliminaries

1 Defence, so the Court can cover everything raised by
2 Crown and Defence. Do you have any other
3 comments?

4 BY THE CROWN (Me Gauthier)

5 No, Sir.

6 BY THE COURT

7 Thank you. Let's continue with the next motions.
8 Sometimes, it's very prudent to reflect before making
9 a comment like that. Let's go ahead.

10

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12 =====

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Representations

1	<u>REPRESENTATIONS</u>
2	BY THE CLERK
3	Is the proof closed on both sides?
4	BY THE COURT
5	Yeah. Maître Gauthier indicated the other day that
6	the Defence had completed questioning of Jocelyn
7	Fortin. So, I just... now that all Defence counsels are
8	present, that's accurate, I presume?
9	BY Me FRANK ADDARIO
10	ATTORNEY FOR THE DEFENCE
11	It is, Sir.
12	BY THE COURT
13	All right. Is there any other evidence to be called by
14	any of the Defence counsels?
15	BY THE DEFENCE (Me Addario)
16	We're not calling any evidence.
17	BY THE COURT
18	Is there any other evidence to be called by the
19	Crown?
20	BY THE CROWN (Me Godbout)
21	There is, Mister Justice. Maître Gauthier announced
22	yesterday that we might have some documentary
23	evidence to complete the record.
24	BY THE COURT
25	Go ahead.

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Representations

1 BY THE CROWN (Me Godbout)
2 We do. And it's quite succinct. My colleagues
3 received these documents yesterday via email. I have
4 a working copy for you.
5 BY THE CLERK
6 Les deux (2) documents sont pour Monsieur le Juge?
7 BY THE CROWN (Me Godbout)
8 S'il vous plaît.
9 BY THE CLERK
10 D'accord.
11 BY THE CROWN (Me Godbout)
12 Copy for the Court files.
13 BY THE CLERK
14 Thank you.
15 BY THE CROWN (Me Godbout)
16 If we look at the first document, we would be at...
17 BY THE COURT
18 Okay. I have two (2). Which is the first document?
19 BY THE CROWN (Me Godbout)
20 The one with the colors, the yellow insert in the
21 middle.
22 BY THE COURT
23 The one with the pictures of the accused...
24 BY THE CROWN (Me Godbout)
25 That's correct, yes.

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Representations

1 BY THE COURT
2 ...before what they would have said?
3 BY THE CROWN (Me Godbout)
4 That's correct. It starts at page 111 at the bottom.
5 BY THE COURT
6 Yeah.
7 BY THE CROWN (Me Godbout)
8 We would file it under **R-32.10**.
9 BY THE COURT
10 Okay. Could you tell me what it is?
11 BY THE CROWN (Me Godbout)
12 I will. You will remember we discussed the
13 surveillance on Mr. Mirarchi on September 21st, 2011,
14 where the MDI, as it appeared, might not have been
15 successful in capturing some of the information on
16 the cellphone, but the Crown wanted to adduce with
17 this document and it will be part of Maître Rouleau's
18 argument. So, I will leave that to him. But if we go
19 through this document, you will find that during his
20 physical surveillance, Mr. Mirarchi was using PIN
21 number, if you look at page 114, PIN number
22 26CA1E1F...
23 BY THE COURT
24 Just a moment. Okay.
25 BY THE CROWN (Me Godbout)

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Representations

1 Okay? And at page 114, we see he's discussing with
2 Mr. Tomasino that he's going for a pizza, north of
3 Montreal, in Boisbriand. And physical surveillance
4 follows him there. Also, physical surveillance will
5 have the report, which will be the next document to
6 file...

7 BY THE COURT

8 So, the next document that starts with dash 1238,
9 that's a surveillance document?

10 BY THE CROWN (Me Godbout)

11 It is.

12 BY THE COURT

13 All right.

14 BY THE CROWN (Me Godbout)

15 Description: "Surveillance special... *du jour*". There's
16 a day surveillance and also an evening surveillance. I
17 put the two (2) reports together, and therefore you
18 can... they cover the entirety of the period.

19 BY THE COURT

20 All right. Does the Defence, all the lawyers have
21 copies of this?

22 BY THE CROWN (Me Godbout)

23 I have one paper copy this morning, but they received
24 it via email yesterday.

25 BY THE COURT

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Representations

1 All right. So, any comments or objections to these
2 two (2) documents?
3 BY Me MICHAEL LACY
4 ATTORNEY FOR THE DEFENCE
5 We have no objection.
6 BY THE COURT
7 Okay.
8 BY THE DEFENCE (Me Lacy)
9 To the filing of the document which is the Crown's
10 theory of identification.
11 BY THE COURT
12 All right.
13 BY THE CROWN (Me Godbout)
14 Um-hum.
15 BY THE DEFENCE (Me Lacy)
16 So, I think it's clear to the Court, but my friend
17 said: "So, this shows Mr. Mirarchi communicating."
18 This is what the Crown will argue to the jury, and...
19 BY THE COURT
20 That's right.
21 BY THE DEFENCE (Me Lacy)
22 That will become relevant during the course of
23 submissions.
24 BY THE COURT
25 Yeah. We're not in front of the jury now. This is a

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Representations

1 motion. It's all... the Crown alleging.
2 BY THE DEFENCE (Me Lacy)
3 That's right. I just wanted to make that point clear.
4 Thank you.
5 BY THE COURT
6 Okay. So, the document with the photos is 32.10. The
7 surveillance documents are **32.11**?
8 BY THE CROWN (Me Godbout)
9 That's correct.
10 BY THE COURT
11 All right.
12 BY THE CROWN (Me Godbout)
13 And then, just one last excerpt where I would like to
14 draw your attention to.
15 BY THE COURT
16 Go ahead.
17 BY THE CROWN (Me Godbout)
18 Page 118.
19 BY THE COURT
20 On 32.10?
21 BY THE CROWN (Me Godbout)
22 Yes.
23 BY THE COURT
24 118?
25 BY THE CROWN (Me Godbout)

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Representations

1 In light blue in the middle.

2 BY THE COURT

3 Right.

4 BY THE CROWN (Me Godbout)

5 Mr. Mirarchi is saying:

6 "Won't be able to see him, because
7 noticed that I'm being followed by pigs."

8 And when we look at document R-32.11, page 10, I
9 just drew a line on the side to draw your attention to
10 that excerpt, where... it's in French but it will show
11 that the surveillance team does notice that the car
12 that Mr. Mirarchi was in has... has noticed that he
13 was being followed.

14 BY THE COURT

15 What was the page on R-32.10?

16 BY THE CROWN (Me Godbout)

17 118. As I was saying before, my colleague Maître
18 Rouleau will have some inferences to... to draw some
19 more comments on these documents with you. I
20 believe that would be the end of the Crown's
21 evidence on the motions, yes.

22 (CROWN'S EVIDENCE CLOSED ON MOTIONS)

23 BY THE COURT

24 Okay. So just to be clear, these are Defence motions
25 raising investigative privilege, and a separate motion

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Representations

1 which is related with respect to the MDI devices. So
2 they're Defence motions. Defence indicates they have
3 no witnesses, no other evidence to call. The Crown
4 indicates they have no witnesses and no other
5 evidence to call. Is that accurate?
6 BY THE DEFENCE (Me Addario)
7 That's correct.
8 BY THE CROWN (Me Gauthier)
9 It is.
10 BY THE COURT
11 Okay. So, Madam clerk, the evidence is closed *de*
12 *part et d'autre*.
13 BY THE CLERK
14 Merci.
15 BY THE COURT
16 Okay? Crown and Defence. And argument.
17 BY THE CLERK
18 Je m'excuse, Monsieur le Juge. Comment vous voulez
19 l'identifier, ce document-là? Si vous l'avez dit, j'ai
20 pas compris, je m'excuse.
21 BY THE COURT
22 D'accord. D'accord.
23 BY THE CLERK
24 R-32.10?
25 BY THE COURT

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Representations

1 Maître Godbout, maybe you can help the clerk
2 identify it?
3 BY THE CROWN (Me Godbout)
4 Of course. I would say: Excerpt from Vittorio
5 Mirarchi's calendar of identification for September
6 21st, 2011.
7 BY THE CLERK
8 Thank you very much. Merci, Maître Rouleau. Je
9 m'excuse.
10 BY THE COURT
11 And the other document would be a surveillance
12 document of Mirarchi.
13 BY THE CLERK
14 Yes.
15 BY THE COURT
16 Correct?
17 BY THE CLERK
18 That, I understood.
19 BY THE COURT
20 Okay. Just before you start, Maître Rouleau.
21 Mr. Kapoor, the document you gave me, this
22 argument, it includes evidence at the *ex parte*
23 hearing and the public hearing?
24 BY Me KAPOOR
25 No. Just the *ex parte* hearing.

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Representations

1 BY THE COURT

2 Just the *ex parte* hearing?

3 BY Me KAPOOR

4 Yeah. I focused on the *ex parte* hearing. There's
5 been... and I did that when I received Mr. Addario's
6 materials. They've done a detailed review of the
7 public evidence. And I felt that rather than repeat
8 that, I would focus on the closed evidence.

9 BY THE COURT

10 All right. So, on the public portion, you're not going
11 to have an argument?

12 BY Me KAPOOR

13 I wasn't planning to make any submissions on the
14 public side.

15 BY THE COURT

16 All right. Okay.

17 BY Me KAPOOR

18 I thought that I would, to the extent that I learn
19 anything in public from the Crown or the Defence, I
20 would incorporate it into my submissions to you
21 enclosed.

22 BY THE COURT

23 All right.

24 BY Me KAPOOR

25 And how it would effect your assessment of the

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Representations

1 closed evidence.
2 BY THE COURT
3 Okay. Thank you.
4 BY Me KAPOOR
5 Thank you.
6 BY Me ROBERT ROULEAU
7 ATTORNEY FOR THE CROWN
8 Just to start on a technical note, it might just be me,
9 I just found it this morning with the speakers on, with
10 the monitor, I had a lot of trouble understanding the
11 Court. Because I'm the closest to the monitor and...
12 but I'm going to be pleading from there, so it might
13 not be a problem. But sitting here, I can tell you that
14 at some point, it's hard for me to...
15 BY THE COURT
16 Okay.
17 BY THE CROWN (Me Rouleau)
18 ...and the Court speaks loud enough. It's just that
19 there's... the buzz from that, let's say...
20 BY THE COURT
21 Well, sometimes I don't speak loud enough, but I will.
22 However, while you are... Maître Rouleau, while
23 you're arguing...
24 BY THE CROWN (Me Rouleau)
25 Yes.

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Representations

1 BY THE COURT

2 ...if there's any interference that bothers you, please
3 let me know.

4 BY THE CROWN (Me Rouleau)

5 Okay.

6 BY THE COURT

7 And we'll take a break and have a technician check
8 then.

9 BY AN UNIDENTIFIED ATTORNEY

10 Non, c'est juste de baisser le volume, Monsieur le
11 Juge. Mais là, il faut que monsieur Simpson nous
12 entende, par exemple.

13 (DISCUSSION REGARDING THE SOUND IN THE
14 COURTROOM AND THE ABILITY OF MR. SIMPSON
15 TO HEAR THE COURT NOT TRANSCRIBED)

16 BY THE COURT

17 Then, we can't continue, so something has to be
18 resolved here. I'm going to step out. He can't hear
19 me. Either it's going to have to be resolved or he's
20 going to have to be here in person.

21 BY THE CROWN (Me Rouleau)

22 Can I suggest, and I'll tell the Court in advance that
23 for the public part of the argumentation, it is certain
24 in our mind that we'll be finished today at... actually,
25 we'll be finished, I believe, early in the afternoon.

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1 So, can I suggest just a quick suspension, so we can
2 just resolve this matter? And...
3 BY THE COURT
4 Yeah. You can. Just to be sure, Maître Gauthier,
5 when Maître Rouleau is finished, was there a
6 possibility of Defence counsel pleading today or not?
7 BY THE CROWN (Me Gauthier)
8 Well...
9 BY THE CROWN (Me Rouleau)
10 Our understanding, Your Lordship, was that they
11 would start on Friday morning.
12 BY THE COURT
13 Okay.
14 BY THE CROWN (Me Rouleau)
15 That's what we understood and that... we're happy to
16 live by that schedule.
17 BY THE COURT
18 Is that still the same position? Yes?
19 BY THE DEFENCE (Me Addario)
20 Yes, Sir.
21 BY THE COURT
22 And I understand you'll want to absorb what he's
23 saying and then have time to fine tune your
24 arguments?
25 BY THE DEFENCE (Me Addario)

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1 It's true, Sir. And in fact, before you came in this
2 morning, we reviewed, Mr. Rouleau and I, Mr. Kapoor
3 whether... then leading the 18th was sufficient time to
4 complete the argument. And all counsels think that
5 with an early start on the 18th, just to be sure, that
6 everything can be completed that day.

7 BY THE COURT

8 All right.

9 BY THE DEFENCE (Me Addario)

10 The *in camera* portion.

11 BY THE COURT

12 So, let's just take a look before the break. So, Maître
13 Rouleau, you'll argue today?

14 BY THE CROWN (Me Rouleau)

15 Yes.

16 BY THE COURT

17 Once you're finished, we're done for today?

18 BY THE CROWN (Me Rouleau)

19 Yes.

20 BY THE COURT

21 Okay. Then, we have an unrelated matter tomorrow
22 with another accused, D'Addario. The Defence
23 argument is on the 11th, correct?

24 BY THE CROWN (Me Rouleau)

25 Yes.

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1 BY THE COURT

2 Okay. And then we have the D'Addario matter on the
3 14th and the 17th, and Racaniello's matter continues
4 on the 16th. So, for the purposes of this matter, the
5 Defence argument is on the 11th, and then the *ex*
6 *parte* submissions of the Crown and Maître Kapoor on
7 the 18th.

8 BY THE CROWN (Me Gauthier)

9 That is our understanding, Your Lordship.

10 BY THE COURT

11 All right. And we'll see where we are then and we'll
12 take it from there. Is that your understanding as well,
13 Maître Addario?

14 BY THE DEFENCE (Me Addario)

15 Yes, sir.

16 BY THE COURT

17 All right. Fine.

18 BY THE DEFENCE (Me Addario)

19 We lose Mr. Kapoor after that day, I believe.

20 BY Me KAPOOR

21 I'm confident we'll complete it on that day. I had a
22 discussion with my friends and I'm confident that a
23 day will be plenty of time. Happy to start early if Your
24 Lordship wishes, so we maximize that day. But I don't
25 imagine it will go longer than that. I should say, just

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1 to round it out, those submissions that you've
2 received from me, there's been no redacted version
3 of that provided to the Defence. I tried to come up
4 with a redacted version yesterday but the closed
5 content is just interwoven through it all, I did not feel
6 it could be safely redrafted.

7 BY THE COURT

8 Okay. So, you went, you didn't distinguish what was
9 public and what was *ex parte*? You'll just argue upon
10 everything before the Court?

11 BY Me KAPOOR

12 Yes. Focusing on the closed information. I've left the
13 open argument to Mr. Addario.

14 BY THE COURT

15 To?

16 BY Me KAPOOR

17 Mr. Addario.

18 BY THE COURT

19 All right.

20 BY Me KAPOOR

21 From the Defence side, and Mr. Rouleau from the
22 Crown side.

23 BY THE COURT

24 Okay. So, we're going to take a short break so that
25 the sound can be adjusted. Just before we go on,

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1 perhaps, Maître Gauthier, you can indicate who is
2 present today?

3 BY THE CROWN (Me Gauthier)

4 Mr. D'Addario, Mr. Fracas, Mr. Mirarchi, Mr. Milioto,
5 Mr. Magistrale, and Mr. Simpson on the screen.
6 Mr. Racaniello, according to discussion yesterday is
7 not present.

8 BY THE COURT

9 Racaniello was excused yesterday at the request of
10 his counsel and with your agreement. All right, thank
11 you. Did you have a comment, Mr. Battista?

12 BY Me GIUSEPPE BATTISTA

13 ATTORNEY FOR THE DEFENCE

14 REPRESENTING FELICE RACANIELLO

15 No.

16 BY THE COURT

17 You just want to have a break?

18 BY Me BATTISTA

19 It was... yes.

20 BY THE COURT

21 I'm leaving. All right. Let me know when the
22 equipment is functioning properly and we'll start the
23 argument.

24 (SUSPENSION OF HEARING)

25 =====

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COURT RECONVENES

ARGUMENT ON MOTIONS FOR DISCLOSURE

BY THE COURT

All right. I see you put the Bible here to raise the microphone. I suppose it's to raise the microphone, not for another reason, that I might need some inspiration! So, I understand that the problem is mine, that I haven't been speaking loud enough. The microphone was too low. Mr. Simpson, can you hear me now? Yeah? He says yes. All right, so that's been resolved. Mr. Rouleau, we're ready to hear you.

BY THE CROWN (Me Rouleau)

Yes, thank you. Excuse me a second. Okay. All right. It's common knowledge that these issues, because we have two (2), R-25 and R-32, R-25 pertaining specifically on two (2) issues, from the interception points or, in other words, the path of the intercepted data, where it is intercepted; and the role, if any, of Research In Motion, or Blackberry, as some might call them, in the process of interception. That's R-25. That's, at the end of the day, since... the process has made it so that information disclosure was made, attempts to settle the issue were made by way of meetings with the Defence, so on and so forth. At the end of the day, these are the two (2) issues that need

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1 to be decided by the Court. It...

2 BY THE COURT

3 Just one moment. There was a document filed, could
4 I have it, please, Madam clerk, which after much
5 discussion in the month of June among all counsels
6 narrowed the issues?

7 BY THE CROWN (Me Rouleau)

8 Marie-Christine... we're talking about the same thing.
9 I have here the list of the issues...

10 BY THE DEFENCE (Me Lacy)

11 R-34.

12 BY THE CROWN (Me Rouleau)

13 Yeah.

14 BY THE CROWN (Me Gauthier)

15 R-34, Madam clerk.

16 BY THE COURT

17 Okay. I have it. I think it's in the other book. All
18 right. So, this is R?

19 BY THE DEFENCE (Me Lacy)

20 34.

21 BY THE COURT

22 34? Thank you.

23 BY THE CROWN (Me Rouleau)

24 And you'll notice that point number on R-34, at some
25 point in the game, the Defence indicated to the Court

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1 that it was no longer a question that needed to be
2 litigated, for different reasons.

3 BY THE COURT

4 So, let's just, before you go on with your argument.
5 The meetings between Crown and Defence resulted in
6 this document R-34. Number 1, that's still a viable
7 issue?

8 BY THE CROWN (Me Rouleau)

9 A live issue that...

10 BY THE COURT

11 "Location on the travel path of the..."

12 BY THE CROWN (Me Rouleau)

13 Yes, yes, yes.

14 BY THE COURT

15 Yes. Number 1 is still an issue. Number 2, you're
16 saying not?

17 BY THE CROWN (Me Rouleau)

18 Exactly.

19 BY THE COURT

20 All right. Let's just confirm that right away. Is that
21 accurate? The Defence says... say yes or no. You're
22 raising that or you're not?

23 BY THE DEFENCE (Me Lacy)

24 Thank you. I just need to look at the original
25 documents for...

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1 BY THE COURT
2 Go ahead.
3 BY THE DEFENCE (Me Lacy)
4 ...if I can have a moment. Thank you.
5 BY THE COURT
6 We have a copy. Mr. Lacy, we have a copy for you.
7 BY THE DEFENCE (Me Lacy)
8 Thank you.
9 BY THE CLERK
10 That's the original.
11 BY THE DEFENCE (Me Lacy)
12 It's not an issue on this motion because the Crown
13 has conceded they will give us the demonstration.
14 That demonstration hasn't happened yet, but we
15 understand it will happen.
16 BY THE COURT
17 So, let's say it's not an issue right now. And it's *sous*
18 *réserve*, dependent upon the Crown allowing you to
19 have a demonstration.
20 BY THE DEFENCE (Me Lacy)
21 That's right. So, as long as that takes place, then it's
22 not part of this motion. We understand the Crown has
23 conceded, in light of the evidence on this motion,
24 that they're required to show us and demonstrate that
25 software.

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1 BY THE COURT

2 Okay. So, I understand that as a result of that, there
3 are no arguments on number 2?

4 BY THE DEFENCE (Me Lacy)

5 Exactly.

6 BY THE COURT

7 By the Crown or by the Defence later on. So,
8 number 3:

9 "Role, if any, of RIM in the interception
10 and decoding process."

11 BY THE CROWN (Me Rouleau)

12 Still a live issue.

13 BY THE COURT

14 Okay. That's still a live issue for the Defence as well.
15 If I don't hear from them, I'll presume it is. So, let's
16 move along. With respect to the... the MDI.
17 Number 1:

18 "The manufacturer make model and
19 software version."

20 I presume that's still a live issue for the Defence?

21 BY THE CROWN (Me Rouleau)

22 Yes.

23 BY THE COURT

24 And they're arguing that. Number 2, the signal, the
25 signal strength?

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1	BY THE CROWN (Me Rouleau)
2	Also a live issue.
3	BY THE COURT
4	A live issue. And number 3...
5	BY THE CROWN (Me Rouleau)
6	Also a live issue.
7	BY THE COURT
8	Number 4?
9	BY THE CROWN (Me Rouleau)
10	4 is a live issue.
11	BY THE COURT
12	5?
13	BY THE CROWN (Me Rouleau)
14	5 relates to... 5 relates to 1, but it is still a live
15	issue.
16	BY THE COURT
17	6?
18	BY THE CROWN (Me Rouleau)
19	Still live issue.
20	BY THE COURT
21	Okay. I'll have to look... I'll look at my notes there. I
22	understood that...
23	BY THE CROWN (Me Rouleau)
24	Oh... on 6, I mean... as a matter of fact, disclosure
25	was made on that issue, but I... what I can tell, I am

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1 not certain at all that what was... what information
2 was given satisfies the Defence. I don't want to
3 presume that, but...

4 BY THE COURT

5 All right. Just one moment. Maître Godbout, do you
6 have another copy of this document? Could you give
7 it to Mr. Lacy?

8 BY THE CROWN (Me Godbout)

9 Of course.

10 BY THE DEFENCE (Me Lacy)

11 We have our copy. Thank you.

12 BY THE COURT

13 All right. So, my noted copy is not here. I have an
14 unmarked copy with me which was provided. I do
15 recall the qualification at number 2, Mr. Lacy, what
16 you've mentioned. And I understand, with respect to
17 the capabilities of interception, R-25, 1 and 3 are the
18 issues to be argued by the Crown and by the
19 Defence. Correct?

20 BY THE DEFENCE (Me Lacy)

21 Yes. That's correct.

22 BY THE COURT

23 Okay. So, for the second portion on the MDI, I recall
24 that those six (6) issues were streamlined and I'll
25 bring forth my notes on that later. Is that still the

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1 case or are all six (6) live issues according to you?

2 BY THE DEFENCE (Me Lacy)

3 You may recall that as a consequence, I believe, of a
4 suggestion of the *amicus*, what was provided, we
5 assume it has been provided in the close session or
6 in a sealed format, is the report of Officers Flynn and
7 Fortin where they would have compiled what the
8 disclosure would look like, if they were required to
9 provide everything to the Defence. That suggestion
10 that arose from Mr. Kapoor's comments, as we
11 understand it, came after this document was
12 originally produced.

13 BY THE COURT

14 Okay. So, that would be related to number 6?

15 BY THE DEFENCE (Me Lacy)

16 I think it's related to 1 through 6 so that the way I
17 would frame it now, Your Honour, is that the Defence
18 position is we're entitled to disclosure of everything
19 that is in the Crown's possession, for control relevant
20 to this issue. That, we understand, has been put
21 together by Officers Fortin and Flynn and has been
22 provided to you in a sealed format and presumably to
23 Mr. Kapoor as well, or will be provided at some point.

24 BY THE CROWN (Me Godbout)

25 It has been.

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1 BY THE DEFENCE (Me Lacy)
2 And perhaps Mr. Kapoor or my friends can confirm
3 that that document is before the Court in a sealed
4 format.
5 BY THE CROWN (Me Godbout)
6 It has been given to Maître Kapoor and to Mister
7 Justice. It hasn't been filed in the *ex parte* files.
8 BY THE COURT
9 Okay. That would be the sealed document here,
10 Mr. Gauthier, that you gave me the other day with all
11 of that material. Is that right?
12 BY THE CROWN (Me Gauthier)
13 Is that right, sorry?
14 BY THE COURT
15 That's Mr. Fortin's report, correct?
16 BY THE CROWN (Me Gauthier)
17 It's Mr. Flynn's report...
18 BY THE COURT
19 Flynn's report, sorry.
20 BY THE CROWN (Me Gauthier)
21 ...mainly, with the collaboration of Mr. Fortin. It's a
22 four (4) page document.
23 BY THE COURT
24 Okay. So just before we go on, MDI portion, the six
25 (6) points, is the Defence saying that all six (6)

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1 points are contested?
2 BY THE DEFENCE (Me Lacy)
3 Yes.
4 BY THE COURT
5 All right. So, we'll go ahead now with that.
6 BY THE DEFENCE (Me Lacy)
7 And sorry to interrupt, Your Honour.
8 BY THE COURT
9 Yeah.
10 BY THE DEFENCE (Me Lacy)
11 Can I just be clear? The report of Officers Fortin and
12 Flynn relate to the institutional state of disclosure or
13 knowledge with respect to this device. But, of course,
14 through the cross-examination of the witnesses, we're
15 also looking for disclosure of how the device was
16 particularly used in this case. So, just to be clear
17 that when we're asking for disclosure, it relates to all
18 of these categories, it relates to the Fortin and Flynn
19 report. And also, we want to have the ability to ask
20 these witnesses questions before the jury after
21 having been disclosure as to how the technique, as
22 they call it, was used on various locations.
23 BY THE COURT
24 All right.
25 BY THE DEFENCE (Me Lacy)

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1 Where they were, what the frequencies were, et
2 cetera, et cetera. But I think it's fair to say all of
3 these matters are all in dispute.

4 BY THE COURT

5 All right. So, your argument today has been
6 interrupted quite a bit. So, I think we've... I just
7 wanted to be sure, the different points in R-34. Could
8 you start again with the points that you're going to be
9 addressing today?

10 BY THE CROWN (Me Rouleau)

11 I'll deal with both R-25 and R-32 in the general
12 principles that, I believe, can be construed from case
13 law and from having read my confrere's *factum*,
14 knowing obviously what our position is as to the
15 questions of law that apply. Obviously, Your
16 Lordship, in that process at some point, as
17 Mr. Kapoor pointed out this morning, it's a very
18 difficult task to try to separate what can be said
19 publicly and what cannot be said publicly, everything
20 is interwoven, so the specifics of every question. And
21 that's what we intend to do at the end of the
22 process: to take every issue that is live and to bring
23 you, as best we can, the specific arguments why we
24 believe that the exercise of balancing that we believe
25 at the end the Court will have to do, weighs in our

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1 favor.
2 BY THE COURT
3 Presuming something is not already public?
4 BY THE CROWN (Me Rouleau)
5 Which is a different... which is a different question.
6 One of the issues that I want to address today, as
7 per what is in the public domain, what is publicly
8 known and... there are subtleties there that I want to
9 address. That I want to address because it doesn't
10 mean that... to jump the gun somewhat. It doesn't
11 mean that if some of the information is known, that
12 there is no need to do the balancing exercise at the
13 end of the day unless it becomes totally pointless,
14 which we do not believe is the case here.
15 BY THE COURT
16 Do I understand you to say that if some things are
17 already in the public domain, that notwithstanding
18 that, the Crown would ask that a privilege cover that
19 material in certain cases...
20 BY THE CROWN (Me Rouleau)
21 Yes.
22 BY THE COURT
23 ...even if it's out there publicly?
24 BY THE CROWN (Me Rouleau)
25 Yes. Not exclusively, but based on the fact that

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1 confirmation of these use or existence of a particular
2 technology is something to be protected. But I'm
3 getting a bit ahead of myself...

4 BY THE COURT

5 Okay.

6 BY THE CROWN (Me Rouleau)

7 ...but, yes, you're right in asserting that.

8 BY THE COURT

9 Okay. So, are you... you have an order in your
10 argument?

11 BY THE CROWN (Me Rouleau)

12 Yes, yes, yes.

13 BY THE COURT

14 Go ahead.

15 BY THE CROWN (Me Rouleau)

16 So, coming back to the order in which I think the
17 issue can be addressed, the best way that we foresaw
18 that this... to take the bull by its horn, if you... There
19 are a few issues that I don't think, at the end of the
20 day, will necessarily be disputed. The fact that the
21 privilege we are talking about here is a case by case
22 privilege. It's not a class privilege whereas the rules
23 of disclosure are much more strict. It would fall into
24 that case where, following the judgment that we cited
25 of RICHARDS of the Ontario Court of Appeal, at the

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1 end of the day the Court has to balance the interests.
2 The interest of the State to protect the investigative
3 technique, as per the interest of the accused to be
4 able to make full answer and defence in a given case,
5 in a given set of circumstances. I don't... I think
6 everybody will be in agreeance with that. I'm not
7 proposing anything new.
8 Also, the fact that police in investigative techniques,
9 the proposition that that, as a general title of
10 privilege, has been recognized in various flavors,
11 different ways, shapes and forms, through the case
12 law, has been recognized as legitimate and genuine
13 point of interest, as something that in some cases,
14 needs to be protected. We gave the Court a number
15 of case law that address specifically some of these
16 issues where jurisprudence and case law has
17 recognized this in different ways, shapes and forms.
18 What is interesting at this point, that I would like to
19 point out, is that these cases often refer to situations
20 where the Crown wishes to put in proof in chief, as
21 proof of a given dispute in fact, that can lead to an
22 individual's finding of guilty or not.
23 Even in those situations, RICHARDS of the Court of
24 Appeal, that's been followed by every Court including
25 the Court of Appeal of Quebec in HERNANDEZ...

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1 (microphone's noise)... I don't know where this is
2 coming from.
3 So, in those cases where the technique is to be
4 presented, for example in the case of the jury trial, to
5 the jury, in order for the Crown to prove guilt, even in
6 those situations, the Courts have upheld investigative
7 privilege. Obviously, in all those cases, the material
8 or the information sought was deemed to be likely to
9 be relevant because it was part of the Crown's proof
10 per se. But in the case... and we gave to the Court
11 examples of observation posts, where an individual is
12 located and ordered, as was the case in RICHARDS,
13 has to see a transaction happen, use of bodypacks,
14 room bugs, surveillance cameras and tracking
15 devices as in GUILBRIDE – I'm not sure that I'm
16 pronouncing it correctly – a case of B.C. where, if
17 you remember, the whole question was precise
18 details on the location of the GPS tracking device
19 that was put on a ship in order to prove that that ship
20 has met with another ship, which was part of the
21 Crown's theory. Even in those circumstances, a Court
22 upheld that the finding... that the exact location and
23 the exact way that that device operated needed to be
24 protected, because it was a technique that was used
25 and could easily be defeated by way of counter-

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1 intelligent from criminal elements, if they were privy
2 to that knowledge. In those cases, the technique
3 itself is well known, that GPS tracking devices can be
4 used to follow an object. It's always in the refinement
5 of the details on how it's used...

6 BY THE COURT

7 Do you find that example of the ship...

8 BY THE CROWN (Me Rouleau)

9 Yes.

10 BY THE COURT

11 ...and the disclosure of the evidence that the Crown
12 sought to protect by privilege, do you find that to be
13 as important as what the Defence is seeking to know
14 in this case? Because in this case, there's no secret
15 of the Crown's position, the pin to pin evidence is
16 their evidence. And in order for the Defence to have
17 full answer and defence, they have to scratch and go
18 behind that. Because that... all of these documents
19 that have been filed and will be filed, with these
20 conversations and these numbers that identify certain
21 devices to different people, that's the case.

22 So, how do you distinguish the circumstances of this
23 case and what the Defence have to do in order to be
24 able to present full answer and have a full defence
25 compared to your example of the ship? Your

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1 argument so far that the case to case privilege and
2 the police investigative techniques are privileged in a
3 variety of cases, whether it's an outpost or it's the
4 same number in a car, or the ship example, they're
5 all over the place. I agree with everything you said
6 and I'm sure the Defence agrees with everything you
7 said up to now. But how do you distinguish those
8 examples where the privilege has been upheld from
9 this case? The evidence in this case is key, it's
10 extremely incriminating evidence against the whole of
11 these accused and...

12 BY THE CROWN (Me Rouleau)

13 Yes, of course. That's the heart of the matter. I
14 agree. And this is how we go about it. Right?

15 First proposition I want to make to the Court is that
16 the effect that disclosure can have addresses the
17 capacity of the State to conduct investigations, in the
18 sense that... and on that, I don't think there will be a
19 lot of disagreements. In the sense that the capacity
20 of the State to effectively identify devices, cellular
21 devices, phones in possession of given individuals –
22 R-32, use of MDI – and to ultimately effectively
23 monitor, intercept the conversations is something per
24 se that is extremely important in today's world, in
25 investigations of organized crime, where you often

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1 hear crimes that are... characteristic of being
2 organized, that need conspiracy, in terrorist activities
3 that are done by way of conversations that can be
4 mouth to ear, but that can be demonstrated by way of
5 conversations on the phone, by use of modern
6 communication technologies.
7 My main proposition is that if disclosure has an effect
8 of rendering the capacity of the State, of diminishing,
9 of rendering its capacity to... in a significant way,
10 then stems from that a need for protection.
11 Our demonstration that the answers that the officers
12 have given to the questions at... that was filed... that
13 are sealed, has that effect. The difficulty here is that
14 I cannot go into the specifics of this case in public.
15 But I can say this. It's that our objection necessarily
16 is linked to the fact that we believe that the answer
17 to the questions will have an effect on the general
18 capacity of the State to conduct investigations.
19 On that, either we're right or we're wrong and the
20 Court will have to come to a conclusion. But it's hard
21 for me to do that and to go into the specifics without
22 addressing the questions one by one and saying why
23 the answer that was given in light of the rest of the
24 testimony has that effect. But definitely, as a general
25 proposition...

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1 BY THE COURT

2 You'll have that opportunity on the 18th?

3 BY THE CROWN (Me Rouleau)

4 Exactly. Exactly. And that's why I agree with Maître
5 Kapoor that it's sometimes difficult. But it needs to
6 be done because that's the heart of the matter, either
7 we're successful or not. But it's a... *le nœud gordien*.
8 I can't translate that, I'm sorry, of this affair.

9 BY THE COURT

10 The Gordian cord.

11 BY THE CROWN (Me Rouleau)

12 Thank you.

13 But I believe that the fact to recognize that – and my
14 colleague certainly can do that effort – to say that if
15 my colleagues convince you that there is an effect,
16 we do recognize that the ability for the State to
17 conduct investigations in this matter is something
18 serious and something that needs to be protected.
19 Whether we're successful or not in doing that, that's
20 another question. But as a general proposition, I
21 think that that can be accepted.

22 Now, to further my answer on the Court's question, I
23 think, here, we need to make certain differences
24 between R-25 and R-32. And I'll start with an
25 admission that I will make that I think will save some,

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1 not ink, but some saliva on both parts.
2 It's that at the end of the process we believe, on
3 R-32, as I had the benefit of reading the
4 supplementary *factum* that my colleagues produced
5 on their view on how the information sought could be
6 relevant to the Garafoli application, we do not intend
7 to contest the fact that the material sought on R-32
8 doesn't meet the test of likely relevance.
9 In other words, would it not be for the privilege that
10 exists in our mind, likely the information sought
11 would be disclosed. So, they don't... we don't, on that
12 specific, we don't agree on everything that is said
13 and on the use that can be made. But at least on
14 that, on the usefulness of the information, on their
15 challenge of, as you pointed it out, the key element
16 of proof against the accused, which is the intercepted
17 communications, it's sufficient to trigger the
18 necessity for the Court to do the balancing exercise.
19 Now, on R-32 and I'm going to sum it up because I
20 think my colleagues... confreres, not colleagues but
21 confreres, have outlined as best they could, to
22 clearly point out to the Court the possible uses of the
23 information sought. There is one major difference and
24 it could... and I'll see what their take on this is on
25 Friday when we work, because as I've mentioned

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**Argument
on motions
By Me Rouleau**

1 before, on Friday, this Friday I can't be there but
2 answer will be given by the Crown in any event, but
3 there's one point of disagreement...

4 BY THE COURT

5 You won't be there to hear the Crown's argument, on
6 what you're arguing right now?

7 BY THE CROWN (Me Rouleau)

8 I'm saying that on Friday, I can't personally be here
9 but my colleagues will be here to answer, if need be
10 so, whatever the Defence will present as arguments
11 to the Court.

12 BY THE COURT

13 All right.

14 BY THE CROWN (Me Rouleau)

15 Because of extraordinary circumstances, otherwise,
16 obviously everybody will be here all the time, of
17 course.

18 But our main point of disagreement, even though I've
19 just told you that we do not contest that the material
20 is likely relevant on the Garafoli issue, it is on the
21 use that can be made as per the negation by the
22 Defence of the proof of identity, of ownership, of
23 usage of a given device.

24 BY THE COURT

25 Okay. Just a moment. So, you're saying that... you

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on motions
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1 admit that based on the arguments of the Defence
2 and their supplementary *factum*, you're not contesting
3 that the material in motion R-32 meets the test of
4 likely relevance to the Garafoli motion. Now, your
5 reserve is what?

6 BY THE CROWN (Me Rouleau)

7 Is on the first... I'll sum it up this way. There's two
8 (2) headlines under which my colleagues have tried
9 to convince you that it's likely relevant:
10 identification, use of that technique to identify the
11 user of a given phone and beat Garafoli. I've already
12 said that B is not contested by the Crown. A, on the
13 other hand, is.

14 When you read my colleague... my confreres'
15 supplementary arguments, you kind of get the
16 impression that they're thinking that they'll be in a
17 situation where the Crown will want to adduce proof
18 in its own case of the use of the MDI operation in
19 order to say, for example, on a given day: Hello, my
20 name is Mr. Richdale, I've operated MDI on this day,
21 and on that day I caught the following serial
22 numbers, IMEI and IMSI, and therefore I wish for the
23 jury to use that, as to prove to you that that person
24 is... Mr. X is the person using that device.

25 BY THE COURT

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By Me Rouleau**

1 And you're saying that that should be the extent of
2 it?

3 BY THE CROWN (Me Rouleau)

4 No. I'm saying we're not doing that. And that was... it
5 is clearly set out in our argumentation in reply to
6 that, it's that the only use of the MDI here that is
7 relevant was in the wiretap application, in the
8 gathering of grounds for the police officers to target
9 or identify devices that they could monitor thereafter.
10 And that is why we say that on the Garafoli
11 application, it has bearing. I'm not saying that I
12 agree with what they're saying or what's the strength
13 of their argument. I'm just saying, in all intellectual
14 honesty, they have something to bring to the Court in
15 to argue.

16 And given the importance of the result of the wiretap
17 wire which is here central, everybody knows that,
18 that's why we're making that concession. But as far...
19 that is the extent of the use of the relevance of the
20 MDI usage, as far as the Crown is concerned. In
21 other words, my colleagues... confreres, I'm sorry,
22 will not have the opportunity to cross-examine any
23 MDI system operator because none will be put in
24 front of the jury in chief.

25 And that is why Your Lordship this morning, to serve

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on motions
By Me Rouleau**

1 as an example, we gave to you what... an example of
2 what was called *calendrier d'identification* or
3 identification proof. Once a device has been
4 identified and monitored, it gives out an output. The
5 question then becomes: Who do we attribute these
6 messages to?

7 That part of the equation which will be put in front of
8 a jury is done by circumstantial proof, example of
9 which was given to you for the 21. But for the 21, you
10 need to add that with other dates, other devices that
11 were used by a given individual. And at the end of
12 the day the jury is convinced beyond a reasonable
13 doubt or not of the use by an individual of a given
14 phone. And in that process, no MDI operator is heard.
15 We do not rely on that as proof positive of the
16 identification.

17 BY THE COURT

18 So, the Crown is not planning to call an MDI
19 operator...

20 BY THE CROWN (Me Rouleau)

21 Exact.

22 BY THE COURT

23 ...to say: On such and such a day, I was at such a
24 location and picked up?

25 BY THE CROWN (Me Rouleau)

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1 Exactly. And therefore... because I believe that we
2 would have to make a nuance if it was the case,
3 because then the Defence would be in a position to
4 argue: Well, listen, in our cross-examination, we're
5 going to want to ask these questions to the operator.
6 And as a matter of fact, publicly here, all the
7 witnesses were asked, and it was certainly fair game
8 and open... relevant questions, were asked questions
9 on that issue, on the operating of the MDI system to
10 the witnesses. And we believe that the witnesses
11 gave a lot of information on that to the extent that we
12 felt that they could go that far without prejudicing our
13 position that some of the information relating to the
14 operation of the machine needed to be protected,
15 which is a difficult...
16 BY THE COURT
17 So, you're making an analogy to a wiretap where the
18 actual operator in a particular room that's using
19 certain equipment, once the order is made by the
20 Court authorizing an interception and once the Court
21 hears motions challenging the admissibility before
22 the jury, once a phone call and conversations are
23 admitted in evidence before jury with respect to a
24 certain number, you're saying: Well, we don't have to
25 call the people that did the actual legwork. You're

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1 making that analogy to the actual operators of the
2 MDI. You're saying it's pertinent to reasonable and
3 probable grounds and all of the other factors to have
4 the evidence admitted pursuant to the sections of the
5 Criminal Code?

6 BY THE CROWN (Me Rouleau)

7 Yes. And to further on that... to further on that,
8 there's two (2) possibilities there. It will be
9 challenged, I understand and we understood that both
10 the authorization itself... but from my colleagues'
11 arguments, we understand that the use of the MDI
12 will be challenged here. And the results of that, the
13 fruits of the use of that technique will be challenged
14 in the wiretap application. But once... and it can go
15 one way or the other, it is put into evidence or it is
16 not, it is accepted or it is not. But once it is accepted
17 that device A, B, C, D, E, F, G were rightfully
18 monitored, the attribution of these devices will be
19 done in a way that doesn't imply any testimony of
20 MDI whatsoever.

21 BY THE COURT

22 Well, the question I have to decide, if the privilege
23 covers that material or not, whatever witnesses
24 you're going to... that could change. Whatever
25 witnesses you're going to call, it's part of your case

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By Me Rouleau**

1 as something else. The argument is being made that
2 the privilege does not cover the MDI. You're saying
3 that it does. And I understand you're admitting that
4 it's relevant, based on the Defence argument, with
5 respect to the Garafoli motion.

6 BY THE CROWN (Me Rouleau)

7 Yes.

8 BY THE COURT

9 But you're saying that it's not relevant, according to
10 you if I understand your argument correctly, on the
11 other prong that position the identification of the
12 user because you're not presenting any of these
13 people that would have taken that device to try to...

14 BY THE CROWN (Me Rouleau)

15 Yes, exactly. And because...

16 BY THE COURT

17 But I have to decide upon whether or not it's
18 privileged. Whatever evidence the Crown is calling
19 later on at trial, it's either privileged or it's not.

20 BY THE CROWN (Me Rouleau)

21 True.

22 BY THE COURT

23 You can take that position...

24 BY THE CROWN (Me Rouleau)

25 We just believe that the...

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**Argument
on motions
By Me Rouleau**

1 BY THE COURT
2 ...you can take that position today, you're not calling
3 an operator. And then at trial, you might say: Well,
4 we're going to call that person.
5 BY THE CROWN (Me Rouleau)
6 That... that would be done with...
7 BY THE COURT
8 And I've seen... and I've seen...
9 BY THE CROWN (Me Rouleau)
10 The only...
11 BY THE COURT
12 Just a moment. And I've seen positions on the Crown
13 part change frequently. So, you haven't...
14 BY THE CROWN (Me Rouleau)
15 The only thing I can say on that...
16 BY THE COURT
17 ...you haven't been here.
18 BY THE CROWN (Me Rouleau)
19 Yes.
20 BY THE COURT
21 And that's not a criticism, you haven't been here on a
22 regular basis.
23 BY THE CROWN (Me Rouleau)
24 That is true. That is true. But I speak on behalf of
25 the Crown in saying that.

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1 BY THE COURT

2 But I've been here every time anything is presented,
3 for obvious reasons.

4 BY THE CROWN (Me Rouleau)

5 And it's... on that note, and I take note of the Court's
6 comment and I say that this... in a perfect world, in
7 every case, nothing would ever change. The reality of
8 these trials is that we have to adjust to a certain
9 number of things that make...

10 But this being said, this being said, when I say that
11 in the Crown's building of the evidence, when I say
12 this, take for granted that this has been discussed
13 extensively between all the lawyers present. And if
14 I... I'm not being... how would you say this, a *haut-*
15 *parleur*, a loud speaker for something I'm not privy
16 to. Otherwise, I wouldn't grant myself the authority to
17 tell the Court, out of respect to the Court.

18 This being said, I have no reason to believe that that
19 would change in any way, shape or form. But this
20 being said, this being said...

21 BY THE COURT

22 I'm working now of... nobody knows what the result
23 will be of this motion, nor any of the other motions
24 that follow. Could be that I agree with you on the
25 privilege. Could be that I agree with you and your

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1 colleagues and all the pin to pin might be admitted.
2 But I haven't heard evidence on the other motion. I
3 haven't heard all the arguments on this one.
4 BY THE CROWN (Me Rouleau)
5 Yes.
6 BY THE COURT
7 I don't know. But for the time being, you're saying
8 that you agree that the Crown's argument... the
9 Defence arguments in their supplementary *factum* are
10 relevant to the Garafoli motion. They need to know,
11 it's relevant that they need to know, according to
12 their position, the various facets of the use of the
13 MDI.
14 BY THE CROWN (Me Rouleau)
15 Yes, Sir.
16 BY THE COURT
17 You're saying since you're not calling any of the
18 operators as part of the Crown's case, well, that they
19 can argue that.
20 BY THE CROWN (Me Rouleau)
21 What they would say and I'm just saying that...
22 BY THE COURT
23 But that's your position today?
24 BY THE CROWN (Me Rouleau)
25 Yes. As a matter of fact, they're not... they don't have

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1 the opportunity to cross-examine anybody on those
2 issues, on the six (6) questions.

3 Now, this being said, they might, around that... I
4 don't want to put words in their mouth or to try to
5 foresee any possible argument, but they could,
6 technically speaking if you look at it broadly and very
7 open-mindedly, say: Well, first of all, it's not because
8 the Crown doesn't use it that it's not covered by
9 disclosure... disclosure issue. And they're totally
10 right in saying that. If that was the rule, it would be a
11 lot simpler, but it wouldn't satisfy all the judgments
12 of the Supreme Court on the matter.

13 Whether we use it or not doesn't matter. If it's likely
14 relevant, it should be disclosed. We're just saying
15 that it has an impact, we believe, on the balancing
16 process at the end. That's the...

17 BY THE COURT

18 Okay.

19 BY THE CROWN (Me Rouleau)

20 In other words, if they were successful in convincing
21 you that they could use it proper to negate the
22 identification, I'm conceding that they'd have a
23 slightly stronger case to present. In other words,
24 they'd have more stuff to put in the balance on the
25 side of disclosure or not disclosure.

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By Me Rouleau**

1 So, that's why I foresee that they probably will insist
2 on that for that reason and their argument might be
3 the following. It might be the following: While we do
4 see that the Crown doesn't use that in its case in
5 chief, what if we wanted to use it as part of our
6 defence? They, technically, although that would not
7 be an easy decision to make, but technically they
8 could decide to call Corporal Richdale, have him
9 testify. Kind of do the exercise that was done in front
10 of you in the course of this motion, and saying:
11 Mr. Richdale, well, that day, is it not true that, from
12 memory, the 21st of September, that you used the
13 MDI and that the IMEI and IMSI of this phone, that
14 the Crown has been trying to prove that was used by
15 Mr. Mirarchi, wasn't caught.

16 BY THE COURT

17 Do you not think they could ask the Court to have you
18 produce that witness?

19 BY THE CROWN (Me Rouleau)

20 Well, that's a different... that's a different argument.

21 BY THE COURT

22 There is some authority for that.

23 BY THE CROWN (Me Rouleau)

24 That is a debate that, in itself, would necessitate a
25 written motion by the Defence that we have not

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on motions
By Me Rouleau**

1 seen...

2 BY THE COURT

3 Okay. But we're not... we're not...

4 BY THE CROWN (Me Rouleau)

5 ...but it would be strongly contested.

6 BY THE COURT

7 Yeah, I can...

8 BY THE CROWN (Me Rouleau)

9 As you can obviously see.

10 BY THE COURT

11 I understand. Um-hum.

12 BY THE CROWN (Me Rouleau)

13 And would arise this set of questions, which are

14 interesting but at the same time difficult. If they do

15 so, they open obviously the possibility for the Crown

16 attorney to cross-examine the witness. And

17 whatever...

18 BY THE COURT

19 Okay. These...

20 BY THE CROWN (Me Rouleau)

21 ...form the Court would direct the parties to...

22 BY THE COURT

23 Okay. Maître Rouleau, these are strategic questions

24 that are premature right now. It's just that you

25 mentioned that they would have to call a person as

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on motions
By Me Rouleau**

1 part of their own defence.
2 BY THE CROWN (Me Rouleau)
3 Yeah.
4 BY THE COURT
5 And I'm just saying that's... you may be right, but it's
6 not entirely clear. There's authority for the other
7 position that I raised.
8 BY THE CROWN (Me Rouleau)
9 Yeah.
10 BY THE COURT
11 Having said that, you indicated that you agree that
12 it's relevant to the issue of Garafoli.
13 BY THE CROWN (Me Rouleau)
14 Yes.
15 BY THE COURT
16 And you say the Crown is not going to call any of
17 these operators of the MDI, so you don't think with
18 respect to them identifying the device, there's any
19 likely relevance to that.
20 BY THE CROWN (Me Rouleau)
21 Yes.
22 BY THE COURT
23 And my remark with respect to that is that's your
24 position today. If I rule in one way or the other and
25 then on the eve of the trial, the Crown change their

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on motions
By Me Rouleau**

1 position, there may be another debate. So, there has
2 to be a decision at large. Whether the Crown calls
3 those witnesses or not, I'd have to... I'd have to look
4 at all of that.

5 BY THE CROWN (Me Rouleau)

6 Yes, of course.

7 BY THE COURT

8 Carry on. Carry on with your argument.

9 BY THE CROWN (Me Rouleau)

10 Yes. And just to add to that, at the end of the day, it
11 is true that that question has to be settled. Because
12 even if the Crown was trying to produce it in evidence
13 in chief, all the case law says that if the privilege
14 applies, it could even apply in such a situation. But
15 I'm just saying that I can see that my colleagues
16 would have different arguments to be presented in
17 the weighing and... but if ever that was the case,
18 everything would not need to be re-argued. They
19 would just say: Well, you see? This is what's
20 happening and then...

21 BY THE COURT

22 Okay. We're...

23 BY THE CROWN (Me Rouleau)

24 ...the disclosure is now a live issue.

25 BY THE COURT

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**Argument
on motions
By Me Rouleau**

1 I'm only saying if I agreed with you on privilege...
2 BY THE CROWN (Me Rouleau)
3 Yeah.
4 BY THE COURT
5 ...and you've argued to me that you're not calling
6 these operators as part of the Crown's case and then
7 you changed your position for strategic or legal
8 reasons or what have you, I would have already
9 rendered a decision that it's privileged. But you've
10 changed your position on who you're calling. I think
11 you should move along in here.
12 BY THE CROWN (Me Rouleau)
13 Yes, okay. On R-25, there's a... at the end of the day,
14 the difference is not that important. We do believe
15 that...
16 BY THE COURT
17 Are you finished with R-32?
18 BY THE CROWN (Me Rouleau)
19 Not altogether, but on that specific topic, on the
20 likely evidence...
21 BY THE COURT
22 Stick to the MDI...
23 BY THE CROWN (Me Rouleau)
24 Okay, I can... yeah, sure. I thought maybe I'd do both
25 *en parallèle* but I have...

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1 BY THE COURT

2 Well, I might say there's a parallel issue that applies
3 to both.

4 BY THE CROWN (Me Rouleau)

5 Yes, but... I believe so, in the sense that in our...

6 BY THE COURT

7 Okay.

8 BY THE CROWN (Me Rouleau)

9 ...in a nutshell, in R-25, the likely relevance for the
10 Defence is... we do not see it as giving, like R-32, the
11 possibility of mounting a challenge on the wiretap
12 issue, because the points of interception and
13 implication of the third-party RIM, we don't see
14 anything. If those questions were answered as giving
15 possibly any arguments, supplementary argument on
16 the Garafoli application, and on that we'll have the
17 chance on Friday morning to hear our colleagues on
18 this point, but as...

19 BY THE COURT

20 So, you're saying, R-25, unlike the MDI, you feel that
21 there is no likely relevance to the Garafoli motion?

22 BY THE CROWN (Me Rouleau)

23 To the Garafoli motion. From what we could gather,
24 from everything that was produced. But given the fact
25 that it is part of the Crown's case at large, because

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1 the Crown's case here is interception of private
2 communications, the pathway and implication of third-
3 parties on how it's done is relevant to the proof in
4 chief. In that sense, given the fact that, let's face it
5 and I'll say it bluntly, the bar is not high, disclosure
6 bar was set by the Supreme Court at a low level.
7 Likely relevant, put in other words is: unless we
8 convince you that it's obviously not relevant,
9 everything else is in the first category.
10 BY THE COURT
11 So, what's your position with respect to R-25?
12 BY THE CROWN (Me Rouleau)
13 Our position is the following. The...
14 BY THE COURT
15 It's relevant or it's not?
16 BY THE CROWN (Me Rouleau)
17 It meets the threshold of likely relevance. Even
18 though in this case, to make this perfectly clear but I
19 don't think there was ever any doubt, we are of the
20 opinion that the answers to the questions that are
21 asked, 1 and 3, are never to be put in front of the
22 jury, are not necessary in order for us to fulfill our
23 obligations of presenting a complete proof on the
24 interception of the communications. In other wise... in
25 other words, put in a different way, the answers to

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By Me Rouleau**

1 those two (2) questions: Where specifically, where
2 are the points of interception? The jury does not
3 need know that. Was RIM implicated or not? The jury
4 does not need to know that.

5 And the core element of that, if you take what has
6 been said publicly by Mr. Flynn and Mr. Boismenu
7 report on the MD5 value of the hashing, of the
8 intercept, we believe, offers a guaranty of integrity
9 that makes it so, that has in these witnesses explain
10 how it's done without giving the particulars of 1 and
11 3, is sufficient, is...

12 BY THE COURT

13 So, for that part, your argument on the question of
14 likely relevance for the Garafoli motion, you're saying
15 that you agree with the Defence that it is likely
16 relevant, R-25, it meets the threshold. However, you
17 feel that the points of interception and the
18 implication of RIM, if any, don't have to go before the
19 jury?

20 BY THE CROWN (Me Rouleau)

21 Yes. And just to be precise, it's not on the Garafoli
22 aspect. It's on the fact that it relates to something
23 that is at heart of the trial and that the Crown puts
24 into proof in chief. On that aspect of it, one must
25 take a step back and say: Well, we believe that it

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on motions
By Me Rouleau**

1 makes it likely relevant. At the end of the day, we
2 believe that the balancing of the interest here weighs
3 heavily in favor of the Crown. That's our end
4 proposition. But the first steps here are taken in that
5 direction.

6 BY THE COURT

7 All right.

8 BY THE CROWN (Me Rouleau)

9 Which takes me to the case of RICHARDS of the
10 Court of Appeal, Ontario. And I say this, probably my
11 colleagues will agree with me that it is the
12 cornerstone of the... the way to handle these issues
13 was followed, as I said before by the Court of Appeal
14 of Quebec in HERNANDEZ and in many other Courts.
15 And we have reproduced the most relevant paragraph,
16 the paragraph 11 of that section that says that
17 basically when claim of privilege is made, the judge
18 must first decide whether the information sought is
19 relevant to an issue in the proceedings. In our view,
20 that is we've agreed to that, with nuances and
21 subtleties, but that's taken care of. Second:

22 "If relevant, evidence of the investigative
23 techniques used will not be disclosed if
24 the public interest in effective police
25 investigation and the protection of those

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on motions
By Me Rouleau**

1 involved in, or who assist in such
2 investigation, outweigh the legitimate
3 interests of the accused in disclosure of
4 the techniques."

5 So, that's the balancing of both interests. So, this is
6 what we're on the pathway to try... to try and do and
7 that's the heart of the matter here.

8 BY THE COURT

9 While you're looking at your notes, I'll just mention,
10 it's twelve twenty-five (12:25) and we have a flexible
11 Court staff here that is usually willing to go for... we
12 can go further or you can stop at a certain time and
13 we can come back after lunch.

14 BY THE CROWN (Me Rouleau)

15 What I would suggest is that what I'm embarking into
16 is very hard to split in two (2). It would make it... it
17 would render it more difficult for me. I'd rather stop
18 here, actually, at twelve twenty-five (12:25),
19 reconvene at the Court's... when the Court believes it
20 to be suitable and carry on from there.

21 BY THE COURT

22 You'd rather break now?

23 BY THE CROWN (Me Rouleau)

24 Yes.

25 BY THE COURT

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**Argument
on motions
By Me Rouleau**

1 All right. Just approximately, without restricting you,
2 you'll take as much time as you need, approximately
3 how much more?
4 BY THE CROWN (Me Rouleau)
5 An hour.
6 BY THE COURT
7 Another hour?
8 BY THE CROWN (Me Rouleau)
9 Yes, at most. Because we will very soon get into that
10 part where we need to go *ex parte* to be able to close
11 the issue, if you will.
12 BY THE COURT
13 Okay. Is two fifteen (14:15) all right or you'd prefer
14 two thirty (14:30)?
15 BY THE CROWN (Me Rouleau)
16 Two fifteen (14:15) is all right, but I'm...
17 BY THE COURT
18 Two fifteen (14:15), and if you feel you need more
19 time, a few minutes extra, you'll advise the bailiff and
20 we'll start at two thirty (14:30). But for the time
21 being, it's two fifteen (14:15). All right. Thank you.
22 (SUSPENSION OF HEARING)
23 =====
24
25

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on motions
By Me Rouleau**

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COURT RECONVENES

ARGUMENT ON MOTIONS FOR DISCLOSURE

(cont'd)

BY THE COURT

I hope the clerk advised you there was an administrative issue that I had to deal with, with the Court staff in the back. So, sorry for the delay. Go ahead.

BY THE CROWN (Me Rouleau)

Okay. Two (2) things...

BY THE COURT

When we break, you were talking about RICHARDS from the Ontario Court of Appeal.

BY THE CROWN (Me Rouleau)

As for the procedure that is to be undertaken by this Court in order to exercise the balancing of the interests that are at stake here. And I think, at the end of the day, recognizing the interests of the other party, we wish the Court to come to the conclusion that the State also here has interests to protect in its investigative technique. Let me start by saying this on that note.

It is obviously here not the technique in itself that needs to be protected in its entirety, in its wholeness. Obviously, we are trying to protect certain

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1 precisions, certain technical details that are asked to
2 be disclosed, because we are of the opinion that it
3 would render the use of the MDI and the interception
4 of private communication itself, speaking about both
5 motions, less effective.

6 So, as is generally the case in such matters, the
7 existence of the technique is known, use of GPS, use
8 of undercover microphones to record conversations,
9 use of double agents, so on and so forth. It's in how
10 far do we go in revealing every technical aspect of it.
11 Do we need to go? And can part of it be protected? In
12 other words, at what point does the interest of the
13 State to have effective investigative methods
14 outweigh the interest of the accused to have these
15 answers in order to full answer and defence? The
16 answer to that question, we believe, will vary from
17 case to case.

18 BY THE COURT

19 Okay. The... *les grandes lignes* of the jurisprudence,
20 it's clear. I agree with that and the Defence, I'm sure,
21 agrees too. But I think their argument in all of these
22 books I've received and all these cases I've received,
23 come down to this. Their clients are charged with
24 first degree murder, except for one, and conspiracy,
25 except for the one who is charged of complicity after

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1 the fact, the murder. They're saying that they can't
2 properly defend their clients because one of the
3 investigative tools that were used led to the
4 discovery of, if I can say so, the only evidence upon
5 which they may be found guilty. So, what they're
6 saying is if the privilege is unlifted, they have to take
7 a leap of faith that everything done by the police was
8 right. It's the first thing.

9 The other thing is that what they're saying, a lot of
10 the material out there is public. They argue that...
11 raise different exhibits there in front of me that's in
12 there. First, a *recueil*. There were cases and
13 documents from North America, from Germany, I
14 believe, with respect to the MDI device. So, from your
15 last comment that the State interest is for privilege,
16 otherwise techniques would be less effective, are you
17 saying that even if these techniques are public, the
18 fact that they were used in a given case shouldn't be
19 disclosed because the techniques to be used in other
20 cases would be less effective? Is that what you're
21 saying?

22 BY THE CROWN (Me Rouleau)

23 Well, that...

24 BY THE COURT

25 Even if it's public? Is that...

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1 BY THE CROWN (Me Rouleau)
2 It is known here that it was used. I mean that's purely
3 public knowledge.
4 BY THE COURT
5 Well, that a technique was used. But they want to
6 know more about the technique. What type of device
7 was used? What range does the device have? What's
8 the name, et cetera? What type... I'm referring to the
9 MDI. So, do I understand that even if these details
10 are public, and that's still to be argued because...
11 your point of view will be that, I presume it's: the
12 important points are not public?
13 BY THE CROWN (Me Rouleau)
14 Exact.
15 BY THE COURT
16 But for argument sake, let's say they were public. Are
17 you saying that the fact that a device that's public
18 was used in this case, the way that it was used
19 shouldn't be disclosed because it could affect other
20 cases later?
21 BY THE CROWN (Me Rouleau)
22 That is what we are saying. And as far as...
23 BY THE COURT
24 So, how does someone defend himself?
25 BY THE CROWN (Me Rouleau)

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1 Well, it is our contention that examining each and
2 every question that are asked, we are of the opinion
3 this can only be done *ex parte* for obvious reasons.
4 But there is an effective way for the accused to
5 gather information from what they already do know to
6 challenge the admissibility and the... But basically,
7 they're saying for the Garafoli application: Details
8 should have been disclosed that weren't, that we
9 learned during the course of these proceedings. As
10 far as... that's the whole inconclusive finding or true
11 negative debate, right? And so, there's a question of
12 ARAUJO, full, fair, frank disclosure to the judge.
13 And also, I foresee an argumentation based on how
14 this device works, is intrusive, shouldn't be allowed
15 by the Courts. Even though here, there was a general
16 warrant, and then in the authorization itself,
17 authorization to use the device, it shouldn't have
18 been. And these devices operate in such a way that
19 the simple fact that they were used, you should come
20 to the conclusion to throw from the proof anything
21 that comes from the use of that device. Which would
22 mean the interception of devices A, B, C, D, E, F, G
23 and the results of that. That's, in a nutshell, and I
24 don't want to over simplify it, but...
25 BY THE COURT

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1 Could you just simplify that again for me and repeat
2 that again?

3 BY THE CROWN (Me Rouleau)

4 Yes. The two (2) areas which we foresee that the
5 Defence, in the Garafoli application, would probably
6 want the Court to consider, are the fact that during
7 the course of these proceedings, we have shown that
8 there is a debate to be had with the inconclusive...
9 the whole 21st of September with Mr. Mirarchi
10 situation, what the witnesses referred to as an
11 inconclusive report, i.e. Crown says that Mr. Mirarchi
12 is using one device, MDI scans for it, doesn't find it.
13 But we know the device was transmitting messages.
14 We have it in the proof. Crown says that isn't
15 inconclusive finding, it doesn't mean much. We, on
16 the other hand...

17 BY THE COURT

18 The Defence.

19 BY THE CROWN (Me Rouleau)

20 ...believe...

21 BY THE COURT

22 The Defence.

23 BY THE CROWN (Me Rouleau)

24 The Defence, yeah, believe that that can be used in
25 order to create doubt on the use of the device by the

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1 defendant Mr. Mirarchi. That's the whole debate. So,
2 they'll be wanting to exploit that in saying, and that's
3 what they say in the supplementary *factum*, knowing
4 that this device has limitations; it should have been
5 drafted in the affidavit. And if not, then it's lesser
6 than the ARAUJO standard, which is full, fair and
7 frank disclosure, and therefore they will invite you to
8 come to the conclusion that...

9 BY THE COURT

10 But that's an argument for Garafoli at the next
11 motion.

12 BY THE CROWN (Me Rouleau)

13 Exactly. That's where we see... that's what I said to
14 start with. That...

15 BY THE COURT

16 So, that's where you see there's a relevance in that?

17 BY THE CROWN (Me Rouleau)

18 They will be challenging or making an argument. Of
19 course, we're of a different opinion, but I can see
20 that that's an avenue that they will be exploiting. The
21 other one being... I'm sorry, I lost my course of
22 thinking. The first one being...

23 BY THE COURT

24 Take your time.

25 BY THE CROWN (Me Rouleau)

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1 ...the full, fair and frank disclosure. Yes, I'm sorry,
2 obviously. We foresee, reading all the materials, that
3 the Defence will probably argue something in the
4 ballpark area of the use itself, of such a device in
5 itself, has such an intrusive nature. Hence, the
6 question that they were asking: What information
7 does it gather? What is the range? How many
8 cellphones can you gather? Do you gather
9 information from third... innocent third-parties?
10 Obviously, you're catching hundreds of cellphones
11 and you're interested in probably one or two (2) of
12 them.
13 All of that will be put by the Defence, we believe, in
14 an argument saying that the use itself of that device
15 shouldn't be allowed. So, they'll be challenging the
16 general one that authorizes it and the authorization,
17 the wiretapping authorization itself that also does.
18 So, they will be arguing something like: If it shouldn't
19 have happened, then everything that spun from that,
20 the interception of the devices that were identified by
21 that process, should be kicked out of the proof.
22 If that happens, obviously that creates a situation
23 where our proof is cut into pieces. So, it has an
24 effect on the trial itself. So, that's where I see the
25 Defence going in the usefulness...

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1 BY THE COURT
2 But you've admitted that this morning, that...
3 BY THE CROWN (Me Rouleau)
4 Yes.
5 BY THE COURT
6 You admitted that there's a likelihood of relevance...
7 BY THE CROWN (Me Rouleau)
8 For... for...
9 BY THE COURT
10 ...for that part of your...
11 BY THE CROWN (Me Rouleau)
12 That's what we understood.
13 BY THE COURT
14 ...of your presentation this morning...
15 BY THE CROWN (Me Rouleau)
16 Yes.
17 BY THE COURT
18 ...for the Garafoli. So, I hear you on that.
19 BY THE CROWN (Me Rouleau)
20 Okay. So... but...
21 BY THE COURT
22 But you mentioned range or something they might...
23 BY THE CROWN (Me Rouleau)
24 I'm sorry. I did...
25 BY THE COURT

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1 It's not your hearing. It's probably me that...
2 BY THE CROWN (Me Rouleau)
3 No. I'm not ruling out the fact that my...
4 BY THE COURT
5 All right. You mentioned range is one possible thing
6 that they want to inquire. You mentioned all the
7 cases, like the ship case this morning.
8 BY THE CROWN (Me Rouleau)
9 Yeah.
10 BY THE COURT
11 And there's a serial number case, or somebody is
12 charged, I think, in possession of a stolen car or
13 stealing a car and possessing it, and for the police to
14 make proof, there's an issue of the location of a
15 serial number, which nobody knows. But that doesn't
16 really infringe upon full answer and defence, the
17 location of a serial number. How would that interfere
18 with full answer and defence on the theft or on the
19 possession of stolen property? There would be
20 another visible serial number. We all know where
21 they are, everybody does, when you have your car
22 where the serial numbers, it's scratched out, another
23 is put there. But if the police identify the car with the
24 hidden one, the enunciated distinction between an
25 example like that and an example like this where the

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1 police are... if I can use the word trawling on the
2 roadway by... non-targets, they could be a kilometer
3 away, they could be a hundred (100) yards away, they
4 could be fifteen (15) feet away, the devices may have
5 certain specifications from the manufacturers as to
6 what the range is, do you not feel that that's different
7 than the serial... or the cases that deal with the post-
8 privilege?
9 BY THE CROWN (Me Rouleau)
10 In every example, I could give you, there would be
11 differences. But there is one common ground. There
12 is a certain point in time where the Court recognizes
13 that even though the Defence generally, genuinely,
14 might have an interest in knowing the information...
15 For example, HERNANDEZ of the Court of Appeal of
16 Quebec. It's a simple case. We all know how this...
17 and it's explained in the case itself, but confidential
18 serial numbers, cars are bought for their serial
19 numbers. A car is stolen. So, you take the stolen car,
20 you put the serial number of the one that's a wreck,
21 right, often from other provinces or jurisdictions
22 where there's no records of the... easy, that is less
23 easy to track. You put the serial number on the car.
24 So, for all intents and purposes, it appears legit, it
25 has a rightful serial number and it will be of a car of

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1 the same year, the same make. Right? So...
2 BY THE COURT
3 But the fact that the accused doesn't know...
4 BY THE CROWN (Me Rouleau)
5 No. He knows that.
6 BY THE COURT
7 But if he doesn't know where the hidden serial
8 number is, that the police use to identify the car, how
9 does that interfere with his right to full answer
10 defence?
11 BY THE CROWN (Me Rouleau)
12 Well, what was asked in HERNANDEZ is... this is the
13 way it goes. You have an expert from the Crown
14 saying: I've looked at the car; it would appear to be
15 legitimate. We had to cut the car in... for example, we
16 had to cut the car in two (2). And we found in certain
17 areas a number that is different from the number that
18 is on the dash. Take our word for it. Now, we're not
19 going to tell you where it is and how we came about
20 to discover it, because we want to keep that
21 confidential. And the Defence rightfully says: Well,
22 how can we challenge the credibility?
23 And that's the argument that was presented in front
24 of the Court of Appeal of Quebec. How can we
25 challenge the credibility of these experts if we don't

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1 know for a fact what he did to uncover this serial
2 number? And that is where the Courts have drawn a
3 line, is that... too bad. Basically, what they say is
4 that car theft is important; the fact for the police to
5 be able to identify this car, these cars that have been
6 disguised, is a legitimate purpose; it's important; and
7 we draw the line there. Yes, of course, you won't be
8 able to challenge this expert's credibility as to how
9 he found it, but at the end of the day, he found it and
10 we draw the line there.

11 BY THE COURT

12 Okay.

13 BY THE CROWN (Me Rouleau)

14 Simply put, that's the way that that cookie crumbles.

15 BY THE COURT

16 I understand. No, it's a good explanation. You've
17 answered me. So, in other words, it doesn't interfere
18 with the defence of theft or illegal possession of the
19 car. But the Defence is prevented from attacking the
20 police witness who identifies the car as being a
21 different car with an original serial number hidden
22 somewhere. That's not disclosed. They don't know
23 where it is.

24 BY THE CROWN (Me Rouleau)

25 In cases where the Criminal Code also says that

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1 proof of obliteration of a serial number... there's been
2 case law on this matter, but it is something that is a
3 factor to be considered by the Court for the finding of
4 guilt. So, the case law came to that because
5 otherwise... for example, this one is crystal clear. If
6 the Courts had been, if the police had been obligated
7 to say, for example, this expert is saying: I found it
8 there, this is how you get to that and for a car of that
9 year, that model, you'll be looking for it there, here,
10 and this is how you reveal it. Well, everybody that's
11 in the business of doing that will know how to
12 effectively make it impossible for the police to do
13 their work. So that is an example where law says: full
14 answer and defence does have limits.

15 BY THE COURT

16 Um-hum.

17 BY THE CROWN (Me Rouleau)

18 And here, in such a case, the Court of Appeal of
19 Quebec said: The balancing favors the police
20 effectiveness of that tool of investigation, case by
21 case. I'm not saying that... but the answer can
22 be: Sorry, but the line is drawn here.

23 But of course, Your Lordship, as my colleagues will
24 say, the fact that the accusation here is first degree
25 murder is something that the Court needs to weigh.

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1 Saying otherwise on our part would be foolish. The
2 seriousness of the charge obviously is something to
3 be put into the basket on one side, if I may, in
4 weighing the... In saying that, I'm not; I believe I'm
5 not saying much.
6 But I just wanted to, just out of abundance of
7 precaution in saying, that in organized crime, drug
8 cases, terrorism cases, cases where, as I said this
9 morning, the possibility of monitoring conversations
10 that are deemed to be private is essential to those
11 types of investigation. And that's been said by at
12 least Mr. Flynn, in different ways, in his public
13 testimony.
14 But it might... some might say that it's pretty obvious,
15 but it's been at least underlined in a couple of cases.
16 And one of them is MARC MICHAUD, MARC MICHAUD
17 v. THE ATTORNEY GENERAL OF QUEBEC. It's an
18 older case, 1996. It doesn't make anybody any
19 younger because I can still remember those facts as
20 they unfolded. Marc Michaud was a *fonctionnaire*, a
21 civil servant. And there was... in that case there was
22 a police investigation that led to wiretapping. People
23 were advised after a period of the wiretap that they
24 were the object of wiretapping, as the Code
25 stipulates.

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1 Now, this individual was suspected of being... that's
2 his position, somebody who leaked confidential
3 information about statements that were made during
4 political discussions between high officials. It was
5 leaked. So, he was under... what he asked for
6 is: Give me the content of the sealed package. And
7 what's important to know is that accusations were
8 never laid against anyone.
9 So, the whole question in that case, it went up to the
10 Supreme Court, was: does a non-accused individual
11 have a right to the packet or not? Or is it somewhere
12 in between? Supreme Court ultimately says it's
13 somewhere in between. It is not right to say that he
14 has no right to it. It is not right to say that he has an
15 automatic right to it. So, they compared the situation
16 of a non-accused to an accused, then, the
17 jurisprudence that came after. And basically, in the
18 course of doing that, what is interesting is that they
19 are weighing... Because this individual, I forgot to
20 mention, says to the Court: I want to sue the
21 government, because he was fired and he wanted to
22 bring a civil action. So, he's saying to the judge: The
23 only way I can do is if I have access to that material.
24 Now, in determining the interest at stake, and the
25 question is different, that is asked there, is different

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1 from the one that you have to answer, Your Lordship,
2 obviously...
3 BY THE COURT
4 Just a moment. Mr. McDonald, do you want to see
5 what's going on there?
6 (DISCUSSION BETWEEN MR. SIMPSON'S AND
7 COUNSEL NOT TRANSCRIBED)
8 BY THE CROWN (Me Rouleau)
9 All right. So, the question of course is a different
10 one. But in asserting the answer interests at stake,
11 at paragraphs 51 and 52, the Chief Justice...
12 BY THE COURT
13 It is still MICHAUD?
14 BY THE CROWN (Me Rouleau)
15 Yeah, in MICHAUD.
16 BY THE COURT
17 Okay. What tab is it?
18 BY THE CROWN (Me Rouleau)
19 15, of our book of authorities.
20 BY THE COURT
21 There's more than one book. Just a...
22 BY THE CROWN (Me Rouleau)
23 Yes. The first...
24 BY THE COURT
25 What tab, sorry?

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1 BY THE CROWN (Me Rouleau)
2 The second one, I'm sorry, tab 15.
3 BY THE COURT
4 Okay. I have it.
5 BY THE CROWN (Me Rouleau)
6 So, the Chief Justice then... before that, is assessing
7 the interests that are at stake, the possibility of this
8 individual to gain access to information relevant to a
9 possible suit, action against the government. And the
10 need for the State to be able to conduct wiretapping
11 investigations effectively. Which raised two (2)
12 questions, the secrecy on the methods that... under
13 which they operate; and also the question of
14 informants. So, there was there a question of
15 informants. But I'm just stating this for the principles
16 that the Chief Justice refers to. Paragraph 51:
17 "By contrast..."
18 BY THE COURT
19 But isn't the issue here whether the person who is
20 being... who is subject wiretap interception is notified
21 afterwards?
22 BY THE CROWN (Me Rouleau)
23 Yes.
24 BY THE COURT
25 The issue is not the secrecy or privacy of the

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1 investigative technique.

2 BY THE CROWN (Me Rouleau)

3 It is in the sense that...

4 BY THE COURT

5 Well, wiretap is the issue here in this case and that's
6 not a privileged investigative technique. It wasn't at
7 the time either. Not in 1998, as far as I know.

8 BY THE CROWN (Me Rouleau)

9 No. The technique itself, the wiretapping has never
10 really been secret. Everybody knows for... since the
11 invention of telephone, I guess, that there's a
12 possibility to do that. But here, I want to know what's
13 in the sealed package in the affidavit, and the take of
14 the government on that is that: No, no, no, no, that
15 can reveal information that needs to be kept secret.
16 But I don't need to go into details, I just want the
17 Court to reflect on the words of Justice Lamer that
18 said that or recognizes that:

19 "The State's interest in protecting the
20 confidentiality of its investigative
21 methods and police informers remains
22 compelling."

23 So, it is a strong societal interest. I'm not saying that
24 he's saying that it applies textually here. I'm just
25 saying that everybody must keep in mind that the

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1 State's ability to investigate is at the heart of our
2 society. It's the way we have all found together to
3 keep the cover on the lid, to be able to effective. And
4 this is recognized further, in saying that the reality of
5 modern law enforcement, is that police authorities
6 must frequently act under the cloak of secrecy to
7 effectively counteract the activities of sophisticated
8 criminal enterprises.

9 BY THE COURT

10 But it's not the same thing. Look at the next
11 paragraph, 52. He's talking about...

12 BY THE CROWN (Me Rouleau)

13 Yes. I was going there. I was going there.

14 BY THE COURT

15 If there is a police investigation going on and they're
16 dealing with an investigative technique that's very
17 public, whether it'd be infiltration, wiretap, of what
18 have you, the technique is not privileged, the
19 investigation is secret, the accused haven't been
20 charged at that point. There's no issue of disclosure,
21 there's no trial. And I think that that case, I mean
22 you've just raised it right now, I think that case has
23 to be looked in that context. Which is why, at
24 paragraph 52, they talk about the disclosure of the
25 application and affidavits in support of a surveillance

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1 authorization with respect to every non-accused. It's
2 not the same thing.

3 BY THE CROWN (Me Rouleau)

4 Well. They say that:

5 "The wiretap application will often provide
6 a crucial insight into the *modus operandi*
7 of electronic surveillance, and regular
8 disclosure would permit criminal
9 organizations to adjust their activities
10 accordingly."

11 So, he's saying: If we send out as a matter of right
12 these packets to anybody who claims it, then we're
13 defeating the purpose, because these packets contain
14 information that are:

15 "A crucial insight into the *modus operandi*
16 of electronic surveillance."

17 So, what we are saying is that here, the details we
18 are trying to hide from the Defence amount to that. It
19 gives them crucial, whether we're right or not, we
20 leave and give them crucial insight into the way these
21 techniques are used. So, it's the details that we're
22 trying to keep secret, not the fact that the technique
23 was used. But he knows that for a long time.

24 BY THE COURT

25 Okay. But the... the case...

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1 BY THE CROWN (Me Rouleau)
2 If that was the case...
3 BY THE COURT
4 Maître Rouleau, they're accused here. In MICHAUD,
5 you said yourself, he wasn't accused.
6 BY THE CROWN (Me Rouleau)
7 Different ballgame. And I'm not saying that... if that
8 issue solved the question, Your Lordship, I'd say
9 MICHAUD solves it and I'd just say you don't have a
10 choice, the Supreme Court says you have to protect
11 it. That is not the case.
12 But Justice Lamer, in his sagesse, in his wisdom –
13 thank you, dear golly – in his wisdom has words that
14 have resonance further than the strict issue he's
15 trying to solve there. And he's saying, first of all,
16 modern law enforcement, electronic surveillance is
17 crucial in the ability for the police to effectively
18 counter; in that case, would he seize the drug
19 operation. But I can say the same thing about
20 organized crime. This is a perfect example, the case
21 that we have here, organized crime. And I could add
22 to that, terrorist activities that use technology to
23 further their criminal endeavors.
24 So these words of wisdom can be used to remind us
25 that anything that has the effect of giving that crucial

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1 insight on the *modus operandi* of electronic
2 surveillance needs to be taken with caution.
3 He's not saying in every case: Then, it can't be
4 disclosed. He's just saying: Let us remind that there
5 is an important issue at stake here for the State. And
6 that's why, at the end of the day, he agrees with his
7 colleagues that give the rules mapped in that case,
8 the conditions that are necessary for a party not
9 accused to obtain... to effectively present a motion to
10 obtain information in such a case. But it's with that in
11 mind that he says that. This, we believe, applies to
12 the case at hand to the extent that these words have
13 resonance into the balancing exercise, the delicate, I
14 might add, balancing exercise that the Court needs to
15 do.
16 Of course, Your Lordship, you fully understand and
17 everybody here, my colleagues, Maître Kapoor, agree
18 on this, that the more a technique that is used is
19 new, the less case law we will find on these
20 questions. Somebody has to start somewhere and
21 that somebody in this case, on this specific issue, we
22 believe, is you. And we can't easily say: Well, listen,
23 this similar case has been decided this way, another
24 case was decided that way. We can then only rely on
25 the general principles and it's not always an easy

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1 task.

2 On this note, I would like to submit to the Court, and

3 I say this with the utmost respect, it is not a decision

4 of the Supreme Court, not a decision of an Appeal's

5 Court, it's an order that was made by the Information

6 and Privacy Commissioner of Ontario, le Commissaire

7 à l'accès à l'information, that denied in, that case a...

8 and it's on the MDI. - I'll just distribute it to

9 everyone. - I'm just saying everybody in life has a

10 job. This commissioner had a job to do. So he was

11 faced with a question, of course, not in a criminal

12 trial, not with individuals accused of first degree

13 murder, not with the specifics of this case, but being

14 faced with a request to have information on the use

15 or not of the MDI. As you can see in that case...

16 BY Me KAPOOR

17 Excuse me...

18 BY THE CROWN (Me Rouleau)

19 Oh, I'm sorry.

20 BY Me KAPOOR

21 I'm perhaps too friendly, I didn't get a copy.

22 BY THE CROWN (Me Rouleau)

23 I'm sorry, I'm sorry. Yes, you're right. I must

24 apologize.

25 BY Me KAPOOR

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1 Thank you very much.

2 BY THE CROWN (Me Rouleau)

3 So, you'll find the gist of the decision and the issue
4 weighed at paragraph 7 and so on. So, the police
5 didn't want to confirm that they were using the IMSI-
6 catcher whereas here, you know for a fact that that
7 ship has sailed. It was used. We are in the realms of
8 the technical details of the functioning of that
9 apparel. We're not... we're in a more narrow scope.
10 But in that decision, and we submit it for the weight
11 that it has, nothing more, nothing less, but the
12 Commissioner acknowledged that... acknowledges the
13 police were right at that time to not disclose that
14 information as it would have the effect to put in
15 jeopardy, at that time, ongoing investigation.
16 Of course, see, that's his... No, I don't want to go too
17 far on that. But I'm just saying I'm not serving it as a
18 precedent. I'm just saying these types of discussion
19 in society are going on. This is one answer that was
20 given.

21 Acknowledged, the ballgame here is different. The
22 stakes are different. When I take...

23 BY THE COURT

24 Who's the applicant in this...

25 BY THE CROWN (Me Rouleau)

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1 In all honesty, I'm not sure. Not an accused person.
2 That is all, I...
3 BY THE COURT
4 No. They refer to the... Oh, I see. It's the Information
5 and Privacy Commissioner.
6 BY THE CROWN (Me Rouleau)
7 Yeah. Could have been made by just anyone actually.
8 But I'm not sure they give that information, on who
9 requires it.
10 BY THE COURT
11 So, it's the Privacy Commissioner that's asking an
12 adjudicator to release this information.
13 BY THE CROWN (Me Rouleau)
14 Yeah.
15 BY THE COURT
16 Okay. I'll look at the case.
17 BY THE CROWN (Me Rouleau)
18 Okay. Anyways, again, I just want to emphasize that
19 we do realize that here, the rules, the set of
20 considerations that this Court has to have in mind are
21 different. But in the MICHAUD decision, we do
22 believe that that decision can be taken to support the
23 proposition that a degree of secrecy in modern
24 investigation techniques as they are, wiretapping is
25 old, but interception of text messages from

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1 Blackberry devices is quite new, so new that a lot of
2 people didn't think it was possible, my friends over
3 there or the ones that did do the messages. So, these
4 questions will arise pursuant to accusations
5 pertaining to the use of that technique. And this
6 debate can only take place once that set of
7 circumstances are put into place, hence, here and
8 now, with this Court.

9 But the need for an area of secrecy in the efficiency
10 of the use of these techniques, I think, is set out.
11 Whether we did it successfully or not is another
12 question. And to answer that question, as I said
13 before, necessarily I need to resort to *ex parte*
14 submissions, because otherwise I'm going to fall into
15 the bear trap in a matter of two (2) seconds.

16 The other... and I'm sorry, the other issue that I
17 wanted to raise or to bring the Court's attention to,
18 was the actual one you raised a couple of minutes
19 ago, where you questioned us in what impact does
20 the relative public knowledge of the information
21 sought, how does that impact your take on does it
22 need to be protected.

23 The answer to that question, we feel, can be found in
24 the MAHER case...

25 BY THE COURT

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1 Sorry, which case?
2 BY THE CROWN (Me Rouleau)
3 I'll give you the reference.
4 BY THE COURT
5 All right.
6 BY THE CROWN (Me Rouleau)
7 It's in the second book, 13a) or 13b) depending on
8 the English or the French. The English version is
9 13a), it's ATTORNEY GENERAL OF CANADA v.
10 COMMISSION OF INQUIRY. And Maher Arar is the
11 individual who was faced there.
12 BY THE COURT
13 The paragraph?
14 BY THE CROWN (Me Rouleau)
15 The paragraphs are... if you give me one second, I'll
16 just look through my notes... The most important one
17 is 56. And it discusses, but you should read the
18 short... the Court's... I will start at 55, because the
19 issue there, the decision that the Court had to make
20 is: Do we make parts of the report public or not? And
21 part of the discussion in law was: What is the public
22 domain? How do you assess if something is in the
23 public domain?
24 I believe that, as a question of fact, our confreres
25 have brought to the Court's attention that use of MDI,

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1 technical nature of the beast has been alluded to,
2 discussed, described in various ways, shapes and
3 forms, in various documents. So, their take is
4 that: Well, there's stuff out there so, sorry to tell the
5 Crown that that ship has sailed and there's nothing
6 they can do; everything is out there.

7 BY THE COURT

8 But "out there", they're referring to the Internet.

9 BY THE CROWN (Me Rouleau)

10 Yeah.

11 BY THE COURT

12 And material that I saw in the Defence book, was
13 material downloaded from the Internet.

14 BY THE CROWN (Me Rouleau)

15 Sure.

16 BY THE COURT

17 So "out there" means you can get it in Trois-Pistoles
18 or you can get it and... go in India or anywhere else.

19 BY THE CROWN (Me Rouleau)

20 Yeah. Okay. Yes, the Internet is a powerful thing. I'll
21 say that.

22 Now, that case of MAHER ARAR, in answering or try
23 to see, legally speaking, what is in the public domain
24 makes nuances that need to be made here. Because I
25 don't believe the fact that something is available on

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1 the Internet makes it necessarily... brings the whole
2 question into the public domain as being true. We
3 don't believe so. And we need to remind ourselves
4 that the questions that are here asked are not in the
5 public domain. Otherwise, my confreres would be
6 asking for confirmation: We know that this is how it
7 functions; did you do this in this case? This is not
8 the approach that they've taken. They can assume in
9 reading the literature that it could be this, it could be
10 that. But they don't know for a fact.
11 The answers to the questions that are asked are
12 not... it's not information that is in the public domain.
13 There might be subtle nuances to be made on
14 particular items, but they need to be made... they
15 need to be made *ex parte*.
16 Now, just coming back to the case of MAHER ARAR.
17 BY THE COURT
18 So, before you do that.
19 BY THE CROWN (Me Rouleau)
20 Yes.
21 BY THE COURT
22 You're saying if something is in the public domain,
23 then Defence doesn't need to inquire, to cross-
24 examine, doesn't need any...
25 BY THE CROWN (Me Rouleau)

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1 Oh, they could seek confirmation. They could seek
2 confirmation. And we, I believe, would have a right to
3 deny confirmation. Because that would have the
4 effect of making the police investigations less
5 effective. An argument could be made in that
6 direction.

7 BY THE COURT

8 But some of the most basic tools in criminal
9 investigations, whether it'd be wiretap, or even in the
10 most elementary case of point zero eight (.08) with
11 the Breathalyzer, it's all public, the Borkenstein or
12 the different devices, and in your career you've seen
13 Defence lawyers who have all this information that's
14 out there publicly spend hours cross-examining
15 qualified technicians or other experts.

16 BY THE CROWN (Me Rouleau)

17 Yeah.

18 BY THE COURT

19 Because there's different ways to operate the
20 apparatus, which is an investigative tool.

21 BY THE CROWN (Me Rouleau)

22 Yes.

23 BY THE COURT

24 And the information relating to it is public. So,
25 although it's public, it's not just confirmation.

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1 Defence may want to attack the modalities, the way
2 that the operator used the Breathalyzer, a radar,
3 perhaps somebody who was involved in intercepting
4 wiretap telephone conversations. And same thing
5 here which is part of their argument, from what I've
6 read. So, it's not because something is public that
7 the Defence, in seeking full answer and defence,
8 would solely seek confirmation.
9 BY THE CROWN (Me Rouleau)
10 No, no, but...
11 BY THE COURT
12 Well, that's what you said.
13 BY THE CROWN (Me Rouleau)
14 But the question is: Can I make a case in saying that
15 I'm not confirming because it would prohibit or make
16 police investigations less effective?
17 No case could be made in saying that for the
18 Breathalyzer example that you gave: Well, if I give
19 you this technical information... And Courts have
20 ordered on numerous occasions the records of the
21 upkeeping of the machines and the solutions,
22 controlled solutions that were used to be disclosed.
23 There's no way that the prosecutor could make a case
24 and saying: If I tell that, then people are going... that
25 gives a way for the drunk drivers to be able to commit

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1 the Crown (sic) without being detected. It wouldn't
2 have made sense.

3 That's not... the issue is not there. It's simply: Is it
4 relevant to the Defence? And if it is relevant, it is
5 given and that's the law of disclosure. Whatever the
6 Defence does with it afterwards is they use it or they
7 don't use. They cross-examine on that or they don't
8 cross-examine on that. But in order...

9 BY THE COURT

10 Okay. But...

11 BY THE CROWN (Me Rouleau)

12 ...for them to convince the Court that it's likely
13 relevant, they need to show something.

14 BY THE COURT

15 It's not just the solutions; it's the proper operation of
16 the device, for example.

17 BY THE CROWN (Me Rouleau)

18 Of course.

19 BY THE COURT

20 Maybe if somebody has something in their mouth or if
21 the accused person who's going to get the test does
22 it in a certain way, or has a certain thing in their
23 mouth, it might affect the operation of the machine.
24 Maybe if there's a strong smell of alcohol in the room
25 or other things were done, it might interfere with the

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1 proper operation. There's all kind of cases like this...
2 BY THE CROWN (Me Rouleau)
3 Of course.
4 BY THE COURT
5 ...and any of us here, as young lawyers, whether
6 Defence or Crown, for those of us who've been in this
7 field for a long time, there's hundreds of cases on
8 this type of thing.
9 BY THE CROWN (Me Rouleau)
10 Sure. And disclosure issues on that have gone further
11 and further. But it does... even just on the disclosure
12 issue, it goes to a point where the Defence still have
13 to show that the information sought is likely relevant.
14 But I'm just saying it's a different history because
15 never, in all of the history of that, has the Crown
16 ever contended that giving the information would
17 make crime solving more difficult, that it would hinder
18 the police officers from being able to catch the drunk
19 drivers, from my recollection anyways. It's a
20 different... that's a purely disclosure issue.
21 If this was just a purely disclosure issue, the case is
22 closed. And we've already admitted that it's likely
23 relevant. The only logical consequence to that, if not
24 for the privilege, is disclosure, that the case... that
25 ship would have sailed. We're in this situation

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1 because we say: Even though if likely relevant,
2 privilege applies here, will have the... our answering
3 these questions will have the effect of rendering the
4 police investigations in this type of criminality less
5 effective. We have a compelling interest to put into
6 the balance. And we believe it outweighs the Defence
7 interest in getting that information that is likely
8 relevant. The whole issue is there.

9 So, all these examples that we can come up to, if
10 they're taken out of the context of the application of
11 a privilege, have some bearing in the sense that,
12 again, if likeliness of usefulness is shown – would
13 the Defence choses to do it is their problem – once
14 the documents are out, really, I start worrying about
15 another issue. It's out, it's disclosed. They do their
16 job, we do ours.

17 But we're just saying: Before doing that, we're asking
18 the Court to consider the effect that that has on the
19 fact that the police tomorrow morning will have a
20 much harder time identifying devices and in
21 conducting the interception of these devices in this
22 context. And that is relevant to important criminality.
23 That's the whole issue, really.

24 BY THE COURT

25 Okay. So, you really believe that if the privilege is

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1 lifted here, it's going to have a major impact on
2 police investigation and detective... and detection of
3 crime in Canada? You really believe that?
4 BY THE CROWN (Me Rouleau)
5 Yes. Otherwise, I wouldn't be standing in front of you
6 and spending a day, not that it's not enjoyable, not
7 that I don't enjoy the challenge. But if I didn't believe
8 that, I wouldn't be wasting the Court's time. I would
9 have... and believe me on this, these discussions
10 take place. They take place between ourselves. They
11 take place at other levels.
12 BY THE COURT
13 Okay.
14 BY THE CROWN (Me Rouleau)
15 It is something that has bearing, we believe, on the
16 functioning of an important institution, the RCMP, in
17 this case practically. That has bearing on all the
18 cases that we, my colleagues and me, more than
19 than me for sad reasons because I'm a bit older than
20 they are, but questions that we will be dealing with
21 for the next ten (10) years. As I said before, Your
22 Lordship, as far as I know, you're the first to address
23 this precise question. You're not the last, obviously.
24 As technology evolves, and this will be a bizarre way
25 of throwing a compliment, but the more you deal with

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1 organized criminality, the more you find that the
2 individuals who are successful in that are not the
3 street vendors that do not ask... that do not think. In
4 other words, they tend to be the smartest. And I'm
5 just saying this to illustrate that that cat-and-mouse
6 game that Mr. Flynn referred to before is reality of
7 police investigations. Technology arises, it gives
8 possibilities of communication, of conducting
9 business, let's keep it at that, that some people are
10 very good at exploiting. Police needs to keep up with
11 that, develop tools, develop solutions in order to be
12 able to keep track with them. And it's in that gray
13 area that the success is found. The little part that is
14 assumed on one part and it is not known: Can they do
15 this? Can they do that? In this case: Can RIMs, can
16 Blackberries be intercepted if you use pin to pin?
17 That produces errors on one side and arrests on the
18 other.
19 This is what we're trying here to protect. Basically
20 put, simply put, the simplest way I can put it, is R-25,
21 the answer to that gives them basically the roadmap
22 to know what highways to circulate in, in order to
23 minimize their risk of being caught. R-32 is, if you
24 don't want the police to know what phones you're in
25 possession of, not excluding all the other ways that

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1 they can, you know, by doing search sneaks,
2 *subreptice* search and seizure, but by way of not
3 going and look into your things, using electronic
4 means, we believe that the answers to these six (6)
5 questions give them – and I'll explain this thoroughly,
6 Your Lordship, in closed arguments – give them an
7 indication specifically what to do in order for them to
8 minimize the risk of these devices to be identified.
9 This is the best way I can put it.
10 And in coming back to the fact that with every
11 technology advancement there will be, out there on
12 the Internet, discussions about what's going on, what
13 do we believe, in the community. Could be anyone
14 discussing what we believe that they have. How can
15 we develop tools in order to try to counter that reality
16 of, for example an MDI, an IMSI-catcher, the MDI
17 device, that will take the information, the serial
18 number of the device, both serial numbers? All of
19 that discussion doesn't make it so that everything
20 relating to that becomes in the public domain.
21 So, what we will do on the 18th, is look at... it's
22 precisely all the information sought and, is that thing
23 in the public domain is confirming or denying the
24 fact? Some of the information, does that also create
25 a problem? But I do believe that, and I want to bring

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1 the Court's attention to the fact that in MAHER ARAR,
2 the public nature of an information is... some notion.
3 And just before doing that, the fact that... and that's
4 been underlined a couple of times by different police
5 officers, the fact that individuals in this case have
6 been charged, that communications were intercepted
7 even though a lot of the material that my colleagues
8 brought forth predates the actual events in this case,
9 the mere fact that they were in that gray area, even
10 though the information, some of the information was,
11 if to use the expression out there, was available,
12 highlights the fact that it is not because something is
13 discussed that it is out there. And I'll make a...
14 **BY THE COURT**
15 It's not because what?
16 **BY THE CROWN (Me Rouleau)**
17 That an information, or some information on a police
18 technique is out there, is discussed, it doesn't put it
19 necessarily in the public domain to the extent that
20 the case law says that what's in the public domain
21 can be protected. Because that's the general rule.
22 But it suffers exceptions and it needs to be... and
23 that's what Justice Noël in ARAR does. He
24 says: Well, there's no perfect equation between the
25 two (2).

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1 And I'll say this also. Of course, the more
2 sophisticated the individual that commits a crime is
3 using technology, the more you'd think that it will be
4 used in a smart way. We are certainly concerned with
5 that, but not only that.

6 The police do not only investigate the smarter or
7 more organized criminal elements. They also are
8 interested in the activities of the less intelligent
9 criminal elements that are possibly just as or more
10 dangerous to society than the other ones. And it's a
11 given, I believe, that the information that might be
12 out there might not be utilized by, let's say, lesser
13 organized individuals. And I think Mr. Flynn gave an
14 example in Operation Tornado where, as we speak,
15 interceptions of communications are successful even
16 though we're having the type of discussions that we
17 have. But it's a simple argument and simply put,
18 we're not trying to protect this information from... just
19 from the more savvy, but to all the criminal elements
20 in society that are... that use technology that can be
21 identified by this investigative technique.

22 Now, coming back. Mister Justice Noël gives the
23 basic on the public domain notion, at paragraph 55,
24 in ARAR. Basically, he refers to the case law from
25 the United Kingdom that supports the principle that:

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1 "Information in the public domain cannot
2 be protected by the Court."

3 That's the staple rule. That's where we need to start,
4 besides a 1990 English case that is pretty blunt. The
5 underlined is Justice Noël's:

6 "But if the matter sought to be published
7 is no longer secret, there is unlikely to be
8 any damage to the public interest by
9 reprinting what all the world has already
10 had the opportunity to read. However,
11 even more interesting is Justice Scott's
12 decision in the..."

13 In another case, which sets out five (5) criteria that
14 should be looked at when determining whether the
15 public accessibility of information is fatal to an
16 attempt to prohibit disclosure and the five (5) criteria
17 are set out.

18 "The nature of the information – where
19 the information is very harmful a Court
20 will be more willing to prohibit further
21 disclosure."

22 Our take, as I said before which will be done *ex*
23 *parte*, is that the answers to the six (6) questions
24 have an harmful effect on ongoing police
25 investigations. It is our opinion that they are not, that

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1 they have not been disclosed, the specifics of the six
2 (6) questions. Second criteria is:

3 "The nature of the interest sought to be
4 protected."

5 Here, the nature of that interest is the security of the
6 State itself, the possibility of the State to regulate
7 the fact that individuals obey the law and not just any
8 law, the Criminal Law that prevents individuals from
9 engaging in activities that are harmful to society. I
10 already gave you all the examples. I will not repeat
11 that. So, the nature of the interest to be protected
12 here, I believe, weighs in favor of protecting the
13 disclosure.

14 "The relationship between the plaintiff
15 and the defendant."

16 Well, here, it's pretty clear cut. The person seeking
17 prohibition of the disclosure is the individual who is
18 charging the individuals seeking the information. That
19 criteria...

20 BY THE COURT

21 That would be the Crown, then?

22 BY THE CROWN (Me Rouleau)

23 Sorry?

24 BY THE COURT

25 The plaintiff would be the Crown?

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1 BY THE CROWN (Me Rouleau)

2 Yes, yes. Plaintiff being the one saying: Do not,
3 please do not disclose this matter. This applies to all
4 kind of cases. I'm making the analogy here. So, that
5 fact that the defendant is accused of first degree
6 murder is important in your decision-making.

7 BY THE COURT

8 At number 4:

9 "The manner in which the defendant has
10 come into possession of the information."

11 So...

12 BY THE CROWN (Me Rouleau)

13 Yes. It's saying:

14 "If the defendant does not have clean
15 hands."

16 Otherwise should be a case where the information
17 was stolen, taken by fraudulent nature, obtained in a
18 tainted way, I would have an argument to say: Well,
19 the only reason they got this is through the use of
20 this scheme which was inappropriate and we're sorry
21 but, for example... Let's for example say that there is
22 an affidavit in my hands here and I want to keep
23 confidential, I leave it there. None of my colleagues
24 would ever engage in any of that conduct. But should
25 one lawyer come and say: "Oh, well..." and then look

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1 at it and then say: "Too late, you have to disclose it,
2 because I already saw it, I already know it" that
3 would be a case where an argument could be made. It
4 cannot be made here, because what they know, they
5 know through perfectly legal channels, the Internet,
6 Court decisions, disclosure in other cases. That is
7 not a factor here. And:

8 "The circumstances in which, and the
9 extent to which, the information has been
10 made public."

11 So, on that note, I want the Court, and I respectfully
12 petition the Court to have in its consideration the fact
13 that in the Crown's opinion, we see a difference
14 between the information that is out there, how well
15 it's known in the general community, and how much it
16 has been accessed by the general public. In other
17 words, are we speaking about an issue that interests
18 the very few people that are very specialized? Or is it
19 something that is discussed more or less on the
20 streets?

21 We believe that as far as we're concerned, we fall
22 within the first group. Even though, even though
23 through the use of Internet, you don't need to be an
24 expert to be able to Google keywords and find
25 documents, documents that talk about the generality

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1 of the existence of this investigative technique, in
2 general terms...

3 BY THE COURT

4 On the term "group", you're referring to what?

5 BY THE CROWN (Me Rouleau)

6 I'm sorry?

7 BY THE COURT

8 When you say "the first group", you're referring to...

9 BY THE CROWN (Me Rouleau)

10 The first group, the limited number of individuals who
11 are interested in this issue. In other words...

12 BY THE COURT

13 Okay. I understand.

14 BY THE CROWN (Me Rouleau)

15 I'm sure if we did a survey at the Metro station, not a
16 lot of people would have an idea, would have a clue
17 of what we're talking about. We do, my colleagues
18 do, all my colleagues here do, these gentlemen
19 certainly are. And again, referring to that argument
20 that it is not at all clear that this information, what is
21 deemed by my colleagues to be publicly known is so
22 well known, and I don't want to use an impolite word,
23 but in the general criminal community, taken as a
24 whole, I have doubts on that.

25 So...

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1 BY THE COURT

2 You're not saying that in order to determine if it's
3 accessible, we have to do some kind of a survey?

4 BY THE CROWN (Me Rouleau)

5 No, we can't. We can't but the fact of...

6 BY THE COURT

7 It's accessible or it's not accessible.

8 BY THE CROWN (Me Rouleau)

9 It is but...

10 BY THE COURT

11 There could be a lot of things on the Internet that
12 very intelligent persons are not aware of, but if you
13 need information on a certain topic, you know what to
14 do. You don't have to be a computer geek to find out.
15 You just do what you have to do and you can find it
16 out.

17 BY THE CROWN (Me Rouleau)

18 Sure. But here, as in many topics, the devil is in the
19 details. The mere fact that the police are right now
20 arresting people that use this technology, the mere
21 fact that they've arrested these people using that
22 technology is in itself proof enough that this
23 dissemination of information is not tantamount to
24 disseminated public knowledge of the issues that are
25 at hand here. And again...

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1 BY THE COURT

2 So, you're saying: Because of these accused here
3 today, we're not able to circumvent the police
4 investigative techniques, then everything is not
5 accessible? Is that...

6 BY THE CROWN (Me Rouleau)

7 No. It...

8 BY THE COURT

9 ...what you're saying?

10 BY THE CROWN (Me Rouleau)

11 ...means that the police investigation technique had
12 efficacy and still does from the testimony that you
13 heard. And that efficacy is because police are always
14 trying to stay one step ahead and in doing so
15 necessarily need for anything that creates that gray
16 area where the criminal elements are not sure what
17 they can and can't do has to remain that way, from
18 their perspective, in order for it to continue to have
19 that efficacy.

20 Now, of course, everybody is subject to disclosure.
21 And the whole, here, issue is can that be done in
22 every case? Can it be done in this case? Does, here,
23 the reality of that interest outweigh their interest in
24 making full answer and defence? And that's the heart
25 of the matter.

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**Argument
on motions
By Me Rouleau**

1 Just to go on, to finish on the ARAR decision.
2 Paragraph 56 also is worthy of mention, where the
3 Court says:

4 "I note that the rule that information
5 available in the public domain cannot be
6 protected from disclosure is not an
7 absolute."

8 So, there's no direct equivalency between the two
9 (2).

10 "There are many... circumstances – I'm
11 sorry, I'm a bit tired – which would justify
12 protecting information available in the
13 public domain, for instance: where only a
14 limited part of the information was
15 disclosed to the public."

16 I'm saying here that we're in the realm of what is
17 sought, the eight (8) questions that remain is that
18 limited part that is not in that public domain and
19 disclosed to the public, with the nuances I've made
20 before. Secondly;

21 "The information is not widely known or
22 accessible."

23 Well, it's just what I've said before. I'm not going to
24 repeat it. But we see it as a difference between
25 something that is widely disseminated and known in

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1 all the *strates* of population, or known to a more
2 exclusive, if I may use, group of individuals. And I'll
3 go even further, within all the criminal elements in
4 society, within a *strate* of those, which we feel is the
5 case here.

6 "The authenticity of the information is
7 neither confirmed nor denied."

8 As we will see on the 18th. Here, there is an area
9 where confirmation is refused, in the sense that we
10 do not wish to confirm a particular information,
11 because confirmation would have effects. So, it might
12 be out there, you might think, but our saying yes,
13 that is the case, would have adverse effects.

14 "And where the information was
15 inadvertently disclosed."

16 Has no bearing here whatsoever. I don't see. Which
17 was the case in ARAR, somewhat.

18 So, we feel that although it's only common sense to
19 say if something is out there, why do you feel the
20 need to protect it, as a general rule? It doesn't make
21 sense. It's a bit more complicated than that. And in
22 applying these guidelines in the ARAR case, we can
23 see here that it is not even taking into account what
24 the Defence has, with a lot of efficacy, brought
25 forward. It is not... there's no automatism and we still

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1 believe that we have a case to make on the
2 information sought in the eight (8) criteria. And we do
3 not believe we're faced, in the answers of those
4 questions, with something that is so publicly known,
5 so publicly disseminated, so out there that it is
6 useless for us to pursue that endeavor. Otherwise,
7 Your Lordship, in all honesty and as bluntly as I can
8 put it, we wouldn't have put so much time into that
9 and I wouldn't be wasting my time and your time
10 today with this.

11 And I believe that wraps what I had to say on that
12 matter, which will lead me...

13 BY THE COURT

14 While you're looking at your notes.

15 BY THE CROWN (Me Rouleau)

16 Yes.

17 BY THE COURT

18 I've received Mr. Kapoor's document and I haven't
19 had the chance to review it. Have you addressed,
20 Mr. Kapoor, each of these items in R-34, the three
21 (3) for R-25 and the six (6) for R-32?

22 BY Me KAPOOR

23 I've addressed them in the sense of what should be
24 released publicly... sorry, what I think can be
25 released by Your Lordship. I've not gone through

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1 each single one. I was going to do that in my oral
2 submissions to you. But I have addressed it in its
3 broad compass.

4 BY THE COURT

5 All right. Because I would like to know your position
6 regarding... because the issues have been
7 streamlined. R-25, there's, well, two (2), really,
8 because there's going to be a demonstration. So, 1
9 and 3 regarding R-25, and the six (6) items regarding
10 R-32. I'd like to know when you argue orally if you
11 could break down each one.

12 BY Me KAPOOR

13 Certainly.

14 BY THE COURT

15 And if you have a written document, even with
16 bullets, that just briefly outlines your position on
17 each one. And if there is any support for it, you can
18 indicate that to me. Because sticking close to the
19 main issues that had been streamlined in this
20 document in June, R-34 I'm referring to, would help
21 me. Because...

22 BY Me KAPOOR

23 Yes. I'm happy to do that. I should say that on R-25,
24 you'll hear from, I gather, Mr. Lacy on that issue. And
25 after you hear from him, I'll take my leave from that

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1 on where the Defence sits on R-25.

2 BY THE COURT

3 Because Crown and Defence have both agreed that
4 these are the issues before me.

5 BY Me KAPOOR

6 Yeah.

7 BY THE COURT

8 The way they're drafted isn't necessarily as precise
9 as I would like it to be, so it's just a comment for you
10 to keep that in mind. And if something can be briefly
11 filed, even at the time of your argument, with your
12 position on each one, and I'll follow up like that.
13 Because I'd like the parties to... for the Defence as
14 well, and Maître Rouleau, when you come back on
15 your next date, these are the issues. We cancelled a
16 lot of dates in June, so you could eliminate a lot of
17 other issues. So, if you also could... I'd like to know
18 in bullet form or in any way you want, with respect to
19 each one, if you can break it down, if it hasn't been
20 done already. Because I can't say that I've gone
21 through every single document that the Crown has
22 submitted within the last week, ten (10) days. We've
23 had a number of other things to do.

24 BY THE CROWN (Me Rouleau)

25 Of course.

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1 BY THE COURT

2 And the same thing for the Defence. But I'd like to
3 have the position regarding each one of these items,
4 with your position underneath each one, if it hasn't
5 been presented that way. You can, in a document,
6 refer to pages, Crown and Defence, in your
7 respective documents. That way, I'll stick to this,
8 because I understand you did a lot of work on it,
9 getting together, avoiding Court dates to prepare
10 this. So, stick to this document with the contested
11 points.

12 BY THE CROWN (Me Rouleau)

13 Yes.

14 BY THE COURT

15 Thank you, Mr. Kapoor. Go ahead.

16 BY THE CROWN (Me Rouleau)

17 Of course. Two (2) file points that I believe I can
18 make in the public portion of the submissions, that
19 are... I don't believe these are really contested
20 points. I don't expect them to be. We will see.

21 The first one is the fact that TRANG, a case of 2002
22 of the Court of Appeal of Alberta, Queen's Bench, at
23 paragraph 50 addresses the question and points out
24 something that is more or less, I guess... stems from
25 common sense or experience in criminal procedures.

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on motions
By Me Rouleau**

1 That... and we put the citation in our submissions, but
2 I'll just read it.
3 BY THE COURT
4 Where are you? What tab is it?
5 BY THE CROWN (Me Rouleau)
6 It is tab...
7 BY THE COURT
8 Sorry.
9 BY THE CROWN (Me Rouleau)
10 Tab 2, and the excerpt will be at paragraph 50.
11 BY THE COURT
12 Tab 2?
13 BY THE CROWN (Me Rouleau)
14 Yeah, of the first book. So, the Court...
15 BY THE COURT
16 Just a moment.
17 BY THE CROWN (Me Rouleau)
18 Yes.
19 BY THE COURT
20 Which book is it? This one?
21 BY THE CROWN (Me Rouleau)
22 This is one. It is the first one. How can I identify...
23 BY THE DEFENCE (Me Lacy)
24 What year is the case?
25 BY Me KAPOOR

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By Me Rouleau**

1 It's 2002.

2 BY THE CROWN (Me Rouleau)

3 2002, ABQB 19.

4 BY Me KAPOOR

5 ABQB 19.

6 BY THE COURT

7 Okay, I have it.

8 BY THE CROWN (Me Rouleau)

9 So, TRANG recognizes the existence of a case by
10 case privilege that applies to police investigative
11 technique, where warranted, cites jurisprudence. And
12 it is part of, it's where I began in saying that, I guess
13 everybody will recognize that such a privilege exists.
14 And I want the Court's attention to paragraph 50, that
15 says, goes as such:

16 "Clearly, disclosure of investigative
17 techniques may in some cases
18 compromise ongoing investigations and
19 put officers or civilians at risk; it might
20 also cause criminal offenders in the
21 future to modify their activities in order to
22 avoid detection. There may be other
23 justifications for non-disclosure of
24 investigative techniques that are specific
25 to the techniques in question."

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on motions
By Me Rouleau**

1 So, I'm just pointing that out just to be able to say
2 that when I tell...
3 BY THE COURT
4 What's the danger here?
5 BY THE CROWN (Me Rouleau)
6 The danger here is the modification of behavior of
7 the criminal elements...
8 BY THE COURT
9 No, but you cited a paragraph that...
10 BY THE CROWN (Me Rouleau)
11 Yes.
12 BY THE COURT
13 ...put officers or civilians at risk?
14 BY THE CROWN (Me Rouleau)
15 Or have the individuals modify their behavior in order
16 to avoid detection. That's the whole... our whole
17 argument is based on that. There is a security
18 assessment to be made by the Court. I will address
19 that. I think I have no choice but to do it *ex parte*.
20 BY THE COURT
21 All right.
22 BY THE CROWN (Me Rouleau)
23 But there is a security but, but, I'm not saying that
24 it's not important, security of anyone is always
25 important, but here, our main concern is the fact that

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1 we would be giving instruction on how to function in
2 order to avoid detection and interception. Our whole
3 argument is based on that. I'm just saying, it's one
4 thing for me to say it; I just feel more at ease when
5 the justice has stated it in a judgment. Something
6 that stems from common sense, that obviously
7 criminal elements that are more savvy have always
8 been interested in what the police can and can't do in
9 order for them to conduct their business without
10 having the police put their nose in it. It's a simple
11 assessment that I make, but it's been said by a Court
12 of law, so it gives me somewhat more authority to be
13 able to put it in front of you. It's just not me. It's just
14 not one guy.

15 The other thing that I wanted to bring the Court's
16 attention to and I refer to... and it has been touched
17 in the MAHER ARAR case that I've cited before, but
18 that's at paragraph 82. It's not necessarily simple in
19 that case...

20 BY THE COURT

21 You're back to that? You're back to?

22 BY THE CROWN (Me Rouleau)

23 Yes. Because it's on another topic.

24 BY THE COURT

25 Okay.

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**Argument
on motions
By Me Rouleau**

1 BY THE CROWN (Me Rouleau)
2 And in MAHER, there is a discussion at paragraph
3 82...
4 BY THE COURT
5 Just a moment. What tab? You have to guide me.
6 BY THE CROWN (Me Rouleau)
7 1380 of the other book.
8 BY THE COURT
9 What paragraph?
10 BY THE CROWN (Me Rouleau)
11 82.
12 BY THE DEFENCE (Me Lacy)
13 2007?
14 BY Me KAPOOR
15 Yes.
16 BY THE DEFENCE (Me Lacy)
17 I don't have...
18 BY THE CROWN (Me Rouleau)
19 I have an extra copy.
20 BY THE DEFENCE (Me Lacy)
21 Yeah?
22 BY THE CROWN (Me Rouleau)
23 Or is it... well, that's not mine anyway. So, at 82, the
24 Court discusses the mosaic effect, something that I
25 will be referring to. And the Court says these words:

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1 "This Court and numerous others have
2 written at length about the *mosaic effect*.
3 This principle advances that information,
4 which in isolation appears meaningless or
5 trivial, could when fitted together permit a
6 comprehensive understanding of the
7 information being protected."

8 The Court, Justice Noël there, refers to an *arrêt* of
9 KHAWAJA that is described as the possibility for the
10 other party, let's call it that, to piece together pieces
11 of information here and there; that taken individually
12 seem trivial, or seem not to reveal much, but when
13 pieced together can better their understanding of
14 here the technique that is sought to be protected, the
15 effectiveness of the technique.

16 And I think it is wise for the Court to have this
17 principle discussed in case law, in consideration in
18 making an assessment of disclosure or not. In other
19 words, saying that a particle or bit of information is
20 not important, we need to go one step further. If I
21 add this, for example any information stemming from
22 the eight (8) questions, to what is already known, to
23 what is already out there, or to what can be gathered
24 from other sources, am I jeopardizing the efficacy of
25 the investigative technique? So, what in *apparence*

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1 can be viewed as trivial can have that adverse effect.
2 And I will be discussing that in the arguments of
3 September 18th, for some of the information that is
4 sought, that might at first glance, when you look at it,
5 say: What's the big deal with that? There is a deal or
6 there are serious considerations to be added with
7 this principle in mind.

8 And unless the Court has further questions on the
9 open part of my submissions, I will conclude with
10 that.

11 BY THE COURT

12 Well, if there's something that you feel you missed
13 and you wish to raise it again, or you have further
14 argument, you can do so when we come back before
15 the Defence begins on the public part.

16 BY THE CROWN (Me Rouleau)

17 Yes. But if so, that would be handled by my colleague
18 because Friday, I cannot be present.

19 BY THE COURT

20 I understand.

21 BY THE CROWN (Me Rouleau)

22 But we certainly appreciate the opportunity that you
23 are giving us and we will advise the Court if that's
24 the case.

25 =====

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1 REPRESENTATIONS

2 BY THE COURT

3 All right. Okay. So, I just repeat that sticking closely
4 to the three (3) points under R-25 and the six (6)
5 points under R-32, makes it easier for the Court, with
6 all of the materials you submitted. Please stick to the
7 issues that have been streamlined and support your
8 arguments with respect to each individual issue. The
9 sweeping global statements, with respect to the
10 balance raised in the various cases, I don't think
11 anybody disagrees with that. Just one thing, there is
12 a Common Law issue here. There's also an issue
13 under *The Canada Evidence Act*.

14 BY THE CROWN (Me Rouleau)

15 Yes.

16 BY THE COURT

17 Just proceed really... perhaps guide me...

18 BY THE CROWN (Me Rouleau)

19 Yeah.

20 BY THE COURT

21 If I rule in your favor, Maître Rouleau, I understand
22 that... on the Common Law basis, that resolves the
23 issue.

24 BY THE CROWN (Me Rouleau)

25 Yes.

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1 BY THE COURT

2 If I don't agree with you, then I understand that
3 you're going to continue your argument under *The*
4 *Canada... The Evidence Act*, is that right?

5 BY THE CROWN (Me Rouleau)

6 Yes.

7 BY THE COURT

8 But you don't want to combine them? You want to do
9 them individually?

10 BY THE CROWN (Me Rouleau)

11 Well, what I would suggest. And I don't think we've...

12 BY THE COURT

13 Because your arguments are principally the same?

14 BY THE CROWN (Me Rouleau)

15 Yes. Normally, what we do, I'd say what's
16 contemplated is to simply verse. If officially an
17 opposition is written down, depose in front of this
18 Court, but we say: Listen, our arguments are the
19 same. So, we expect the Court's decision to be the
20 same. And if the Court agrees that the decision that
21 you've rendered under the Common Law applies to
22 section 37, and I don't think there would be any
23 dispute on that...

24 BY THE COURT

25 So, you don't want to finish all arguments and then

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1 leave me with both? You want an argument on the
2 first one. And if I rule against you, then very briefly,
3 you'll raise the second one which gives you other
4 avenues within a certain delay?
5 BY THE CROWN (Me Rouleau)
6 Exactly.
7 BY THE COURT
8 All right. I understand.
9 BY THE CROWN (Me Rouleau)
10 Yes.
11 BY THE COURT
12 Okay. Understood. All right. Yes, Sir?
13 BY THE DEFENCE (Me Addario)
14 Your Honour, two (2) things. First of all, in relation to
15 this document with the nine (9) points in issue, did
16 you want us to do the same? We're asked to do the
17 same?
18 BY THE COURT
19 Yes.
20 BY THE DEFENCE (Me Addario)
21 To annotate it?
22 BY THE COURT
23 Well...
24 BY THE DEFENCE (Me Addario)
25 In relation to our...

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1 BY THE COURT

2 ...we had a lot of dates fixed in June that were...
3 there were several dates in June that were cancelled.
4 The Crown and the Defence, I understood, were
5 meeting. And this document was the fruit of those
6 meetings in the cancelled dates.

7 BY THE DEFENCE (Me Addario)

8 It was.

9 BY THE COURT

10 So, since the issues have been streamlined, I think
11 they could even be more precise than that. I think
12 that the argument should focus on the contested
13 issues that have been presented to me in R-34. If I
14 misread something from the Defence side or the
15 Crown side with respect to the issues, let me know.

16 BY THE DEFENCE (Me Addario)

17 No. So... but just to clarify. We can annotate it. It
18 won't take long.

19 BY THE COURT

20 Okay.

21 BY THE DEFENCE (Me Addario)

22 And my arguments intended to follow...

23 BY THE COURT

24 Right. What you can... and honestly, I don't need a
25 lot more paper. And I understand the gist of all the

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1 arguments. Perhaps if you took this document in a
2 Word program and you, under one, you refer to
3 different pages of your written argument, which book
4 or which document... I thought that the arguments
5 would follow the points in R-34.

6 BY THE DEFENCE (Me Addario)

7 It was a reasonable assumption, but the evidence
8 was a bit dynamic and so, we followed the evidence.

9 BY THE COURT

10 All right. Because for a judgment to follow, my
11 understanding is it's more or less with some
12 modification: these are the issues the Court has to
13 decide as to whether or not a privilege applies or not.
14 And the arguments are a bit all over the place.

15 BY THE DEFENCE (Me Addario)

16 Sure.

17 BY THE COURT

18 So...

19 BY THE DEFENCE (Me Addario)

20 We'll do what we can to organize it for Your Honour
21 so it's presented to you coherently. The other thing I
22 wanted to mention, and I just want to say this
23 because Mr. Rouleau is not going to be here Friday; I
24 stand to be corrected, but I'm pretty sure there was
25 no evidence about the mosaic effect while the

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1 defendants or their counsels were in the Courtroom,
2 given by any of the police witnesses. So, he may be
3 alluding to something that was given *in camera*, but
4 the submission that he just made, the very last
5 submission he just made is dependent on evidence.
6 Otherwise, what you were given is just a judgment by
7 a judge. He pointed out that he had evidence. I just
8 wanted to say that while he's here, so that if he
9 wants to clarify with you, he can.

10 BY THE COURT

11 Okay.

12 BY THE DEFENCE (Me Addario)

13 Otherwise, in my view, it's just another case and I'll
14 be developing that argument on Friday.

15 BY THE COURT

16 Okay. I did invite him to come back before you start
17 your argument on Friday and to raise anything else.
18 So that might be something that one of the
19 prosecutors can raise or address if they feel they
20 should, because Maître Rouleau won't be here Friday,
21 so he says.

22 BY THE DEFENCE (Me Addario)

23 Thanks very much.

24 BY THE COURT

25 All right. Yes, Sir?

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1 BY Me KAPOOR

2 Yes. Thank you, My Lord. I want to address one of
3 our favorite topics, scheduling. If I can just very
4 briefly...

5 BY THE COURT

6 Are you in trouble in the end?

7 BY Me KAPOOR

8 I'm not in trouble. I'm thankful that that opportunity
9 of me getting home early, it was money in the bank
10 with my wife. So, that was good. If I can ask this, I
11 know we're due back for the closed submissions on
12 the 18th. I don't know what the Court counters
13 otherwise, but listening to my friend, Mr. Rouleau,
14 and all the foreshadow on what he's going to deal
15 with in closed, if it's possible to also grab the 17th
16 for argument, I think that will allow us to...

17 BY THE COURT

18 17th is taken.

19 BY Me KAPOOR

20 It's taken? All right. That was my question, whether it
21 was available. If it was not... if it's not, so we'll have
22 to get it done on the 18th.

23 BY THE COURT

24 We're starting another bail hearing tomorrow. It's
25 fixed for tomorrow, the 14th and the 17th. We might

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1 require more time or... one never knows, but at the
2 present time, it's taken. And I know you have another
3 trial coming up.

4 BY Me KAPOOR

5 It starts on the 28th of September. But I have a client
6 that I need to spend some time with on the 21st so...

7 BY THE COURT

8 No. I've seen how well prepared you are and I
9 anticipate that you would need that.

10 BY THE CROWN (Me Rouleau)

11 If I can... I'm sorry if I'm going to add my fifty cents
12 worth, there? I think my colleague has a valid point
13 there and I'm just saying it, I don't know, I can't
14 remember what...

15 BY THE CROWN (Me Gauthier)

16 D'Addario, bail hearing.

17 BY THE CROWN (Me Rouleau)

18 ...bail hearing, yeah. Maybe we could borrow some of
19 the time?

20 BY THE COURT

21 Yes, I was thinking that, yes.

22 BY THE CROWN (Me Rouleau)

23 Yeah. Not the whole thing, but a little part of it can
24 be given to us. And I know my colleague would put
25 that, as I, but... put that to good use to make sure

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1 that we're finished on the 18th.

2 BY Me KAPOOR

3 If we could steal a half-day, that would be great.

4 BY THE COURT

5 Okay. So, how about, Maître Gauthier, because I
6 think you're coordinating the hearing for tomorrow,
7 maybe speak with the Defence counsel. Could be that
8 it's done before them. If not, perhaps they can have
9 the morning of the 17th and we could use the
10 afternoon for purposes of Maître Kapoor's argument.
11 Or to at least begin the *ex parte's* part, so he'll be
12 out of here early on the Friday. Could you...

13 BY THE CROWN (Me Gauthier)

14 So, we will speak to Mr. D'Addario's counsel tonight
15 and see what could be done about the 17th.

16 BY THE COURT

17 If not, his lawyers will be here tomorrow. We'll
18 address that then.

19 BY THE CROWN (Me Gauthier)

20 They will be, Sir.

21 BY THE COURT

22 So, for the time being, tentatively, we'll begin at two
23 o'clock (14:00) on the 17th, tentatively, subject to
24 confirmation. And, Maître Gauthier, you'll advise
25 everybody. All right. There's one other issue with this

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1 question of admissions on Île Vaudry judgment that
2 was brought up.
3 Mr. McDonald, you're here. I'd like to resolve that.
4 Because I had read that... pretty well ninety percent
5 (90%) of the comments made by yourself in Court, I'd
6 need a few minutes, because the last part was typed
7 today and I just received it, so I'd like to review it. I
8 can either raise it this afternoon or we can find a few
9 minutes to do it tomorrow. Would Maître Rondeau-
10 Marchand be back to deal with that?
11 BY THE CROWN (Me Gauthier)
12 Yes, she would be...
13 BY THE COURT
14 Is she here today?
15 BY THE CROWN (Me Gauthier)
16 She's here today but I see the time. Now, if you want
17 to deal with it right now, we can go and grab her or...
18 BY THE COURT
19 No.
20 BY THE CROWN (Me Gauthier)
21 ...we can wait tomorrow.
22 BY Me MACDONALD
23 ATTORNEY FOR THE DEFENCE
24 REPRESENTING JACK SIMPSON
25 I will have to be in Court in Montreal tomorrow

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1	morning.
2	BY THE COURT
3	Okay. The whole day?
4	BY Me MACDONALD
5	The whole morning, at least.
6	BY THE COURT
7	Okay. Are you here tomorrow afternoon?
8	BY Me MACDONALD
9	I could be here, yes.
10	BY THE COURT
11	But you're here on Friday?
12	BY Me MACDONALD
13	Uh... yes. I will be here on Friday.
14	BY THE COURT
15	We can do it on Friday.
16	BY THE CROWN (Me Gauthier)
17	Thank you.
18	BY THE COURT
19	But it is... I can deal with it in ten (10) minutes as
20	well. Would you rather do it Friday?
21	BY THE CROWN (Me Gauthier)
22	We don't see any rush for that.
23	BY THE COURT
24	All right. But I've had everything transcribed from
25	the... just a moment, from the dates that Maître

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1 Rondeau-Marchand provided...
2 BY THE CROWN (Me Gauthier)
3 Um-hum.
4 BY THE COURT
5 ...regarding Macdonald's remarks, with the exception
6 of the last portion that I haven't read yet, because it
7 wasn't typed. I've gone through everything, and once
8 I've read the last portion, I'll be prepared to hear
9 Maître Rondeau-Marchand and Mr. Macdonald and I
10 think we can deal with that issue.
11 BY THE CROWN (Me Gauthier)
12 All right.
13 BY THE COURT
14 So, Friday... (inaudible)... during the day?
15 BY Me MACDONALD
16 Yes, Sir.
17 BY THE COURT
18 All right. And you'll advise your colleagues we'll deal
19 with that then.
20 BY THE CROWN (Me Gauthier)
21 Yes. Do you...
22 BY THE COURT
23 And if she wishes, if any of you wish to, yourself,
24 listen to the CourtLog, yourself as well,
25 Mr. Macdonald...

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Representations

1 BY THE CROWN (Me Gauthier)
2 But did you ask for transcripts for these...
3 BY THE COURT
4 No, no. These are unofficial transcripts.
5 BY THE CROWN (Me Gauthier)
6 All right.
7 BY THE COURT
8 You don't... no, I didn't ask for an official transcript,
9 but you can... you have access to the CourtLog when
10 it's not a judgment.
11 BY THE CROWN (Me Gauthier)
12 Maître Rondeau-Marchand already listened to these.
13 BY THE COURT
14 So, she knows.
15 BY THE CROWN (Me Gauthier)
16 Yeah.
17 BY THE COURT
18 Because she said that... well, just say this so she can
19 prepare accordingly. She mentioned there were
20 admissions. I asked for an email with formal
21 admissions. And usually, in a criminal trial, a formal
22 admission is a document prepared and the Crown and
23 the Defence sign it and its entitled "Admissions". It
24 didn't come out like that. The document that... the
25 two (2) documents that were filed, related to

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1 Mr. Macdonald indicating: "I'm not contesting and
2 we're not asking that such and such be excluded",
3 someone can present a motion and not make an
4 admission: We're asking for items X, Y and Z to be
5 excluded. But all the other evidence goes in and it's
6 in front of the judge to decide. And unless there's a
7 formal admission for which the Crown can be
8 dispensed of making proof, the judge will render his
9 decision upon the evidence that he's heard.
10 Very often, from time to time I should say, not very
11 often, Defence counsel will say that: We're asking for
12 items 1 to 4 be excluded. As far as 5 to 10, we leave
13 that to your discretion. Which is different than
14 saying: You don't need to decide on this, the Crown
15 doesn't have to make a proof on this because we
16 formally admit that items 5 to 10 form part of the
17 record, and the Crown can produce it as part of their
18 case, we have nothing to say about that, an
19 objection, we admit their evidence. So, that's
20 basically where we're at.
21 It's a not a clear cut issue and it's not the way things
22 should be done, but those are my comments at this
23 point. We'll deal with it Friday. All right. So, thank
24 you very much, Maître Rouleau, thank you for your
25 interesting argument.

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Representations

1 BY THE CROWN (Me Gauthier)
2 So, for the presence of the accused, all accused here
3 but Mr. D'Addario, will only come back on Friday
4 morning.
5 BY THE COURT
6 So, D'Addario will be here tomorrow.
7 BY THE CROWN (Me Gauthier)
8 Yeah, for his bail hearing.
9 BY THE COURT
10 And all the accused will be here Friday.
11 BY THE CROWN (Me Gauthier)
12 Unless there are other requests.
13 BY THE CLERK
14 Mr. Macdonald, for your client...
15 BY THE COURT
16 It seems that there's some issues with your client,
17 Mr. Macdonald, on the videoconference. Don't you
18 think it would be better if he'd be here? Firstly, it
19 doesn't disturb the Court, he can hear better, and he
20 doesn't have individuals going behind the curtains
21 like he mentioned this afternoon?
22 BY Me MACDONALD
23 Well, we apologize for this.
24 BY THE COURT
25 No, there's no need to apologize.

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Representations

1 BY Me MACDONALD

2 It seems I should have been sitting to my left.

3 BY THE COURT

4 No. There's no criticism of you. On the contrary, I'm
5 just saying for the purposes of your client, following
6 the proceedings better, hearing better and not being
7 disturbed and everyone in the room not being
8 disturbed. Do you not feel it would be better if he
9 was present?

10 BY Me MACDONALD

11 I would have to take it up with Mr. Simpson, Your
12 Honour. I would ask for the next Court date that he
13 remained in Bordeaux and I will try to... not I will try,
14 I will go and see Mr. Simpson tomorrow afternoon and
15 we'll try to resolve that. We'll have an answer for the
16 Court.

17 BY THE COURT

18 Okay. Maître Gauthier, do you have anything to say
19 on that?

20 BY THE CROWN (Me Gauthier)

21 No, Sir. We don't.

22 BY THE COURT

23 All right. So, for the time being, you want him to be
24 here by videoconference on Friday?

25 BY Me MACDONALD

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Representations

1 Yes, Sir.
2 BY THE COURT
3 The Crown agrees with that?
4 BY THE CROWN (Me Gauthier)
5 Yes, Sir.
6 BY THE COURT
7 Okay. So, I will allow it this time. If you change your
8 position, please advice the clerk by eleven o'clock
9 (11:00) tomorrow. And if there is any other
10 disturbances Friday, if he should so appear by
11 videoconference, I'm going to order his presence on
12 subsequent dates.
13 BY THE CLERK
14 Monsieur le Juge, quant à l'accusé Racaniello,
15 qu'est-ce qu'on fait?
16 BY THE COURT
17 For Friday? Is anyone...
18 BY THE CLERK
19 Maître Battista...
20 BY Me BATTISTA
21 Yes. I...
22 BY THE CLERK
23 Habituellement, il n'est pas là.
24 BY Me BATTISTA
25 That's right. I don't have any information asking that

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1 he be present. He's not present today.
2 BY THE COURT
3 Well, all right. So...
4 BY Me BATTISTA
5 Your Honour, what I can do is I will advise Mr. Boro
6 and Mr. Engel.
7 BY THE COURT
8 So, tomorrow...
9 BY Me BATTISTA
10 And if they want... if they want him to be present,
11 they will do what is necessary.
12 BY THE COURT
13 No, no, I can't... there's enough work to do here, I
14 can't be kept in the dark on all these issues. So,
15 Maître Emond is here tomorrow, I understand?
16 BY Me BATTISTA
17 Yes.
18 PAR LA COUR
19 So, I would suggest... I'm going to order that
20 Racaniello be present Friday. If there's a specific
21 request that he not be here, then Maître Boro can...
22 I'm sorry...
23 BY Me BATTISTA
24 Maître Emond can speak for Mr. Boro tomorrow.
25 BY THE COURT

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Representations

1 Maître Emond will speak for Mr. Boro tomorrow.
2 What's the problem?
3 BY THE CLERK
4 Ça, ça cause un problème quand on annule des
5 mandats, Monsieur le Juge. La détention va vous le
6 dire...
7 BY THE COURT
8 Okay.
9 BY THE CLERK
10 ...parce que si ça se rend pas, on a un problème.
11 BY THE COURT
12 Okay. There's only so much I can do. I don't have any
13 information from anybody. So ordinarily, the accused
14 has to be present. So, I'd make an order that he be
15 present.
16 BY THE CLERK
17 C'est bon.
18 BY THE COURT
19 Okay? You're saying you can't cancel that tomorrow?
20 BY THE CLERK
21 Je vous dis qu'il y a des problèmes. Quand on fait ça
22 sur la...
23 BY THE COURT
24 Madam? Okay. J'ai rendu une ordonnance qu'il soit
25 présent...

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Representations

1 BY THE CLERK

2 C'est bien, Monsieur le Juge.

3 BY THE COURT

4 ...vendredi. So, he's going to be present Friday.

5 BY THE CLERK

6 C'est beau.

7 BY THE COURT

8 If there is a different position, someone can address
9 me tomorrow.

10 BY THE CLERK

11 Voilà. Pas de problème.

12 BY THE COURT

13 But he'll be present on Friday, Racaniello. That's all.
14 Thank you.

15 (CASE CONTINUED TO SEPTEMBER 11th, 2015 -
16 9:30)

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18 =====

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7 enregistrement, et conformément à la loi. Et j'ai
8 signé :

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