

As a result of my involvement in this case, and my understanding of pre-trial identification procedures, I wrote a paper on eyewitness identification evidence that was presented at the first Crown-Defence Conference in 2002, an outgrowth of a recommendation in Commissioner Cory's report.<sup>19</sup> It was updated for Mr. MacFarlane's class and this seminar and is included at the end of this presentation.

## IV. BRUCE MACFARLANE

### A. The Burchill Report

Thanks very much, John. I would now like to give you some context for the Burchill report. The Report was forwarded to Manitoba Justice, and to me, in my former capacity, to assess how to handle this from a broader criminal justice and social justice perspective. The immediate issue was that we had a problem with the case, in the sense that Mr. Sophonow had ultimately been acquitted by the courts. This was not a case of wrongful conviction as he was acquitted, so how were we to handle that?

I mentioned at the outset that in my former life I was the Deputy Attorney General for the province. I left government in 2005 to teach at Robson Hall, and my main course is Miscarriages of Justice. I wanted to design a course dealing with that subject, with a particular focus on wrongful conviction. I would like to step back a bit in my presentation because I am going to deal with the response by government in the next several minutes, and I wish to provide you with some context for this case because it is relevant to the question of how you get to a public inquiry.

The brutal death of Barbara Stoppel outraged the City of Winnipeg and outraged the Province of Manitoba. It occurred two days before Christmas. There is no happy way to die, but it was truly brutal and she was a relatively young girl. The pressure on the police was intense. They had to solve this case. As the days went on and as Barbara Stoppel died five and a half days after she had been strangled by the perpetrator, the pressure intensified even more. When time slipped into January, the media and the public were openly critical of the police. "What's going on? Why haven't you found this killer? Get with it." And for those of you in my class, you will recognize some of the red flags: a brutal murder, a young girl, pressure on the police, pressure to

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<sup>19</sup> *Sophonow Inquiry*, *supra* note 9 at 60.

solve the case, and ultimately pressure on the prosecution to successfully put the killer away.

Then all of a sudden there was a suspect who roughly looks like the police composite picture, roughly fits the description of the perpetrator, and who is from Vancouver, where police believed the rope used for the strangulation had originated. Pretty slim case, but then all sorts of jail house informants started to come out of the woodwork and wanted to testify.

We will be dealing with some of those issues as the panel continues this morning, but I just wanted to give you a sense of the type of case it was and how it gripped this province over a period of many, many months, if not many years.

When the Burchill Report was received by me on behalf of Manitoba Justice and the Minister of Justice, my immediate reaction upon reading it was, “well, wait a second now. There is no DNA to exculpate Thomas Sophonow, so this is not a DNA clearing case”— which is your typical scenario.

Secondly, as I mentioned before, this is not a wrongful conviction case. This was a case where Thomas Sophonow went through three trials and was ultimately acquitted by the courts. So it is not a wrongful conviction; at most it’s a wrongful imprisonment. My immediate question was “how did the police reinvestigate this and why did they reinvestigate an acquittal?” That was an immediate issue. Why would they reinvestigate an acquittal?

With tremendous credit to the Chief of Police and John Burchill, and the Winnipeg Police Service generally, they decided to take a principled approach to this because Thomas Sophonow had been acquitted, but everyone continued to see him as a murderer who “got off”.

The Court of Appeal, in finally entering an acquittal as opposed to a new trial, said that enough is enough. Thomas Sophonow has had three trials and the Crown cannot force him through a fourth. The evidence was not going to get better. That was a signal to the public that the case had not been dealt with on the merits, and that Thomas Sophonow was probably guilty. He just got off on a technicality.

So that was how Thomas Sophonow was seen for the next 10 to 15 years. He was branded. As Commissioner Cory subsequently said, “he bore the mark of Cain.”<sup>20</sup> He suffered because of that. I have spoken to him several times over the years and he has described to me the firebombing that took

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<sup>20</sup> *Sophonow Inquiry*, *supra* note 9 at 1.

place at his house in Vancouver. He and his wife and young child were upstairs when they heard a commotion downstairs. Someone had firebombed his house at the front door and they barely got out alive. His children were ostracized at school because their father was a murderer who got off. The family had no friends in Vancouver for the same reason. He was a murderer who had evaded justice.

Thomas Sophonow, even though he was acquitted, decided he had to do something about the appearance of being a murderer when he was not a murderer. He started petitioning everyone he could think of. He put together an information package and sent a request for assistance to the Prime Minister, the Premier, Ministers of Justice, to the police, the Winnipeg Police Service, the RCMP, and I received one as well. Anybody who he could think of that could set a wheel in motion. For all of the right reasons and using a very principled approach, the Chief of Police in Winnipeg decided there might be something to this. He was the one that set those wheels in motion for the investigation. That was why there was the reinvestigation of a case that had resulted in an acquittal.

In fact, in the final Court of Appeal decision, what the Court said was this:

[t]he quality of the identification evidence would not be improved by its further repetition, as that would only give the witnesses an opportunity of being even surer than before...[and] it would be difficult, in view of the notoriety the case has gained...to find a jury of 12 citizens totally uninfluenced by what they have seen or heard already.<sup>21</sup>

In other words, during that period it was a notorious case and Thomas Sophonow was going to be stuck with that label for the rest of his life unless he was able to cause a change.

Upon receiving the Burchill Report, I sent it over to the Prosecution Division of Manitoba Justice for an analysis. Prosecutors agreed with the conclusions that had been reached by the Winnipeg Police Service: namely, that there was a strong likelihood that Thomas Sophonow had not committed the offence, that he had had no involvement, and that there was another viable suspect who probably was the killer.

I sat down with the Attorney General to discuss what the options were. The government at that time was relatively new, as they had just been voted

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<sup>21</sup> *Sophonow Trial*, *supra* note 9 at 529.

into office a matter of months before. It was clear that they wanted to do the right thing by taking a principled approach to this case. If there was something wrong in the criminal justice system in Manitoba, we had to find out what was wrong and fix it. The fact that it was an acquittal was of no moment. It appeared that there was something very wrong in the Province of Manitoba in terms of the criminal justice system, whether it was in the realm of the police and police investigations, or whether it was in Manitoba Justice itself in the Prosecution Division. We did not know where it had gone wrong, but we knew something had gone wrong and something had to be done.

We looked at a number of options, and the option of a public inquiry was the favoured one. That conclusion was reached even though a public inquiry, as most of you know, is very costly. They are usually in the millions of dollars by the time all the dust settles. Public inquiries also take a fair amount of time. Other options could include a private review, which is shorter, faster, and less expensive, but does not carry the same level of confidence with the public.

## B. Public Inquiries

It is also clear that once you set a public inquiry into motion you do not know where it is going to go, and you do not know how it is going to unfold. One author has made this statement, which I think is quite accurate, in describing a public inquiry and some of the risks, at least from the standpoint of government, in launching such an inquiry. This author said:

Launching a royal commission of inquiry is a risky process – a bit like sending a ship out to sea. You don't know where it will go, how long it will take, how much it will cost or what it will bring back. And trying to relocate a ship lost at sea and bring it back to port can be a costly experience (especially if the captain is not in a hurry to come home).<sup>22</sup>

So just what is a public inquiry, and why were we looking at that as an option? And what are you going to get into once you do order a public inquiry? Because, as I said, once you announce it, it runs itself.

A public inquiry is one illustration, or one type, of an administrative tribunal. There are two basic types of inquiries: the advisory body, and the

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<sup>22</sup> Peter Larson, Larson Associates, "IPAC Executive Brief: September 2006", online: < <http://www.ipac.ca/documents/ExBrief3Commissions31.pdf> > at 3, cited in Ed Ratushny, *The Conduct of Public Inquiries: Law Policy, and Practice* (Toronto: Irwin Law Inc, 2009) at 130.

investigative body. Most public inquiries have elements of both. They have both an advisory element, advising government, and at the same time an investigative component, to find out what happened.

Fundamentally, commissions of inquiry receive their terms of reference (which is their mandate document), investigate based on that mandate document, report to government, and then cease to exist. They just disappear. It is a very ad hoc body with a time limit. For that reason, they form a very unique residual role in government if other processes are seen to be inadequate. It is a residual role because it is something that can be created very quickly. If other processes are not going to work, then you can set a public inquiry into motion, get the report, and then it disappears. But the government loses control over the information and, as well, loses control over how the information is going to be communicated to the public. In other words, once you set a public inquiry into motion, it is the commissioner and the commission that determines what information is pursued, and what the report is ultimately going to say.

I say that for a few reasons. From the standpoint of government, there are two absolutely critical things that must be taken into account when ordering a public inquiry. If there is one thing I am going to leave you with, it is these two critical decisions. The first is the appointment of the commissioner. That above everything else is very important. You need a commissioner with integrity; someone who is going to manage the process, who is going to focus the inquiry, and who you can count on to make the right and principled decisions throughout the entire process. That is so because once you toss it to the commissioner, the commissioner runs with it. The second is the development of the terms of reference, which is the mandate document. It defines where the commissioner is expected to go by providing the focus for the inquiry.

Those two decisions, because they were critical, were assigned to me. So for the next several months I spent a fair bit of time sitting down with counsel for Mr. Sophonow, and Mr. Sophonow himself, to work out terms of reference for the public inquiry. We felt that it was important that there be, in essence, a buy-in to the process and to the terms of reference. It was almost a negotiation process as opposed to a consultation. That took a fair bit of time because we had to work out each paragraph in the Order-in-Council. I will discuss the results in a moment.

The search for the commissioner was considerably easier. I reviewed potential commissioners who were likely available, with a preference for a

former judge. I then took a potential short list to counsel for Mr. Sophonow. There were three individuals listed. We had a recommendation for one, but we wanted to get Mr. Sophonow's views. The recommendation was retired Justice Cory, who had just left the Supreme Court of Canada about a year earlier. I had not spoken to Justice Cory at that point; I first wished to get the view of Mr. Sophonow and his counsel. They sat on it for a week or so, as they wanted to do some consultation of their own. They wanted to speak with some people with AIDWYC (the Association in Defence of the Wrongfully Convicted),<sup>23</sup> and with partners and other people on their assessment of the short list and retired Justice Cory. They came back and said that Justice Cory was perfect for the job. So you had a happy situation where the government favoured Justice Cory for commissioner, and Mr. Sophonow's counsel heartily agreed and endorsed Justice Cory. It was a good match.

We hammered out the terms of reference and the appointment of the Commissioner. I approached Justice Cory and met with him on a few occasions. He was enthusiastic about taking on the job, so that worked out well. The announcement was set for early June. It was planned so that the Chief of Police would call a press conference in the morning – I think it was around 10 o'clock – announcing in essence that Thomas Sophonow had not been involved in the murder. He wished to make that point perfectly clear – a very bold move coming from a Chief of Police. One hour after, the Minister of Justice called a press conference and announced that based on the statement of the Chief of Police, a full public inquiry was being called into what had happened and how we can fix any problems that were discovered.

It is, parenthetically, perhaps telling and a bit mysterious that a statement from the courts acquitting someone did not carry weight with the public, yet a press conference where the Chief of Police announces innocence changed the whole picture.

The Order-in-Council is fairly lengthy and I will not go through the whole thing.<sup>24</sup> It recites the background to the case, the concern on the part of the police, and the concern on the part of Manitoba Justice. Then there are four key paragraphs. These were the ones that had been worked out with counsel for Mr. Sophonow.

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<sup>23</sup> The AIDWYC was granted standing for the Sophonow Inquiry. See "AIDWYC Exonerations: Individual Cases – Thomas Sophonow", online: AIDWYC <[http://aidwyc.org/Exonerations\\_11.html](http://aidwyc.org/Exonerations_11.html)>.

<sup>24</sup> *Sophonow Inquiry*, *supra* note 9 at 135-138.

The first paragraph is an obvious one – that the Commissioner is mandated to inquire into the police investigation and resulting prosecution against Thomas Sophonow. So it was a two-pronged inquiry involving both the police and the prosecution.

The second paragraph mandated the Commissioner to advise on practices or systemic issues that contributed to the miscarriage of justice, and to provide recommendations. That was the next most important part of the Order-in-Council: tell us what things happened to contribute to this miscarriage of justice, and provide us with recommendations on how to avoid them in the future.

The third was this: should Thomas Sophonow be compensated? If so, on what basis, and how much, given the fact that he had been acquitted but had spent three and a half years in jail because he had been refused bail on the charge.

The fourth was added because there was some sense that there might be some pushback from the Winnipeg Police Service in terms of cooperation and documents. I think this is the only time in any public inquiry that this type of paragraph has been included – namely, it provided that all government departments and agencies, including the Winnipeg Police Service, must assist the Commissioner. That was specifically included in the Order-in-Council to make sure there was not going to be any problems down the road.

The announcement went ahead, the media received the announcement well, and the public received the announcement well. There was virtually no criticism. It was recognized that Justice Cory was a perfect selection.

At the time that the announcement was made, Thomas Sophonow was in the Minister's office. He received a written apology from the Attorney General. I will not read the whole thing but it essentially is an unqualified apology noting

...that legal proceedings led to imprisonment for almost four years, although the court system ultimately acquitted you of the offense. A recent police investigation has demonstrated that you are in no way involved in this crime and a review of that investigation by my department supports that conclusion. You were arrested, charged, and imprisoned for a crime you had not committed. I cannot begin to understand the anguish you must have felt as you were going through this process. I wish therefore to extend to you on behalf of the Province of Manitoba my full and

unqualified apology for your imprisonment under these circumstances as well as the lengthy struggle you subsequently endured to clear your name.<sup>25</sup>

I wrote the draft apology for the Minister, but the last 13 words were specifically added by the Minister himself. He wanted to make it perfectly clear that the struggle was something that he was apologizing for as well.

From Thomas Sophonow's standpoint, the apology was almost the most important thing he received. The inquiry was fine, but the fact that he had a written apology from the Attorney General of the province was something that he cherished. The two of them then had a private meeting together.

The last step in the setting up of the public inquiry was Commission Counsel. Generally speaking, the Commissioner is the one that selects Commission counsel. In this particular case, Commissioner Cory asked for my advice. I provided him with a very short list and recommended a particular person, namely Richard Wolson. I said that Mr. Wolson would be outstanding in this task, and he was. Commissioner Cory accepted that advice and asked that Mr. Wolson be approached to see if he would take on the assignment.

The public inquiry was thus announced; all of the main pieces were in place in terms of the infrastructure and the key players. At that point, government simply backs off. If there are any questions raised in the legislature the standard response is "I can't discuss that case publicly, it's before a public inquiry. A Commissioner is now in charge of it." And that is the position that we took for the next many months, until the report was prepared.

It was then in the hands of the Commissioner and Commission Counsel. Commission Counsel was Richard Wolson, and he is with us here today.

## V. RICHARD WOLSON

**I**t was the 8th of June 2000, I was just finishing a murder case in Vancouver and the verdict had been delivered that morning. When you do these types of cases, you are energized, and the adrenaline is flowing, but when the verdict arrives, it all vanishes. Even though it was a decent verdict, as I went back to my hotel room I was just exhausted. I fell into a chair; I was going to fly home that night, and I turned on the television looking for the news. I was changing channels and I saw Winnipeg's Chief of

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<sup>25</sup> For a reproduction of the full apology, see page 154 of this issue.