

close to twenty different witnesses to the events that lead to his death. In addition, there is forensic and other evidence to consider. None of the witnesses are one hundred percent clear in their recollections of what they saw nor are their recollections entirely consistent from one witness to the next. No one should be surprised at either of those realities.)Jo one remembers every detail of what they observe. No one sees an event in exactly the same way as another observer of that same event.)Jo one remembers the very same things as others do. All ofthat is simply human nature.

[3] Further, there were some variations in what some of the witnesses said that they saw between the different times in which they have been called upon to give their evidence. In most cases, these witnesses have been required to recite these events at least three times: first to the police; then at the preliminary hearing; and finally at this trial. Those renditions have occurred over a period of about three and one-half years -a passage of time that brings its own problems to the quality of the evidence in this case. Delay does not enhance the quality of any witness' evidence.

[4] Those are realities that occur in most criminal cases. They are at least part of the reason why any trier of fact, whether judge or jury, is permitted to accept some, none or all of any witness' evidence. Put simply, a witness' evidence does not have to be taken on an all or nothing basis. **In** this case, there is no one witness whose evidence I am prepared to accept without qualification. I do not mean that comment as a criticism of the witnesses who appeared at this trial, save for certain particular instances that I will come to. To the contrary, I would point out that, in contrast to many other criminal cases that we see these days, in this case all of these citizens came forward, co-operated with the police regarding what they had seen and then gave evidence at this trial. They are deserving of our appreciation and thanks for doing so.

[5] That said, as I have already noted, like anyone of us watching an event, each of these witnesses saw the events from their own perspective and each remembers the events in their own way. Their recollections do not match in every respect from one "vitness to another. I would not expect them to do so. A consequence of that reality is, however, that I must piece together as best I can from all of this evidence what I conclude actually happened in the late evening of August 8, 2007 and into the early moming of August 9 that ultimately lead to the death of Ross Hammond.

[6] To explain the conclusions that I have reached, it is first necessary to summarize what each of the witnesses said as a prelude to my analysis and conclusions. I recognize that this may be a somewhat lengthy process. Nevertheless, it serves to provide a framework that will hopefully assist in an understanding of the conclusions that I have reached. In this summary, I do not intend to mention every aspect of each witness' evidence. Rather, I will mention those portions of their evidence that might appear to be important or relevant to my decision. Later, I will set out the facts as I find them and that provide the foundation for my conclusions in this case.

[7] I start with George Dranichak who was a friend and co-worker of Ross Hammond. Mr. Dranichak says that he, Ross Hammond and four of their co-workers went out on August 8 for an evening together. The purpose of the evening was to improve morale among the workers. It appears that the evening failed in that objective. The group originally went to Gretzky's and then to Second City for a show. The evening went sufficently poorly that, after the show, the group decided to go their separate ways. In an effort to salvage what was left of the evening, Ross Hammond and George Dranichak went to the Big Bop, a music club located at Queen Street West and Bathurst Street. The two arrived at that club around 9:30 or 10:00 p.m. and stayed until about 11 :30 p.m. when they left. They intended to find a place to have something to eat. As they walked west along Queen Street West, Mr. Dranichak realized that he was low on cash. He spotted a TD Bank at Queen and Euclid. Mr. Dranichak went over to use the A TM machine at the bank although he is not certain if, in fact, he actually used the machine.

[8] After Mr. Dranichak and Mr. Hammond arrived at the ATM, he says that they were approached by a female who asked for \$20. Mr. Dranichak described this female as wearing loose clothing, having a loose pony tail, young, about 5 with dirty light brown hair. He subsequently identified a police photograph of Faith Watts as being this female. Both Mr. Hammond and Mr. Dranichak reacted to this request with vulgar comments directed at the female. No doubt these comments resulted, at least in part, from the consumption of alcohol by Mr. Hammond and Mr. Dranichak over the course of the evening. Indeed, I will say that I believe that Mr. Hammond and Mr. Dranichak had more to drink during the course of that evening than Mr. Dranichak was prepared to acknowledge.

[9] About this time, Mr. Dranichak says that a male came to join the female. He described this male as young, urban, very skinny, blondish and with scruffy facial hair. The argument continued. Another male, middle eastern in appearance, joined in the argument. Then a second female arrived on a bike. Mr. Dranichak identified this female as Ms. Kish although he did so only after having seen a video taken by CityTV.

[10] While I will have more to say about this video later, at this point I simply mention that a cameraman from CityTV happened onto the scene after Mr. Hammond had been stabbed. He filmed Mr. Hammond on the ground being tended to by emergency personnel. He also filmed Ms. Kish, and three other persons who are connected to her and who are significant participants in these events, as they came to an ambulance because Ms. Kish required medical attention. Those other three individuals are Douglas Fresh, Faith Watts and Jeremy Wooley.

[11] Returning then to the events at the ATM, Mr. Dranichak says that he and Mr. Hammond tried to move away from this group by going diagonally across Queen Street from north to south. When they reached the south side, the two became separated with Mr. Hammond being to the east of Mr. Dranichak. Mr. Dranichak says that he was then attacked by a female, who he identified as Ms. Kish, and another blond haired male whom he had not seen before. He described this male as looking a little older than the other earlier male but with similar stature and similar weight.

[12] Mr. Dranichak says that Ms. Kish hit him in the knee with her bike and the male began punching him. Mr. Dranichak fell to the ground and was kicked by the male. The male then attempted to gouge at his eyes. This caused Mr. Dranichak to get up, grab the male and shove him into a store iron window. Mr. Dranichak then says that he escaped by jumping into a taxi.

As the taxi left the scene, Mr. Dranichak was unable to see Mr. Hammond but he yelled for him to meet him at their workplace that was nearby. Mr. Dranichak took the taxi to his place of work where he waited for Mr. Hammond, who he assumed had also left the scene. Mr. Hammond did not arrive at the workplace. It was only the next morning that Mr. Dranichak found out that Mr. Hammond had been stabbed and was in hospital. Of some consequence to his evidence is the fact that Mr. Dranichak is adamant that, throughout these events, he and Mr. Hammond were never as far west on Queen Street as Niagara Street.

[13] The next witness was Mystica Cooper. Ms. Cooper came to this area of Queen Street West to meet some friends. She was on the south side of Queen Street West, east of Bellwoods, outside a bar called Squirrley's. Ms. Cooper observed four people in a dispute on the north side of Queen Street. There were three males and one female. Two of the males were in a dispute with the other male and the female. She described the male with the female as being grungy. She described the female as having dirty blonde hair in dreads, i.e. dreadlocks, wearing loose fitting clothing and a long hippy style skirt. She described the other two males as being clean cut with casual clothing. Another female then arrived on a bike. This female did not play any part in the events as Ms. Cooper observed them but she did come over to Ms. Cooper and ask for a cigarette. Ms. Cooper described this female as having dark hair, wearing shorts and that she looked Spanish.

[14] One male attacked one of the other males. At one point, two of the males fell into a store front window. The two groups separated briefly and then re-engaged. At one point, Ms. Cooper saw the female throw bags of garbage at the males. Ms. Cooper lost sight of the two groups briefly. She then noticed traffic, including a street car, blocked at Niagara Street. Ms. Cooper saw the first female run out onto the street. She did not know why the female did this but she assumed that she was following the two males. Ms. Cooper called the police. She then heard a female scream. A police car arrived. About the same time, Ms. Cooper's friends arrived. Ms. Cooper then went into a bar with her friends.

[15] The next witness was Laura Quigley. Ms. Quigley worked at Terroni's which is a restaurant on the north side of Queen Street West between Claremont and Manning Streets. Ms. Quigley was leaving work a little before midnight. She heard a woman screaming and then observed a female who appeared to have been pushed to the ground a couple of blocks away to the east of her. Ms. Quigley saw two males who appeared to her to be the ones who had pushed the female. She also saw another male who appeared to be with the female.

[16] Ms. Quigley described the two males as being similar in appearance, wearing casual clothing that was dark. She said they both had dark hair. She described the female as short with blondish hair in dreadlocks, tied back and wearing a patch together dress. The male with her was tall, thin and had a style of clothing similar to the female. She said that the female and male looked like street kids.

[17] Ms. Quigley says that the two groups moved towards her, that is, they moved westward on the north side of Queen Street. The female was screaming at the males saying that they had hit her. She saw the female pick up bags of garbage and throw them at the two males. By the time that the two groups got to Euclid they were no longer on the sidewalk. A street car arrived at Niagara. Ms. Quigley says that the two males headed towards the street car. Ms. Quigley opened the door to Terroni's and asked for someone to call the police.

[18] The dispute continued in the middle of the street. Ms. Quigley describes the scene as chaotic. She saw someone limp on the ground being dragged onto the south sidewalk of Queen Street. She also saw the female with blood around her holding her shoulder. Ms. Quigley says that the female was west of Claremont. She says that there was another group of street kids and that the female was brought to them. Ms. Quigley says that she saw two males, who seemed like the original two males, trying to get into a taxi. Ms. Quigley wanted to get away from the scene. She could hear sirens. She got on her bike and headed home.

[19] The next witness was Molly Stopford. She was on a street car with her ex-boyfriend Jonathan Paget. She was sitting by the open window of the street car when it stopped at Niagara. Ms. Stopford heard men yelling and then saw two men pushing. She described one of the males as jockish wearing a dark fitted t-shirt. The other male was smaller, scruffy looking, had longer hair and was wearing baggy clothing. He appeared to Ms. Stopford to be a street kid.

[20] The two males began fighting. The jock quickly got the upper hand of the fight. He appeared to Ms. Stopford to be full of rage. He was beating on the street kid right against the side of the street car. Eventually the street kid ceased to fight back. Indeed, Ms. Stopford thought he might be unconscious. The street kid went to the ground and the jock continued to beat him. Two females on the south sidewalk were yelling at the jock to stop. They appeared to Ms. Stopford to also be street kids. They started pulling and punching at the jock to get him to stop but the jock essentially ignored them -only occasionally swatting at them with his arm as if to push them away.

[21] One of the females seemed to be more involved than the other. She was punching the back and shoulders of the jock. Ms. Stopford described this female as average height, slim build, with light brown hair. She had messy clothing and messy hair. She had baggy pants on. Ms. Stopford could not describe the other female in any real terms. There were other people around the scuffle including a male that Ms. Stopford also described as a jock.

[22] Ms. Stopford observed the more involved female to have a knife. Ms. Stopford said that the female had the knife in her mouth with the blade sticking out. At the sight of the knife, Ms. Stopford became scared and ceased looking out the window. Indeed, she shut the window at this point. A short time later, Ms. Stopford looked out the window again. She saw the male street kid on the sidewalk with blood on his face. She saw the jock heading to the rear of the street car. He was staggering. Ms. Stopford thought he might be drunk. Ms. Stopford then noticed the female, who she had seen with the knife, on the north of Queen Street. She was among several other people. Ms. Stopford observed another female take off her shirt and wrap it around the hand of the female who she had seen with the knife. Ms. Stopford thought this female's arm had been cut although she could not see a cut. Ms. Stopford also thought that the female who took off her shirt was the same female who had been with the other female in the fight but she admits that she is not sure of that. She also admits that she might be interchanging the two females in terms of which one had the cut arm.

[23] Ms. Stopford then saw the jock on the north side of Queen Street to the west of the group where the female was. He was lying on top of a cab yelling at the driver. Ms. Stopford noticed that the jock had a knife in his hand. It appeared to her to be the same knife that she had earlier seen the female with.

[24] Ms. Stopford does acknowledge that her recollections of the events may have been influenced by media coverage that she saw of the story.

[25] Jonathan Paget was the next witness. Mr. Paget is a paramedic with Toronto EMS. He was on the street car with Ms. Stopford. When the street car stopped at Niagara, Mr. Paget heard yelling from outside. He saw two males in a fight at the front of the street car. One male was preppy looking with short hair and the other had long hair with street fashion clothes and appeared to be a street kid. The preppy male had the upper hand in the fight. The fight moved to close to where Mr. Paget and Ms. Stopford were sitting on the street car which was about seven rows back from the front. The fight continued.

[26] Mr. Paget saw a female come up to the fight and the fight ended shortly after she arrived. He described this female as also dressing in street fashion. Mr. Paget had seen this same female with another female in front of the street car when he first noticed the fight. He says that she was able to stop the fight by getting the preppy guy off of the street kid but he did not see how she did that. He also saw the street kid pulled to the sidewalk where he was lying on his back. Mr. Paget next saw the preppy guy to the west of his location on the road and then saw him on a taxi. He says that the preppy guy was extremely agitated and that, at one point, the guy said "who's next?".

[27] Mr. Paget says that he saw a knife on two occasions. He saw it first in the female's hand when she was at the front of the street car but he is not sure if this was before or after the fight between the two males. At the same time, Mr. Paget says that he believes that the female had the knife when she came to the fight but admits that he is not sure. He saw the knife a second time in the hand of the preppy guy when he was on the hood of the taxi. Mr. Paget says that a second taxi came by and the preppy guy disappeared.

[28] Mr. Paget next saw the female to the north of the street car in the roadway. Another female was with her. The other female had taken off her shirt and was tending to a cut on the first female's arm. This female was upset and Mr. Paget heard her say "he cut me".

[29] Mr. Paget says that the reason that he remembers that the first female had a knife is because he had once heard the expression that a person should not take a weapon to a fight because it might be used against the person and he thought, at the time, that that is exactly what had happened to the female. In cross-examination, Mr. Paget said that he was "fairly certain" that the female who broke up the fight was the same female who was cut in her arm. Mr. Paget is not able to provide any meaningful description of this female.

[30] The next witness was Shaun Park. Mr. Park owned a restaurant on the south side of Queen Street between Manning and Euclid. Mr. Park went outside for a cigarette. He saw a friend of his chatting with a female. He described the female as wearing dark clothing with a black top and perhaps black leggings with a skirt over top. The female left and Mr. Park and his friend went back into the restaurant.

[31] While back in his restaurant, Mr. Park heard screaming from outside. He went to the front window of his restaurant and looked out. Directly across the street, he saw two males and a female. He recognized the female as being the same female who had earlier been chatting with his friend. He described the two males as both being tall, wearing jeans with short hair and clean cut. The males and the female were arguing and moving westward. Another male who also looked like a street kid joined the group. Mr. Park described this male as thin and not very tall. He described his clothes as not preppy.

[32] Mr. Park saw one of the clean cut males pick up the male street kid and throw him with some force against a store front window. The street kid fell to the ground and the female went to help him. The two males then continued west along Queen. Two other males, who also looked like street kids, crossed Queen Street diagonally from south to north. At that point, Mr. Park lost sight of the group.

[33] About ten to fifteen minutes later, many emergency vehicles arrived. At this point, Mr. Park went outside of his restaurant. He noticed a street car stopped at Niagara. Two males were coming towards him from the west. Mr. Park believed that these two males were the same two males who he had earlier seen cross Queen Street in a diagonal direction. One of the males said that someone had been stabbed. This male then lifted up his shirt and showed Mr. Park what appeared to be some wounds on his abdomen and chest. The male said that he had also been stabbed but that it was no big deal. These two males then continued heading east. Mr. Park was shown a surveillance video that records Nicole Kish, Faith Watts and Douglas Fresh after Ms.

Kish had been cut on her arm. It also shows other people around them who appear to be with them. One of these persons, an unidentified male, lifts up his shirt and shows his chest to another male and points at something. Mr. Park believed that this male was the male who showed the chest wounds to him.

[34J] The next witness was Woosen Hallimerian. Mr. Hallimerian is a taxi driver. He was driving in the area of Queen Street West on the night in question. He was heading westbound with a customer when he noticed a fight on the north side of Queen Street. Three or four people were involved. One was a female and the rest were males. Mr. Hallimerian described the female as wearing black clothing with black jeans. It was pointed out that, in his statement to the police, Mr. Hallimerian had said that the female was wearing a black dress but Mr. Hallimerian maintained at trial that the female was wearing pants and not a skirt.

[35J] One male was being beaten by the others. This male managed to get away and tried to get into Mr. Hallimerian's taxi but he could not do so because the doors were locked and the windows were up. Mr. Hallimerian noticed that the male had a knife in his hand. Mr. Hallimerian saw blood on the knife.

[36J] Another taxi came up and the male went towards that taxi. The windows of that taxi were open and Mr. Hallimerian says that the male went in one of the windows. He then saw the male being dragged by the taxi. Mr. Hallimerian followed the other taxi a short distance to a church that is on the north side of Queen Street West just past Bellwoods Avenue. At this point, the male fell from the taxi.

[37] The next witness was William Patsiopolous. Mr. Patsiopolous was riding his bike home when he stopped at the lights on Niagara Street at Queen Street. He saw a fight on Queen Street. A male was involved in the fight as was a female. Mr. Patsiopolous also saw a male banging on the side of a street car. He described this male as wearing a jacket, jeans, dark shoes and had short dark hair. This male had a knife in his hand. During the time that he was making these observations, Mr. Patsiopolous turned west onto Queen Street towards the fight but then did a U-turn such that he was facing east. Mr. Patsiopolous acknowledged that the man at the street car could have moved from the fight to the street car while he was moving his bike and making the U-turn.

[38] Mr. Patsiopolous continued to observe what was happening when the female, who had been in the fight, approached him. She had a cut on her arm. Prior to this happening, Mr. Patsiopolous had called 911. He escorted the female over to the north side of Queen Street and they sat down on a step. Mr. Patsiopolous was still speaking to the 911 operator. A recording of the 911 call was played. At one point during that call, the female says that the male with the knife stabbed her and that "he is Canadian". At some point, Mr. Patsiopolous also noticed that the male, that he had seen at the street car, went over to a taxi.

[39] Others came up to the female who was injured and they appeared to Mr. Patsiopolous to know her or be friends of hers. Mr. Patsiopolous felt at this point that his help was no longer wanted so he withdrew. Emergency vehicles then started arriving. As Mr. Patsiopolous had blood on his hands from trying to help the female, he went to one of the ambulances to get something to clean his hands.

[40] The next witness was Melissa Gallately. Ms. Gallately lives with her husband in a unit that is above the stores on the south side of Queen Street at the TTC shelter near Niagara Street. Ms. Gallately was lying down with her baby when she heard screaming coming from Queen Street. She got up and went out on the balcony of the unit to see what was going on. Ms. Gallately saw a fight on Queen Street. Four people were involved -three males and one female. Two of the males and the female were attacking the other male. The two males and the female looked like street kids. The other male looked conservative and was wearing a black shirt. She described the female as wearing a longer black skirt, a black tank top and that she had matted hair or dreads and the hair was dark.

[41] During the fight, the two street kid males were kicking and punching the other male. The female was flailing around with her arms. She appeared to Ms. Gallately to be very angry. Early on in the fight, Ms. Gallately heard the female say the word "stab".

[42] Ms. Gallately observed the male who was being attacked eventually get to his knees and then stumble in a southwest direction along Queen Street. He reached a black vehicle which then left. Ms. Gallately thought that the male had gotten in the car and driven off. The other three remained in the area. The police arrived. When the police were speaking to the female, Ms. Gallately thought that she noticed something on the female's arm.

[43] The next witness was Nataja DeSilvia. Ms. DeSilvia also worked at Terroni's. While she was inside the restaurant, her co-workers said that there was a fight going on out on Queen Street. Ms. DeSilvia did not immediately react to this information because she was getting ready to go home and, apparently, the fact of a fight in this area of Queen Street was not an unusual occurrence. About ten minutes later, Ms. DeSilvia left and went out on Queen Street. She heard screaming and yelling. She observed that there was a fight at Queen and Niagara. Ms. DeSilvia walked up to Claremont to look. She saw a taxi and a street car stopped at the light at Niagara. A female and a few males were involved in the fight. There was also another female present who was not involved in the fight. One male in the fight seemed to Ms. DeSilvia to be singled out by the others. The other males and the females looked to her like squeegee kids.

[44] Ms. DeSilvia described the male in the fight who was singled out as wearing a black tshirt. In terms of the other males, she said one was a taller skinnier male in green and another was shorter, stockier and wearing a dress shirt that was ripped. She described the female who was involved in the fight as younger, wearing a tank top and with dreadlocked hair.

[45] When the fight ended, Ms. DeSilvia saw the male who had been singled out hook his arm into a taxi and it carried him west on Queen Street. Ms. DeSilvia heard the female in the fight yell that he had stabbed her. The female was bleeding and calling for an ambulance. Another female came to her assistance. Ms. DeSilvia called 911.

[46] Ms. DeSilvia was shown some photographs by the police. She picked out a photo of Ms. Watts as looking like the female who had been stabbed. However, she also picked out a picture of Ms. Kish as being someone who she said looked familiar from the fight.

[47] The next witness was Nelson Decarvalo. Mr. Decarvalo was driving westbound on Queen Street. He heard some words exchanged between a male and a female. Mr. Decarvalo decided to turn around to see what was happening. After he turned his car around, Mr. Decarvalo saw the female with two or three other males. They were in a fight. Mr. Decarvalo stopped his car and got out. He noticed a male was bleeding and the female was saying "How could you do this? How could you stab me?" He described the male who was bleeding as wearing light green army coloured pants. Mr. Decarvalo saw this male later at the ambulance. Mr. Decarvalo identified the female who was in the fight as Ms. Kish. Mr. Decarvalo described

the people who were involved in the fight as all looking like squeegee kids except for one gentleman.

[48] Mr. Decarvalo saw the one gentleman try to get into one taxi but he could not. The male then went to another taxi, grabbed onto it and was dragged down Queen Street to the church. Mr. Decarvalo observed this male to have a knife in his hand. At the church, the male left the taxi and walked towards the church and sat down. He had his head down and he placed the knife on one of the steps. The male then got back up and walked to the sidewalk where he fell down. Emergency vehicles began arriving. Mr. Decarvalo subsequently pointed out the knife to the police.

[49] The next witness was Saad Mir. Mr. Mir was also driving a taxi that night. He was at Queen and Niagara. He looked to the north side of Queen Street and saw a female and two males attacking another male. Mr. Mir said that the male being attacked was on top of the female while the other two males were kicking at him. He says that the male and the female were struggling.

[50] Mr. Mir identified the male who he saw on top of the female as being Ross Hammond. He got that name from the police. He also believed that male had a black t-shirt on. He described the other males as both being blonde. One of them had a beard. He also described the female as being blonde and having a pony tail. Mr. Mir is not otherwise able to describe any of the clothes that these people were wearing.

[51] After about ten seconds, Mr. Mir said that the male who was being attacked got up and went towards another taxi but could not get in. Mr. Mir saw blood everywhere. He thought he saw blood on the shirt of the male. Mr. Mir also saw the female get up and she appeared to him to be fine.

[52] The male then approached Mr. Mir's taxi. Mr. Mir noticed that the male had a knife in his hands. Mr. Mir was scared and locked his doors. However, his windows were open and the male locked his arm around the centre post of the car on the passenger side. Mr. Mir began moving the car but only slowly as there was traffic ahead of him. As Mr. Mir approached the 7-Eleven store on Queen Street, which is on the south side of Queen Street across from the church, the male fell from the car. Mr. Mir made a U-turn and drove back towards Niagara Street because he saw a police officer there. Mr. Mir went past Niagara Street and then made another U-turn and came back west along Queen Street. He saw the female again. She was holding her left wrist and saying that she got stabbed. He pulled into the parking lot of the 7-Eleven and parked his taxi. There was blood on the passenger side of the taxi. Subsequent DNA analysis showed that this blood was that of Ross Hammond.

[53] Those are the prosecution witnesses who gave evidence regarding the events surrounding the altercation. The defence called four witnesses at trial. A fifth witness gave evidence on consent through a videotape of other evidence given at the preliminary hearing.

[54] The first defence witness was Cameron Bordignon. He was walking with friends east along Queen Street towards Niagara. He saw two men who he described as "jocks" coming across Queen Street from the north in a southwest direction towards the corner of Queen and Niagara. The two jocks were being followed by persons who Mr. Bordignon described as "street punks". One of the street punks went to fight one of the jocks. The jock quickly got the street punk on the ground and was getting the better of the fight. Another fight began at the front of a street car that was stopped at Niagara. Mr. Bordignon was not sure whether this fight involved the same jock or his buddy. He next remembers seeing the first street punk lying on the south sidewalk of Queen Street. He was being tended to by a female and also by one of Mr. Bordignon's female friends.

[55] Mr. Bordignon's attention returned to the second fight. He remembers two or three street punks beating on the jock. A taxi came up and blocked his view. Mr. Bordignon remembers hearing one of the street punks say "You die tonight". He then saw the jock stumble up and get onto the hood of the taxi. At that point, Mr. Bordignon and his friends left. Mr. Bordignon does not remember whether the group of street punks who he saw involved females as well as males. Mr. Bordignon described the first fight as happening between the front and side doors of the street car and the second fight as happening north of the street car either on the road or on the sidewalk.

[56] The next defence witness was Lindsey Williams. Ms. Williams left a friend's home in the Queen and Niagara area. She walked up Niagara towards Queen Street. She heard loud voices. She heard a male yell "You hit a woman". Ms. Williams noticed an altercation on the north side of Queen Street. She saw a group of people beating on one person. Ms. Williams could not recall much in terms of any descriptions of the people that she saw. She did not see any women involved in the fight. She watched the fight for a couple of minutes and then noticed a friend who was standing by a taxi that was stopped at the intersection. She went over to speak to her friend and then left. Ms. Williams walked east along Queen. After she had walked away and as she got past Claremont, she heard a female scream hysterically. The female said "stop, stop" and was asking for help.

[57] Faith Watts gave evidence for the defence at the preliminary hearing by way of video link from California. On consent, her evidence from the preliminary hearing was played as evidence at the trial. Ms. Watts says that on the day in question, she was very drunk. She drank all day. She also injected oxycontin at one point. This lead Ms. Watts to say on a number of occasions during the course of her evidence that she blacked out or that there were a bunch of blank spots in her memory or that she only remembered bits and pieces of the day.

[58] During the day, she was with her boyfriend, Douglas Fresh, Jeremy Wooley and Nicole Kish. There were two other males with the group as well. Ms. Watts says that the group eventually wound up on Queen Street. Mr. Hammond and another male approached them, harsh words were spoken and a scuffle ensued. Ms. Watts says that she had a knife that she had stolen while in Montreal. It matched a knife that Douglas Fresh had that he also stole in Montreal. As the scuffle took place, Ms. Watts took out her knife. She says that the knife was almost immediately taken from her either by Mr. Hammond or by the other male.

[59] Ms. Watts remembers Ms. Kish being hysterical and saying that she had been stabbed. Ms. Watts did not see who stabbed Ms. Kish. She does remember the two of them going to an ambulance. She remembers seeing a man on a stretcher at the ambulance. She did not remember that man as being one of the men who had been involved in the scuffle.

[60] Ms. Watts says that Ms. Kish did not have a knife. She said that she had asked Ms. Kish to get a knife for protection but Ms. Kish had refused.

[61] The next defence witness was Raymond To. Mr. To owns the One of a Kind Pasta store that is located on the north side of Queen Street, just west of Niagara. Mr. To was in his apartment above the store. He heard people arguing and so he looked out his window. He saw three men arguing on the sidewalk. One of the men got pushed to the ground and was then being punched and kicked by the other two. He described the three as all wearing the same clothing that he described as army style clothing. He did not see any females near the fight Mr. To says that the man on the ground struggled, got up and went to a taxi that was coming along Queen Street. The taxi left. Mr. To saw the other two males still arguing. The man from the ground went west on Queen and the other two males followed him. The police then arrived.

[62] Mr. To got dressed and went outside. He walked west on Queen to where the church is. He saw a female with the paramedics. Mr. To also saw three men, who he believed were the same three men who had been in the fight, standing in the street. There was a man lying on the sidewalk but Mr. To did not know who that man was.

[63] The final defence witness was Paul Gallately who is married to Melissa Gallately. Mr. Gallately says that he was watching TV in the second floor of their apartment He looked out a window and saw two men beating up on another man who was on the ground. The fight was very close to the entry door to the apartment that is located off the south sidewalk of Queen Street. The two men who were doing the beating had punk style clothing. Mr. Gallately went to the sunroom for a better look. He saw yet another male lying on the sidewalk. That male also had punk style clothing.

[64] Mr. Gallately went upstairs to the balcony. The balcony is where his wife had made her observations that I have already recounted. When he got to the balcony, Mr. Gallately saw one of the two men, who had been beating the other man, go across Queen Street diagonally in a northeast direction. Mr. Gallately did not see the man who had been beaten.

[65] On the north side of Queen, Mr. Gallately saw a group of people. They were all wearing similar clothing. The man who Mr. Gallately saw going north diagonally across Queen joined this group. Mr. Gallately then saw a male and a female from that group leave and run down Niagara Street. Mr. Gallately also saw another female screaming that she had been stabbed. She was standing in the curb lane of Queen Street.

[66] Mr. Gallately did not see any altercation on the north side of Queen Street. Mr. Gallately also did not see a street car at the intersection. Mr. Gallately admits that he was tired and not very alert at the time that these events occurred.

[67] That concludes my summary of the evidence given by the witnesses who saw various portions of the events as they unfolded. I appreciate that there were other witnesses who gave evidence relating to specific issues in this trial and I will refer to their evidence where necessary as I undertake my analysis and reach my conclusions.

[68] Let me then deal with the elements of the offence of second degree murder. They are:

(i) that the accused caused the victim's death;

(ii) that the accused caused the victim's death unlawfully; and

(iii) that the accused had one of the states of mind required for murder.

In terms of the required states of mind for murder, the prosecution must prove that the accused either meant to kill the victim or meant to cause the victim bodily harm that the accused knew was likely to kill the victim and was reckless whether the victim died or not. The prosecution does not have to prove both. One state of mind for murder is enough.

[69] It is self-evident that the person who stabbed Ross Hammond four times in the chest caused Mr. Hammond's death and that his death was caused unlawfully. It should also be obvious from the number, nature and location of the stab wounds that, whoever stabbed Ross Hammond, that person either meant to kill Mr. Hammond or was reckless whether Mr. Hammond lived or died. Given those facts, defence counsel does not dispute that, if Ms. Kish is the person who stabbed Mr. Hammond, she would be guilty of second degree murder.

[70] At the same time, a person can be found guilty of second degree murder even though they do not administer the fatal injuries. If a person is a party to a murder, they are equally guilty of the offence. In this case, if someone brought a knife to the fight and then passed it to another participant in the fight, given the circumstances in which the fight was occurring, then that person could be seen as having intended that the other person use the knife in the fight and the person would then have the subjective foresight that death would likely result from the use of the knife. That person would be a party to the offence as an aider. The defence also does not dispute that, if Ms. Kish brought the knife to the fight and passed **it** to one of her friends with the intent that it be used on Mr. Hammond, then Ms. Kish would be guilty of second degree murder as an aider.

[71] In addition to those considerations, on the facts of this case, the prosecution asserts that it is possible that, if the accused had an agreement with her friends to assault Mr. Hammond and the accused knew that her friends routinely carried knives, then the accused could be seen as having subjective knowledge that one of her friends might use a knife and cause Mr. Hammond's death and thus be a party to the offence under the common purpose party provisions.

[72] While I accept that the common purpose party provision might be applied in theory, I am not satisfied that there is a sufficient evidentiary basis for its application in this case. In particular, I do not see that there is sufficient evidence that there was a common practice by Ms. Kish's friends of carrying knives. We know that Mr. Fresh had a knife on his person at the time. We know there is one other knife involved, namely the knife that was used to kill Mr. Hammond. There is, however, no other evidence of anyone within Ms. Kish's group of friends carrying a knife nor is there any other evidence that the persons within her group of friends routinely carried knives. Consequently, I do not see how all of the necessary elements of the common purpose party provisions are made out in this case.

[73] Having set out the essential elements of the offence of second degree murder and the party provisions that might apply in this case, I wish to address two other legal concepts. One deals with the nature of the evidence in this case. As I have noted, this case turns on the evidence of various eyewitnesses. I am well aware of the frailties that come with eyewitness identification. We caution jurors very strongly about these frailties and the need to take special caution in approaching such evidence.

[74] Having said that, however, recognizing that there are risks associated with eyewitness identification cannot at the same time paralyze triers of fact from reaching conclusions based on such evidence when the trier finds it reliable. In other words, we must not become so fearful of the problems associated with the evidence of eyewitnesses that we effectively abandon that evidence or refuse to act on it.

[75] The reality is that, in most cases, we do not have the benefit of objective physical evidence that provides answers to all of the questions raised. We often do not have the benefit of video surveillance evidence that provides a record of the events with clarity and objectivity. Indeed, in some cases where we do have video surveillance evidence, the lack of clarity of that evidence can give rise to its own problems. We also do not usually have the benefit of other independent physical evidence such as fingerprints or DNA. Contrary to popular belief, fingerprint evidence is rare. DNA evidence is more common but it frequently does not provide all of the answers -as this very case demonstrates. The DNA evidence here is helpful in certain respects but it alone cannot provide the answer to the central question, that is, the identity of the person who fatally stabbed Ross Hammond.

[76] It is entirely proper for a trier of fact to reach a conclusion based on the evidence of eyewitnesses. A single eyewitness may be sufficient to reach a determination in a given case,¹ Our reliance on the evidence of any eyewitness also recognizes that an eyewitness does not have to be certain in his or her identification. To the contrary, it is well-recognized that there is a weak link between the certainty of an eyewitness and the accuracy of that witness' evidence? A witness who is certain may be mistaken. Equally a witness who is not entirely certain may be correct. Consequently, we should not discount the evidence of any eyewitness just because that witness fairly allows for the possibility that they might be mistaken. Certain witnesses in this case said precisely that. Rather than detracting from their evidence, in my view, their willingness to acknowledge the reality that they might be wrong only serves to enhance the genuineness with which they gave their evidence. Ultimately, it is the trier of fact who must assess the evidence and decide what evidence to act on.

[77] In addition, where individual eyewitnesses may be uncertain and thus their evidence, standing alone, might not provide a safe foundation for a conclusion, the combination of the evidence of a number of such witnesses, whose evidence matches in material respects, may lead to a greater degree of certainty.³ It becomes less likely that a witness is in error as to his or her observations if other witnesses, unconnected one to the other, share similar observations. This is

¹ see *R. v. Nikolovski*, (1996] 3 S.C.R. 1197 at para. 23

² see *R. v. Hibbert*, [2002] 2 S.C.R. 445 at para. 52

³ see, for example, *R. v. Rybak* (2008), 233 c.c.c. (3d) 58 (Ont. C.A.) at para. 121 and *R. v. Dimitrov* (2003), 181 C.c.c. (3d) 554 (Ont. C.A.) at para. 18

especially the case when those observations are supported, in whole or in part, by forensic evidence. It must also be remembered that in this case we are not dealing with direct identification but rather with circumstantial identification. In the end result, while caution is the watchword when it comes to eyewitness evidence, that caution must be both rational and measured.

[78] The other legal concept I wish to mention regarding the evidence is the fact that some evidence was lead by the defence. I am cognizant of the approach mandated by *R. v. W (D.)*, [1991] 1 S.C.R. 745 regarding defence evidence. In this case, given the nature of the defence evidence, I can say that even if I were to accept all of the defence evidence, and I do not, it would not by itself lead inescapably to a finding of not guilty. The defence evidence also does not, on its own, raise a reasonable doubt. Rather, the issue is whether the defence evidence taken with the prosecution evidence serves to establish the guilt of Ms. Kish beyond a reasonable doubt.

[79] Turning then to the ultimate issue, I will begin my analysis and my conclusions by setting out what I have concluded happened in the late hours of August 8 and into the early hours of August 9, 2007. I will then turn to the issue of identity. I start then with the events that lead to the death of Ross Hammond as I find them based on the evidence that I have heard.

[80] Mr. Dranichak and Mr. Hammond began the evening with their co-workers as Mr. Dranichak described. Mr. Hammond and Mr. Dranichak split off from their co-workers and went to a club at Queen and Bathurst Streets where they spent some time drinking. They left that club in search of food. They were under the influence of the alcohol that they had been consuming since early in the evening. They walked westbound along Queen Street West. Mr. Dranichak decided that he needed some cash. He saw a TD Bank ATM at the corner of Queen and Euclid. He went to the ATM and, whether before or after using the machine, he and Mr. Hammond were approached by a female who asked for money. I am satisfied that the female who approached them was Nicole Kish. In that regard, I have concluded that Mr. Dranichak is mistaken in his identification of Ms. Watts as the person who approached him. I reach that conclusion for two reasons. One is that I do not accept most of Mr. Dranichak's evidence regarding the events that occurred after the female approached him and Mr. Hammond. For reasons that I will outline shortly, I do not consider his evidence to be reliable in those respects and I include his identification of the female in that category. The other is that I am satisfied, based on the evidence of other witnesses, namely Mystica Cooper, Laura Quigley and Shaun Park, that the female who was engaged in the ensuing dispute that occurred with Mr. Hammond and Mr. Dranichak was Nicole Kish. I will set out in a moment their evidence in that regard. It follows that if Ms. Kish was the person who was involved in the ensuing dispute, it was Ms. Kish who was involved when the dispute started. I am also satisfied based on the evidence of these other witnesses that it was Douglas Fresh who joined Nicole Kish in this dispute.

[81] The dispute began because Mr. Hannond and Mr. Dranichak responded to the request for money from Ms. Kish with rude and offensive remarks. Their ill-advised responses were no doubt fuelled in part by the alcohol that they had consumed. Had Mr. Hammond and Mr. Dranichak responded in a more intelligent and polite fashion, the resulting events would likely not have taken place. But that is not what happened.

[82] The reaction of Ms. Kish to these comments was predictable. She reacted with both offence and anger and she was not shy about expressing herself in those respects. She started yelling at the two men in equally obscene language. Her response was no doubt similarly fuelled by the alcohol that she had consumed. In that regard, while I do not accept much of what Faith Watts had to say in her evidence, I do accept that she had been drinking all day. She said that she was drinking with her friends that included Nicole Kish, Douglas Fresh and Jeremy Wooley. If Ms. Watts was drinking all day with this group, there is no reason to believe that the others were not also drinking all day and that includes Ms. Kish.

[83] Douglas Fresh arrived on the scene and joined in the dispute. The dispute began to move westward along Queen Street. It did not, as Mr. Dranichak said, move south across Queen Street. Mr. Dranichak's evidence in this regard is at odds with the evidence of virtually every other witness. His assertion that he and Mr. Hammond went to the south side of Queen Street at which point he was attacked by a male and a female simply cannot be true. Equally, his contention that he and Mr. Hammond never travelled as far west as Niagara Street is also clearly wrong.

[84] I cannot explain why Mr. Dranichak is in error with respect to his recollection of these events. I recognize that Mr. Dranichak may have had any number of reasons for wishing to distance himself from the death of Mr. Hammond, not the least of which is the fact that Mr. Dranichak is an American citizen who is on a work permit in this country. As he himself acknowledged, involvement with the authorities in a situation such as this might quickly end his stay in this country. In any event, it is unnecessary for me to determine the reasons for his faulty recollections. It is sufficient to point out that his evidence cannot be reconciled with the evidence of any other witness in this trial. I am compelled to decide between these competing recollections as to which I find to be the more reliable and I will say that I find the evidence of the other witnesses, who I shall now mention, to be more reliable.

[85] Mystica Cooper, Laura Quigley and Shaun Park all provided evidence that establishes that the dispute that began at the TD Bank moved westward along Queen Street on the north side. Ms. Cooper's description of the two males fits Mr. Hammond and Mr. Dranichak. Ms. Cooper and most of the other witnesses in this trial observed that Mr. Hammond and Mr. Dranichak were dressed in casual or "preppy" clothes as distinct to the "punk" or street fashion that Ms. Kish's group were dressed in. Most of the witnesses observed Mr. Dranichak's black shirt. Although many witnesses referred to it as a t-shirt when in fact it was a golf shirt, the distinction between the two would not be obvious from a distance and, in any event, is not significant.

[86] Importantly, Ms. Cooper's description of the female involved fits Ms. Kish. Prior to the events of the two fights that I will come to, Ms. Kish had two particularly identifying features one was that she wore her hair in what appeared to be dreadlocks and the other was that she was wearing a long skirt. Ms. Cooper mentions both of these features in her description of the female involved in the dispute. Similarly, Ms. Quigley mentioned both of these distinguishing features in her description of this female. Their observation of, and agreement on, these specific identifying features tends to refute any suggestion that they are both mistaken.

[87] At the same time, I am mindful of the fact that both of these witnesses described the female as blondish whereas Ms. Kish's hair would be more accurately described as brown or dark. Indeed, a number of witnesses described many of the persons involved as being blonde including Ms. Kish, Ms. Watts, Mr. Fresh and Mr. Wooley. I do not consider those misdescriptions to be significant. The lighting in the area was entirely artificial consisting of street lights and store front lighting. Artificial lighting distorts colours. Indeed, one can see the distortion of colours on the surveillance video from the pasta store.

[88] Mr. Park also described Ms. Kish's skirt and he accurately recollected her black tank top. Mr. Park also accurately described Mr. Fresh's clothing. He and Ms. Quigley both described the male as very thin which also fits Mr. Fresh especially when contrasted to Mr. Wooley.

[89] As the dispute moved westward, it began to escalate with the result that either Mr. Hammond or Mr. Dranichak threw Mr. Fresh into a store front window. Both Mr. Park and Ms. Cooper saw this happen. While Ms. Quigley did not, that can be explained by the fact that Ms. Quigley twice briefly went into Terroni's to ask someone to call the police. It is therefore quite possible that the brief event of Mr. Fresh being tossed into the store window occurred while Ms. Quigley's attention was distracted from the scene for this reason. It is of no particular consequence who threw Mr. Fresh into the window. I doubt it was Mr. Dranichak since, on all of the evidence, it would appear that he was the one who was the more anxious of the two to leave the area. He also had reasons to be more concerned about becoming involved in an escalating fight that might draw the attention of the police. I will note in passing, though, that it is interesting that he incorporated this particular event, and claimed participation in it, into his recollection of the events.

[90] I also conclude that in the course of Mr. Fresh being tossed into the window, Ms. Kish was either pushed or hit. Mr. Park saw Ms. Kish fall to the ground and Ms. Quigley caught sight of Ms. Kish getting up from the ground. Also Ms. Cooper, Ms. Quigley and Lindsey Williams all heard someone say that a woman had been hit.

[91] This event provided an opportunity for some separation between the two groups as Mr. Fresh recovered and Ms. Kish assisted him. This was observed by Mr. Park. It is at this point that Mr. Hammond and Mr. Dranichak moved across Queen Street diagonally in a southwest direction. I am satisfied, as I have said, that Mr. Dranichak was, for his own reasons, encouraging their departure from the scene. Cam Bordignon observed this behaviour as he saw the two jocks in the intersection of Queen and Niagara Streets. Seeing an eastbound street car arriving at Queen and Niagara, Mr. Dranichak and Mr. Hammond likely decided that that was a convenient way to leave the area. They were, however, being pursued. Mr. Fresh, who undoubtedly was not happy at having been thrown into a store window, was after them.

[92J As I have just mentioned, Cam Bordignon saw Mr. Hammond and Mr. Dranichak coming across Queen Street in this fashion being pursued by what he described as street punks. Mr. Bordignon said that there were three or four of them. I am satisfied that Mr. Fresh was leading the charge, that Ms. Kish was following him and that Ms. Watts had now come to join the group.

[93J It is at this point that Mr. Fresh attacked Mr. Hammond. The fact that Mr. Fresh attacked Mr. Hammond would suggest that it was likely Mr. Hanunond that had thrown Mr. Fresh into the store window. Mr. Bordignon saw this occur and his general descriptions again fit Mr. Hammond and Mr. Fresh. Again there was the distinction in the clothing between the two and also a noticeable distinction in the physical shape of the two. In addition, Jonathan Paget also witnessed the beginning of the fight between Mr. Hammond and Mr. Fresh. His general descriptions also fit both men.

[94] It is at this point that I have concluded that Mr. Dranichak left the scene. The dispute had escalated still further and now there was a physical fight going on between Mr. Fresh and Mr. Hammond. I believe that Mr. Dranichak decided that he was going to leave whether Mr. Hammond was coming or not. This conclusion is supported by the fact that the majority of the witnesses to the events, once the first fight starts, do not see another male similar in physical size or clothing to Mr. Hammond. Mr. Dranichak himself said that he left the scene by finding a taxi. Irrespective of how he left, I believe that this is the point at which Mr. Dranichak essentially slipped away and made good his departure.

[95J Returning then to the fight started by Mr. Fresh, while he may have intended to even the score, he failed in that objective as Mr. Hammond quickly got the better of Mr. Fresh in the fight. Mr. Bordignon says that is what happened as does Jonathan Paget as does Molly Stopford. When it comes to the events of what I term the first fight, I generally accept the evidence of these three witnesses as to what happened. Both Mr. Paget and Ms. Stopford were sitting on the street car that had stopped on Queen Street just west of the intersection with Niagara Street. The fight moved from the front of the street car to the area between the front and side doors on the south not then allow me to substitute my own opinions on such a topic for which I have no expertise or foundation. The defence submission also does not take into account that the knife in question is serrated or irregular on only one side of the blade. It is essentially smooth on the other side. That fact would presumably impact on the nature of the wound that it would make. Unfortunately, Dr. Pollanen was not asked about that possibility.

[99] Ms. Stopford became scared at the sight of the knife and turned away from the fight. Indeed, she closed the window of the street car. Mr. Paget also saw the female, who got involved in the fight, with a knife. He saw her with the knife in her hand. Mr. Paget says that when the female got involved in the fight, she managed to get Mr. Hammond off of Mr. Fresh and the fight stopped. Mr. Paget said that he did not know how the female accomplished this.

[100] At this point I return to the evidence of Dr. Pollanen who conducted the post mortem examination of Mr. Hammond. Mr. Hammond had five superficial stab wounds to the area of his back. I am satisfied that those wounds were caused by the female who involved herself in the fight and got Mr. Hammond off of Mr. Fresh. I reach that conclusion because there is no other logical explanation for how this female would have interrupted a fight involving Mr. Hammond, who was considerably larger in size than the female, who Ms. Stopford described as full of rage and who ML Paget described as extremely agitated. The fact that there were five such wounds would suggest that the first few stabs did not get Mr. Hammond's attention but the cumulative effect of them eventually did. That is not surprising given the superficial nature of the wounds, the fact that Mr. Hammond had been drinking and the fact that he was very agitated by the attack. This conclusion is also consistent with Ms. Stopford's evidence that Mr. Hammond swatted at the females. It is also consistent with her evidence that the more involved female was punching the back and shoulders of Mr. Hammond.

[101] A stunned or unconscious Mr. Fresh was then pulled to the south sidewalk. While it is not clear by whom, the fact that he was pulled to the sidewalk was observed by Ms. Stopford and Mr. Paget and is consistent with the fact that Mr. Fresh's blood, and only his blood, was found on the south sidewalk, just west of the TTC shelter. I should say at this point that in the course of these reasons when I refer to the identity of whose blood was found where, I am conscious of the DNA evidence and the proper caution that DNA evidence does not match blood

to people. Rather, it only provides a statistical probability as to the likelihood of the blood coming from another person thus the common expression that a given person "cannot be excluded" as the donor of the blood that is found. However, for the findings that I must make in the course of my reasons, I believe that I am entitled to move beyond those technical expressions to a factual conclusion as to whose blood it actually was.

[102] At this point, I find that Mr. Hammond went around the street car to the north side of Queen Street. I also find that the female in the fight went after him as she was no doubt upset at what had happened to her friend, Mr. Fresh. The other female remained behind with Mr. Fresh as was observed by Mr. Bordignon.

[103] In moving in that direction, Mr. Hammond wound up going directly into the path of other street kids who had, by this time, gathered on the north side of Queen Street. At the very least, Mr. Wooley and an unknown male were there. A second fight then ensued when Mr. Wooley, the unknown male and the female who had been involved in the first fight attacked Mr. Hammond. This time Mr. Hammond was outnumbered and this time it was he who went to the ground. This second fight was observed by Melissa Gallately from her balcony. It was observed by Mr. Patsiopolous from the intersection of Queen and Niagara. It was observed by Nataja DeSilvia from her location at Queen and Claremont. It was observed by Mr. Bordignon and it was observed by Lindsey Williams as she walked up Niagara and arrived at Queen. While neither Mr. Bordignon nor Ms. Williams specifically saw a female involved in the fight, neither of them were in a position to observe the fight clearly. Both were across the street, there were many people around and, at least in the case of Mr. Bordignon, there was a street car between him and this second fight that may have obscured some of the north side of the street. I would note in this regard, for example, that Mr. Bordignon said that he could not remember whether the street kids involved in this second fight were male or female. Ms. Gallately did, however, see a female involved in the fight as did both Mr. Patsiopolous and Ms. DeSilvia. In addition, Mr. Hammond's presence in the fight at this location is also confirmed by the fact that his blood was found at two locations in the westbound lanes of Queen Street, that is, the lanes on the north side of Queen Street.

[104] It was in the course of this second fight that I conclude that Mr. Hammond was able to wrestle the knife away from his attacker but, unfortunately, only after he had received further stab wounds, this time to his chest one of which would ultimately prove to be fatal. This conclusion is supported by a number of witnesses who saw Mr. Hammond with a knife in his hand when he interacted with the two taxis. It is also supported by the fact that Mr. Hammond is briefly seen in the surveillance video just before the second fight occurs and he has nothing in his hands. It is further supported by the evidence of Mr. Hammond leaving the knife on the church steps. It is still further supported by the evidence of Adrienne Chan who heard Mr. Hammond tell a police officer that he got the knife in a fight and it is supported by the evidence of that police officer, Officer Dawn, who said that Mr. Hammond told him "I just took it off them".

[105] On this latter point, I will mention that there was a conflict in the evidence between Officer DaVvTI and Det. Scott, who said that Officer Dawn told him at the hospital that Mr. Hammond had said "I ripped it out of his hands". I first note that this conflict does not detract from the conclusion that Mr. Hammond got the knife in the fight. Insofar as the defence urges that I accept Det. Scott's evidence regarding what was said because it would establish that Mr. Hammond got the knife from a male rather than a female, I do not accept that evidence. Rather, I accept the evidence of Officer Dawn on this point. Officer Dawn was clear and unequivocal in terms of his evidence as to what he heard Mr. Hammond say. Officer Dawn fairly pointed out that Mr. Hammond did not say very much at the scene or in the ambulance on the way to the hospital and therefore it was relatively easy for Officer Dawn to remember what was said. Further, Del. Scott said that he did not take a verbatim account of what Officer Dawn said to him. Del. Scott also said that, in noting what Officer Dawn told him, he was aware that he would not be the source of any evidence on this point as that would have to come from Officer Dawn. Del. Scott did not, therefore, have any particular reason to be scrupulously accurate in recording what Officer Dawn told him. All Del. Scott required for his investigation was the gist of what had been said.

[106J Returning then to my narrative of the events, Mr. Hammond emerged from the fight and attempted unsuccessfully to get into a taxi. Mr. Hammond then grabbed hold of a second taxi and was dragged west about a block down Queen Street to the church where he fell off. All or part of this was witnessed by both of the taxi drivers involved, Mr. Hallimerian and Mr. Mir. It was also observed by Mr. Patsiopolous. Each of these witnesses also observed Mr. Hammond to have a knife in his hand.

[107] After falling from the taxi, Mr. Hammond, who by this point was no doubt stunned and likely in shock from internal bleeding, walked to the church steps where he sat down and left the knife. Mr. Hammond then moved back to the sidewalk where he collapsed. This was witnessed by Adrienne Chan. An unidentified friend of hers started to try and administer aid to Mr. Hammond. All of this was also witnessed by Nelson Decarvalo. It was Mr. Decarvalo who subsequently pointed out the knife to the police.

[108] Emergency services then began arriving including police, paramedics and firefighters. The paramedics and firefighters began helping Mr. Hammond. Nicole Kish, Faith Watts, Douglas Fresh and Jeremy Wooley also arrived at the scene because that is where the ambulances were. All of this is clearly shown on the video taken by CityTV. That video also clearly shows Ms. Kish suffering from a wound to her left forearm that is bleeding heavily. Ms. Watts is helping hold Ms. Kish's arm. While Ms. Watts appears relatively calm, Ms. Kish is hysterical and Mr. Wooley and Mr. Fresh are belligerent.

[109] In summary, then, I find that Mr. Hammond was in a fight with Mr. Fresh at the south side of the street car. Mr. Hammond beat Mr. Fresh to the point that he was stunned or unconscious. Mr. Hammond only ceased to beat Mr. Fresh when a female approached him from behind and distracted him by inflicting superficial wounds to his back with a knife. Then, likely in an effort to get away, Mr. Hammond went to the north side of Queen Street where, instead of disengaging from the events, he became engaged in a second fight that involved the same female who had the knife and two other men, one of whom was Jeremy Wooley. During the course of this second fight, Mr. Hammond was stabbed four times in the chest, one of which wounds ultimately caused his death. Those wounds had to have been caused by the female either directly or indirectly by her passing the knife to one of the two males who then stabbed Mr. Hammond.

[110] Before turning to the issue of identity, I want to address certain other aspects of the evidence including the evidence of two witnesses that I have not mentioned so far in my findings, namely, Paul Gallately and Raymond To. I do not accept the evidence of either of these witnesses. In Mr. Gallately's case, he describes a fight at the front access door to his apartment that no one else saw. Mr. Gallately also did not see the altercation on the north side of Queen Street that clearly took place. Mr. Gallately did not see a street car at the time but it is obvious that a street car was present and it would have been evident to anyone looking out of the Gallatelys' sunroom or from their balcony. Lastly, Melissa Gallately did not believe that her husband was on the balcony with her when the fight took place. While Mr. Gallately may have seen some small portion of the events on Queen Street, these problems with his recollections lead me to conclude that his evidence in general is not reliable.

[111] Mr. To says that he saw three men involved in a fight on the north sidewalk directly outside his store whereas the rest of the witnesses have the fight on the street and each of those witnesses says that a female was involved in the fight. Mr. To describes the three men as having the same clothing, army style clothing, whereas we know that Mr. Hammond's clothing was very different to that of the street kids who were involved. Mr. To also believes that he saw the three men in the fight later standing in the street near the church and the ambulances. If Mr. Hammond was involved in the fight, as I have found to be the case, then obviously he could not have been standing in the street. Mr. To also saw a man lying on the sidewalk outside of the church but did not know who the man was even though it is clear that that man was Mr. Hammond. Given these problems with Mr. To's recollections, I find his evidence also to be unreliable.

[112] In terms of the evidence of the other witnesses, I acknowledge that in many cases there are one or two aspects of their evidence that did not match up with the preponderance of evidence or which may have been filled in from assumptions or from subsequently obtained information. In the first category, for example, Molly Stopford described the female with the knife as wearing baggy pants as opposed to a dress. I note that, in the circumstances and from her viewpoint, one could have been easily mistaken for the other. Nataja DeSilvia described the female with the injury to her arm as wearing raver pants, not a skirt. However, she also described raver pants as being very, very wide pants. Once again, from a distance, a skirt of the type being worn by Ms. Kish could have been mistaken for those type of pants. In the second category, Saad Mir said that he saw blood on Mr. Hammond's black shirt. Not only would it have been difficult to see blood on a black shirt, Dr. Pollanen said that most of the bleeding from Mr. Hammond's chest wounds would have been internal. I believe that Mr. Mir simply filled in that detail as a logical deduction from what else he had seen.

[113] I do not intend to go through each and every other instance of these types of inconsistencies or to explain them. I do not believe that I am required to do so. It is sufficient to reiterate what I said earlier and that is that every witness will see events from their own perspectives. They will remember some aspects of the events better than others. In my view, those inconsistencies are minor in nature and, rather than detracting from the honesty of the witness' evidence, they enhance it because they are precisely the type of inconsistencies that one would expect to see when asking multiple people to recall the same event. It does, however, further explain why we exercise the caution that we do when we approach the evidence of eyewitnesses and why we look for corroboration in other evidence.

[114] It is at this point that I will again refer to the DNA evidence. It established that there was more of Mr. Hammond's blood found on the footwear of Ms. Watts than was found on the footwear of Ms. Kish. The defence relies on this evidence to direct attention to Ms. Watts as the more likely perpetrator of Mr. Hammond's murder than Ms. Kish. The fact is that the amount of blood found on the footwear and clothing of many of the persons involved, including these two, is miniscule. It does not provide a solid foundation for making the type of distinction urged by the defence especially given that there was blood on the street that all of these people could have stepped in or collected on their footwear after the stabbing of Mr. Hammond. This again shows some of the limitations of physical evidence.

[115] I also acknowledge that there are some unanswered questions that remain in this case. One is the identity of the other male who was involved in the second fight. The evidence offers very little information regarding his identity. Another is the connection of the male who told Mr. Park that he had also been stabbed after which he wandered off east along Queen Street. That mayor may not have been the same male. On this point I simply repeat what we routinely tell jurors. The evidence in a case does not have to answer every question. Indeed, it would be an unusual case where everything that could be known about a case was known. All that is necessary is to decide whether the evidence answers the essential questions that must be answered before a finding of guilt can be made.

[116] I turn then to the issue of the identity of the female involved in the two fights. Before reviewing the evidence on that issue, I want to say that I am aware that, with one exception, none of the witnesses, on whose evidence I rely, positively identified Ms. Kish, or indeed Ms. Watts, from any photographic line-ups that they were shown by the police. Given the circumstances of these events, I am not surprised by that fact. These events took place in a matter of minutes -not over days as they took to be recounted at this trial. They were fast moving and chaotic -as more than one witness described them. I would not expect people to necessarily be able to point to pictures of the persons involved with the degree of certainty that the process of a police line-up both explicitly and implicitly attracts. I would also note on this point that some witnesses, Jonathan Paget for example, were not shown photographic line-ups until months after the events and others were not shown line-ups at all.

[117] The one exception is Ms. DeSilvia who did pick out a photograph of Ms. Watts as looking like the female who had been stabbed. She was obviously in error in that regard as we know that Ms. Kish was the only female who was stabbed. At the same time, Ms. DeSilvia also picked out a photograph of Ms. Kish as someone who looked familiar as being involved in the events. The actual photo line-up process was not shown in evidence so I do not know the certainty with which Ms. DeSilvia made her selections but I am satisfied that Ms. DeSilvia simply interchanged the two females in the process. This reiterates the risks inherent in the photographic line-up process. It does not, however, detract from the reliability of her evidence generally, especially when it is confirmed by other evidence.

[118] Turning then to the final issue, I refer first to the evidence of Molly Stopford. Ms. Stopford saw a female at the first fight with a knife in her mouth. She described the knife as I have mentioned. Ms. Stopford says that she next saw the female who had the knife on the north side of Queen Street slightly ahead of the street car. She noticed another female, who she assumed was a friend, take her shirt off and wrap it around the hand or arm of the female who had had the knife. Ms. Stopford assumed that the female's arm had been cut. Ms. Stopford thought that these two females were the same two females who she had earlier seen around the first fight. Ms. Stopford also believed that the female with the cut on her arm was the same female she had seen with the knife in her mouth but she allowed that she might be interchanging the two females.

[119] Jonathan Paget had also seen a female with a knife in the first fight. Mr. Paget next saw this female a short time later on the north side of the street car. He said that she was very upset because she had been cut in the arm. Mr. Paget said that another female, whom he had seen with this female at the beginning of the first fight, was, at this time, tending to the cut on the female's arm. He also saw that this female had taken off her shirt and was using it to tend to the cut. Mr. Paget also said that the female with the cut was upset and he heard her say "he cut me".

[120] William Patsiopolous saw a female in the middle of what I have termed the second fight. She eventually approached him. She was bleeding. Mr. Patsiopolous helped her as he spoke to 911. During the course of that conversation, the 911 operator asked whether the man, who Mr. Patsiopolous had told the 911 operator he had seen with a knife, was the person who had stabbed the female. The female said "yes and he is Canadian". Mr. Patsiopolous took the female to the north side of Queen Street where they sat down on the steps of a store. Friends of the female then arrived to help her. Mr. Patsiopolous, feeling unwelcome, withdrew. There is no doubt that the female that Mr. Patsiopolous dealt with was Nicole Kish.

[121] I am satisfied that Ms. Kish was the female who was involved in the second fight. That conclusion could be drawn based on the evidence of Mr. Patsiopolous alone. In saying that, I recognize that Mr. Patsiopolous was a somewhat challenging witness. He was being so careful to be as honest and accurate as he could be, and to not say anything wrong, that his answers were seldom short and were seldom absolute. Having said that, however, I accept his evidence as being accurate in terms of his dealings with Ms. Kish and of her involvement in the fight. I would note that to a large extent those dealings are confirmed both by the contents of the 911 call and by the contents of the surveillance video.

[122] Ms. Kish's participation in the second fight is also confirmed, however, by the evidence of other witnesses. Ms. DeSilvia described the female in the fight that she observed as wearing a tank top and having dreadlocked hair. She also heard this female yell that "he" had stabbed her. She also observed this female to be bleeding and heard her call for an ambulance. All of this evidence points directly to Ms. Kish.

[123] Melissa Gallately saw the female involved in the second fight. She described the female as wearing a longer black skirt, a black tank top and having matted hair or dreads. Again all of this evidence points directly to Ms. Kish.

[124] Nelson Decarvalo also saw the second fight. He saw a female in the fight who he identified in court as Ms. Kish. I acknowledge that such an "in court" identification is of no value.⁴ However, Mr. Decarvalo did hear the female say "how could you stab me?" He subsequently saw this same female at an ambulance. She was suffering from an injury. Again this evidence points directly to Ms. Kish.

[125] Saad Mir saw the second fight. He also saw a female involved in the fight. Mr. Mir saw the same female later. She was standing in the intersection just east of Niagara on the north side. She was holding her left wrist and saying that she had been stabbed. Once again this evidence points directly to Ms. Kish.

[126] Ultimately, in addition to the evidence of Mr. Patsiopolous supported by the contents of the 911 call and the surveillance video, the evidence of these four other eyewitnesses points directly to Ms. Kish as being the female involved in the second fight. The fact that each of these witnesses, from their own vantage points, essentially identifies Ms. Kish undermines any suggestion that they are all mistaken.

[127] There is also the evidence that Ms. Kish's blood was found in seven locations on the north side of Queen Street including two spots in the westbound lanes of Queen Street which is the general area in which I have concluded that the second fight took place. Indeed, at one of the locations where Ms. Kish's blood was found, it was mixed with Mr. Hammond's blood. This spot was located on the north side of Queen Street near the westbound street car tracks.

[128] In addition to all of this evidence, however, there is the salient fact that Ms. Kish was stabbed. She was the only female who was stabbed. Common sense dictates that she must have been stabbed while participating in the second fight where Mr. Hammond got hold of the knife. There is no other logical explanation for how Ms. Kish could have come to be stabbed

see, for example, *R. v. Izzard* (1990), 54 C.C.C. (3d) 252 (Ont. C.A.)

and none has been suggested to me. At the same time, all of the witnesses I have mentioned have said that there was only one female involved in the second fight.

[129] On this point, I wish to make it clear that I fully understand and appreciate that there is no onus whatsoever on Ms. Kish to prove anything in this case. At the same time, however, the fact that Ms. Kish was stabbed is part of the factual matrix in this case. It becomes another identifier relied upon by the witnesses in terms of placing people in the events that they saw. It is a fact that must take its proper place in the determination of the events as they unfolded. In the end, it is a fact from which an irresistible inference flows that Ms. Kish was the female in the second fight.

[130] In addition to concluding that Ms. Kish was involved in the second fight, I have also concluded that she was involved in the first fight. Both Molly Stopford and Jonathan Paget saw the female in the first fight with a knife. Ms. Stopford gave a particularly accurate drawing of what the knife looked like. Ms. Stopford also believed that she saw the female later when another female was tending to what Ms. Stopford assumed was a cut on the first female's arm. Not only was that a reasonable assumption, it was a correct one. Mr. Paget was "fairly certain" that the female he saw with the knife was the same female that he later saw with a cut on her arm. Both Ms. Stopford and Mr. Paget gave their evidence in a very fair, unbiased and sincere fashion. As I have already said, I accept their evidence.

[131] **In** addition to those considerations is the fact that the blood of Ross Hammond and the blood of Nicole Kish were found mixed together at the hinge of the knife, that is, where the blade meets the handle. It is again an irresistible inference from that fact that the same knife caused the wounds to both. Still further is the fact that the only other knife, that we know was present at any time in the course of these events, belonged to Douglas Fresh. Not only was Mr. Fresh still in possession of that knife when he was arrested, it was tested for blood and none was found. **In** addition, as I have already found, Mr. Fresh was not involved in the second fight.

[132] I repeat that Ms. Kish was involved in the second fight and that she was stabbed during the course of that fight. I find that Ms. Kish was stabbed with the knife that Mr. Hammond eventually got control of. That is the knife that was recovered from the steps of the church after Mr. Hammond left it there. I find that that knife is the same knife that Ms. Stopford and Mr. Paget saw in the possession of the female who was involved in the first fight. I am satisfied that that female was Nicole Kish. It follows from those findings that Ms. Kish took the knife from the first fight to the second fight That is how the knife, that Mr. Hammond eventually got hold of, became involved in the second fight.

[133] In terms of Ms. Kish's participation in the second fight, Melissa Gallately said that she saw the female in the fight flailing around with her hands and arms while she was crouched over the male who was on the ground. I appreciate that Ms. Gallately did not mention this observation in her statement to the police but she explained that failure by pointing out that, at the time that she gave her statement, she did not realize someone had died and she therefore did not approach the matter with the same degree of seriousness that she now was. Once again, in my view, a very honest and forthright explanation. Ms. Gallately also said that the female she saw was very angry and very aggressive.

[134] Ms. Dasilvia, in her description of the fight, said that she saw blows and punches thrown by all involved. That would have included the female. Mr. Mir said that he saw Mr. Hammond and the female struggling and that they were moving their hands back and forth.

[135] No one saw Mr. Hammond stabbed. The identity of the person who stabbed Mr. Hammond must be pieced together from the evidence that is available including inferences that reasonably flow from that evidence. I find that Ms. Kish had a knife and that she used it to superficially stab Mr. Hammond in his back during the first fight. I also find that Ms. Kish followed Mr. Hammond from the first fight to the second fight. As I have already said, I am satisfied that she still had the knife. Ms. Kish had no particular opportunity or reason to give the knife up in between the two fights. I accept the evidence that Ms. Kish was angry and was aggressive. Her anger and aggression was undoubtedly fuelled by the earlier insults directed at her, the tossing of Mr. Fresh into a storefront window, the subsequent beating of Mr. Fresh and the consumption of alcohol that she engaged in all day with Ms. Watts and the others. I note in that regard the observation of the 911 operator, who spoke with Mr. Patsiopolous while he was dealing with Ms. Kish, that Ms. Kish sounded "combative".

[136] Ms. Kish engaged in the second fight and, according to the three witnesses I have just mentioned, she delivered blows to Mr. Hammond. I am satisfied beyond a reasonable doubt that those blows were the stabs wounds to Mr. Hammond's chest. It was after those blows were delivered that Mr. Hammond managed to wrest the knife away from Ms. Kish and then struck out at her, stabbing her in the forearm. That latter conclusion follows from, among other things, the words out of Ms. Kish's own mouth when she was heard by more than one witness to say "he" stabbed me or words to that effect. It is also consistent with the comment that Ms. Kish made, while Mr. Patisopolous was on the phone with the 911 operator, regarding the identity of the person who stabbed her. In response to the inquiry whether it was the man who then had the knife, Ms. Kish said "yes and he is Canadian". Ms. Kish's reference to the citizenship of the man who stabbed her might strike one as odd until one realizes that all of Ms. Kish's friends, including Jeremy Wooley who was involved in the second fight with her, were Americans. In making this comment, Ms. Kish was obviously seeking to ensure that no one thought that **it** was one of her friends who had stabbed her.

[137] I would also note that, even if that conclusion is in error, the only other possible explanation for the wounds to Mr. Hammond is that Ms. Kish, having brought the knife to the second fight, then passed it to one of the males who were involved in the fight and that he then inflicted the stab wounds. In that scenario, Ms. Kish would have aided that act and be liable as a party to the offence.

[138] The defence contends that Ms. Kish was not the person who stabbed Mr. Hammond because, if she had been, she would not have hung around. I reject that contention for a number of reasons. First is that Ms. Kish was seriously injured and was much more concerned at the time with getting aid for her injury than she was in the optics of whether or not she should remain at the scene. Her actions as depicted on the CityTV video make plain her overriding concerns for her injury. Second is the reality that if Ms. Kish had fled the scene and gone to a hospital to have her injury treated, as she would have had to have done given the seriousness of the wound, the police would have very quickly been able to locate her. Third is the fact that if Ms. Kish did not stab Mr. Hammond, Mr. Wooley would be the next logical perpetrator of that act and he too remained at the scene.

[139] The defence also asserts that Ms. Kish is heard to say on the CityTV video that "he stabbed me for no reason" and that this statement in some fashion exonerates Ms. Kish. The statement does not, in fact, serve that objective. The statement is completely self-serving. No one would reasonably have expected Ms. Kish, after having stabbed Mr. Hammond, to have walked up to the authorities and have said "he stabbed me because I stabbed him first".

[140] Finally, I will comment on two suggestions that the defence made regarding the evidence of Faith Watts. First, it was suggested that her evidence should exonerate Ms. Kish because Ms. Watts said that Ms. Kish did not have a knife. As I have already indicated, I do not find Ms. \Vatts' evidence reliable and I do not accept it. Ms. Watts had every reason not to tell the truth about these events in which she played an active role and regarding which she pled guilty to certain offences before being deported to the United States. Ms. Watts also had every reason to want to protect Ms. Kish who was her friend and who, as she said in the course of her

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evidence, she still misses. In addition, Ms. Watts' recollection of the events is so erratic due to her consumption of alcohol and drugs that I would not safely rely on it other than for the very limited purposes that I have mentioned. Still further, it does not follow from the fact that Ms. Watts said that Ms. Kish did not own her own knife, that Ms. Kish did not take and use Ms. Watts' knife. In fact, that is what I have found that she did do. Whether she borrowed the knife earlier in the day or took it at the time that Mr. Hammond beat Mr. Fresh, I do not know. What I am satisfied of, for the reasons that I have given, is that Ms. Kish had the knife in both the first and second fights.

[141] Then in somewhat of a reversal of approach, the defence asserts that Ms. Watts was the female with the knife in the fights. On that point, I note that the defence called Ms. Watts as a witness. It was never put to Ms. Watts that she was that person and counsel was duty bound to put that assertion to her if they were subsequently going to make that suggestion to the court so that Ms. Watts could have the opportunity to respond to it. That assertion is also inconsistent with my conclusion that, given what happened to Mr. Fresh at the street car, it was Ms. Watts and not Ms. Kish who remained to help him a conclusion that follows from the pertinent fact that Mr. Fresh was Ms. Watts' boyfriend. It is also consistent with the fact that Mr. Fresh's blood was found on the sleeve of Ms. Watts' hooded sweatshirt. Finally, if Ms. Watts was the sole female in the second fight, then it again begs the question as to how Ms. Kish came to be stabbed.

[142] For all of these reasons, therefore, I am satisfied beyond a reasonable doubt that Nicole Kish stabbed Ross Hammond and thus caused his death, that she caused his death unlawfully and that, when she stabbed Ross Hammond, and notwithstanding the earlier insults and other events, Nicole Kish had the state of mind required to intentionally cause Ross Hammond bodily harm that she knew was likely to kill him and was reckless whether Ross Hammond died or not. Nicole Kish thereby committed second degree murder.

Released: March 1,2011



NORDHEIMER J.

CITATION: R. v. Kish, 2011 ONSC 1303 COURT FILE NO.:
SUPERIOR COURT OF JUSTICE

BETWEEN:

HER MAJESTY THE QUEEN

-and-NICOLEKISH

REASONS FOR DECISION

NORDHEIMER J.
RELEASED: March 1,2011

side of the street car. This is where Ms. Stopford and Mr. Paget were sitting. All three of these witnesses say that Mr. Hammond started beating on Mr. Fresh. Indeed, both Mr. Paget and Ms. Stopford say that Mr. Fresh was beaten by Mr. Hammond to the point that he ceased to fight back and may have become unconscious. At the same time, both of these witnesses saw two females in the vicinity of the fight. They were trying to stop Mr. Hammond from beating on Mr. Fresh. I am satisfied that these two females were Nicole Kish and Faith Watts.

[96] Ms. Stopford said that both females were pulling on Mr. Hammond and punching him although she also says that one of the females was more involved than the other. Mr. Paget says that only one of the females got involved in the fight. Ms. Stopford says that she saw the female, who was more involved in stopping the fight, with a knife. The knife was in her mouth with the blade sticking out. Ms. Stopford subsequently drew a sketch of the knife for the police. Her sketch includes a round circle that marks a distinguishing feature of the knife, that was subsequently recovered from the steps of the church, and which was, I have no doubt, the murder weapon. That knife has a distinctive circular feature at the hinge where the blade meets the handle. I am satisfied that the knife that Ms. Stopford saw in the mouth of the female is this same knife.

[97] It is at this juncture that I choose to address the defence submission that the knife that was recovered from the church steps could not be the murder weapon because the stab wounds to the chest are smooth in their contours. The knife has a serrated edge to it and therefore would, in the defence's submission, cause jagged or irregular wounds as appears on at least two wounds on Mr. Hammond's back.

[98] This submission is contrary to the expert evidence of Dr. Pollanen, the forensic pathologist, who said that a knife with a serrated edge may or may not cause a wound with an irregular shape. Dr. Pollanen was clear that while you might be able to exclude a smooth knife from causing an irregularly shaped wound, you cannot similarly exclude a serrated edged knife from causing a wound with smooth edges. The nature of a stab wound depends on too many things including the angle at which the knife enters the skin, whether it is twisted during the course of its path, and other factors. Dr. Pollanen was accepted as an expert by both sides. His is the only expert evidence that I have on the subject and I accept it. Even if I did not, it would