SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Adam Joseph Drake*, 2024 NSSC 431

Date: 20241025
Docket: CRH 519166
Registry: Halifax

Between:

His Majesty the King

v.

Adam Joseph Drake

Trial Decision

Judge:	The Honourable Justice D. Timothy Gabriel
Heard:	April 3-5, 8-12, 15-19, 22-23, 2024
Final Written (Closing) Submissions:	June 3, 2024
Oral Decision:	October 25, 2024
Written Release to Parties:	October 28, 2024
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Counsel:	Carla B. Ball, K.C. and Cory J. H. Roberts, for the Provincial Crown Stanley W. MacDonald, K.C. and Allan F. MacDonald for the Defence

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By the Court (Orally):

[1] Tyler Keizer was murdered on November 21, 2016. The Court watched him being gunned down, at close range, on video footage obtained by the Crown. This footage (Exhibit 3) had been captured by the exterior security camera of a nearby building. This will sometimes be referred to as the "Norex video" or the "parking lot video". The Crown says that the accused, Adam Joseph Drake, killed him. He has been charged with first degree murder pursuant to section 235 of the *Criminal Code* ("the Code" or "CC"), as a result.

[2] The Indictment says that Mr. Drake:

> … on or about November 21st, 2016, at, or near Halifax, in the County of Halifax, in the Province of Nova Scotia, did unlawfully cause the death of Tyler Keizer, and did thereby commit first degree murder, contrary to Section 235 of the *Criminal Code*.

[3] Because he is charged with first degree murder, the trial was originally to have been heard by judge and jury. On March 26, 2024, one week before the trial started, the parties agreed that the matter would proceed as a trial before me sitting as a judge alone, pursuant to s. 473.1(1) of the CC.

Theory of the Crown

[4] The Crown theorizes that the killing was "retribution" or "payback" for an aggravated assault that Mr. Keizer had committed, in concert with another inmate (Matthew Munroe) upon Donald Arsenault, when Mr. Keizer and the latter were both incarcerated in 2013.

[5] To explain that theory, evidence was led that Messrs. Arsenault and Drake are friends. They grew up together in Halifax, in the vicinity of Federal and Romans Avenues, two very proximate streets which comprise part of a public housing development in the west end of the City. This development has long been known, colloquially, as "the pubs". The Crown says that both men were affiliated, to some degree, with a group which will be identified (in a shorthand fashion) as the "Melvin group" or "the Melvins". With that said, Sergeant Wagg testified that Mr. Drake had no connection with the Melvins, to police knowledge.

[6] Mr. Keizer, as will be seen, is said to have been affiliated with another group, which will be similarly identified as the "Marriott group", or "the Marriotts". They are said to be a group which does not get along with the Melvins, and their antipathy sometimes expresses itself in violence.

[7] According to one Crown witness (Morgan Harrington) members of each group, while incarcerated, are generally kept apart from each other, because of

violence that can occur between them. The attack by Messrs. Keizer and Munroe upon Mr. Arsenault (they stabbed him) occurred in 2013, while they were still in reception at Springhill, and had not yet been separated institutionally.

[8] Ultimately, whether Messrs. Drake and Arsenault are (or are not) affiliated with either group, the Crown says, succinctly:

> Tyler Keizer got out of jail for the first time after the stabbing of Donald Arsenault in late August 2013 [sic-2016].
>
> On November 21, 2016, revenge was exacted; Adam Drake went to the location where he knew Tyler Keizer would be returning to meet his curfew and shot him point-blank.
>
> (*Crown Closing Submissions, paras 15 – 16*)

Recognition Evidence

[9] As will soon be apparent, what will be dealt with in this case involves "recognition evidence". As a consequence, I will comment briefly upon the nature of that type of evidence. We will see that Morgan Harrington says he identified the shooter, with whom he interacted that evening, to be Adam Drake, because he knows him well. In fact, Mr. Drake is someone that he has known since his youth, someone he knows so well (again, as we will see) that the latter took him out sea-dooing when he received his parole in August 2016.

[10] Our Court of Appeal, in *R. v. Downey*, 2018 NSCA 33, had occasion to explain the significance of recognition evidence:

> [69] … the importance of articulating identifiable features or idiosyncrasies will vary depending upon the level of familiarity the witness has with the person to be identified. <u>In some cases a witness may be sufficiently familiar with the person, so as to render the identification by the witness of any unique identifiable feature unnecessary, in order for a court to properly assign substantial value to that evidence</u>. Common sense and one's life experience reminds us that people have vastly different abilities when it comes to identifying or expressing the particular features of people they know and recognize, through their contact with one another. Where contact is fleeting, a person's recognition evidence may be of little value unless the witness can explain its basis in some detail. On the other hand, a simple conclusory recognition without additional elaboration of any points of distinctiveness, may still be highly probative in the case of a person who is closely familiar with the accused. See for example *R. v. Panghali*, [2010] B.C.J. No. 2729; *R. v. Benson*, 2015 ONCA 827; and *R. v. M.B.*, 2017 ONCA 653.
>
> [emphasis added]

[11] Morgan Harrington had the ability to identify Mr. Drake based upon his longstanding familiarity with the accused. The first issue, therefore, is: Am I satisfied, beyond a reasonable doubt, that Adam Drake was Tyler Keizer's killer on

the basis of the whole of the evidence, including Morgan Harrington's testimony? Second, if am satisfied beyond reasonable doubt that Adam Drake was Mr. Keizer's killer, does this act amount to first or second degree murder?

A. Crown Evidence

i) Morgan Harrington – who is he?

[12] It is clear from the video footage which the Court observed, both that captured at the scene of the murder, as well as that captured from the Salvation Army building nearby, that Morgan Harrington was an eyewitness to Mr. Keizer's death. He was right there, standing beside the shooter. He says the shooter was Adam Drake. He was the Crown's central witness. With that said, counsel for Mr. Drake has forcefully argued that Mr. Harrington is a career criminal, having committed a significant number of violent crimes, drug crimes, and others involving deceit and dishonesty.

[13] In fact, the Defence refers to Mr. Harrington as "the epitome of an unsavoury witness" (*Defence Closing Submissions, para 10*). The Crown does not take issue with this characterization, itself acknowledging that Mr. Harrington has a significant criminal past, and that he is "classically, a *Vetrovec* witness" (*Crown Closing Submissions, para 413*). I will return to this characterization later on.

[14] At the relevant time, Mr. Harrington lived at 3040 Joseph Howe Drive, also in West End Halifax, with his mother. His father had died in 2013. He explained on the stand that he was known by the nickname "Too Hot", for his quick temper. More precisely, he was "Too Hot Bang Bang". He went on to say that "Bang Bang" is just something that a rapper says. Most people simply called him "Too Hot".

[15] The Crown has concisely summarized Mr. Harrington's prior convictions in Nova Scotia, which had been outlined at more length in his Justice Enterprise Information Network ("JEIN") profile report (Exhibit 20):

OFFENCE DATE	CHARGE	MORGAN'S AGE	DETAILS	SENTENCE
September 19, 2009	430	14		Community service (34)
March 14, 2011	86(1), 92(1),	16	He was outside of Citadel High School, and shot at 3 maybe 4 people. He did target specific people and discharged the firearm, but no one was shot. There were "definitely" other people around. HE was by	Custody and supervision (153 days) Waterville Correctional Facility

			himself and under the influence of calzapam, diazopma, benzos.	
April 18, 2012	266	17	He was out for his shower, somebody was mouthing off to him, so he jumped on table and kicked them on face. This resulted in a "bruise on forehead for sure"	Custody and supervision (30 days)
June 7, 2012	94, 351(2), 344	17	He and his friend robbed a local convenience store of $80.00 and cigarettes. His co-accused had a firearm. Morgan was wearing a mask. No one was physically injured and the firearm was not discharged. While he was being driven away, the vehicle was pulled over and he was caught.	Custody and supervision (330 days) served at the Waterville Correctional Facility
Jan 20, 2014	95(1), 117.01	19	Was caught with a firearm on his person when he was on the run for warrants for an assault.	3 years, 9 months. Served first at provincial then Springhill in medium security, then Renous in maximum security.
February 23, 2019	266	24	He assaulted his domestic partner, Chaisette Husbands. They got in a fight, and she ended up with bruises or scrapes probably to her face.	Suspended sentence, Probation 18 months

(Crown Closing Submissions, para 414)

[16] In addition to the substantive offences noted above, Mr. Harrington was convicted of breaches of youth sentence orders, which were also outlined in Exhibit 20. His record is not in dispute.

[17] It is also not in dispute that he was charged with some other criminal offences, for which he did not end up being prosecuted. This was because of his decision to testify against Mr. Drake in these proceedings. These "unprosecuted offences" follow:

ALLEGATION DATE	CHARGE	DESCRIPTION	OUTCOME	EXHIBIT
May 18, 2018 in Saint-Anicet, PQ and, **August 24, 2018 in St. Anicet, PQ**	Section 216(1)(a) of the Excise Act	Possession of tobacco products not stamped in accordance with the Excise Act	Immunity dated February 2019	21
December 21, 2018 in Halifax, Nova Scotia	5(2) CDSA x 3	Count 1: Cocaine, Count 2: N-methyl-3, 4-methylenedioxy-amphetamine (N, g-dimethyl-1, 3-benzodioxole-5-ethanamine), (Ecstasy) Count 3: Fentanyl (N-(1-phenethyl-4-piperidyl) propionanilide), and Diacetylmorphine (Heroine)	Immunity dated February 2020	22
March 28, 2019, **New Brunswick**	s. 268 CCC 145 CCC	Aggravated assault Fail to appear	Stay of Proceedings March 28, 2019	

(Crown Closing Submissions, para 416)

[18] The Crown has pointed out that, on several occasions, both on direct and cross examination, Mr. Harrington has acknowledged, without hesitation or minimization, his criminal record. Moreover, counsel submits that he did not attempt to downplay or mitigate his role in the crimes which constitute it (see, for example, *Crown Closing Submissions, paras 417-422*). This appears to be correct, as far as it goes. However, details of most of these offences were already in the possession of the parties, anyway.

[19] I will not exhaustively survey these offences, nor all of the details with respect to those crimes which were referenced during the trial. But a few are illustrative.

[20] In one example, the Court was able to observe firsthand the type of violent criminal activity in which Mr. Harrington was (apparently) willing to engage. Exhibit 39 consisted of institutional video footage of a severe beating inflicted upon one inmate by no less than five others (including Mr. Harrington). This occurred while they all were incarcerated at the Atlantic Institution in Renous, New Brunswick ("Renous" which is a federal penitentiary), in March 2016.

[21] Mr. Harrington was an active participant in the vicious assault of the victim. This beating included such brutal acts as stomping on the victim's head after he was lying on the floor apparently unconscious, and a stab in the back administered (almost gratuitously) also while he lay prone and unconscious upon the floor.

[22] Mr. Harrington was charged with aggravated assault in the aftermath. These charges were among those stayed by the New Brunswick Crown (and to which earlier reference has been made) after he provided police with a KGB statement in January 2019 identifying Mr. Drake as the killer of Tyler Keizer.

[23] Mr. Harrington acknowledged that, on an earlier occasion, also while incarcerated, he had donned a pair of heavy work boots, and then proceeded to repeatedly kick and stomp another inmate in the head. It appeared to the officers at Witness Protection Services, to whom he had earlier recounted this episode, that he was enthusiastically reliving this memory as he described it to them. He added that there was so much swelling to the sides of the victim's head that it looked like he had "grown horns".

[24] On another occasion, he acknowledged that he had participated in a gunpoint robbery of three people at a convenience store, and that, on another, had actually discharged a firearm at three to four people outside Citadel High School, while other students were in the immediate area. Fortunately, no one was hurt on that occasion.

[25] Mr. Harrington agreed (in cross-examination) that, with respect to two of the relationships in which he had been involved as an adult (with KM and CH) he had prostituted each of them. The revelation with respect to the latter (with whom he had been involved around the time he came forward and provided the KGB statement with respect to Mr. Drake) came on cross-examination. It also came after he had attempted (on direct) to explain his reasons for deciding to come forward and give the statement. One of the reasons that he initially provided was to the effect that he was in a "stable relationship". He added that he had "good people in his life at that time" – people who had influenced him positively. While doing so, he appeared to be portraying his provision of the KGB statement as an attempt to put his criminal lifestyle behind him, because of that positive influence.

[26] Ironically, a very short time before he provided the KGB statement, he was caught in a "drug bust", peddling some very serious drugs (including cocaine and

heroin). This spawned another spate of criminal charges that "went away" after Mr. Harrington provided his statement.

[27] Mr. Harrington also acknowledged that he had signed various court orders in the past, promising to abide by conditions, and then subsequently breached them. While agreeing that this could be characterized as lying to the Court, probation services and police, he explained that he had had no intention to breach when he entered into these orders, and did attempt to follow them for "a little bit".

[28] With all of that said, Mr. Harrington also admitted that he has engaged in other acts of physical violence and gun violence, dishonesty, and abuse, for which he had not been caught, and of which the Court would have been otherwise unaware.

ii) Specifics of Mr. Harrington's Testimony

[29] Mr. Harrington testified that he considered Tyler Keizer to be a "brother". He had known him since 2011, where they became acquainted while incarcerated as youths at Waterville, Nova Scotia. They subsequently did a lot of time together, when in custody on other matters, including the federal penitentiary at Renous. They also fraternized when not incarcerated. Mr. Keizer's girlfriend (in 2016), Catherine Tranchita (when she testified) confirmed that she knew them to be close friends.

[30] Mr. Harrington spoke of the relations between the Marriotts and the Melvins, who, to repeat, were two local groups whose members were frequently in conflict with one another. He referred to both "associates" and "actual" members. His understanding was that the former were not closely tied to either side but became associated with one over the other depending on the people with whom they hung out. Since the people with whom he hung out daily were associated (in one manner or another) with the Marriott side, he too became affiliated with them essentially "by default."

[31] Mr. Harrington said that correctional facilities will generally separate those identifying with one of the two groups, given the history of conflict between them. Only in reception are the two groups housed together, since that is the place where the authorities sort out where individuals will be sent (on a more permanent basis). One of the ways they do that depends upon which people they are "good" with.

[32] When institutionalized, Mr. Harrington said he was a member of a group known by the acronym "RNS". They, in turn, he understood to be affiliated with the Marriott group, at least for the most part. Although there was eventually a falling out, he remained a member of the RNS from January 2014 until 2019.

[33] When he was not institutionalized, he testified that he was a part of the

"YKF", or "Young Kartel Family", which operated out of Uniacke Square in Halifax. He was thus affiliated from 2010 – 2018. This group, too, to his understanding, had been associated with the Marriotts well before he became involved with them.

[34] When in jail, he said there are times when "you" get orders. On occasion, a person might receive orders from "higher ups" in a given group. In such a case, that person would be told what to do, and he was expected to do it. If he did not, in Mr. Harrington's experience, the person who refused was in danger of being targeted for violence himself.

[35] Mr. Harrington went on to testify that he had known Donald Arsenault since 2010. He was aware that Mr. Arsenault had grown up in the "pubs", and that his mother still lived in the area. Even though they were acquaintances rather than friends, and had hung out on no more than two or three occasions over the years, if they encountered each other, they spoke and said "Hi". This was notwithstanding the fact that Mr. Arsenault (at least according to Mr. Harrington) had ties to the Melvin group.

[36] Mr. Harrington testified that he had first learned of the 2013 attack on Mr. Arsenault from gossip around the jail, but when he arrived at Renous in 2015, he heard about it directly from Mr. Keizer while the two men were housed in close proximity for a relatively short period of time in that institution. It was at that time that Mr. Keizer told him about it. This conversation, predictably, was the subject of an earlier *voir dire*, and it was ruled admissible because (succinctly stated) it may have some probative value with respect to motive, and as to the victim's state of mind.

[37] Specifically, while at Renous, Mr. Keizer told Mr. Harrington that, in 2013, he and another individual, Mr. Munroe, who was an actual Marriott associate, were being housed together in reception at Springhill. The order was given by a "higher up" in the hierarchy (to Mr. Keizer's roommate) to jump Mr. Arsenault in retaliation for something the latter had done previously. Given Mr. Keizer's association with the Marriott group, he said that he felt obliged to assist, under threat of himself becoming the recipient of future violence. Mr. Arsenault was stabbed and injured when the two men jumped him.

[38] Exhibit 70, which is Tyler Keizer's certificate of conviction, confirms that he was convicted pursuant to s. 266(a), namely assault on Donald Arsenault and that the date of offence was July 18, 2013. The two accused noted on the attached information are "Matthew Robert Dillon Munroe" and "Tyler Ronald Keizer". Mr. Keizer was sentenced in March, 2016 to 12 months custody, consecutive to the sentence he was (then) currently serving.

[39] Toward the end of the time that they were serving in Renous, Messrs.

Harrington and Keizer had opportunity to speak again. According to Mr. Harrington, Mr. Keizer told him that, when released, he was going to try and change his life and do better. Specifically, he did not want to go back to jail, nor did he want to be targeted for something done in the past. Aware that Mr. Harrington was a comparatively rare individual who had friends (or at least acquaintances) in both Marriott and Melvin groups, including Adam Drake, Mr. Keizer asked him to see if he could determine whether Mr. Keizer was in line to receive some "payback" for his involvement in what had happened to Donald Arsenault. Mr. Harrington agreed to do this because (to repeat) he felt that Mr. Keizer was his "brother".

[40] Mr. Harrington received his statutory release in mid August 2016. Mr. Keizer received his approximately two weeks later, on August 31, 2016. Just before this latter date, Mr. Harrington testified that he attempted to discharge the task with which he had been entrusted. First, he spoke to Mr. Drake. After that conversation, he spoke to Mr. Arsenault.

[41] Mr. Harrington's opportunity to speak to the former presented itself on August 27, 2016, when Mr. Drake invited him to go "sea- dooing" in Halifax Harbour. He had just been released, and he interpreted this gesture as "Mr. Drake doing something nice" for him in consequence. Mr. Harrington said he knew the accused better than he knew Mr. Arsenault, but he knew that Messrs. Drake and Arsenault were very close friends. Therefore, he decided to take the opportunity to raise the issue with Mr. Drake first, rather than going to the latter right away.

[42] Two other men participated with him and Mr. Drake in the recreation. After spending about an hour sea-dooing, just before getting into the car to leave, Mr. Harrington said he raised (with Mr. Drake) Mr. Keizer's concerns about retaliation. This was communicated privately to the accused, out of earshot of the others. He said that he wanted Mr. Drake to speak to his friend, Mr. Arsenault. Mr. Drake refused, adding that it had nothing to do with him. Rather, he said, it concerned Donald Arsenault, and therefore Mr. Harrington would have to speak to him if he wanted to know where things stood.

[43] Throughout Mr. Harrington's narrative, I will pivot at times to consider what he has said, and compare it with some of the other evidence, independent of his testimony. The reason for this will become clearer further along in these reasons.

[44] So, to start, Exhibit 25 consists of the records from the business which had leased the sea-doos to both the accused and Mr. Harrington. Both signed rental agreements dated August 27, 2016.

[45] Next, Jennifer Austin provided a report dated May 4, 2021 (Exhibit 55). This was augmented by her *viva voce* testimony. The document was a Correctional Services Canada (CSC) "Electronic Monitoring Report" and it captured Mr.

Harrington's movements, as he was required to wear a monitoring bracelet after his release. He wore it from August 17, 2016 to November 15, 2016, while on parole.

[46] Ms. Austin testified that Mr. Harrington's bracelet had not been tampered with. Moreover, it would not be affected by proximity to water. GPS coordinates from his device depict that it was travelling over water between 4:29 p.m. and 5:19 p.m., and then from 6:09 p.m. to 6:22 p.m., on August 27, 2016.

[47] Moreover, Mr. Drake, through counsel, admitted that he and Mr. Harrington were sea-dooing at that time.

[48] Picking up the narrative again, shortly after meeting with Mr. Drake, Mr. Harrington testified that he met with Donald Arsenault on Federal Avenue. He did not tell Mr. Arsenault, in advance, the purpose of the meeting. The two spoke "on the sidewalk" outside of his (Arsenault's) mother's house, to Mr. Harrington's recollection. He said also that the conversation lasted for about five to ten minutes.

[49] It began with Mr. Arsenault asking Mr. Harrington how he was doing, and asking if he "needed anything". Mr. Harrington then revealed the purpose of his visit, saying, in effect, that Tyler Keizer was now out of custody, was sorry for what he had done, that he had been simply following orders, that he had had no choice in the matter, and that he wanted to change his life and go straight.

[50] He testified that Mr. Arsenault told him that he was not going to go looking for Mr. Keizer to retaliate. However, he added that, if he saw him again, he was not exactly prepared to "shake his hand" either. Mr. Arsenault then drove Mr. Harrington to his mother's house.

[51] The gist of their discussion was later communicated by Mr. Harrington to his friend. They were both staying at the same halfway house by this time. He testified that both he and Mr. Keizer felt very reassured by what Messrs. Arsenault and Drake had said.

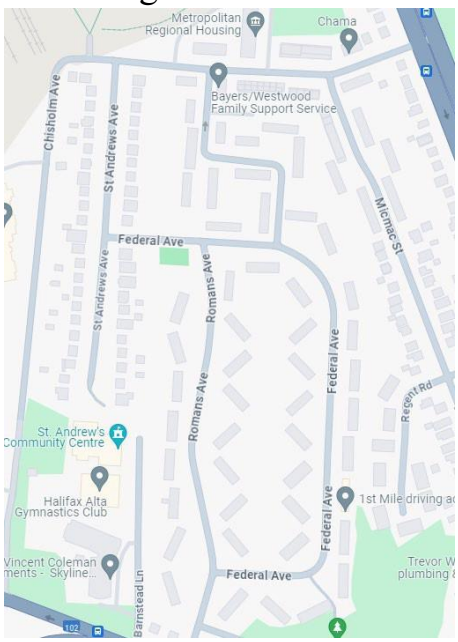
[52] Some of this part of Mr. Harrington's testimony is supported by other evidence. For example, given the nature of his curfew, Mr. Harrington had to be back to his halfway house by 11:00 p.m., in the evening, on the day that he and Mr. Arsenault met. From Exhibit 55 (and Ms. Austin's testimony) it is apparent that there is one day upon which the GPS coordinates from the ankle bracelet depict a trek by Mr. Harrington to Federal Avenue, then from there to Joseph Howe Drive (his mother's house) and then from there to the halfway house on the same day.

[53] This occurred on September 8, 2024. A 32-minute visit in the area of 3305 – 3307 Federal Avenue took place between 6:18 p.m. and 6: 50 p.m. that day. This was followed by a visit at 6:56 p.m. at Joseph Howe Drive for 1.5 hours. After that, Mr. Harrington arrived at the halfway house at 7:50 p.m.

[54] Chelsea Nordin (Mr. Arsenault's partner) testified that, contrary to what Morgan Harrington has said, Mr. Arsenault's mother lived on Romans (not Federal) Avenue, in Halifax. Indeed, Mr. Arsenault's Telus records (Exhibit 41) list his mother as a contact at 3344 Romans Avenue.

[55] Notwithstanding this, and, given the proximity of Federal and Romans Avenues in the "pubs", I viewed this evidence as (overall) corroborative of Mr. Harrington's testimony that he met with Mr. Arsenault at that time.

[56] In fact, the Crown provided the Court with a copy of a "Google Map" of the area. Page 100 of the Crown's closing submissions is thus reproduced below:



[57] Counsel has not taken issue with the manner in which the proximity of these streets is depicted.

[58] The houses on Federal and Romans Avenues, in most instances, are so close that they literally "share" backyards. I agree with the Crown that, while Mr. Harrington was in error when he said Mr. Arsenault's mother lived on Federal Avenue (instead of Romans) it was an understandable one.

[59] The parties have agreed (Exhibit 37) that in late 2016 Messrs. Drake and Arsenault were co-owners (or co-proprietors) of "Coastal Cannapy", which was an establishment where people could purchase marijuana. It was located on Agricola Street in Halifax.

[60] Mr. Harrington testified that he visited the shop on one or two occasions (he could not be sure) to pick up marijuana. In his testimony he said he went in September 2016, but his phone records indicate two visits, one on October 23, 2016, and another on November 1, 2016. These records depict him connecting to the Wi-Fi at the establishment, and are found in Exhibit 49. They are reproduced below:

#	Type	Direction	Attachments	Locations	Timestamp	Party	Description	Deleted
1916	Wireless Networks				10/23/2016 11:55:42 AM(UTC-3) [Last Connected]		SSId: Coastal Cannapy BSSId: 14:CF:E2:A0:6A:D0	
2320	Wireless Networks				11/1/2016 10:40:26 PM(UTC-3) [Last Auto Connected]		SSId: Coastal Cannapy BSSId: 14:CF:E2:A0:6A:D0	

[61] In the visit that he recalled, Mr. Harrington testified that he was there for about 15 minutes, and logged onto the Wi-Fi on the premises. Only Mr. Drake was there, with the exception of another individual ("Buzzy"), who came in briefly but left. The two went to a back office and the accused "fronted" Mr. Harrington about $500 worth of marijuana to sell on the street. Mr. Harrington needed money at the time, and the quantity of drugs with which he was provided was expected to yield a profit of approximately $500. The arrangement was that, out of the total proceeds of approximately $1,000, he would repay Mr. Drake the $500, and keep the remainder.

[62] Some of the $500 that was owed to the accused was repaid (Mr. Harrington testified). This amounted to about $200 - $300 worth. Mr. Drake had provided him with the names of two associates and instructed him to provide the money to one or the other of them. He (Mr. Drake) was out of the Province at the time that Mr. Harrington was able to make this partial payment, hence the need to give the money to someone else.

[63] Telus records with respect to Mr. Drake confirm that his phone was in Québec from November 8 to November 15, 2016 *(Exhibit 49, SMS details, Rows 2 – 1703)*. This indebtedness has further significance to Mr. Harrington's narrative, which will be explained later.

iii) What Morgan Harrington says happened on November 21, 2016

[64] At the time, KM was Mr. Harrington's girlfriend. He said he spent at least three hours in the evening of November 21, 2016 hanging out with her. His curfew was 11:00 p.m. that night. He was required to be back at the Carlton Centre Annex, his halfway house, which is located in the Salvation Army building on Gottingen Street ("Carlton Annex" or "halfway house") by then.

[65] Shortly after 10:00 p.m. that evening, he testified that he called Casino Taxi. He used a fictitious name to do so: "Patrick" – his middle name. It took him from KM's house, in West End Halifax, to Creighton Street. On the way, he had the cab stop at his mother's home so that he could drop off the scale with which he measures drugs. He allowed that his phone might have connected to the Wi-Fi at

his mother's house while he was there.

[66] He got out of the cab on Creighton Street. This is a block or two down from where he needed to report, at the Carlton Annex. Mr. Harrington testified that he had begun doing this out of an abundance of caution. He explained that a person known to him had been the victim of violence in front of the halfway house a couple of months earlier. As a consequence, his practice was to approach the Annex on foot, which enabled him to see if there was anything dangerous going on in the environs. This was preferable to stepping out of the cab right into the middle of what (if anything) was occurring at the location.

[67] He sketched his "walking route" (after having exited the cab) on a map entered as Exhibit 26. It took him down Creighton Street, and then east on Falkland Street to where it intersected with Gottingen Street. Then he went northeast on Gottingen for a very short distance until he arrived at the halfway house.

[68] At this juncture, it is appropriate to pause (again) and examine the extrinsic evidence which backs up some parts of this portion of his evidence. First, Casino Taxi records (Exhibit 38) for that night establish that a request for a cab was made from Mr. Harrington's cell phone requesting a pickup call at KM's address. It identified the customer as "Patrick" and revealed that the destination was 2098 Creighton Street, Halifax, Nova Scotia. This may be cross referenced with Mr. Harrington's cell phone records (Exhibit 60, p. 14). They confirm an outgoing call to (902) 425 – 6666 at 22:12:18 that evening. The same records confirm (at row 4588) that he connected to "Julia Wi-Fi" at 22:31:11. "Julia" is his mother's name.

[69] Additionally, on the Norex (parking lot) video, which was entered as Exhibit 3, a figure identified both by Mr. Harrington (and other witnesses) as himself can clearly be seen walking east on Falkland Street approaching the point where it intersects with Gottingen. The Crown says that this occurred at "22:39:35 (Norex video time)" (*Crown Closing Submissions, para 491*).

[70] There is a reason for that parenthetical qualification with respect to Exhibit 3. The parties have agreed that the time depicted on the Norex video is three minutes and 43 seconds slower than that depicted on the security camera fixed to the exterior of the Salvation Army building, where the Carlton Annex is located. This discrepancy will also figure into the narrative below.

[71] Returning to his testimony, Mr. Harrington said he arrived in front of the Salvation Army building on November 21, 2016 at approximately 22:40 hours. He was outside the building, speaking on his cell phone with KM. It was at this time that he noticed Mr. Drake in the environs. To Mr. Harrington's knowledge, the latter had never been at the location before.

[72] He described Mr. Drake as wearing a lighter grey hoodie, with the hood drawn up, and "woolly" gloves. He said Mr. Drake's being there did not make any sense to him. He initially attributed it to the fact that he still owed Mr. Drake some money from the cannabis that had been fronted to him earlier. Even that did not make much sense, because he knew Mr. Drake to be someone with a lucrative cannabis business. Therefore, the remaining $200 – $300 would have been too insignificant for Mr. Drake to bother to personally make a journey to the halfway house to collect. He testified that he did not figure out the "real" reason for Mr. Drake's presence there until moments before Mr. Keizer was shot.

[73] Mr. Harrington testified that, while he was still on the phone, Mr. Drake approached him and said, "what's up" and (unusually) greeted him with a fist bump. He testified that their ordinary greeting involved a "slap five" plus "pull each other in with half hug". He thought it felt "off", or wrong.

[74] This exchange with the individual that Mr. Harrington says is Mr. Drake appears on Exhibit 8, portion SA2 – 6. It was captured by the camera in the front of the Salvation Army building, facing West, at 10:44:58 p.m.

[75] While still on the phone, Mr. Harrington became aware of the fact that Rocky Syliboy, whom he described as "one of the homeless people in front of the Salvation Army", and to whom he had sold some crack in the past, started "mouthing off" at Mr. Drake. Apparently Mr. Syliboy took issue with the way Mr. Drake had his hood drawn up because he said aggressively "who does he think he is coming around here acting all tough with his hood up" and using similar phrases.

[76] Mr. Harrington could see that this conduct was angering the accused, and he told Mr. Syliboy (while still conversing with KM) to "shut the fuck up", in an attempt to diffuse the situation. Mr. Drake was on the sidewalk and Mr. Syliboy had originally been sitting on a wall proximate to the building, but had gotten up while the exchange ensued.

[77] Once again, the narrative will "pause" as the issue of whether there is corroborating evidence (apart from Mr. Harrington's testimony) exists for this installment of his testimony, is considered.

[78] The Crown argues that the video surveillance captured from the Salvation Army camera at Exhibit 8 corroborates Morgan Harrington's testimony showing the time at which the events captured took place, the fist bump, that the person alleged to be Mr. Drake was wearing a hoodie with the hood up, Rocky Syliboy's intervention, the latter's location, that his body language is corroborative of the fact that he was having some type of argument with Mr. Drake, that Mr. Harrington was on the phone while all this was occurring, and that his body language was consistent with somebody trying to steer Messrs. Drake and Syliboy

apart from one another. The Crown also argues that the shooter, when walking towards the camera, appears to be white, which the Crown notes, is consistent with Mr. Harrington's physical description of Mr. Drake's race (*Crown Closing Submissions, para 510*).

[79] Mr. Harrington testified that he had seen the Norex video (Exhibit 3) during his interrogation by the police during the early morning hours of November 22, 2016, but had never viewed the footage in Exhibit 8 until he was shown it while in the witness box, after he testified as to what had happened. Counsel for Mr. Drake has taken issue with this assertion in the following terms:

> ... Mr. Harrington lied about this fact. The degree to which Mr. Harrington relied on video footage for his memory of events is further evidenced by his description of the shooter as wearing a lighter grey hoodie. Clearly this is not correct. However, the Norex video depicted the shooter in a grey hoodie. At the very least, Mr. Harrington's evidence is intermingled with what he saw on video footage, which cast significant doubt on the alleged corroborative value of the evidence. (Defence Reply Submissions, June 3, 2024, para 31)

[80] It is certainly the case that Mr. Harrington described the shooter as wearing a grey hoodie. It is also the case that the footage at Exhibit 8, captured from the Salvation Army camera, shows the shooter in a black (or dark) hoodie (with an exception which I will discuss below). It is also clear that the virtually contemporaneous footage at Exhibit 3 from the Norex parking lot appears to depict the shooter in a grey hoodie.

[81] This latter footage appears to have been in a "black and white" format and was also subject to a similar observation by another witness, Peter Schnare, who testified that he arrived upon the scene minutes after the shooting and attempted to render assistance. He remarked upon the manner in which dark clothing that he and other people (that he had observed in the area) were wearing, and that such clothing appears as though it were grey, as captured on the footage. He speculated that an "infrared distortion" might have caused this effect. While this may or may not be so, the significance of it lies more in the fact that the shooter is not the only person whose clothing colour appears to be "off" in Exhibit 3 that evening .

[82] For the time being, it will be sufficient to observe that Mr. Harrington's recollection of the shooter as being dressed in grey could be consistent with his having seen the Norex video (where dark clothing appears grey) but not the Salvation Army video (Exhibit 8). But, having said that, it could also be consistent with his memory of what occurred that evening having been influenced, to some degree, by the content of the Norex video.

[83] Another point of corroboration is provided by Ms. Tranchita's evidence. She was in the vehicle with Mr. Keizer when the latter was shot, and she also described the shooter as white. The Defence contrasts this with the testimony of Rocky

Syliboy, which was at odds with Ms. Tranchita's evidence. Mr. Syliboy's evidence on this, and other points, will be more closely examined when I comment more extensively about the Defence evidence.

[84] In sum, all parties are agreed as to which individual (depicted in both Exhibit 8 and Exhibit 3) is the shooter. They (obviously) do not agree upon the identity of the shooter.

[85] It is clear, however, having reference to both Exhibits 3 and 8, what happened next. The shooter walks closer to the west facing camera outside of the entrance to the Salvation Army building. At 10:45:27 he is captured, on the footage (Exhibit 8) from the neck down. Ironically, this is one of the few "stills" from Exhibit 8 which, due to the momentary lighting at the time, makes the hoodie worn appear to be light grey. It is reproduced below:

[86] Mr. Harrington's testimony was that, after getting this close to the Salvation Army entrance, Mr. Drake turned around and walked back in the direction of the Norex parking lot (upper left direction of above photograph), which is on the corner of Gottingen and Falkland Streets. The witness said that, while in the process of finishing his phone conversation with KM, he decided to follow Mr. Drake to see what was going on.

[87] Allowing for the earlier noted time discrepancy between the two videos, the shooter arrives at the Norex parking lot (Exhibit 3) contemporaneously with his "disappearance" from the Salvation Army video (Exhibit 8). Briefly, he is alone. As Mr. Harrington testified, and as can be seen from Exhibit 3, the shooter, looking back down Gottingen Street, sees him and waves for him to come over. Mr. Harrington testified that Mr. Drake simultaneously said, "Too Hot, come holler at me." So he joined Mr. Drake.

[88] Mr. Harrington testified he was not entirely at ease in doing so, even though he was comfortable with Mr. Drake "to a point". If he did not go, he explained, it might be interpreted as him "having a problem" with Mr. Drake, or portray a lack of trust, or simply make him look like a coward.

[89] When Mr. Harrington arrived at the parking lot with the shooter, the two

were briefly alone. There were no vehicles in the lot. Mr. Harrington said that Mr. Drake asked him about what was going on with the money that he owed him, the former reminded him that he had paid some of it while Mr. Drake was away. He said the two then made a bit of small talk, for a few moments.

[90] Then, southbound on Gottingen, he saw Tyler Keizer driving a black Dodge Durango toward them. He knew it to be Mr. Keizer's vehicle because he saw Mr. Keizer through the driver's side window. Moreover, he had actually been in that vehicle with Mr. Keizer just the weekend before. Mr. Keizer was accompanied by his girlfriend, Catherine Tranchita. He was, apparently, intending to park it in the Norex lot, and to walk the short distance from the parking lot to the halfway house in accordance with his 11:00 p.m. curfew. Mr. Keizer duly drove the vehicle into the lot.

[91] As soon as he saw Mr. Keizer's face, Mr. Harrington testified that he realized what was actually going on. Mr. Drake was "not here for me", rather, it was about Mr. Keizer. Mr. Harrington said he had just enough time to say "Adam you don't have to do this. Don't do this" or words to that effect. But the accused did not listen. Without saying anything, he simply pulled something out from under his hoodie and began firing. Mr. Harrington said that he heard about four shots, but he ran after the first one. He testified that he did not see the gun.

[92] The Crown, it its closing submissions, has included the "still" taken from Exhibit 3 which shows the Norex parking lot, at 22:42:52 (22:46:35 in Exhibit 8) on November 21, 2016. It is reproduced:

[93] The two figures in the upper right of the photograph represent the person conceded to be the shooter, and Mr. Harrington, respectively, at the moment the first shot was fired. These two individuals are depicted in an enlarged portion of that "still", by the Crown in paragraph 531:

[94] Mr. Harrington can next be seen as he starts to move away (to the right) down Gottingen Street, in the direction of the halfway house.

iv) Further discussion of what happened immediately before and after the shooting

[95] The Crown and Defence put different complexions upon Mr. Harrington's actions immediately before, and in the immediate aftermath of the shooting. For example, the Defence argues:

> 25. It is submitted that it is no coincidence that after Mr. Harrington arrived [before the shooting] at the halfway house, the shooter arrived just one minute and six seconds later. The shooter positioned himself in the area where the vehicle would normally arrive. This occurred just two minutes before Mr. Keizer arrived. Upon Mr. Keizer's arrival, the shooter opened fire on the driver of the vehicle, with hardly a look at who was driving. The evidence shows that Mr. Keizer was wearing a baseball cap at the time of the shooting, undoubtedly making him less recognizable. It is obvious that the shooter knew that Mr. Keizer would be driving the vehicle upon his arrival.
>
> 26. The evidence of Catherine Tranchida and Mr. Harrington himself was that he would normally greet Mr. Keizer on his arrival. He did not do so on the night of November 21, 2016. Further, despite testifying that he knew that the shooter was going to open fire on Mr. Keizer, Mr. Harrington did absolutely nothing to stop the shooter or warn Mr. Keizer.
>
> 27. Shockingly, after Mr. Keizer was shot, Mr. Harrington did not go anywhere near the vehicle. Mr. Harrington described Mr. Keizer in his testimony as his "brother". Yet, he did not even go to the vehicle to see if he was okay. Nor did he check on Ms. Tranchida. Instead, he walked to the front of the Salvation Army

building, still smoking the cigarette that he held at the time of the shooting. He had his telephone in his hand. However, he did not call 9-1-1. Mr. Harrington testified that, at that point, he was having an "out of body experience". Frankly, that is a lie. That lie is exposed by the fact that, at the very least, Mr. Harrington "gave" $800 worth of crack cocaine to a person who was hanging out in front of the Salvation Army. The more reasonable inference is that he sold those drugs to that person, as evidenced by his hand motions on the video. The video reveals that there was an exchange between Mr. Harrington and the other person which, undoubtedly, involved the payment of money. All of this occurred within 30 seconds of Mr. Harrington's "brother" getting shot.

[emphasis added]

28. Mr. Harrington then waved people away from the front of the building. All of these people were those who would have seen the shooter. In other words, the witnesses who could provide evidence as to the identity of the shooter. When confronted with this evidence at trial, Mr. Harrington acknowledged that it was possible that he was waving witnesses away.

(*Defence Closing Submissions*)

[96] For its part, the Crown argues:

[535] Catherine Tranchida corroborates his [Mr. Harrington's] evidence. Under

cross examination, which was clarified in re-direct examination, Morgan was asked whether he knew Keizer was coming and whether he knew him to be coming in a black dodge Durango. Morgan said yes to both answers and he knew that Keizer was driving the Durango because Keizer told him he was excited about that vehicle, which is exactly what Ms. Tranchida testified.

[536] Third, the phone records corroborate Morgan. When Morgan Harrington rounds the corner on the Norex Video at timestamp 22:42:26 (10:46:09pm on Salvation Army), Harrington can still be seen with his arm/hand up to the side of his head as if holding a phone. Morgan Harrington can be seen lowering his arm down and then placing something in his pocket just before timestamp 22:42:36 which is 10:46:19pm on the Salvation Army clock. As already explained above, Harrington finishes his call with [K.M.] (the Queen) at 22:46:16 according to the Information in the Telus records for his phone.

…

[538] The shooting, according to Morgan, was "unreal". He was "scared" and had an "out of body experience", which is why he did not call for help.

[539] He returned to the front of the Salvation Army after the shooting and gave his drugs, crack cocaine, that he had to a friend, Scottie; one of the homeless people. Then he went upstairs.

…

[545] Indeed, at 10:47:04, Morgan passed something to a male person who dropped it and then picked it up, but it is not obvious from the video that it occurred nor what was said. Morgan did not have to indicate that this occurred, nor that it was crack cocaine. He did, however, because he was being honest and doing his very best to recall the details of the evening which, according to him, the questions during the preparations and the court process facilitated. This is logical.

[emphasis in original]

(*Crown Closing Submissions)*

[97] After leaving the scene, Mr. Harrington can be seen in the still above

walking towards the front of the Salvation Army. The palms of his hands are seen to be resting on his head. Mr. Harrington also said that, because he was present when the shooting had occurred, he was aware that his parole would be revoked, and he would be going back to jail. In his experience, that was the way it worked. And that is indeed what happened.

[98] Robyn Gay, the manager of the halfway house, was working with Corrections Services Canada ("CSC") at the time, and was called back into work that evening after the shooting. She reviewed the footage in Exhibit 8. Her evidence was that, since Mr. Harrington was on parole at the time, and had been at the scene where a person had been shot, the possibility of his involvement in the incident had to be investigated. CSC has 30 days within which to investigate. Consequently, she issued the warrant.

v) The arrest on November 22, 2016 and the later KGB statement

[99] Mr. Harrington testified that he was arrested after midnight, in the early morning hours of November 22, 2016. At the time of his arrest, he was not wearing the clothes that he had worn when Mr. Keizer was shot. His recollection was that he was just getting into the shower when the warrant was executed.

[100] Constable Justin Murphy confirmed that this was the case and testified that Mr. Harrington was arrested at 1:05 AM on November 22, 2016. He said that the latter was clad in a dark blue shirt, white shorts, and flip-flops, and was exiting the communal bathroom on the fifth floor of the Salvation Army building (the halfway house). The items that he had been wearing at the relevant time, per Constable Beer's evidence, were seized from room 507 (Mr. Harrington's room in the halfway house). From the photographs thus obtained, the pants were found hanging on a hook on the inside of his door, and the grey hoodie was found hanging from a small closet in the room.

[101] Before his arrest however, Mr. Harrington testified that he had received somewhere in the vicinity of 4-5 texts messages from Mr. Drake, who had been identified on his cell phone as "AD". These began about an hour after the shooting. Mr. Harrington said "AD" was Adam Drake, and the latter began by texting that he heard something happened down around there and wanted to know what it was. Mr. Harrington responded in words which (when shorn of the jargon in which the reply was couched "cuz got slumped") indicated that Mr. Keizer had been killed. Mr. Drake then said some other things, including "told you be careful smoking out there creepin' around".

[102] Mr. Harrington's evidence was that he had never had such a conversation with Mr. Drake, prior to the shooting. However, he felt that he had to, in effect, play along with the conversation because he was worried that he would experience

retaliation himself if he did not.

[103] After testifying thus, he was directed to the relevant portion of Exhibit 50, (page 21, lines 308 to 310) which was, specifically, a portion of some text messages which had been recovered by the police from the phone that he had used that evening. The Crown says, "He had not seen them or known they existed prior to his testimony at this trial" (*Crown Closing Submissions, para 547*). Mr. Harrington agreed that these were the text communications that he had had with Mr. Drake after the shooting.

[104] Constable Bromley testified that, on occasion, communications deleted from a cell phone, when recovered, could contain subsequent data stored in all or part of the space thus vacated by the deleted message, resulting in the new data being placed next to an undeleted portion of the older data. He described the result as gobbledygook. It will suffice to remark, at this stage of these reasons, that these texts do not appear to have been thus afflicted, as they are comprehensible, and are consistent with the specifics of the text conversation that Mr. Harrington said he was having with Mr. Drake, prior to being shown what had been recovered from his phone.

[105] Following his arrest, Mr. Harrington was taken in by the police for interrogation. He testified that he was very mad because November 23, 2016 was his son's birthday, and it would have also been his 100th day of parole. Moreover, his relationship with the police was not very good. He said that his rapport with them was terrible because of his criminal lifestyle, and also, he took issue with the way that he had been treated by them in the past. As noted previously, he said that he was shown the Norex video (Exhibit 3), but not the Salvation Army video (Exhibit 8) that evening by the police.

[106] Although interrogated extensively during the early morning hours of November 22, 2016, he did not tell the police the identity of the shooter. He said this was because CSC was obliged to investigate whether he had any involvement in the shooting. While they investigated, he knew he was going back to jail. While there, he would be vulnerable to retaliation not only from Mr. Drake's friends and/or associates, but his own as well, should he cooperate. Even after that, upon his release, he, his friends, and his family members would still be at risk if he gave information to the authorities. He said that "you do not do that in gang lifestyle, it is super frowned upon. If you are cooperating, you are cooperating."

[107] In the aftermath of his interview by the police on November 22, 2016, Mr. Harrington went to Burnside for a short period of time, then was sent to Renous penitentiary, until his release approximately seven months later. He was thereupon transferred to a halfway house in Newfoundland for the ensuing three months. He returned to Halifax in late 2017, where he resided initially at Uniacke Square. He

then moved in with his girlfriend, CH, where he stayed for (roughly) the next two years.

[108] He was unemployed, and he quickly returned to the only lifestyle he had ever known. He was charged in Québec with the *Excise Act* offences referenced earlier. They were alleged to have occurred in May and August 2018. As has been (also) previously referenced, this was followed up by charges under the *Controlled Drugs and Substances Act* ("*CDSA*") in December of 2018. These came about after Mr. Harrington was caught in a "bust" selling some very serious drugs, including cocaine and heroin.

[109] On January 24, 2019, Mr. Harrington provided a KGB statement to the police. The Crown describes his motivation in coming forward at that time in the following terms:

> There was a constellation of factor[s], at least seven (7), that ultimately led Morgan to provide that statement about the shooting on November 21, 2016:
>
> [1] He completed his criminal sentence.
>
> [2] He felt bad for Keizer's mother. When the police visited him in Newfoundland, they showed him a video of Keizer's mother Lisa who had asked him to let the police know what happened. He testified that it hurt his feelings. He felt bad. He sympathized with her.
>
> [3] He testified that he had "good people" around him including a "good girlfriend next to me that was more pro-social than I was."
>
> [4] He was "tired of worrying for my safety," which he felt was a live issue because he felt he was the only one who could implicate Drake so had "an automatic target" on his back.
>
> [5] He began to feel more comfortable with the police, "they came to speak to me a couple of times and it was more respectful than other interactions I had had". By January 2019, Morgan felt "more comfortable, possibly that they could help".
> [6] He learned about the possibility of emergency protection through the Witness Protection Program; the police advised him of same during a visit in Lower Sackville.
>
> [7] He had independent legal advice from Pat Atherton.
>
> (*Crown Closing Submissions, para 564*)

[110] But there were other things that prompted him to come forward as well, as the Crown properly concedes, and as defence counsel properly emphasizes. For example, there was the following:

> [567] It is undeniable that the police therefore worked hard to get him to cooperate – as they should have. After all, a person was shot and killed in the early hours of the night on a very public city street in Halifax and the person responsible should be held accountable.
>
> [568] Their efforts to encourage Morgan included:

- Advising him of the Rewards Program.
- Meeting (formally and informally) with him directly (in Renous, in Newfoundland at the halfway house, at his home in Sackville NS, by phone).
- Meeting with him indirectly (talking to his girlfriends, and his mother).
- Linking him community services to see if they would entertain a visit with his child.
- Talking with the Crown Attorneys to lessen conditions.
- Encouraging independent legal advice.

[569] Various officers met with him including, Sgt. Wagg, or "White Boy Wagg," as Morgan called him. Sgt. Wagg employed Cst. Robbie Baird, a younger black officer, to try to establish rapport given the possible appeal with his younger age and racial background.

(*Crown Closing Submissions*)

[111] The defence characterizes it this way:

34. It is respectfully submitted that it is difficult to conceive of a situation where a witness could achieve more beneficial treatment than that which Mr. Harrington has received, and hopes to achieve. In this sense, Mr. Harrington is not just an unsavoury witness. He is a witness who has been incentivized to the extent that his testimony is of no practical value.

35. It is obvious from the evidence of Cst. Baird and Sgt. Wagg that Mr. Harrington was repeatedly told that if he were to testify against Mr. Drake he could earn a reward of up to $150,000. This incentive was dangled in front of him by his girlfriend, Tyler Keizer's mother, Cst. Baird and Sgt. Wagg. Mr. Harrington testified that he was aware of the rewards program and had read about it. Of course, Mr. Harrington is also aware that one of the conditions of receipt of the reward is that Mr. Drake must be convicted. This particular condition of the rewards program underlines the extreme danger associated with evidence of this nature. From a public policy perspective, an incentive of this kind is hard to understand. From a Vetrovec perspective, this type of condition requires a very critical examination of the jaundiced evidence that it inevitably produces.

…

37. On top of the monetary incentive, the police weaved [*sic*] a personal incentive into their efforts to entice Mr. Harrington to testify. In particular, they knew that Mr. Harrington had been in jail for two of his son's recent birthdays. Consequently, they engaged in efforts with the Department of Children's Services to make arrangements for Mr. Harrington to see his son. The police went so far as to set up a meeting with Children's Services, a meeting which was held at the police department. It is important to remind ourselves that gaining the trust of a witness by no means ensures the honesty of that person's evidence. In fact, it is simply the manipulation of a person that has the effect of undermining the trust that can be put in that person's evidence.

> 38. It is also noteworthy that, during his testimony, Mr. Harrington claimed that he did not recall meeting with Children's Services. Of course, this meeting was proven through the evidence of Sgt. Wagg. Mr. Harrington was not being forthright on the stand when he downplayed the significance of that meeting.
>
> 39. By way of further incentive, Mr. Harrington was granted immunity in relation to some extremely serious charges which, without a doubt, Mr. Harrington would have been convicted of and sentenced for.
>
> 40. Prior to his release on parole, Mr. Harrington engaged in the vicious beating of Mr. Diblawe at the Atlantic Institution. As Your Lordship is fully aware, this offence was video recorded and the evidence of Mr. Harrington's participation was irrefutable.

[112] The argument culminates in this:

> 57. Simply put, Mr. Harrington's life was crashing down around him in December of 2018. He needed a way out. The police were actively offering him that escape route at the time, incentivizing him on a regular basis. When the crash came, Mr. Harrington knew full well that the police suspected Adam Drake of having shot Tyler Keizer. He was their target. Mr. Harrington testified that he knew this soon after he returned to prison in November of 2016. All Mr. Harrington had to do was implicate Mr. Drake, and the rest would take care of itself. In addition, it cannot be forgotten that Mr. Drake, with the knowledge of Mr. Harrington, had engaged in sexual activity with two of Mr. Harrington's girlfriends, one of whom was the mother [of] his child.
>
> (*Defence Closing Submissions*)

vi) After KGB

[113] In the aftermath of the KGB statement, on May 6, 2019 Mr. Drake was charged with first degree murder. Exhibit 27 evidences that Mr. Harrington was made subject to an Emergency Protection Order, which he knew was not indefinite. Exhibit 28 provides evidence that he refused to be placed in what he called a "full-blown" witness protection program because he would be unable to communicate with family members and his name would have been changed as a consequence.

[114] Exhibits 29 to 33 establish, respectively, that:

(a) on May 31, 2019, he entered into an agreement whereby he was to be provided with funding of up to $1,500 to obtain independent legal advice, advice which lawyer Patrick Atherton subsequently provided;

(b) having refused entry into the "full-blown" program, on July 31, 2019 he entered into what one of the police witnesses referred to as the "Triple A", or Alternate Aid Agreement, which would assist him to set up new accommodations, and provide for some basic living needs, for three months.

(c) on December 19, 2019, Mr. Harrington signed a Witness Support Agreement with Halifax Regional Police ("HRP"). He explained that it was to cover the same types of things that the Triple A agreement had; and

(d) following the reinstatement of the charges against Mr. Drake (see below) Mr. Harrington entered into a subsequent Witness Support Agreement with HRP on January 30, 2023, which was amended on February 29, 2024.

[115] A precondition to the financial support components of these documents was his agreement to testify against the accused. The Crown dropped the charges against the accused in late October 2021, but re-laid them again just a little over a year later, in November 2022, under circumstances which I have outlined in a previous, but as of yet, unpublished, *voir dire* decision. For present purposes, it is sufficient to observe that Mr. Harrington received no financial support, under the auspices of agreements (a) – (c) during that 13-month hiatus.

[116] No financial assistance was provided by the Crown and/or its agents (the police) other than in accordance with the above agreements. Of course, Mr. Harrington stands to receive up to $150,000 through the provincial rewards program (with whom he was in contact prior to provision of his KGB statement to the police) in the event that Mr. Drake is convicted.

[117] In sum, it is clear from the Norex video footage (Exhibit 3) that Morgan Harrington was present when Tyler Keizer was gunned down. As such, it is obvious that he knows the true identity of the killer. It is also obvious that he knows Adam Drake very well. The big issue is whether he is telling the truth when he says that Mr. Drake was the killer.

[118] It must be expressly noted that there is no fingerprint evidence, blood evidence, gunshot residue, footwear impressions, canine evidence, lipreading evidence, gait evidence, height analysis, or other type of evidence implicating the accused. Part of the explanation as to why there is a dearth of evidence, at least from the scene itself, may be because the killer was dressed from head to toe in a hoodie and gloves, and it was raining. But it is idle (and in fact, impermissible) to speculate.

[119] It is also worthy of note that the police had covertly installed and monitored an audio probe in Mr. Drake's home from October 2018 to March 2019, and another one which was installed in his Ford vehicle. Other communications were intercepted throughout this period as well, including those of Donald Arsenault. The police uncovered no admissions, confessions, or statements implicating Mr. Drake through any of these means either. This was clear from Sgt. Wagg's testimony.

[120] The Crown also introduced evidence from some other individuals which has not yet been mentioned. These witnesses essentially provided evidence intended to independently verify one or another aspect of Mr. Harrington's testimony. Of particular importance was Don Calpito's evidence. This evidence will be discussed later in these reasons, at the appropriate time.

[121] As always, the Court must be convinced, beyond a reasonable doubt, before a conviction may be entered. Obviously, the manner in which Mr. Harrington's testimony is viewed will be extremely important to this calculus.

B. Defence Evidence

[122] Although Adam Drake did not testify, the Defence did call other evidence. Their first witness was Rocky Syliboy. Recall that Morgan Harrington had testified that there was some negative back and forth between Syliboy and the accused when he said that the accused had arrived at the Salvation Army on November 21, 2016 just before the shooting.

[123] Mr. Syliboy testified that he remembered being interviewed by the police on November 23, 2016, but recalled no part of what he said. Nor could he remember anything about the night of November 21, 2016. He was shown a video of his interview with the police, but that did not assist his memory.

[124] Given that this was defence-led evidence, and that the witness had no recollection of what he had said to the police (two days after the shooting) and, also, given that he had stated therein to the police interviewer that he was trying to be accurate, I ruled that it met the requirements of past recollection recorded, a recognized exception to the hearsay rule. I provided more detailed oral reasons in my mid-trial *voir dire* ruling, which I will not attempt to further recapitulate. Following the Court's ruling, the video of the interview was tendered as Exhibit 77, along with a transcript (only as an exhibit aide). The photo lineup to which Mr. Syliboy had referred during the interview became Exhibit 76. In effect, what Mr. Syliboy said in Exhibit 77 became his evidence. Like all evidence, it must be weighed.

[125] I will, similarly, not attempt to recount the contents of the police interview in its entirety. For present purposes, the crux of the statement is found in the transcript (aide) for Exhibit 77 (page 32, line 26 to page 33, line 26). The police interviewer, apparently alerted by the Salvation Army video, reminded Mr. Syliboy that he may have interacted with someone conversing with Morgan Harrington shortly before Mr. Keizer was shot. We know this "someone" to have been the shooter.

BUELL: Do you remember what he looked like?

ROCKY: I don't.

BUELL: Oh, okay.

ROCKY: That's total black, right now.

BUELL: Total black out, right now for you?

ROCKY: Yeah, like even when I thought of it, I was like I didn't even like-, and, uh, you know, 'cause I never see the guy before, right? And I had said…

BUELL: Okay, so we'll just put this down as a stranger, how about that? A stranger or?

ROCKY: Yeah, stranger.

BUELL: A unknown male.

BUELL: Yeah. Said like I had like a verbal argument. And he's not someone that's from around there all the time, or someone that you would see?

10:34

ROCKY: Uh, the guy?

BUELL: Yeah, like…

ROCKY: No.

BUELL: …this-, that guy. Not the, not the guy with the dreads [Harrington] but this other guy that kind of comes out or arrives there, or whatever, that, that…

ROCKY: He comes here once in a while but, like it's hard for me to put…

BUELL: Yeah.

ROCKY: …like you know what I mean? 'Cause I, I don't really know that.

[126] However, next the conversation becomes:

BUELL: Okay. And, and you don't remember what this guy-, is he white, is he black, is he Hispanic, is he…

ROCKY: Black.

BUELL: This guy's black?

ROCKY: Yeah, I think he was black…

BUELL: Okay.

ROCKY: …yeah. 'Cause I was saying to myself, because I, I'm not racist but those guys, and those guys that-, most guys that always starts up...

BUELL: Yeah.

ROCKY: ...(inaudible) [come from] nothing and think they're better than you.

BUELL: Was he light skinned, dark skinned?

ROCKY: I believe he was light. He's light.

(*Exhibit 77, Transcript, p. 35*)

[127] Mr. Syliboy went on to say that he was very intoxicated that evening. He initially denied that he got on a bus after the shooting or that he spoke with anyone while on it. Subsequently, he agreed that he did get on a bus, and had spoken to a fellow passenger. He told that individual that he had been shot in the hand. He acknowledged that he had not really been shot, but, rather, had fallen. "It was just drunk talk." (*Exhibit 77, Transcript, p. 48*)

[128] Moreover, in the video he can be heard telling his interviewer that he had an overdose the night before (November 22, 2016) from having consumed clonazepam and alcohol. He added, while on the stand "I've had a lot of overdoses since then." It is also clear that he was anxious to leave the police interview so as not to miss his methadone appointment (*Exhibit 77, Transcript, p. 65*).

[129] Monica Paris was the second Defence witness. She said she was having a smoke outside her Falkland Street residence on November 21, 2016. She noticed an unfamiliar car – a white one with distinctive lights. A man got out of it on the passenger side. She went back inside, and very shortly thereafter (less than a matter of minutes) she heard some "pops". Upon her return, she witnessed a man running away with his hands in the area of his stomach. He was clad in a dark top and light-colored bottoms. She lost sight of the individual whom she described as "normal to slim" after he got into a car which had been driving north on Maynard Street. The vehicle then took a left on Falkland Street and turned right on Bauer.

[130] On a photo presented as Exhibit 75, she placed an X where she had seen the man first get out of the car. This was a map which did not depict the corner of Gottingen and Falkland Street, which is where, when she had given her statement to police (on December 2, 2016), she had said she had seen him do so.

[131] Exhibit 74 was introduced to her by the Crown on cross-examination. She agreed that "#2" marked thereon was where she had told the police (when she had given her statement) that the individual had exited the white car before the shooting. This location was much closer to the location of Gottingen and Falkland Streets than was the location specified in Exhibit 73. Predictably, she said her memory of the events would have been fresher when she had given her statement to the police.

[132] The third Defence witness was Constable Robbie Baird. It was through he and Sgt. Wagg that the Court heard of some of the efforts that were made by the police to obtain Mr. Harrington's cooperation with the investigation, most of which have been earlier described.

[133] Cst. Baird knew that Mr. Harrington mistrusted the police, and therefore he struggled to build a rapport with him. There were five meetings between them. Some occurred while Mr. Harrington was in custody, and some occurred at his home in Lower Sackville where he lived with C. H. at the time. These meetings

occurred on October 5, 11, 19, 23 and December 9, 2018 respectively. Cst. Baird also met with Mr. Harrington's mother on October 25, 2018.

[134] During the course of these meetings, Cst. Baird discussed the aforementioned rewards program, told him that he could receive up to $150,000, and that a conviction of Mr. Drake was a prerequisite. He also set up a meeting with Child Protective Services ("CPS") to discuss the possibility of Mr. Harrington obtaining some access with his son. This occurred after Mr. Harrington had raised the topic and had added that his parole had been revoked when he had been arrested (early morning hours of November 22, 2016), which was one day before his son's birthday. Cst. Baird also arranged for the return of some clothes belonging to Mr. Harrington that had remained with the police after he had been incarcerated previously.

[135] As noted earlier, this augmented the considerable assistance, afforded by Sgt. Wagg, with respect to the serious criminal charges which Mr. Harrington was facing at the time in Québec, New Brunswick, and Nova Scotia.

[136] Lynne Fox and Tracy Peloquin, called by the Crown and Defence respectively, gave evidence with respect to the frames obtained from Exhibits 3 and 8. Ms. Fox is a civilian member of the HRP Forensic ID Section. She was qualified to provide an opinion as a digital media analyst. It was to the effect that when she enhances a frame from a particular video, the image is not altered in any way. She received footage from the Salvation Army video in an ASF (Advanced System Format) file. It was not the best system with which to work. This was contrasted with the Norex video, which was provided to her in its native format. All of this notwithstanding, the quality of both Exhibits provided sufficient material with which to make the still photo extracts to which both she and Ms. Peloquin referred.

i) Height and weight and other distinguishing marks of the shooter from Exhibits 3 & 8

[137] Tracey Peloquin was qualified as able to provide expert opinion evidence with respect to forensic video analysis, and forensic video comparison. She agreed with Ms. Fox that the Salvation Army footage, although in Advanced System Format (ASF), was sufficient to yield the stills that were obtained, and that generally speaking, the closer that an object is to the frame, the better the quality of the image. She did, however, add that she decided not to do a height analysis because, in order to do so, she would need the original footage, so that she could satisfy herself, first of all, that what she had been given had not been altered in any way. She also agreed that it was not possible to compare the images to look for a tattoo in the area of the shooter's neck (where Adam Drake is known to have one) because that area of the shooter's neck appears covered in the stills extracted from

the footage.

[138] The Crown says:

> [326] Her [Fox's] evidence not only assists by making it simple to watch the videos, but her evidence also shows the video most definitely does not exclude Drake's face as the shooter. Indeed, the Crown submits the shooter depicted in the video looks similar to Drake in terms of his features. Certainly, the Crown acknowledges the video would not on its own allow a viewer to draw this conclusion, rather, it's another piece of substantial corroborative evidence that it was him.
>
> [327] Further, the video evidence that she provides with the screenshots developed shows his sweater with a logo on the top left quadrant, and a glove. She also incorporates 2016 photo packs from the police that clearly show how Drake appeared from all angles.
>
> [328] Specifically, the following analysis of each folder is below:
>
> - Multiview Video
>   - a video that seamlessly shows both Exhibits 3, and 8 for relevant time frames. She did not use the time stamp to link the videos together, rather she simply watched the videos and linked them by what was occurring within the frames. The purpose of this Multiview is simply for viewing simplicity. She placed a circle around what she identified as "the suspect". It should be noted that this video does not include the very first footage that depicts Morgan Harrington and Adam Drake walking on screen consecutively walking eastbound on Falkland.
> - Stills of Salvation Army:
>   - A cropped video from 10:45:24-10:45:31pm in front of the Salvation Army. At 10:45:26 – without any magnification, or amplification, it is apparent that there is a visible logo on the top left of the sweater. This is also in the 5th file that Ms. Fox provides under "Sweater": see below.
>   - Three magnified single frames of Adam Drake from the above footage at approximately 10:45:25. The color of the person's skin in these stills is white. Indeed, it is possible to contrast the skin tone with that of Morgan Harrington's skin tone, which has been described in this trial as "light skin black male". (See Multiview video at 10:47:18 and the grocery cart as a reference point). Indeed, Adam Drake's skin tone is lighter than that of Morgan Harrington's which is visible in the video. This evidence corroborates Morgan Harrington's testimony that this person was Adam Drake.
> - Stills yellow block Salvation Army:
>   - She has provided footage showing Adam Drake walking away from the camera and various screenshots of each frame. She was unfamiliar with the facts of the case and

provided this in case it was helpful.

- Still front angle Salvation Army:
    - There are two still shots in this subfolder. The second, at 10:45:27, shows Adam Drake from the neck down. It is noteworthy that in this frame, it is apparent that Drake is wearing a glove, just as Morgan described.

- Sweater:
    - She used photos of Drake from his phone where he was wearing a hoodie as it resembled what he was wearing in the videos. In the file labelled "16-174955- comparison", she does not draw any comparisons, rather simply puts one photo of Drake beside the screenshot of Drake at 10:45: 25. The Crown is not arguing that Drake was wearing exactly the same sweater in the video. However, the court can use the photo that Ms. Fox pulled from Exhibit 50 and the remaining selfies at Exhibit 50 to see that in fact Drake has very similar sweaters. The selfies on his phone show Drake owns black hoodies with Nike check mark logos on the top left quadrant of his sweater with neck drawstrings.
    - In the third file Ms. Fox places a yellow square around the logo on the hoodie for ease of reference at 10:45:26pm on the Salvation Army video

- The fourth file provides a 4 page "photo pack" of Drake from July 2016. This provides clear images of Drake's appearance from the shoulders up. It is noteworthy that his style consistently is in a black hoodie. In that photo a very small "A Deezy" tattoo is located on his left neck, which is not noticeable in the video because the hood is up and covers it.
- Finally, the 5th file is a screenshot of the video at 10:46:26pm on the video which shows the logo on his sweater. The 6th file is a cropped image of the same.

[139] The Defence argues:

200. According to the photograph of Adam Drake taken by the police in July of 2016 (Exhibit #71), Mr. Drake's height was listed as 5' 11". The photograph appears to actually depict Mr. Drake as being six feet tall. According to Exhibit #71, Rocky Syliboy is listed as being 5' 11". The photo actually depicts him as six feet tall. In that same exhibit, Mr. Harrington is listed at 5' 9" tall. Removing the hair, that appears to be accurate. The upshot of this evidence is that Rocky Syliboy and Adam Drake are essentially the same height, whereas Morgan Harrington is shorter.

201. Mr. Harrington testified that at the time of the incident, he was 5' 9" tall and weighed 220 pounds. He also testified that Adam Drake was the same weight as Mr. Harrington at the time (ie. 220 pounds). According to the evidence of Catherine Tranchida, when asked for the height of the shooter on direct examination, she said "under six feet for sure". She agreed on cross-examination that the shooter may have been as much as three to four inches shorter than six feet and she believed that the shooter was shorter than Morgan Harrington. It is important to note that Ms. Tranchida would have had an opportunity to see the shooter from behind, and standing beside Mr. Harrington, before the shooter opened fire.

202. It is submitted that a review of the Salvation Army video (Exhibit 8) clearly shows that the shooter was shorter than Rocky Syliboy and the same height as, or shorter than, Morgan Harrington.

203. At 10:44:59pm, as the shooter and Mr. Harrington fist bump each other, the shooter appears to be shorter than Mr. Harrington.

204. Between 10:45:00pm and 10:45:06pm, Mr. Syliboy and the shooter are standing face to face. The shooter is shorter than Mr. Syliboy.

205. At 10:45:08pm, the shooter and Mr. Harrington are standing beside each other, and it certainly appears that the shooter is not taller than Mr. Harrington.

206. At 10:45:40pm, Mr. Syliboy is standing beside Mr. Harrington, and is obviously taller than him.

207. Further, it would be impossible to characterize the shooter as “stocky”. Certainly, there is no way that the shooter weighed 220 pounds. According to Tracy Peloquin, the shooter did not fill out the jacket he was wearing in the same manner that Mr. Drake is depicted in the photographs in Exhibit #35.

[140] However, since the Defence expert (Ms. Peloquin) declined to do a height analysis, any reconstruction performed or inference drawn by the Court based on isolated stills would both be of little value, and somewhat speculative. Among

other things, it would depend upon whether the individuals depicted were standing on identically level ground, their footwear, the lighting in the area, and other empirical observations (which are matters upon which I have no evidence), as well as the other factors to which Ms. Peloquin herself had adverted.

C. Burden of Proof

i) Reasonable Doubt

[141] I remind myself of the oft quoted passage from *R. v. Lifchus*, [1997] 9 CR (5th) SCC:

> 13 The onus resting upon the Crown to prove the guilt of the accused beyond a reasonable doubt is inextricably linked to the presumption of innocence. That jurors clearly understand the meaning of the term is of fundamental importance to our criminal justice system. It is one of the principal safeguards which seeks to ensure that no innocent person is convicted. The Marshall, Morin and Milgaard cases serve as a constant reminder that our system, with all its protections for the accused, can still make tragic errors. A fair trial must be the goal of criminal justice. There cannot be a fair trial if jurors do not clearly understand the basic and fundamentally important concept of the standard of proof that the Crown must meet in order to obtain a conviction.
>
> 14 No matter how exemplary the directions to the jury may be in every other respect if they are wanting in this aspect the trial must be lacking in fairness. It is true the term has come echoing down the centuries in words of deceptive simplicity. Yet jurors must appreciate their meaning and significance. They must be aware that the standard of proof is higher than the standard applied in civil actions of proof based upon a balance of probabilities yet less than proof to an absolute certainty.

[142] Or, as the Court observed in *R. v. Starr*, [2000] 2 SCR 144:

> 242 In my view, an effective way to define the reasonable doubt standard for a jury is to explain that it falls much closer to absolute certainty than to proof on a balance of probabilities. As stated in *Lifchus*, a trial judge is required to explain that something less than absolute certainty is required, and that something more than probable guilt is required, in order for the jury to convict. Both of these alternative standards are fairly and easily comprehensible. It will be of great assistance for a jury if the trial judge situates the reasonable doubt standard appropriately between these two standards. The additional instructions to the jury set out in *Lifchus* as to the meaning and appropriate manner of determining the existence of a reasonable doubt serve to define the space between absolute certainty and proof beyond a reasonable doubt. In this regard, I am in agreement with Twaddle J.A. in the court below, when he said, at p. 177:
>
> > If standards of proof were marked on a measure, proof "beyond reasonable doubt" would lie much closer to "absolute certainty" than to "a balance of probabilities". Just as a judge has a duty to instruct the jury that absolute

> certainty is not required, he or she has a duty, in my view, to instruct the jury that the criminal standard is more than a probability. The words he or she uses to convey this idea are of no significance, but the idea itself must be conveyed....

ii) The W.(D.) Test

[143] It is helpful to begin with first principles. The applicable tripartite analysis was first set out in *R. v. W.(D.)*, [1991]1 SCR 742. It is appropriate to situations, in which the accused elected to testify and/or call other evidence. In this case, even though the Mr. Drake did not testify, he did call evidence.

[144] First, if the trier of fact believes the evidence of the accused, he must be acquitted.

[145] Second, if the trier of fact did not believe the evidence of the accused but was left in reasonable doubt by it, then again, he must be acquitted.

[146] Third, even if the trier of fact was not left in doubt by the evidence of the accused, s/he is then required to decide whether on the basis of the evidence s/he did accept, s/he was convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[147] As has been pointed out many times, this is not a magical incantation, or a mere litany which, upon recital, suffices to ensure that the proper principles were applied when the evidence was parsed.

[148] The objectives to be attained by the Crown and defence are disparate. The Crown must prove guilt beyond a reasonable doubt. Put differently, I must be "sure" that Mr. Drake did that of which he is accused before a conviction may be entered.

[149] There is no burden cast upon Mr. Drake to prove or disprove anything. He did not testify, and he was under no obligation to do so. He elected to call some evidence nonetheless, so I will proceed within the context of the first and second stages of the *W.(D.)* analysis, to consider that evidence, within the context of all of the other evidence heard in this case.

iii) Consideration of the Defence evidence within the context of the evidence as a whole

[150] Briefly put, the dual notions of credibility and reliability are in play when the evidence of these or any other witnesses is considered. They are related, but nonetheless, quite distinct, concepts.

[151] As Saunders, J.A. said in *R. v. D.D.S.*, 2006 NSCA 34:

> [77] Before leaving the subject and for the sake of future guidance it would be wise to consider what has been said about the trier's place and responsibility in the search for truth. Centuries of case law remind us that there is no formula with which to uncover deceit or rank credibility. There is no crucible for truth, as if pieces of evidence, a dash of procedure, and a measure of principle mixed together by seasoned judicial stirring will yield proof of veracity. Human nature, common sense and life's experience are indispensable when assessing creditworthiness, but they cannot be the only guide posts. Demeanour too can be a factor taken into account by the trier of fact when testing the evidence, but standing alone it is hardly determinative. Experience tells us that one of the best tools to determine credibility and reliability is the painstaking, careful and repeated testing of the evidence to see how it stacks up. How does the witness's account stand in harmony with the other evidence pertaining to it, while applying the appropriate standard of proof in a civil or a criminal case?

[152] I can accept as credible a witness who is honestly attempting to describe what he or she saw. But a credible witness is not always one whose testimony can be relied upon. Their memory could be faulty, or almost nonexistent. What they "remember" could be based upon factors other than what they actually observed at the time.

[153] The testimony of Rocky Syliboy is a case in point. When he testified, Mr. Syliboy had absolutely no recollection of what he had told the police in his statement on November 24, 2016. Indeed he had overdosed the night before, and appeared, in the statement, to have a distracted focus, given the imminence of his appointment to receive methadone.

[154] After having advised the interviewing officer that he had no recollection of what the person with whom he interacted that evening (whom we know to be the shooter) looked like, and after the officer asked him questions about the shooter's race, Syliboy then identified him as a "light-skinned black man". But his reason for doing so appeared to stem from his perception of the way "those guys" always behave: "I'm not racist but those guys, and those guys –, most guys that always start up [from] nothing and think they're better than you".

[155] His "recollection" appeared to depend upon a negative racial stereotype rather than something that he actually recalled. This is particularly so when, before he was prompted, he had earlier said that he remembered nothing about the shooter.

[156] Moreover, Mr. Syliboy was highly intoxicated the evening of November 21, 2016 when he encountered the shooter. While he was nonetheless able to identify many other "regulars" at the Salvation Army when he spoke with the police, these were people that he saw on an almost nightly basis, whereas the shooter was someone he had either never met before, or had only seen on an occasion or two previously.

[157] With respect to the evidence of Ms. Peloquin, I am satisfied that the photo stills to which she (and Ms. Fox, for that matter) referenced as excerpted from Exhibits 3 and 8 were as depicted on those Exhibits and had not been altered. There was nothing from her evidence that provided the Court with any means of identification of the shooter having reference to his height and girth relative to the other individuals depicted therein.

[158] The Court is satisfied that the capture of the shooter in the still extracted from Exhibit 8 at 10:45:26 PM., depicts the hoodie that he was wearing, and that it bears a logo below his neck in the upper portion of the left side of his chest. When compared with the personal photographs (apparently taken with his cell phone) of Mr. Drake appearing in Exhibit 50, the most that can be said is that the logo depicted on items of clothing which he is wearing in those photographs appears to be similar. The logo appears to be located in different areas of that clothing in the photographs, than in the still excerpted from Exhibit 8.

[159] There were also some difficulties with the evidence of Monica Paris with respect to the ensuing portions of her evidence. As earlier noted, on direct examination, she identified on Exhibit 73 the spot where she said that she saw the shooter getting out of a white car. This differed significantly from what she had described to the police in her statement of December 2, 2016. Exhibit 74 was put to her on cross-examination, and she agreed that this latter Exhibit accurately shows the area which she had identified in her police statement, where the man had gotten out of the white vehicle. This location was much closer to the corner of Falkland and Gottingen Streets, than where she had indicated on Exhibit 73. As earlier noted, she agreed that her recollection on December 2, 2016 would have been more reliable than her testimony at trial almost eight years later.

[160] With that having been said, the closest thing which in any way coincided with the evidence of what Ms. Paris (on this point) provided to the police on December 2, 2016 are the stills from the Norex video at 22:35:49 and 22:35:52 on November 21, 2016. Recall that this would be 22:39:46 and 22:39:49, respectively, if depicted on the Salvation Army video. Certainly, it is true that a white car is visible at these times. In the stills, and in the actual video footage which immediately follows each of them, it is difficult to ascertain whether there is anything distinctive about the vehicle's lights. More importantly, in neither the stills themselves, nor in the footage immediately following them (as the vehicle approaches the corner of Falkland and Gottingen streets) does anyone exit the vehicle.

[161] Ms. Paris' evidence with respect to when she heard the shots fired in relation to her observation of the white car was similarly problematic. She said on direct that the shooting took place five to ten minutes afterward. On cross she acknowledged that she told the police that it was 30 seconds afterward. Then she

clarified that the interval was “short”: “I don't think five minutes is accurate, I would say less, much less”.

[162] As to the testimony of Sgt. Steve Wagg, and Cst. Robbie Baird, it is beyond question that Morgan Harrington derived a considerable package of benefits by agreeing to come forward, provide a police statement against the accused, and testify at this hearing. He stands to gain more (via the rewards program) if Mr. Drake is convicted. I will discuss this evidence more fulsomely below, since it is more pertinent to the credibility of Mr. Harrington and/or the reliability of his identification of Mr. Drake as the shooter, and, in turn, the Crown’s case as a whole.

D. Consideration of Crown’s evidence within the context of the evidence as a whole

[163] Integral to this determination is the conclusion at which I arrive after consideration of all of the evidence, particularly that of Mr. Harrington. As mentioned earlier, Mr. Harrington’s life story to this point portrays him as an “unsavoury” witness. He has been dishonest, extremely violent, and has demonstrated little to no regard either for other people, or the law. I have concluded that his testimony requires me to look to extrinsic or independent evidence for confirmation of at least some of it. The independent evidence must confirm actual features of his evidence, in a manner sufficient enough to allow me to trust in the veracity of the relevant portions of his testimony. I will explain.

i) What is a Vetrovec witness, and what does that have to do with Morgan Harrington?

[164] When someone is referred to as a *Vetrovec* witness, it is almost always within the context of a trial by Judge and Jury. The term harkens back to the eponymous case of *R. v. Vetrovec*, [1982] 1 SCR 811. *Vetrovec* held that it was to be taken as a matter of common sense, rather than a special rule of evidence, that when a disreputable, yet important, witness testifies for the prosecution, circumstances may require that that his or her evidence be scrutinized carefully, and that it may be necessary to look for confirmation of some of it outside of the evidence which that witness provided.

[165] It is impossible to lay down an exhaustive list of circumstances which will require the trier of fact to be alert (or alerted) to this. In *R v. Bromley,* (2001) 151 CCC (3d) 480 (Nfld CA) (which was a jury trial) the Court concluded that while a trial judge has a discretion as to whether to administer a *Vetrovec* warning to the jury, this discretion is not limitless. The most significant considerations involve an assessment of the credibility of the witness; and the importance of the witness to the prosecution’s case. There are only rare cases in which the judge’s view of the

credibility of a witness with an extensive criminal record will justify the failure to give a *Vetrovec* caution to a jury.

[166] In *R. v. Campbell*, 2002 NSCA 35, our Court of Appeal added that an unsavoury witness may be one who is suspected of providing evidence for an ulterior motive. That motive could include attempts to divert suspicion from themselves, gaining advantages, such as immunity from prosecution from the current or another offences, or monetary gain.

[167] True, this is a Judge alone case. I am the trier of fact. As Buckle, J. observed in *R. v. K.W.*, 2019 NSPC 6:

> [87] The defence argues that Mr. Taylor is an unsavory witness worthy of a *Vetrovec* ([1982] 1 S.C.R. 811) caution. That caution simply reminds the trier of fact that some witnesses are so untrustworthy that it would be dangerous to convict on their evidence without independent corroboration. I recognize that Mr. Taylor has many of the characteristics of a *Vetrovec* witness. However, because this is a judge alone trial, I don't feel it's necessary to make that determination. I can simply assess his evidence through the normal credibility lens.

[168] As I assess Mr. Harrington's evidence, my lens must be one which recognizes that his testimony identifying Mr. Drake as the killer requires special scrutiny. It would be dangerous to convict upon unconfirmed evidence from this witness. I may (properly) do so, however, if satisfied that the evidence is true. In determining the veracity (or lack thereof) of Mr. Harrington's evidence, I must consider evidence from other sources which reflect upon whether or not he was telling the truth when he testified. In fact, I began that process earlier, at intervals throughout the discussion of Mr. Harrington's testimony.

[169] What type (or types) of evidence may qualify as "confirmatory"? In *R. v. Seruhungo*, 2016 SCC 2, that Court upheld the dissent (in *R. v. Seruhungo*, 2015 ABCA 189). In his dissent at the Appellate level, O'Ferrall, J. had canvassed the authorities and concluded:

> [59] I turn to the remaining issues. The Crown submits the trial judge misunderstood the test for confirmatory evidence with respect to an unsavoury witness. The test was summarized by Fish J in *R v Khela*, 2009 SCC 4, [2009] 1 SCR 104 at paragraphs 39-43:
>
> > Common sense dictates that not all evidence presented at trial is capable of confirming the testimony of an impugned witness. The attribute of independence defines the kind of evidence that can provide comfort to the trier of fact that the witness is telling the truth. Where evidence is "tainted" by connection to the *Vetrovec* witness it cannot serve to confirm his or her testimony (N. Harris, "*Vetrovec* Cautions and Confirmatory Evidence: A Necessarily Complex Relationship" (2005), 31 C.R. (6th) 216, at p. 225; *R. v. Sanderson*, 2003 MBCA 109, 180 C.C.C. (3d) 53, at para. 61).

Materiality is a more difficult concept. In *Vetrovec*, the Court did away with the requirement that corroborating evidence implicate the accused. As Dickson J. noted, such evidence is not the only type capable of convincing a jury that a witness is telling the truth. In *Kehler*, the Court confirmed that evidence, to be considered confirmatory, does not have to implicate the accused. We maintain that position here.

> Individual items of confirmatory evidence need not implicate the accused. As Dickson J. explained in *Vetrovec*:
>
> > The reason for requiring corroboration is that we believe the witness has good reason to lie. We therefore want some other piece of evidence which tends to convince us that he is telling the truth. Evidence which implicates the accused does indeed serve to accomplish that purpose but it cannot be said that this is the only sort of evidence which will accredit the accomplice. [p. 826]
>
> However, when looked at in the context of the case as a whole, the items of confirmatory evidence should give comfort to the jury that the witness can be trusted in his or her assertion that the accused is the person who committed the offence. Again in *Vetrovec*, Dickson J. thus noted, with respect to evidence capable of being confirmatory:
>
> > All of this incriminating evidence, when considered together, strongly strengthens the belief that Langvand was telling the truth regarding the participation of Vetrovec and Gaja. It rebuts any suggestion that he is falsely implicating innocent individuals. [Emphasis added; p. 833.]

This passage was cited with approval in this Court's unanimous judgment in *Kehler*, where the Court concluded that confirmatory evidence must be capable of restoring the trier's faith in *relevant* aspects of the witness's account (para. 15). As a matter of logic, where the only issue in dispute is whether the accused committed the offence, the trier of fact must be comforted that the impugned witness is telling the truth *in that regard* before convicting on the strength of that witness's testimony. [Italics by Fish, J., bolding by O'Ferrall, JA.]

[60] In short, the evidence must be both independent and material. In relation to the latter, the evidence need not necessarily implicate the accused but it must relate to relevant aspects of the witness' account, and where the issue is whether the accused actually committed the offence the evidence must assist the trier of fact in being satisfied that the witness is telling the truth in that regard.

[61] In this case, the trial judge stated the test in the following fashion:

> Regarding [Abdullah] Mohammad. This witness is an unsavoury character as confirmed by the Crown. His evidence must, therefore, be looked at with the greatest of care and caution. Therefore, the Court should consider whether his evidence is confirmed by other evidence that is on important issues before it is relied upon.

[62] In my view, this statement of the law is consistent with what the Court said in *Khela*. I take "important issues" to include relevant matters, and because, as the Crown conceded, Seruhungo's conviction for manslaughter depended on Mohammad's evidence, "important matters" would also include evidence that

> assisted in showing Seruhungo actually committed the offence. Thus, there is no merit to the submission that the trial judge applied the wrong test for confirmatory evidence.
>
> [emphasis (underlining) added]

[170] Assistance is also provided in *R. v. Vallee*, 2022 BCCA 11, where that Court noted:

> [141] We do not agree, however, with the substance of Vallee's submission that there must be independent evidence that implicates him in the offence before the judge may rely upon the *Vetrovec* evidence. Such a conclusion usurps the role of the trier of fact.
>
> [142] The authorities require a judge to instruct a jury to look for independent evidence that will restore faith in the witness's testimony. The importance of such independent evidence increases with the centrality of the disputed issue to the crime alleged and to the degree of disrepute of the witness. However, in respect of a trial by jury, we know of no cases that require more than instructions warning the jury of the danger of convicting on a *Vetrovec* witness's identification alone, so as to prohibit a conviction.
>
> [143] Nor do we accept Vallee's submission that the statement in *Khela* made by Justice Fish "the trier of fact must be comforted that the impugned witness is telling the truth *in that regard* before convicting on the strength of that witness's testimony" means that corroboration is required on the disputed issue. The phrase "in that regard" comes straight from para. 20 of *Kehler*, which affirms the ability of the trier of fact to believe the evidence of a disreputable witness, even on disputed facts that are not confirmed if the trier of fact considers the witness is telling the truth. In other words, we read "in that regard" as applying to the contentious evidence – is the trier of fact satisfied that the witness is truthful on that factual issue in contention?
>
> [144] It happens that serious crimes occur where the only evidence of the commission of the offence comes from a highly disreputable witness, or from a nest of such people. With the aid of an appropriately fashioned *Vetrovec* caution, such cases are left to a jury tasked with determining whether the facts essential to conviction are established. Credibility assessments belong to the jury. In a judge alone case, credibility assessments belong to the judge as trier of fact. The approach proposed, in our view, is contrary to paras. 15 and 22 of *Khela* and contrary to the proper role of a trier of fact.
>
> [145] We decline to adopt the proposition that the judge here was unable to accept the evidence of Witness B for the sole reason of lack of confirmatory evidence (corroboration) on the issue of identity. It follows we do not accept the augmented approach advanced before us.
>
> [emphasis (underlining) added]

[171] As a consequence, I remind myself that the independent "confirmatory evidence" which I require in this case need not (necessarily) implicate Mr. Drake. It must, however, be capable of providing comfort that Mr. Harrington was being truthful when he testified: it must have the ability to restore my faith in the relevant

aspects of his testimony.

[172] At the risk of further repetition, Mr. Harrington is a career criminal, one who has committed crimes, some involving extreme violence, some involving deceit and dishonesty. His decision to testify against Mr. Drake saved him from being tried on several very serious crimes. A conviction with respect to even one of the *CDSA*, aggravated assault, or *Excise Act* charges with which he was charged would almost certainly have sent him back to prison, to serve a lengthy sentence.

[173] Once in prison, he would have been endeavoring to survive in a climate in which he was suspected (by some) not only of having been involved in Mr. Keizer's death, but (by others) of having cooperated with the authorities in relation to it. In such an event, he would have been in danger not only from inmates whose sympathies aligned with the accused, but also from those who had formerly been, if not friends, at least associates of his own.

[174] On top of that, testifying opened up the possibility of his receipt of a financial reward of up to $150,000, which is contingent upon Mr. Drake being convicted. Finally, the fact that the police facilitated a meeting with CPS (which, unusually took place at the police station) with respect to the possibility of his receiving access with his child, must also be considered.

[175] To conclude on this point, the Defence argues (and the Crown, for that matter concurs) that Mr. Harrington's evidence should be treated by myself (as the trier of fact) as though he were a *Vetrovec w*itness, hence, with extreme caution (*Crown Closing Submissions, para 61)*. I agree.

ii) Do we have some other independent or corroborative evidence that has not yet been previously discussed?

[176] I have earlier discussed some of the evidence that independently confirms portions of Mr. Harrington's testimony. I will now consider some more of it. I will not necessarily recite all of it. With that said, I have obviously considered all of the evidence in this matter.

a) Constable Beer

[177] For present purposes it suffices to begin with the evidence of Constable Jon Beer. He responded to the shooting approximately 11:00 p.m., along with Detective Constable Wasson. He took the pictures of the homicide that appear in Exhibit 4. The headlights of the Dodge Durango (the vehicle Mr. Keizer was driving) were still on at that time, and there were clearly four bullet holes in the centre of the driver side of the windshield and the driver side door of the vehicle (Exhibit 4, photo 25). Shell casings are noted in photos 21, 23, 27 – 29, 31, 38, 46 and 50. One bullet fragment was also found (Exhibit 4, photos 10 – 12). Blood

spatter and human material is shown in the front of the vehicle, particularly on the driver side and centre console (Exhibit 4, photos 111 – 112) and no weapons were located in the vehicle. This is consistent with Mr. Keizer having been defenceless at the time of his being shot, and having been killed in the manner described by Mr. Harrington.

b) Laura Lewis

[178] Next, we turn to the testimony of Laura Lewis. She was attending a restaurant called "the Field Guide" on Gottingen Street in the vicinity of its intersection with Falkland Street. She heard a loud bang and lifted her head. She saw a man discharging a gun. She covered her head and ran inside. She heard three more gunshots while doing so (so, four shots in total). She said he was wearing a black hoodie and a baseball cap. She was incorrect on this latter detail, as it can be clearly seen on Exhibit 3 that the shooter is not wearing a baseball cap under the hoodie. She also said that the shooter was a white male, approximately six feet tall and with an average build.

[179] Ms. Lewis estimated that this occurred around 11:00 p.m. She agreed that she had also, earlier, told the police that the shooter was white when she provided her statement. The point is not that repetition improves the value of her evidence, but, as she said, merely that this was what she had believed at the time she witnessed these events, 7 ½ years earlier.

[180] She was in the process of locking up her bicycle when all of this occurred. She identified where she was standing (when she made these observations) with an "X" on photos 9A and 9B of Exhibit 4, the former having been taken the night of the shooting, and the latter having been taken by Constable Beer the following day.

c) Catherine Tranchita

[181] Ms. Tranchita has been mentioned earlier. She was 33 years old when she testified, and, on the night of his murder, she was Mr. Keizer's girlfriend. She was seated in the front passenger seat of the Dodge Durango at the time of the murder. She was a Montréal, Québec resident, but had flown down to Halifax on November 18, 2016. The following day, she arranged to rent the black Dodge Durango, and she testified that Mr. Keizer really liked that vehicle.

[182] She said that, on November 21, 2016, the two had supper at Mr. Keizer's mother's residence, and left around 10:30 p.m., so as to have sufficient time for Mr. Keizer to return to the Carlton Annex and abide by his curfew. The timing of that curfew had changed since his release. It had become later, as his liberties increased. On November 21, 2016, the curfew was 11:00 p.m.

[183] The Norex parking lot is very proximate to the halfway house, and she said

that, regardless of whether he was driven to the Annex by her, his sister or his mother, they "always parked there". She acknowledged that she was not sure necessarily why that was the case, "maybe he had a reason".

[184] When they arrived at the parking lot, there were two people there already. One of them was an individual whom she described as a very good friend of Mr. Keizer's, "Too Hot". He was a "black man with 'dreads'". The other individual was the shooter, a white guy wearing a black hoodie which covered his head. Her estimate was that he was under six-foot and maybe 200 pounds, and approximately 25 years old.

[185] She said that the shooter first shot from a position in front of the vehicle, then went to the driver side and shot some more. Mr. Keizer attempted to open the door, but he was unable to get out. Ms. Tranchita was ducking down below the level of the windshield while this was going on. The next thing she knew, her boyfriend was laying on his side facing her, and he was not exhibiting any signs of life.

d) Detective Constable Mansvelt

[186] Detective Constable ("D/Cst.") Johnny Mansvelt and Corporal ("Cpl.") Todd Bromley testified to the seizure of the accused's cell phone. It occurred on March 16, 2017, and was taken directly from Mr. Drake's hands while he was using it. The reason for this strategy was to deny the accused the opportunity to lock the phone before it came into police custody.

[187] D/Cst. Mansvelt seized the phone, and he and Cpl. Bromley drove it from the Canda Games Centre to RCMP Headquarters in Dartmouth, where it was extracted. Extraction results were tendered by the Crown as Exhibit 50.

[188] D/Cst. Mansvelt also provided evidence in other respects – surveillance evidence, and evidence with respect to the time required to traverse the distance between certain areas in which Exhibit 50 depicts the accused's phone as having been situate that night (I will later offer a review of how the phone's location can be determined when Don Calpito's evidence is discussed) and the murder scene.

[189] But first, the surveillance evidence. D/Cst. Mansvelt testified that he had been involved, with other officers, in observing a residence located at 153 Governors Lake Drive, Timberlea, Nova Scotia. He testified that it was where Mr. Drake's girlfriend (and the person in whose name ownership of the seized phone was registered) lived. The accused had been seen coming and going from this location both by day and night.

[190] The Crown argues that this, in conjunction with the evidence of Telus records analyst, Don Calpito, sheds additional light upon the accused's movements on the night of the shooting, and confirms Mr. Harrington's evidence in some very

important respects, which will soon be discussed.

[191] Finally, D/Cst. Mansvelt spoke to evidence relevant to the Crown's theory that the accused was dropped off close to the intersection of Maynard and Falkland Street just before he appeared on the Norex video walking eastbound on Falkland towards Gottingen Street. It is uncontroverted that the accused's phone "pinged" off a tower at 10:38:21, a location to the northeast of the tower located at 6080 Young Street.

[192] D/Cst. Mansvelt and D/Cst. Matt MacIsaac timed the drive between Maynard and Falkland, and (first) Agricola Street and Duffus Street and (second) to Novalea and Duffus Street. The officers travelled, at all times, either at or below the speed limit.

[193] Maynard/Falkland to Agricola and Duffus, Mansvelt testified, took them five minutes and thirteen seconds. The other route required five minutes and one second to traverse. The routes taken were depicted on Exhibits 42-43, and 44-46. No evidence was led, however, as to the traffic conditions along these routes on the night of the shooting, or whether the streets along these routes had been altered during the approximately seven years that intervened between November 21, 2016, and when these tests were conducted.

e) Don Calpito

[194] How do we go about interpreting the location of a phone at a given point in time? Mr. Calpito was qualified as an expert with respect to the general functionality of the Telus wireless records, including cell tower locations rendered in call details.

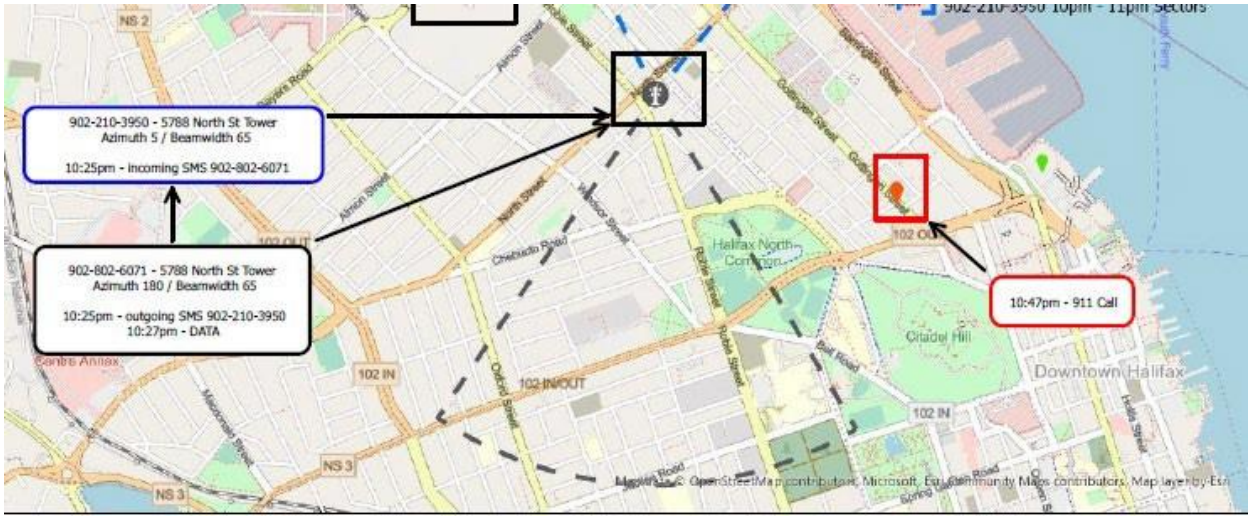
[195] There is a distinction between information gleaned when SMS ("short message system" or "text messages") are exchanged, and information provided by voice calls to and from the Telus device (usually, a phone). First, for ease of reference, I will provide an example of an SMS message. Reproduced below is the one cited in paragraph 196 of the Crown Closing Submissions:

DATETIME	CALLING NUMBER	DIALED NUMBER	CALLED NUMBER	CALL DIRECTION	SWITCH	SITE ID	SAC CI	CARRIER	BILL FLAG	CALL CODE
2016-11-21 22:25:27	9028026071	19022103950	9022103950	Outgoing	HQC007	J0400	141440810	bell	Filtered	Short message service (point-to-point) mobile-originated

[196] In this example, "Site ID" would be the tower (J0400) with which the phone is connecting. Location is given in the Tab appended to the particular exhibit called "Tower Sites" which provides a location for that tower Site ID "J0400": 5788 North Street, Halifax. Latitudinal and longitudinal reference points are also available.

[197] The location of the phone relative to the tower is revealed by the "azimuth" or angle of the phone in relation to the tower. For that, we go to SAC CI in the above example, and note that it is 141440810. Reference to the corresponding chart shows the location clockwise from the due north of the tower (due north has an azimuth of "0"). In the example referenced above, the azimuth is 180.

[198] So, when these coordinates are plotted on the map below, we have an outgoing call on November 21, 2016 at 10:25:27 p.m. from 902-802-6071 (the accused's phone, a post paid device registered in the name of Tara Downey, 153 Governors Lake Drive) to 902-210-3950, a device registered in the name "Ray Lewis", but actually owned, as admitted by the accused, by Donald Arsenault. The "red box" in the right hand portion of the map below, and in some subsequent maps, shows the area of the 911 call from Peter Schnare's phone at 10:47 p.m., while he stood proximate to Mr. Keizer's vehicle (and body).



(Exhibits 57, Tab F and 58, Map #6)

[199] Mention must be made of Mr. Calpito's evidence respecting tower range. There is a difference between the ubiquity (hence, density) of towers in urban areas, as opposed to rural or suburban areas. The greater concentration of towers in urban areas is a function of their increased usage in these more heavily populated areas. This is important because the range of a particular tower can vary, depending on how far away the next nearest tower is. The range of any given tower, generally speaking, is one half of the distance between it and the next most proximate one. The range of a particular tower in any given direction will generally be less in urban areas than in others, because of their relative density in such areas.

[200] At Exhibit 59, Mr. Calpito furnished a calculation of the range of the tower at 5788 North Street, with an azimuth of 180 degrees, to be 450 meters. He also said that cellphones will connect to the tower whose signal is strongest in a given area. The strongest signal will generally be emitted by the nearest one, and so the

phone will usually connect to the nearest tower, but there are exceptions.

[201] Sometimes large buildings in built up areas can block the signal to the nearest tower, and the phone will, instead, ping off of a tower further away. Similarly, sometimes topography could dictate that a tower further away is "pinged" because that one presents a more straightforward line of sight. Also, bodies of water may may amplify a signal. For example, phones close to the Harbour on the Halifax side could actually hit a tower on the Dartmouth shore, even though (obviously) the towers on the Halifax side were closer, because of the amplification properties of that body of water.

[202] Finally, the nearest tower may already be at peak capacity, so the call would, in such a case, be "shunted" to the next nearest one with available capacity.

[203] How does the above differ with respect to voice calls to and from the device? Unlike their SMS counterparts, data in relation to voice calls only provide the tower and azimuth where the call begins, and the tower and azimuth where it ends. Towers and azimuths "in between" are not recorded.

[204] For simplicity, I will (once again) provide the example cited by the Crown in its brief to illustrate the fields that are depicted in a call which is answered by the recipient:

DATETIME	CALLING NUMBER	DIALED NUMBER	CALLED NUMBER	CALL DURATION	CALL DIRECTION	SWITCH	SITE ID START	SAC START	SITE ID END	SAC END	CARRIER	BILL FLAG	CALL CODE
2016-11-21 23:35:18	9028026071	19022093502	9022093502	43	Outgoing	HQC006	J0400	46094	J0400	46094	bell	Billing	Mobile-originated call

(*Crown Closing Submissions, para 203*)

[205] Unanswered incoming calls, as well as those that arrive when the device is turned off, are bereft of SITE ID, or SAC ID information, and we instead see information like the following:

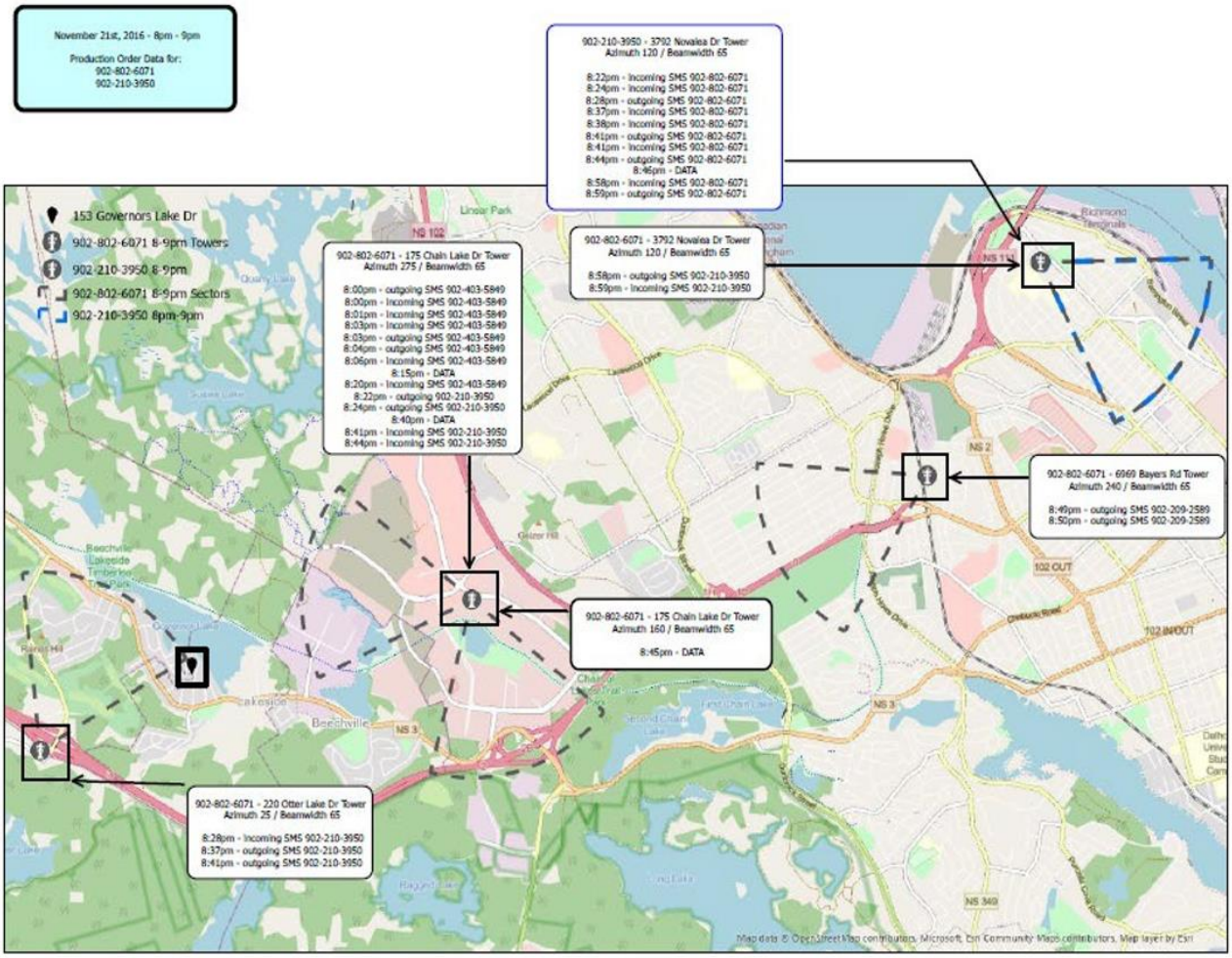
DATETIME	CALLING NUMBER	DIALED NUMBER	CALLED NUMBER	CALL DURATION	CALL DIRECTION	SWITCH	SITE ID START	SAC START	SITE ID END	SAC END	CARRIER	BILL FLAG	CALL CODE
2016-11-08 07:31:22	9024146258	9028026071		4	Outgoing	HQC003						Filtered	Forwarded call

[206] Of note is the reference to "forwarded call" in the final "call code" box.

[207] So, having regard to this (admittedly very basic) overview of Mr. Calpito's evidence, we can gain an appreciation of both the Crown and Defence contentions as to what this says (or does not say) about the location of the Drake, Arsenault, and Harrington cell phones on the night of Mr. Keizer's murder.

[208] While following these maps and the arguments advanced, it is helpful to bear in mind that the individual known to be the shooter enters the footage of Exhibit 3 (Norex video) at 10:40:42 p.m., which equates to 10:44:25 p.m. on the Salvation Army video (Exhibit 8). I will explain below why I am satisfied that the latter is the one most coincident with "real time".

[209] I begin with Exhibits 57 (Map 1A) with appendices and Exhibit 58 (HRP Crime Analyst Map #1). This is rendered below:



[210] This provides an overview of the whereabouts of the Drake phone between 8:00 – 9:00 p.m. on November 21, 2016. This may also be compared with a map (Exhibit 57, Tab 2A) which Mr. Calpito identified as showing the towers in HRM as they were constituted in November, 2016.

[211] Calpito said that the above usage depicted between 8:00 – 8:44 p.m. was consistent with that phone being initially located in the vicinity of 153 Governors Lake Drive, which D/Cst. Mansvelt connects to Mr. Drake's girlfriend (and registered owner of the phone) Tamara Downey, as her residence.

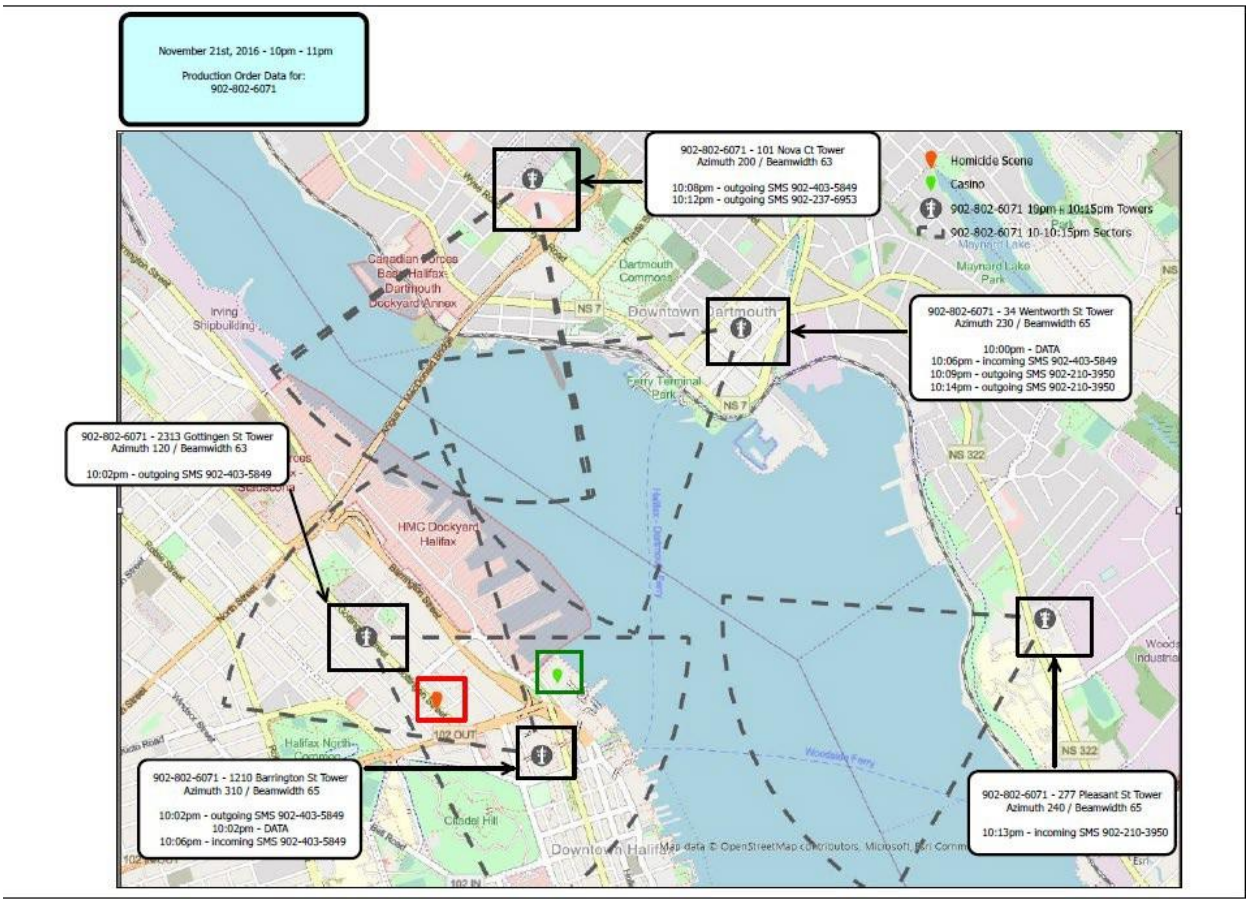
[212] Mr. Arsenault's phone records suggest that his device was pinging in a southwest direction off of a tower located at 3790 Novalea Drive (Halifax peninsula, North end). Tower pings from the Drake phone at 8:58 and 8:59 p.m. suggest that Mr. Drake is moving toward Mr. Arsenault's location (at least the two

devices are getting closer).

[213] Movement or divergence between the two devices occurs between 9:03 – 9:09 p.m. One phone (that of Mr. Arsenault) appears to head in the direction of Bedford. Pings from the Drake device place him in the vicinity of Casino Nova Scotia.

[214] The Court received specific evidence from Casino Nova Scotia employees (and records from that institution) which place Mr. Drake there shortly before 10:00 p.m., that evening. Moreover, Mr. Calpito's testimony was that tower pings shown on Exhibit 58, Crime Analyst Map #4, and Exhibit 57 (Tab 1D) at 10:06, 10:08, 10:13 and 10:14 p.m. off of towers located on the Dartmouth harbour shoreline could be consistent with the accused using the phone at the Casino or its environs. This is because of the amplification properties of Halifax Harbour and the topography of the environs.

[215] It appears that Mr. Drake is communicating with the Arsenault device during the above intervals. For ease of reference, Exhibit 57 (Tab 1D) is reproduced below:



[216] Mr. Arsenault's phone records also show that the device was making its way back to Halifax during this interval. The phone appears to be situate at a location

north of the tower at 5788 North Street at 10:25 p.m. (Exhibit 57, Tab 1E, Exhibit 58, Crime Analyst Map #4).

[217] Meanwhile, the Drake phone is pinging off of the south side of the same tower at 10:25 p.m. Evidence that the accused had left the Casino by this time has already been referenced. First, the time is proximate to that at which the pit manager noticed that Mr. Drake (who was known to him) was no longer on the premises. Second, at 10:08 p.m. Mr. Drake responds to a text message. The conversation is this:

- "u around the casino" (*Exhibit 50, Tab 1, p. 20, row 292*)
- "just here brought two bills n lost it low" (Exhibit 50, Tab 1, p. 20, row 299)

[218] Tim Moffatt, the pit boss on duty in the relevant area of the Casino that night, offered an interpretation of the above as "brought $200 and lost it at the low limit tables". These are the tables at which he saw Mr. Drake playing that evening. Moreover, he said that the start time at which Mr. Drake's player card was activated was 9:53 p.m. The end time attributed to Mr. Drake's casino visit was 10:25 p.m., but this is not exact. It says merely that 10:25 p.m. is when the Casino personnel had noticed that he was no longer on the premises. Patrons do not have to sign out, or present their cards when they leave the premises.

[219] So, the Crown argues:

> [222] At 10:25pm, Don Calpito estimated that Drake's phone was located within 450m south of 5788 North St. Arsenault's phone is located within 1.1km north of the tower at 5788 North St.
>
> [223] Drake's phone then proceeds north and pings northwest of the tower located at 6080 Young St. at 10:38pm. This is the last activity on Drake's phone until after the shooting of Tyler Keizer. The next time Drake's phone connects with any tower, be it for text, data or voicecalls, is at **11:25pm**.
> 10:38pm SMS and timing evidence
>
> [224] *Material information from the pings at 10:25 and 1038pm appear in the Telus Records as follows:*

DATETIME	CALLING NUMBER	DIALED NUMBER	CALLED NUMBER	CALL DIRECTION	SWITCH	SITE ID	SAC CI	CARRIER	BILL FLAG	CALL CODE
2016-11-21 22:25:27	9028026071	19022103950	9022103950	Outgoing	HQC007	J0400	141440810	bell	Filtered	Short message service (point-to-point) mobile-originated

> [225] The 10:25pm and 1038pm pings from Drake's phone is entirely consistent with him being the shooter of Keizer, as Morgan Harrington told the Court. These two pings just prior to Keizer's shooting are consistent with Drake circling the area around the Salvation Army before Keizer is scheduled to arrive for his curfew before 11pm.
>
> [emphasis in original]
>
> (*Crown Closing Submissions)*

[220] The Crown also reminds the Court that Mr. Calpito said that Mr. Drake's device would be at most 750m northwest of the tower at 6080 Young Street, and argues that this would be "closer to 6080 Young St. than the intersection of Novalea and Duffus St." This leads to (in the Crown's submission):

> [228] The evidence of D/Cst. Johnny Mansvelt demonstrates that the distance from the location where the shooter came from on Falkland St. to these locations is approximately 5 minutes by car driving normally at the speed limit. Therefore, one would expect that the distance by car would be less than five (5) minutes to the furthest (750m) that Drake's phone was relative to the 6080 Young St. Tower. This route would take even less time if the car Drake was travelling in was travelling faster than the speed limit.
>
> (*Crown Closing Submissions*)

[221] Mr. Calpito also testified that when there is an apparent gap in data usage (as there was, between 10:38 p.m. and 11:25 p.m. on November 21, 2016, with respect to Mr. Drake's phone) there are four possible reasons which could account for it. The device could be turned off, it could be on airplane mode, it could be in an area lacking service, or it could be connected to Wi-Fi.

[222] The Defence extrapolates from this:

> 131. In this case, Mr. Drake's phone was not using data when the outgoing SMS at 10:38:21 was sent. SMS messages are not able to be sent if the device is turned off, on airplane mode, or in a no-service area. It follows that Mr. Drake's phone was connected to Wi-Fi when the critical text message was sent. Don Calpito testified that Wi-Fi networks are typically used in homes or businesses.
>
> 132. As such, it is extremely likely that Mr. Drake was in a dwelling or business in the North End when the critical text was sent at 10:38pm, and not in a vehicle. Mr. Drake had numerous and significant connections to that area of the city. The trial evidence of D/Cst. Mansvelt and Sgt. Wagg included surveillance efforts involving Mr. Drake and others which placed Mr. Drake at various times at Coastal Cannapy, Chris Baird's residence on Lynch Street, his parents' address on Hunter Street, various restaurants in the North end, and other such locations. This evidence undermines the Crown's entire case, which rests on the highly suspect evidence of Mr. Harrington. Mr. Drake was in a dwelling or building in a completely different area of the city immediately before the homicide. He was not the shooter.
>
> 133. The Crown may argue that the Cellebrite report for Mr. Drake's phone does not show a connection to a Wi-Fi site at 10:38pm on November 21, 2016. However, this argument has no merit, because Cpl. Todd Bromley testified that capturing Wi-Fi connections in a logical extraction is very unreliable, and that hundreds or even thousands of such connections could be missing from such an extraction.
>
> 134. There is further evidence in the Telus records from November 21, 2016, that erodes the Crown case. That night, around the time of the homicide, Mr. Harrington sent and received a number of SMS messages (see Exhibit 60, Tab F,

> p. 193). After Mr. Harrington arrived back at the halfway house, his cellphone pinged off the following three towers:
>
> (a) J0694 – the Scotia Square tower1;
>
> (b) J0906 – the Halifax Infirmary tower at 1796 Summer Street;
>
> (c) J1437 – the Ahern Manor tower at 2313 Gottingen Street, at azimuth 120 (see Exhibit 60, Tab H, p. 198; also confirmed by Mr. Calpito on cross-examination).
>
> 135. Importantly, Mr. Drake's cellphone never pings off towers J0694 or J0906, nor does it ping off of tower J1437 at azimuth 120 (south east of the tower) around the time of the homicide. Mr. Drake's cellphone pings off of the Scotia Square tower only while he was at the Casino around 10:00pm. As explored in cross-examination, Mr. Drake's phone does ping off of tower J1437 on the night of the homicide at 11:25pm, but at a different azimuth (240 degrees – southwest of the tower) (*see enlarged portion of map G on the next page*).
>
> 136. Although Mr. Drake is within a kilometer of the scene of the homicide at 11:25pm, his cellphone never pings, at any relevant time, at that scene.
>
> (*Defence Closing Submissions*)

[223] The Defence concedes that the Telus data strongly suggests that Mr. Drake and Mr. Arsenault were together from 11:25 p.m. to 1:00 a.m. on the night of November 21 – 22, 2016. With that said, counsel argues that this means little to nothing as it was not abnormal for the two to be together. Moreover, when their phones converged earlier, they could simply have been in the Agricola Street/North end area (*Defence Closing Submissions, para 137*). After all, they were the co-owners of the cannabis dispensary at 2411 Agricola Street and Mr. Drake had other friends and acquaintances in the area, as referenced earlier.

[224] This Defence argument culminates with:

> As such, there is a perfectly innocent explanation as to why Mr. Drake and Mr. Arsenault were in the area of the homicide on November 21, 2016 – they were at Coastal Cannapy.
>
> (*Defence Closing Submissions, para 141*)

[225] As I evaluate this evidence, and the parties' positions with respect to it, it is helpful to recall certain things.

[226] We start with the fact that the 911 call with respect to Mr. Keizer's shooting occurred at 10:47 p.m. (see, for example, Exhibit 57, Tab 1F and Exhibit 58, Crime Analyst Map #6). Mr. Schnare said that he made that call at 10:46 p.m. according to his watch.

[227] Next, we recall that the Norex video (Exhibit 3) depicts the shooter appearing in a frame time stamped 22:40:39 (10:40:39 p.m.). We further recall that the parties have agreed that the Norex video is three minutes and 43 seconds

behind the time of the Salvation Army video (Exhibit 8).

[228] Next, the evidence of Niko Zjacic, which was to the effect that the timestamp on Exhibit 8 was supplied by the computer controlling the surveillance system employed by the Salvation Army. This computer time was set, in turn, by virtue of its connection to the "world clock".

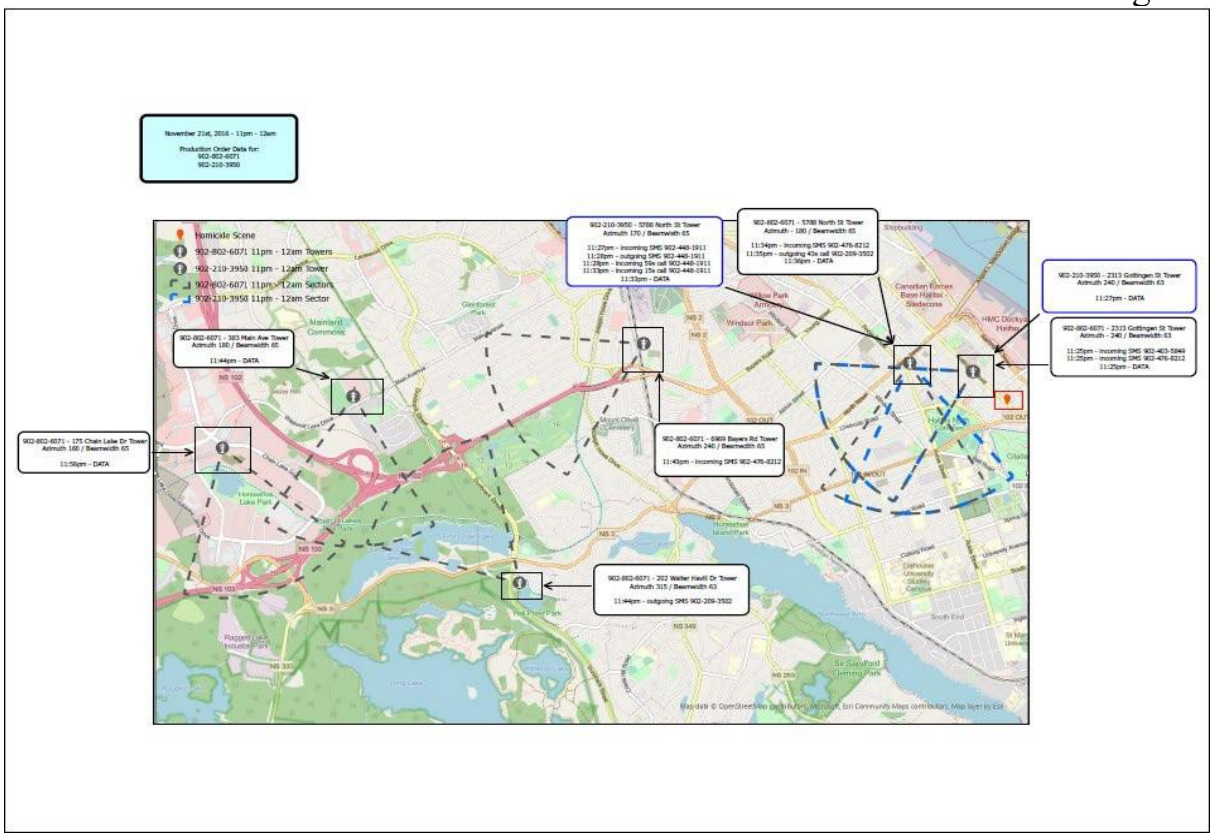
[229] I have concluded that the correct time is the one provided by the Salvation Army video (Exhibit 8), and that the Norex video is three minutes and 43 seconds slower than "true" time. Exhibit 8 also corresponds, in most cases, with the times noted in the Telus records. This facilitates cross-referencing with the Drake, Arsenault, and Harrington phone records.

[230] Informed by these conclusions, I return to the shooter's appearance in the Norex video at 22:44:22 (corrected time). This was six minutes after the Telus records show that Mr. Drake's phone pings off of 6080 Young Street tower. I also factor in the aforementioned evidence of D/Cst. Johnny Mansvelt concerning how long it would take, by car, to traverse this distance, all else being equal. With that said, I remain fully cognizant that Mansvelt and his partner conducted the tests about seven years after the night in question. I have no evidence as to whether anything occurred within the intervening time which would have shortened or lengthened that drive.

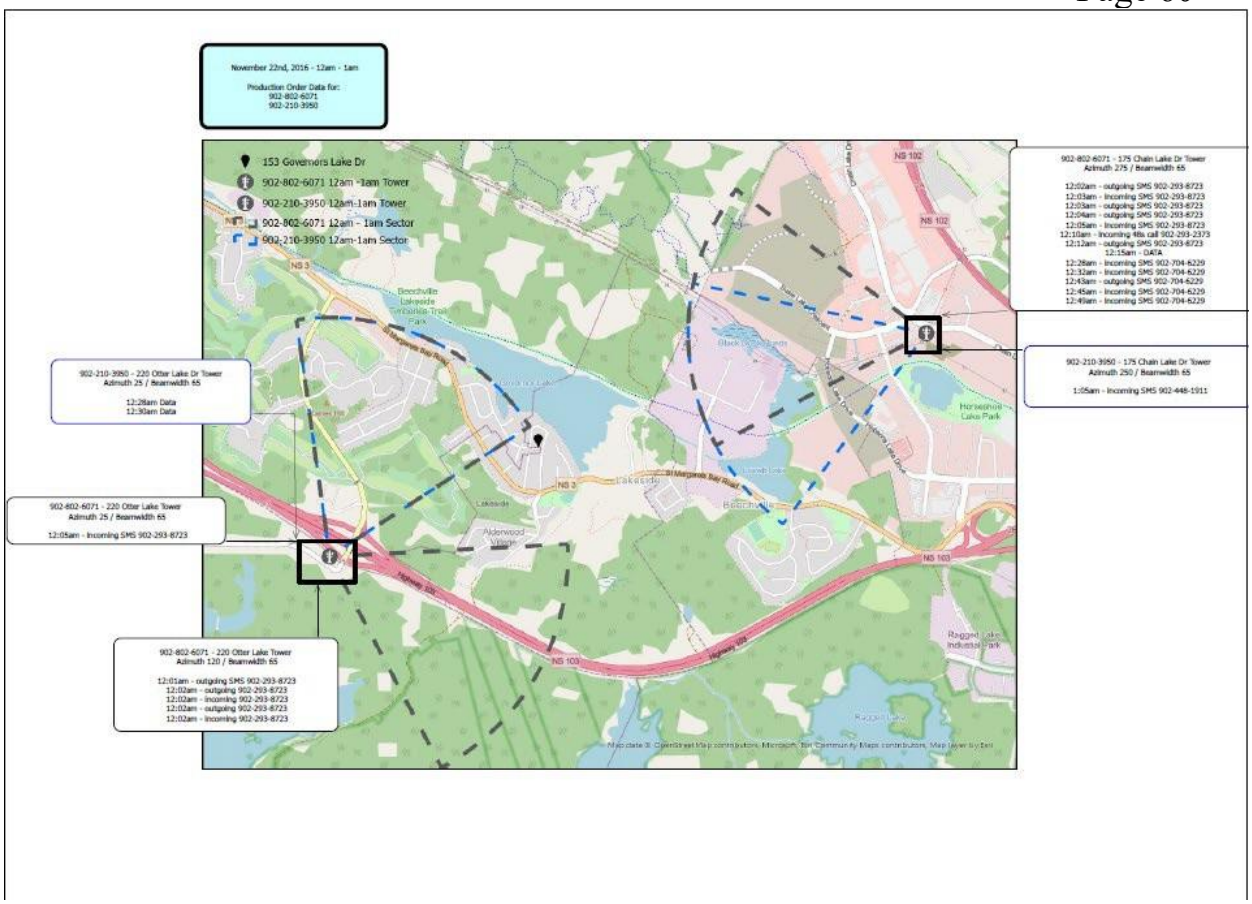
iii) Further considerations: After the shooting – what do the Telus records say?

[231] The Norex video depicts the shooter running west down Falkland, after the shooting has occurred. This is consistent with the *viva voce* testimony of two Falkland Street residents. At 11:25 p.m. November 21, 2016, we know that Mr. Drake receives two incoming texts. His phone pings off of a tower at 2313 Gottingen Street. On the basis of Don Calpito's testimony, it would be expected that his phone was, at most, 475m from that particular tower, albeit at a southwest azimuth. His phone receives SMS messages at 11:34 p.m. and 11:35 p.m. respectively. The data indicates that its location is in the same general area, as is that of Mr. Arsenault.

[232] This is more easily seen on the map at Exhibit 57 (Tab 1G) / Exhibit 58 which is reproduced below:



[233] As can also be seen from the above, both phones subsequently appear to be moving in the direction of Governors Lake Drive. By midnight, both phones are in the area of 153 Governors Lake Drive, as per below:



[234] It has earlier been mentioned that the Telus records corroborate Mr. Harrington's evidence that he was with his girlfriend on November 21, 2016, before returning to the Salvation Army. He called a cab from that location (Exhibit 60, p. 14). The same Exhibit reference depicts a 1:15 second phone call, consistent with him being talking on the Salvation Army video (Exhibit 8) at 10:45:12 p.m. and indicates that it would have ended at 10:46:16 p.m., which also lines up with the footage (adjusted for the time discrepancy) on the Norex video.

[235] We have also earlier discussed the texts sent by Mr. Drake to Mr. Harrington after the shooting (i.e., the "what happen" / "cuz got slumped bro" discussion).

iv) One day later

[236] We know from the extraction records from Mr. Drake's phone on November 22, 2016 he was searching for information about the Tyler Keizer homicide. The Crown argues that "… the specificity of his searches regarding Keizer are telling":

11	Allie Keizer	https://m.facebook.com/allie.keizer?tsid=0.13231346601383198&source=typeahead	11/27/2016 8:46:02 PM(UTC-4)	1		Artifact Family: Source Repository Path:	Source: Safari	Yes	
12	Allie Keizer	https://m.facebook.com/allie.keizer?tsid=0.13231346601383198&source=typeahead	11/27/2016 8:46:03 PM(UTC-4)	1		Artifact Family: Source Repository Path:	Source: Safari	Yes	
13	Catherine Castellucci	https://m.facebook.com/catherine.castellucci?fref=pb	11/27/2016 8:46:30 PM(UTC-4)	1		Artifact Family: Source Repository Path:	Source: Safari	Yes	
14	Catherine Castellucci	https://m.facebook.com/catherine.castellucci/posts/picfp.502931742.10153745885796743/?photo_id=10153745885841743&mds=%2Fphotos%2Fviewer%2F%3Fphotoset_token%3Dpicfp.502931742.10153745885796743%26photo%3D10153745885841743%26profileid%3D502931742%26source%3D49%26refid%3D17%26cached_data%3Dtrue%26ftid&mdf=1	11/27/2016 8:46:31 PM(UTC-4)	1		Artifact Family: Source Repository Path:	Source: Safari	Yes	
15	Catherine Castellucci	https://m.facebook.com/catherine.castellucci/posts/picfp.502931742.10153745885796743/?photo_id=10153745885826743&mds=%2Fphotos%2Fviewer%2F%3Fphotoset_token%3Dpicfp.502931742.10153745885796743%26photo%3D10153745885826743%26profileid%3D502931742%26source%3D49%26refid%3D17%26cached_data%3Dfalse%26ftid&mdf=1	11/27/2016 8:46:21 PM(UTC-4)	1		Artifact Family: Source Repository Path:	Source: Safari	Yes	
16	Catherine Castellucci	https://m.facebook.com/catherine.castellucci?fref=pb	11/27/2016 8:46:13 PM(UTC-4)	1		Artifact Family: Source Repository Path:	Source: Safari	Yes	

(*Crown Closing Submissions, para 281*)

[237] Allie Keizer is Tyler Keizer's sister. Catherine Castellucci (aka Catherine Tranchida), as we have earlier noted, was his girlfriend at the time.

[238] The Crown also attaches some significance to the photos in Exhibit 50, Tab 3 of Mr. Drake's phone extraction records. It argues that it "…does not say that this comparison allows Drake to be identified as the shooter, but the Crown submits that there are definite similarities as between the photos of Mr. Drake and the enhanced photos of the shooter taken from Salvation Army footage" (*Crown Closing Submissions, para 284*).

[239] I have concluded that the photographic and/or video evidence neither confirms nor excludes the possibility that he is the shooter. It is more valuable, however, for depicting the timeline at which the relevant events occurred, and what the person (conceded to be the shooter) therein depicted, was doing.

[240] Very little positive or negative may be derived from the specifics of the texts between Messrs. Harrington and Drake in the very early hours of November 22, 2016. Nor from the earlier message #251 which appears in the Cellebrite report "nothin took buncha pills just gonna stay in house or someone prob get hurt lol." The fact is, we know Mr. Drake did go out that evening. He could have changed his mind after text #251, or he could have been "messing around" when he texted, or his intention could have been something else. For that matter, with respect to the post-12:02 November 22, 2016 messages sent to Mr. Harrington, he could have been testing loyalty or discretion, as Mr. Harrington testified he thought Mr. Drake was doing. Or he could have been simply inquiring.

[241] It would be too speculative to attempt to assign a meaning to the texts. They do, however, coincide with what Mr. Harrington said with respect to their having been received by him from the accused.

v) How to weigh and analyze the confirmation evidence in this case

[242] Simply put, I must consider the evidence as a whole in order to determine whether my faith in the veracity of Mr. Harrington when he identified the accused as the shooter, has been restored.

[243] I must not piecemeal each bit of evidence that I accept, by subjecting that particular bit or portion to an analysis of whether the possibility exists for a "perfectly innocent explanation," for that piece. Instead, when I weigh the strength and weakness of the constituent elements of the body of confirmatory evidence, I do so as a whole.

[244] This is no different than the approach discussed in a case both counsel referenced: *R. v. Muise*, 2016 NSCA 34. I must follow the approach stated in that case:

> [51] In reviewing the evidence and explaining his view of the teller's evidence as he did, the trial judge was doing his job of turning a critical eye to the evidence. He was not dealing with it on a piecemeal basis. He was weighing it and commenting on its strength and reliability, not subjecting it to the standard of proof beyond a reasonable doubt or saying that he would not later consider it in determining whether Mr. Muise was innocent or guilty.

[245] Obviously, since this is a Judge alone trial, it is not necessary to administer a *Vetrovec* warning to a jury. But, as has been repeatedly emphasized, I must treat Mr. Harrington's evidence with a great deal of caution.

[246] Indeed, the determination of whether sufficient evidence exists to confirm Mr. Harrington's testimony, independently, in a material enough manner to satisfy me that he was telling the truth with respect to the identification of the shooter, is largely responsible for the length of these reasons.

[247] In a very real sense, I am gauging how his "account stands in harmony with the evidence pertaining to it, while engaging in the appropriate standard of proof in a … criminal case" (*D.D.S.*, para. 77). As the Court continued in *D.D.S.*:

> [78] In this regard I find it helpful to repeat the lucid observations of Justice O'Halloran in the oft-cited case of **Faryna v. Chorny** [1952] 2 D.L.R. 354 at 356:
>
> > . . . But the validity of evidence does not depend in the final analysis on the circumstance that it remains uncontradicted, or the circumstance that the Judge may have remarked favourably or unfavourably on the evidence

or the demeanour of a witness; these things are elements in testing the evidence but they are subject to whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time; and *cf. Brethour v. Law Society of B.C.*, [1951] 2 D.L.R. 138 at pp. 141-2.

If a trial Judge's finding of credibility is to depend solely on which person he thinks made the better appearance of sincerity in the witness box, we are left with a purely arbitrary finding and justice would then depend upon the best actors in the witness box. On reflection it becomes almost axiomatic that the appearance of telling the truth is but one of the elements that enter into the credibility of the evidence of a witness. Opportunities for knowledge, powers of observation, judgment and memory, ability to describe clearly what he has seen and heard, as well as other factors, combine to produce what is called credibility, and *cf. Raymond v. Bosanquet* (1919), 50 D.L.R. 560 at p. 566, 59 S.C.R. 452 at p. 460, 17 O.W.N. 295. A witness by his manner may create a very unfavourable impression of his truthfulness upon the trial Judge, and yet the surrounding circumstances in the case may point decisively to the conclusion that he is actually telling the truth. I am not referring to the comparatively infrequent cases in which a witness is caught in a clumsy lie.

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and of those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth. Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken. For a trial Judge to say "I believe him because I judge him to be telling the truth", is to come to a conclusion on consideration of only half the problem. In truth it may easily be self-direction of a dangerous kind.

The trial Judge ought to go further and say that evidence of the witness he believes is in accordance with the preponderance of probabilities in the case and, if his view is to command confidence, also state his reasons for that conclusion. The law does not clothe the trial Judge with a divine insight into the hearts and minds of the witnesses. And a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case. [underlining by Saunders, J.A.]

While his comments were not expressed in the context of a criminal trial,

observations similar to Justice O'Halloran's have often been emphasized in criminal cases, with suitable allowance for the different standard of proof.

vi) A non exhaustive summary of the nexus between Morgan Harrington's testimony and independent confirmatory or corroborative evidence

[248] A non exhaustive (point form) summary of the independent and material confirmatory and/or corroborative evidence in relation to the testimony of Mr. Harrington follows. These points (and some others) were discussed more fulsomely earlier in these reasons:

(i) Mr. Arsenault and Mr. Drake had grown up in the "pubs" and were friends, they are also business partners in "Coastal Cannapy". This supports Mr. Harrington's testimony to that effect.

(ii) The approximate location of Mr. Arsenault's mother's address, which confirms that the meeting on Federal Avenue with Mr. Arsenault was at least proximate to her house.

(iii) (Exhibit 70 is confirmation of Mr. Keizer's conviction for his role in the jailhouse attack on Mr. Arsenault, and supports Mr. Harrington's depiction of the ostensible basis for the "beef" between he and Mr. Arsenault.

(iv) Records of the sea-doo rental on August 27, 2016 (Exhibit 25) bearing the signatures of both Messrs. Drake and Harrington, which (again) strongly supports the occurrence of the meeting which Mr. Harrington described.

(v) Ankle bracelet data, which further supports (iv) above.

(vi) Ankle bracelet data which also supports the meeting which places Mr. Harrington on September 8, 2021 on Federal Avenue where he said he met with Mr. Arsenault. It also tracks the subsequent drive (which he said was provided by Mr. Arsenault) from there to Mr. Harrington's mother (Julia's) home on Joseph Howe Drive, and finally, Mr. Harrington's trek, after that visit, to the half-way house, all in the same day.

(vii) Chelsea Nordin's testimony that Mr. Arsenault's mother lived on Romans (albeit, not Federal) Avenue, combined with the very close proximity of the two streets.

(viii) Phone records of Mr. Harrington's visits to Coastal Cannapy (Exhibit 49, lines 1916 and 2320) October 23, 2016 and

November 1, 2016, during one of which he says the accused fronted him the marijuana to sell.

(ix) Telus records confirming that the accused was indeed out of Province (in Québec, to be specific) for a period of time after Mr. Harrington says Mr. Drake fronted him the marijuana (Exhibit 49, SMS details, rows 2 – 1703). This was provided as an explanation as to why he made a payment to one of Mr. Drake's associates (rather then to the accused personally) on the total amount that was owed.

(x) Taxi records (Exhibit 38) establishing that on November 21, 2016, Mr. Harrington requested a cab to pick him up at KM's address, and confirming that the name "Patrick" was used.

(xi) Mr. Harrington's cell records (Exhibit 60, p. 14) confirm his outgoing call to 902-429-6666 at 22:12:18 (10:12:18 p.m.) on November 21, 2016. They also confirm that he stopped at his mother (Julia's) house at 22:31:11 (10:31:11 p.m.) on the way to Gottingen Street (Salvation Army Building) because he connected to her Wi-Fi at that time.

(xii) Exhibit 3 (Norex video) shows him walking east on Falkland 22:39:35 (Norex video time) which is 10:43:08 p.m. (Salvation Army video time). Moments after that, he is captured on the Salvation Army footage (Exhibit 8) walking toward the front of the building.

(xiii) Exhibit 8 (Salvation Army) video depicts Mr. Harrington's "fist bump" with the shooter at 10:44:58 and that it corresponds with his having testified that he was on the phone as this occurred. It also depicts the shooter's "run-in" with Rocky Syliboy, and Mr. Harrington's body language while this was going on. This is video footage which the Crown and Mr. Harrington say he did not view until after he took the stand and gave his evidence as to what happened.

(xiv) Mr. Harrington's phone records, which corroborate that he was speaking with KM ("The Queen") while all of this was happening, and that this call ended less than a minute before Mr. Keizer was shot.

(xv) Ms. Tranchita's evidence, as well as Ms. Lewis' testimony, who said the shooter was white.

(xvi) Exhibit 3 and Exhibit 8 show the shooter walking from the front of the Salvation Army video (shortly after 10:45:27 p.m.). First, he is seen walking away from the front of the building

southward on Gottingen. He appears on the Norex video virtually contemporaneously with his disappearance from the Exhibit 8 video. He arrives moments before Mr. Harrington, who essentially followed him, all the while talking on the phone with KM, as Mr. Harrington testified.

(xvii) The shooter is then seen gesturing to Mr. Harrington (Exhibit 3). Mr. Harrington had testified that the words accompanying that gesture were "Too Hot, come holler at me", and that the two appear to be alone, briefly.

(xviii) Mr. Harrington described the accused as clad in a grey hoodie. Exhibit 8, the Salvation Army video, shows the shooter dressed in a dark or black hoodie (with one prominent exception, earlier noted, due to the momentary lighting when the particular still from that Exhibit was captured). This would be consistent with his having seen Exhibit 3, the Norex video while the police interviewed him on November 22, 2016, where dark clothing appears grey due to light distribution in the footage. It is also consistent with him not having seen Exhibit 8 prior to trial, as he (and the Crown) maintain. I hasten to point out that, as with all of the other evidence, just because it is consistent, does not (in and of itself) mean that he is telling the truth. It is simply another piece of evidence.

(xix) Exhibit 3 depicts the arrival of the Durango on the scene moments after Mr. Harrington's appearance. Mr. Keizer's Durango approaches southbound on Gottingen and enters the Norex parking lot (Squiggle Park). The first shot is fired, at which time Mr. Harrington leaves with haste, and heads north on Gottingen towards the Salvation Army Building (Exhibit 3, 22:42:52 – time, corresponding to 22:46:35 (or 10:46:35 p.m.) on Exhibit 8). The footage depicts him walking down Gottingen with the palms of his hands resting on the crown of his head.

(xx) Mr. Harrington testified that he knew he would get picked up by police and warrant issued because he was present at a shooting. He divests himself of the cocaine that had been on his person (he said he gave them to a friend "Scottie"). The moment is captured by the "still" at 10:46:45 of Exhibit 8, which has earlier been reproduced.

(xxi) Scottie dropped the package during the transfer. Mr. Harrington volunteered that the package contained crack cocaine. The Court would have otherwise been unaware of that fact.

(xxii) Phone record confirmation of the messages Mr. Harrington testified that Mr. Drake sent him. They figure in this sequence merely corroborating that he received texts from the accused. As noted earlier, it is not necessary to delve into what Mr. Drake meant by those texts. Just that they correspond with what Mr. Harrington said happened, and as to the words the messages contained.

(xxiii) The Telus records (which were recently discussed) which portray Mr. Drake's device "pinging" off the south side of the Tower at 5788 North Street (and within 450m of that tower) at 10:25 p.m. on November 21, 2016, and Mr. Arsenault's located within 1.1 km north of that Tower.

(xxiv) Mr. Drake's phone then is seen to ping northwest of the Tower at 6080 Young Street at 10:38 p.m. (at most 750m northwest of the tower) which is almost exactly six minutes before the shooter is first seen on the Norex video on Exhibit 3.

(xxv) Exhibit 3 portrays the shooter walking east on Falkland at 22:39:35 (Norex) which is 10:43:08 in real time, as per (xii) above.

(xxvi) Dt/Cst. Mansvelt's evidence as to the location of Mr. Drake's phone to the effect that it was less than a five minute car ride away from the location on Falkland Street where the shooter is first observed on Exhibit 3, all else being equal.

(xxvii) After 10:38 p.m., Mr. Drake's phone records depict no activity until 11:25 p.m., when he receives two incoming texts. His phone pings off of the southwest side of the Tower at 2313 Gottingen Street, at most 475m away from it, at that time.

[249] While acknowledging that Mr. Drake's phone does ping off the Tower on Gottingen Street, at 11:25 p.m. as we have seen, the Defence points out that it does not ping off two of the other towers that we know registered pings for Mr. Harrington's phone earlier in the evening. This is argued to be significant because we know Mr. Harrington was in the area of the Carlton Annex on Gottingen Street.

[250] As we have seen, the Defence also argues that the tower pings off of the Young Street Tower are consistent with Messrs. Drake and Arsenault being together at their business "Coastal Cannapy" on Agricola Street rather than on Gottingen Street, and that this would explain why no records of phone activity exist on either phone – from 10:30 p.m. to 11:25 p.m.: they were hooked up to private Wi-Fi on the premises of the business, or, to the Wi-Fi of one of any number of the premises of friends in the area. There are no records of that

happening, but Cpl. Bromley testified that the process of capturing Wi-Fi connections is often unreliable.

[251] Moreover, as has also frequently been mentioned, the Defence has argued that Mr. Harrington's demeanour both before, during, and after the shooting are not consistent with him having been surprised by it, and suggest that he may be complicit with the shooter, and implicating Mr. Drake to protect the real killer.

[252] It is true that some pieces of this evidence are stronger than others. As discussed earlier, the Defence points to the fact that Mr. Harrington said Tyler Keizer was like his brother, so why did he depart the scene so quickly after his "brother" was shot? Did he look "upset" in the stills of him captured in the halfway house moments after the shooting? Was he really "warning away witnesses" from the scene after the shooting? Could Messrs. Drake and Arsenault have been at their business premises, or a friend's house in the areas when some of the "pings" which the Crown argues are inculpatory were recorded?

[253] I have considered this and all of the independent evidence relating to Mr. Harrington's account of what happened. To deal with one of the specific examples, I am hesitant to assign any importance to how Mr. Harrington acted immediately after the shooting. There is no "standard script" for someone to follow when they have just witnessed the shooting of a good friend. Moreover, there is often a good reason not to rush to the aid of someone while they are still being shot at. With that said, I remain acutely aware that Mr. Harrington's testimony is the only evidence that puts Mr. Drake at the Norex parking lot on November 21, 2016 at 10:46 p.m., and names him as the killer.

[254] So, I have looked at the evidence from other sources. That has included the factors most recently summarized which confirm or strongly support many important features of Mr. Harrington's testimony.

[255] Earlier, I considered the evidence (as a whole) when I determined whether or not the Defence led evidence had left me in reasonable doubt. I have done so again when I determined whether the Crown has satisfied me beyond a reasonable doubt as to Mr. Drake's guilt.

Can I be satisfied that Adam Drake was Tyler Keizer's killer?

[256] To return to what I said earlier, when *W.(D.)* was discussed, the burden is upon the Crown to prove these allegations beyond a reasonable doubt.

[257] This legal or persuasive burden never shifts to the accused, Mr. Drake, as it remains with the Crown throughout the trial. The presumption of innocence can only be displaced by credible and reliable evidence that establishes beyond a reasonable doubt all the essential elements of the offences charged. In particular,

an accused person cannot be called upon to explain or theorize as to why a complainant would make an allegation against him because it undermines the presumption of innocence by shifting the onus of proof to the accused.

[258] As the Ontario Court of Appeal stated, such a diversion into "whether the accused can provide an explanation for why a complainant would make false allegations" is dangerous because it risks having the trier of fact "find the accused guilty if a credible explanation is not forthcoming" (*R. v. TM*, 2014 ONCA 854, at para. 38).

[259] In brief, I must remember that the issue is not whether I believed evidence led by the accused, Mr. Drake, but whether the evidence as a whole convinces me of his guilt beyond a reasonable doubt. For example, even if I do not believe that Defence evidence, when looked at in the context of the evidence as a whole, I must ask myself, if it nonetheless gives rise to a reasonable doubt. Finally, even if I am not left in such doubt, I must still address and resolve the most critical, in fact, the only question in every criminal case: Does the evidence, when viewed as a whole, convince me of his guilt beyond a reasonable doubt?

[260] First, having regard to the first two stages of *W.(D.)*, I considered the evidence in its totality, including the evidence that Mr. Drake called. I was not left in a state of reasonable doubt by any of it.

[261] As to the third part of *W.(D.)*, to repeat I must ask myself whether I am satisfied beyond a reasonable doubt that Mr. Drake was the shooter. In order to answer this question, I consider the evidence as a whole. I observe that on some occasions, it is necessary for the Crown to have recourse to some very unsavoury witnesses in order to attempt to prove its case. Mr. Harrington is an example of one such witness. He is amoral, a lifelong criminal, violent, and, unsurprisingly, self interested. There is no doubt that the possibility of obtaining reward money, which is contingent upon Mr. Drake's conviction, played a part in his ultimate decision to come forward.

[262] So, too, did the assistance of Officers Wagg and Baird with respect to the outstanding and very serious charges which Mr. Harrington was facing in 2018 play its part. So did the other factors to which reference has been made in these reasons, including the fact that Mr. Harrington considered Mr. Keizer to be a "brother" for that matter.

[263] But, having considered Mr. Harrington's testimony and the body of evidence which independently support it, the relative strengths and weaknesses of the evidence, and all of the other evidence in this case, I am satisfied beyond a reasonable doubt that Adam Drake deliberately shot and killed Tyler Keizer on November 21, 2016.

Is Adam Drake guilty of first degree or second-degree murder?

(i) What is first degree murder?

[264] It is necessary to discuss, at this point, the essential elements of first-degree murder. The *Criminal Code* defines murder in the following terms:

> **Classification of murder**
>
> **231 (1)** Murder is first degree murder or second-degree murder.
>
> **Planned and deliberate murder**
>
> **(2)** Murder is first degree murder when it is planned and deliberate.
>
> **Contracted murder**
>
> **(3)** Without limiting the generality of subsection (2), murder is planned and deliberate when it is committed pursuant to an arrangement under which money or anything of value passes or is intended to pass from one person to another, or is promised by one person to another, as consideration for that other's causing or assisting in causing the death of anyone or counselling another person to do any act causing or assisting in causing that death.
>
> …
>
> **Second degree murder**
>
> **(7)** All murder that is not first degree murder is second degree murder.

[265] Obviously, "planned" and "deliberate" mean different things. A "planned" murder is one thought out and considered before it is consummated. The plan does not have to be a complicated one. It is only necessary that it be formulated in advance.

[266] As for "deliberate", case law tells us that it signifies something more than mere intent. It is an act which was not done on the spur of the moment, or impulsively. It is one where the perpetrator has taken the time to weigh out the consequences beforehand. The time taken for deliberation, however, need not be lengthy.

[267] No direct evidence of planning and deliberation was led. But it can be inferred. This was an execution style murder. In *R. v. Bazuhair and Nirmalendran*, 2024 ONSC 1584, the Court observed:

> [41] This was an execution style killing. It was clearly planned in advance and then carried out by the two men who arrived at the victim's apartment building after parking their car on Blue Lagoon Court. They can be seen on video walking together towards the apartment building at 400 McCowan Road. Both were armed and concealing their faces. Upon reaching their victim, they opened fire, shooting into his body multiple times. There can be no doubt that both these men intended to kill their target. This was a planned and deliberate killing and is clearly first degree murder. The only issue to be determined is the identity of the two men.

[268] In the case at bar, the shooter (who I have been satisfied was Mr. Drake) had been travelling around in the proximate area of the shooting in a vehicle that evening. He was dressed in dark clothing, and wore a hoodie, under which he concealed a loaded firearm. He arrived at the Carlton Annex minutes before Mr. Keizer did. The latter had a routine of getting dropped off at the Norex parking lot (sometimes called "Squiggle Park") so as to arrive at the Salvation Army building ahead of his 11:00 p.m. curfew.

[269] The shooter moved from the front of the Carlton Annex / Salvation Army building to a position beside the Norex parking lot mere moments before the car bearing Mr. Keizer arrived. The shooter discharged at least four shots into the vehicle while standing in front of it, then moved to the driver's side door to get off a last shot, which may have been the one later found lodged in Tyler Keizer's neck (*Exhibit 69, para. 18*).

[270] I once again consider the evidence as a whole, and in particular, the following:

(i) First, we have the numerous phone calls with Donald Arsenault while they rode in their vehicles and each of their respective positions throughout the night, before and after Tyler Keizer is killed.

(ii) We observe Adam Drake walking onto Gottingen Street after coming from Falkland Street. This is the first and only time, according to Mr. Harrington, that he was ever visited the halfway house or environs.

(iii) He greets Mr. Harrington in the manner earlier described, has an argument with Rocky Syliboy, and gets close enough to the camera such that his entire body, from the neck down, is depicted

(iv) At his closest, he is depicted in the still at 10:45:27 p.m. Although earlier reproduced, it will be shown once again below for ease of reference:

(v) We know him to be carrying a loaded firearm under his clothing. He is looking into the group of people proximate to the entrance

to the Salvation Army/Carlton Annex. He turns and walks back up the way he came, stopping by the parking lot where Mr. Keizer will park moments later, accompanied by his girlfriend.

(vi) There he waits. Seeing that Mr. Harrington has followed him up from the front of the Salvation Army Building (while talking on the phone) he waves him over "Hey, Too Hot, come over and yell at me." Some small talk is made ostensibly about the small debt that Mr. Harrington owes to him.

(vii) Mr. Keizer appears. He parks the vehicle. Mr. Harrington says "wait, you don't have to do this," or words to that effect. Mr. Drake says nothing. He pulls the weapon (Mr. Harrington did not see it, but heard the shots) and fires about four times, then runs away.

(ii) What may I infer from this?

[271] Justice Saunders (as he was then) provided a concise explanation of what constitutes a permissible inference, albeit in a civil context. In *Jacques Home Town Dry Cleaners. v. Nova Scotia (Attorney General*, 2013 NSCA 4, he said this:

> [31] An inference may be described as a conclusion that is logical. An inference is not a hunch. A hunch is little more than a guess, a 50/50 chance at best, that may turn out to be right or wrong, once all the facts are brought to light. Whereas an inference is a conclusion reached when the probability of its likelihood is confirmed by surrounding, established facts. When engaged in the process of reasoning we are often called upon to draw an inference which acts as a kind of cognitive tool or buckle used to cinch together two potentially related, but still separated propositions. In the context of judicial decision-making, drawing an inference is the intellectual process by which we assimilate and test the evidence in order to satisfy ourselves that the link between the two propositions is strong enough to establish the probability of the ultimate conclusion. We do that based on our powers of observation, life's experience and common sense. In matters such as this, reasonableness is the gauge by which we evaluate the strength of the conclusion reached through our reasoning.

[272] In *R. v. Villaroman*, 2016 SCC 33, the Court reminds us that, inferences relying on circumstantial evidence must be based on whether: "… viewed logically and in light of human experience, [it] is reasonably capable of supporting an inference other than that the accused is guilty." In fact, Justice Cromwell elaborated at greater length:

> [35] At one time, it was said that in circumstantial cases, "conclusions alternative to the guilt of the accused must be rational conclusions based on inferences drawn from proven facts": see *R. v. McIver*, 1965 CanLII 26 (ON CA), [1965] 2 O.R. 475 (C.A.), at p. 479, aff'd without discussion of this point 1966 CanLII 6 (SCC), [1966] S.C.R. 254. However, that view is no longer accepted. In

assessing circumstantial evidence, inferences consistent with innocence do not have to arise from proven facts: *R. v. Khela*, 2009 SCC 4, [2009] 1 S.C.R. 104, at para. 58; see also *R. v. Defaveri*, 2014 BCCA 370, 361 B.C.A.C. 301, at para. 10; *R. v. Bui*, 2014 ONCA 614, 14 C.R. (7th) 149, at para. 28. Requiring proven facts to support explanations other than guilt wrongly puts an obligation on an accused to prove facts and is contrary to the rule that whether there is a reasonable doubt is assessed by considering all of the evidence. The issue with respect to circumstantial evidence is the range of reasonable inferences that can be drawn from it. If there are reasonable inferences other than guilt, the Crown's evidence does not meet the standard of proof beyond a reasonable doubt.

[36] I agree with the respondent's position that a reasonable doubt, or theory alternative to guilt, is not rendered "speculative" by the mere fact that it arises from a lack of evidence. As stated by this Court in *Lifchus*, a reasonable doubt "is a doubt based on reason and common sense which must be logically based upon the evidence or lack of evidence": para. 30 (emphasis added). A certain gap in the evidence may result in inferences other than guilt. But those inferences must be reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense.

[37] When assessing circumstantial evidence, the trier of fact should consider "other plausible theor[ies]" and "other reasonable possibilities" which are inconsistent with guilt: *R. v. Comba*, 1938 CanLII 14 (ON CA), [1938] O.R. 200 (C.A.), at pp. 205 and 211, per Middleton J.A., aff'd 1938 CanLII 7 (SCC), [1938] S.C.R. 396; *R. v. Baigent*, 2013 BCCA 28, 335 B.C.A.C. 11, at para. 20; *R. v. Mitchell*, [2008] QCA 394 (AustLII), at para. 35. I agree with theappellant that the Crown thus may need to negative these *reasonable* possibilities, but certainly does not need to "negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused": *R. v. Bagshaw*, 1971 CanLII 13 (SCC), [1972] S.C.R. 2, at p. 8. "Other plausible theories" or "other reasonable possibilities" must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation.

[emphasis added]

[273] In the more recent case of *R. v. Roberts*, 2020 NSCA 20, our Court of Appeal pointed out:

> [56] Mr. Roberts criticizes the verdict by focusing on particular aspects of the evidence and the inferences drawn from those aspects by the trial judge. Nevertheless, it is important to keep in mind that standard of proof beyond a reasonable doubt does not apply piecemeal to individual items of evidence (*R. v. Ménard*, [1998] 2 S.C.R. 109 at ¶23). Rather that standard applies to consideration of all the evidence. As Justice Beveridge explained in *R. v. Al-Rawi*, 2018 NSCA 10:
>
> > [73] A trier of fact is not to assess each piece of evidence individually on a standard of proof beyond a reasonable doubt (*R. v. Morin*, [1988] 2 S.C.R. 345). Rather, the trier of fact must take into consideration all of the circumstantial evidence relevant to any particular element.
> >
> > [74] When the evidence is entirely circumstantial, the judge must again

> consider all of the evidence. If after considering that evidence, existence of the elements is the only reasonable or rational inference, the trier of fact should draw the inference that the elements, and hence guilt, have been established beyond a reasonable doubt (see *R. v. Villaroman*, *supra* at para. 41). If there are other reasonable or rational explanations inconsistent with guilt, the inference must not be drawn and the accused acquitted.

[57] Chief Judge Williams considered the alternative arguments offered by Mr. Roberts. She rejected them. This Court should not lightly intervene:

> [139] Consistent with the observations of Cromwell J. in *Villaroman*, the cases illustrate a high level of deference to a trial judge's conclusion that there are no reasonable alternative inferences other than guilt. In *R. v. Loor*, 2017 ONCA 696, this court observed, at para. 22, that, "[a]n appellate court is justified in interfering only if the trial judge's conclusion that the evidence excluded any reasonable alternative was itself unreasonable."

(*R. v. S.B.1*, 2018 ONCA 807)

[274] We know that Mr. Drake went to the Carlton Annex on the night of November 21, 2016. It may be the first time he ever did so. He brought with him a loaded firearm. He arrived at, and ultimately stopped in front of the Salvation Army building, looked at the people who were in front. I infer that this was to see if Mr. Keizer was among them. It was very close to Mr. Keizer's 11:00 p.m. curfew. Not seeing him among the group, he turned and retraced his steps, going back the way that he came. He stopped by the parking lot where Mr. Keizer will park. Very shortly after, Mr. Harrington joined him as we have seen. Moments later, Mr. Keizer arrived. Mr. Harrington said, "Adam, you don't have to do this," but, Mr. Drake said nothing - his mind had already been made up. He pulled out the firearm and commenced shooting.

[275] The only reasonable inference that may be drawn on the totality of the circumstances, having considered the evidence in its entirety, is that the actions of Adam Drake in shooting Tyler Keizer were planned and deliberate. They constitute first degree murder in these circumstances. He is therefore guilty as charged.

Gabriel, J.