

through the conduct of the Inquiry itself. We are very fortunate to hear from him, as he has a wealth of experience when it comes to inquiries. He has subsequently been appointed as counsel for the Winnipeg Police Association in the Driskell Public Inquiry⁶ and was also appointed as commission counsel in the very recent inquiry into the Mulroney-Schreiber affair, now known as the Oliphant Commission.⁷

Speaking of which, our final speaker is Mr. Justice Oliphant himself. He presided as Commissioner in the Mulroney-Schreiber Inquiry.⁸ Justice Oliphant is a judge of the Court of Queen's Bench in Manitoba and for many years was the Associate Chief Justice of that court. He will discuss the role of commissioners, and describe the conduct of an inquiry through the eyes of a recently appointed inquiry commissioner at the Federal level.

Each of the presenters will speak in the order in which I have just introduced them. But the panel wishes to emphasize that we will protect some time at the end of the presentations so that you will have an opportunity to ask questions of any panel member, and so that we can have a bit of a dialogue on this important issue. To ensure we make the best of our time I am now going to turn to John Burchill so that he can talk to you about the very roots of the Sophonow inquiry.

III. JOHN BURCHILL

Thank you very much Bruce. My involvement began back on June 15, 1999. At that time, I was given a letter that Thomas Sophonow had written to the Chief of the Winnipeg Police Department asking for a review of the evidence against him as a suspect in the murder of Barbara Stoppel. The Chief of Police assigned me that letter and asked that I review the file.

⁶ *Report of the Commission of Inquiry into Certain Aspects of the Trial and Conviction of James Driskell* (Winnipeg: Manitoba Justice, 2007) at 3 [Driskell Inquiry].

⁷ *Commission of Inquiry into Certain Allegations Respecting Business and Financial Dealings Between Karlheinz Schreiber and the Right Honourable Brian Mulroney* (Ottawa: Minister of Public Works and Government Services Canada, 2010) [Oliphant Commission].

⁸ *Ibid.*

A. Reinvestigation of the Stoppel Murder⁹

The first thing I did was pull the police file in the matter. I collected all the evidence that was still in police custody and all the evidence that had been entered in the various trials at the Court of Queen's Bench. I had not been a police officer at the time of the original investigation or the original arrest, so I was not aware of all the details of the case. Although, as a teenager when that murder occurred, I had an idea about what generally had happened at that particular time.

Prior to being assigned this file, I was a fraud investigator and was aware that often you have incomplete details of a crime. For example, when money is missing, you have to track backwards on the evidence in order to find out what happened. I took a similar approach in this case. Like an auditor, you create a theory based on observations and then you test that theory. So, I began with an assumption, based on the facts that were in the police file, of what might have occurred. Then that assumption was tested to determine what was still provable using an approach very much like a fraud investigation: you analyze the available data, create a hypothesis, test the hypothesis, and refine and amend that hypothesis as needed.

When you are conducting a review of a case after the fact, your assumptions are based on the known facts as they have occurred. It is certainly different from starting fresh with an investigation because most of the evidence has already been collected prior to the start of the review. You do not have to go out and collect the evidence, and, in this particular case, 20 years had passed so the likelihood of any new evidence was probably remote.

The hypothesis about what might have occurred could relate to many things. It could be about the original murder investigation or it could relate to what might have occurred that took the original investigation down the wrong path. In this case it was the assumption that something caused the investigation to lead to the wrong person. This was based on Thomas Sophonow's claim that he did not commit the crime. So if that was the case,

⁹ Mr. Burchill talks at length about the factual background of the events of Barbara Stoppel's murder and the subsequent investigation. For a more in depth and complete account, see *The Inquiry Regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation* (Winnipeg: Manitoba Justice, 2001) [*Sophonow Inquiry*]; *R v Sophonow*, (1986) 2 WWR 481, (1986), 38 Man R (2d) 198 at 481 [*Sophonow Trial*].

the question was where did it go wrong, and what different paths could it have taken, and where could it have led?

With a hypothesis in place, I started looking at the evidence that I had collected. What convicted Thomas Sophonow in the first place? If he were innocent, perhaps the evidence would not hold up any more after 20 years. That was the first step that I looked at.

Broadly speaking, the evidence that convicted Thomas Sophonow could be broken down into three broad areas. One was eyewitness identification and the related procedures around it. The second, admissions or confessions either to the police or to jail house informants. The last was circumstantial evidence, including opportunity, motive, and post-offence conduct (such as a disbelieved alibi).

Some of this review was done with a good deal of hindsight based on changes in technology and experience over the past 20 years. Examples of these changes include the extensive studies done on eyewitness identification post-1982, and the fact that DNA technology had not even been developed until around 1985. Organizations such as the Innocence Project did not exist at the time,¹⁰ and when you consider their review of cases where DNA evidence has found people innocent or cleared previously convicted people, their work ties in well with the pre-trial identification procedures that the police used in this case. The Morin Inquiry¹¹ in 1998 certainly shed a very strong light on the use of jailhouse informants, and from the perspective of police techniques, the benefit of videotaping the statements of both your suspects and witnesses.

First and foremost, I do not have anything new to say today, and nothing revolutionary, because much of what I said, or read, or reviewed, or canvassed during my review has come out in a number of different forums. Whether it was the original trials, the appeals, or any of the number of books that have been written on the case, including Commissioner Cory's Report,¹² most of everything that transpired up until now is in some kind of published format.

¹⁰ The Innocence Project is a national non-profit organization that seeks to exonerate wrongfully convicted persons and reform the criminal justice systems to avoid future injustices. Online: Innocence Project <<http://www.innocenceproject.org/>> [Innocence Project].

¹¹ *Report of the Kaufman Commission on Proceedings Involving Guy Paul Morin* (Ontario: The Commission, 1998) available online: <<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/morin/>>.

¹² *Sophonow Inquiry*, *supra* note 9.

There were two books in particular that I read while I was reviewing this case. The first one, by Ronald Malloy, was “Guilty Till Proven Innocent – The Thomas Sophonow Story”.¹³ The second was “Manufacturing Guilt: Wrongful Convictions in Canada”¹⁴ which came out in 1998 and has a section in it with respect to Thomas Sophonow. Certainly reading those books in addition to the police file gave me a different perspective. It is not just the defence counsel's perspective or the police perspective, rather you have the perspective of a third party. You have the perspective of a third party that is looking, perhaps objectively, from the outside and providing what they saw and what they thought was going on. You also have all of the media reports, what people said at the time, and the impressions that the media had of these trials as well.

Because of our limited time here today I am just going to review, or focus on, one part of the case: the suspect identification procedures. It was certainly a very strong point in this case that led to Thomas Sophonow's arrest, and I know Mr. Wolson will be talking about a number of the other procedures that came up during the Inquiry, so I will just focus on the suspect identification. Further information on this topic has been included in a comprehensive paper on eyewitness identification generally that has been made available to Mr. MacFarlane's class on Miscarriages of Justice.¹⁵

B. The Eyewitnesses

The victim in this case was Barbara Stoppel. She was 16 years old and she worked at the Ideal Donut shop at 49 Goulet Street. It was in the Dominion Mall right at the foot of what is now Queen Elizabeth Way. She was attacked and strangled while she worked alone at that donut shop on December 23, 1981. What I am going to do is attempt to go through a chronology of the events, because it has been 30 years now and pretty much every single store in that mall has changed, the bridge has changed, and the location of some of the stores, such as the Domo gas station, has changed relative to the mall. In

¹³ Ronald Alexander Malloy, *Guilty Till Proven Innocent – The Thomas Sophonow Story* (Toronto: RM Publications, 1987).

¹⁴ Barrie Anderson & Dawn Anderson, *Manufacturing Guilt: Wrongful Convictions in Canada* (Winnipeg: Fernwood, 1998).

¹⁵ John Burchill, “That's the Man! Admission of Positive Assertions in Court and Police Identification Procedures” (Paper delivered at Crown-Defence Conference, September 2002), updated for this presentation. It can be found at page 195 of this volume.

fact, I think the only store that has not changed is the McDonald's right on the corner of Goulet.

In this particular case there were at least seven relatively good eyewitnesses to the event. These names have been reprinted many times in the various formats I talked about earlier, but I will go through what they saw.

On the 23rd of December 1981, the police arrived at 8:46 pm; it is known that this was the time that the police respond to this case. The owner of the Ideal Donut shop collected the day's receipts, the sales of the donut shop, and left at 8 o'clock at night. When he leaves, Barbara Stoppel is talking on the phone and she continues to talk on the phone from about 8:00 to 8:10. There is a lone customer in the store, Mr. Andy Dafoe, and he indicates that Barbara Stoppel is still talking on the phone when he leaves at about 8:15. Barbara Stoppel is now alone in the store.

Mildred King is an older lady and she is on her way to go shopping at the Dominion store, which is now a Shopper's Drug Mart. As she is walking through the parking lot by the donut shop she bumps into a very angry man clenching his fists, quite tall with a cowboy hat on. She falls down. She estimates the time when this happened as between 8:00 and 8:15.

Paul McDougald brings his wife to the mall to buy some cigarettes at Boot's Drugs Store. He estimates their arrival at the mall to be around 8:25. He drops his wife off and he remains sitting in his car, which is facing the donut shop. He sees a male walk around inside the donut shop with Barbara Stoppel. He sees the male come up to the door, lock the door, and then walk further back into the store. McDougald's wife now comes back into the truck, and they talk about what he has seen. They remain in the parking lot and they both watch what is going on in the Ideal Donut shop.

Lorraine Janower works at Boot's Drugs, the same store Mrs. McDougald is buying her cigarettes from. Mrs. Janower walks over to Ideal Donuts between 8:15 and 8:20 and finds that the door is locked. She thinks that this is rather strange, and walks back to Boot's Drugs where the pharmacist also finds it strange that the donut shop is closed. They phone the store and nobody answers. They call one of the sister stores of Ideal Donuts' and are told it should be open and the other store does not know why it is closed.

Paul McDougald leaves his truck and walks over to Boot's Drugs Store. He finds that Lorraine Janower has already had the same concerns that he has. So he goes back to his truck, and then to a TV store that is right across the parking lot. He continues to watch what is going on in the donut shop, and is now joined by the owner of the TV store. The two of them watch a

man come out from the back washrooms of the donut shop. The unknown man crouches and slinks along by himself, and there is no longer any sign of Barbara Stoppel in the donut shop. The unknown man comes up to the door, grabs a box off the shelf, unlocks the door, and walks out. Mr. McDougald and the TV store owner place that time at around 8:45.

John Doerkson is working in the parking lot selling Christmas trees. He walks over to the donut shop at 8:35 and finds the doors locked as well. He waits for about five minutes right outside the front doors, when Mr. Janower walks over and stands with him. Mr. Janower went to the store because his wife had told him that something was going on. The two men are both looking in the front doors of the shop. It should be noted that nothing has changed with respect to the layout of the store in the past 30 years – the roofline has changed on the store, but the front windows and how it looks has not changed since the days it was an Ideal Donut shop. So the two men have a very good view right inside the store from the front doors and the front windows. They see what Mr. McDougald saw – a man come out of the women's washroom at the rear. He is crouching, slinking along, and he picks up a box off the shelf. He comes to the front door and he takes the open/closed sign, flips it to closed, unlocks the front door, and he walks out facing right to Mr. Janower and Mr. Doerkson. He tells them "the store is closed."

Mr. Janower goes into the store and he finds Barbara Stoppel on the floor in the washroom with twine wrapped around her neck. He comes out and asks his wife to call the police. The police are called and Mr. Janower tells John Doerkson, who is still standing out front, to follow the suspect.

The man/killer walks away towards the McDonald's restaurant and then goes around the back of the McDonald's, behind the mall, and then onto the Norwood (now Queen Elizabeth Way) bridge. He starts throwing things over the side of the bridge, including a pair of gloves, a box, and some twine.

John Doerkson is following the killer at this time. Doerkson makes a little detour to the Domo gas station in the parking lot, and asks the attendants for a baseball bat that he knows they have behind the counter. He tells them to call the police and he goes onto the bridge. The attendants call 911 but they do not know what has happened. The call to the police is received at 8:57. The police and ambulance have already responded previously to Mrs. Janower's phone call. The attendants were probably already well aware that something was going on, but they do not know what. All they know is that John Doerkson has asked them to call the police.

One thing that should be noted about the timing of the events here is that because the attendants at the Domo do not know what is going on, they describe John Doerkson to the police dispatchers. They describe him as a guy in a snowmobile suit, he is about 5'6", he is carrying a baseball bat, and he is going onto the bridge. Later on, this description causes the Court of Appeal to think that there is something suspicious about John Doerkson because his is the first description the police are given (of the suspect). The Court of Appeal questions Mr. Doerkson's credibility because of some comments that he made that do not make sense in light of the call to the police.

After he obtains the baseball bat John Doerkson goes onto the bridge and confronts the man that he saw inside the donut shop while the man is throwing things over the side of the bridge. As this is happening, Marcel Gloux drives by and he sees the confrontation on the bridge. While he testified at the first trial, Mr. Gloux was not called as a witness for the last two trials of Thomas Sophonow. This also causes some concern for the Court of Appeal because it appears there are no witnesses to John Doerkson having a confrontation on the bridge – something that might be expected two days before Christmas on a busy bridge near a mall. This further adds to the credibility issues that the Court of Appeal finds with John Doerkson. Unfortunately, it was out of the Crown's hands as to why Mr. Gloux was not called as a witness in the last two trials to corroborate Mr. Doerkson's evidence – namely that he saw things getting thrown over the side of the bridge by a tall man with a cowboy hat.

In any event, the killer apparently pulls a knife on Mr. Doerkson and Mr. Doerkson lets him go. The killer continues north over the bridge and Mr. Doerkson returns the bat to the Domo before returning to the Ideal Donut shop. He sees that the police and an ambulance are in attendance, and he decides to leave. He does not talk to any of the policemen and they do not know his identity for about an hour and a half. Eventually they do speak with him and he does take them back to the bridge and shows them where the man was discarding items over the railing. The police search along the frozen ice and they find two sets of gloves, a cardboard box, and a bunch of twine that matches the twine that was wrapped around Barbara Stoppel's neck.

C. The Rope

The police tried to identify and connect the twine they found to a business or store, but they were unable to do so. It turned out to be a very unique type of rope. After about a month and a half of trying to determine

where it came from, which included shipping the rope all over the country, one company said “absolutely that’s ours. We made that for British Columbia Hydro as shot line.” This company, Powers Twine, was actually based in Washington. They testified at all three trials that the rope was theirs and that they made it for BC Hydro. So this will be one of those hypotheses mentioned earlier that you would want to test – was the rope in fact made by Powers Twine? The significance of that claim is that it effectively turned the investigation from Winnipeg to BC.

In reading the report, there was mention of another company in Portage La Prairie that said ‘it is not our rope as far as we can tell visually, but for liability reasons we put a secret chemical in our rope. So if we are pulling a skier and it breaks and someone is going to sue us, we’re going to make sure it’s our rope. And that’s how we know it’s our rope because we put this chemical in it.’ The cost of the test was \$100 and the company would perform the test themselves. But nobody followed up with the company. The Winnipeg Police did go to the RCMP lab but were advised that the RCMP did not do the kinds of test required – atomic absorption – and that’s where it ends.

So 20 years later, that was something that could still be tested. Berkley Canada is the name of the company in Portage but they have not made rope at that plant for probably 25 years. However, the headquarters still exists in Colorado and they still had the formula that they used to identify their rope. The rope was tested and it contained the trace element that Berkley put in for liability purposes (Powers Twine did not use a chemical tracer in their ropes).

So where the twine came from became rather important. The police could not find anybody locally, so they shifted their focus to British Columbia. One policeman remembered having to field an inquiry from BC regarding a man by the name of Thomas Sophonow. So he thought, well it is around the same timeframe I wonder what he looks like? The policeman obtains Thomas Sophonow’s picture and he looks similar to the composite drawing that had been prepared by the witnesses that had seen the killer inside the donut shop.

D. The Composite

One interesting thing, or maybe several interesting things, about the killer is that he certainly made no attempt to hide himself. He seems to be in that donut shop for 10 to 15 minutes with windows all the way around. It is dark outside and bright inside which makes the observation for the witnesses very

good. At least two of the witnesses are within a couple feet, and John Doerkson would appear to be hands on with the suspect on the bridge. It is at a busy mall. So is this person comfortable with his surroundings? Is he a local person? He escapes over a busy bridge. He does not appear to have a car because he had gone by foot over the bridge, and is not seen coming back. So it could be somebody local, but, contrary to that, you now have this indication from the twine that he may be from British Columbia.

So the policeman compared the composite of the suspect to Thomas Sophonow's picture. While it was a couple of years old, the picture and the composite rather looked the same. That composite was made from six witnesses that got together. They sat down with the police sketch artist individually, and then collectively at the end they agreed with the composite picture that had been made by the police artist.

John Doerkson and Norman and Lorraine Janower were involved in the creation of the composite. These names you will recognize because I already talked about them. However there were two other names that were not eyewitnesses that we have not talked about. That is because they actually saw an identical person during the day. The murder happened around 8:30 at night and they saw this identical person at about 4 o'clock in the afternoon. They were believable, honest witnesses and they described the identical person having been at the mall earlier in the day, so the police believed these two individuals had in fact seen the same person that was in the donut shop four hours later. So these two individuals were included in the creation of the composite – even though they were not eyewitnesses.

Barbara Stoppel was put on life support, but she dies five days later. The newspapers run the police composite, saying 'this is the suspect in the slaying'. However, some of the eyewitnesses that we did talk about, such as Mildred King and Paul McDougald, were not involved in the creation of the composite. So perhaps this was the beginning of some more problems in the investigation, as two people that were not really witnesses were involved in the creation of the composite, which could have influenced the actual eyewitnesses (when the composite is run in the newspaper). Could this cause the actual eyewitnesses to adopt the composite they did not help create as their own image of who the killer was?

So Thomas Sophonow became a suspect because he is from British Columbia and the rope was from British Columbia. Was there opportunity? The police made some inquiries and found out that Thomas Sophonow was in Winnipeg for two days, including the day of the murder, because his ex-

wife and child lived here. Did he have an alibi? Well that was to be tested, but he was in Winnipeg at the relevant time. Witness identification? He seemed to look like the composite sketch, so the Winnipeg Police requested the Vancouver Police pay Thomas Sophonow a visit. This occurs on March 3, 1982.

This visit may also have caused some of the problems that were to occur later on, because the Vancouver Police took Sophonow's picture in such a way that made it very similar to the composite – wearing a cowboy hat. This type of suggestive influence may have affected later line ups.

I talked earlier about the Innocence Project. If you go back and you look at their first 130 DNA exonerations, most of the convictions were based on mistaken identification. The other exonerations had convictions based on informants, like we had in this case, and false confessions. But mistaken identification is a large factor in most wrongful convictions, and DNA has now confirmed that the identification was mistaken. You will also see that hypnosis was a factor, the use of a sketch, photo line-ups, and in-person line-ups. To varying degrees they all have been used and contributed to some of these wrongful convictions.

So in this particular case a Vancouver policeman visits Thomas Sophonow at his house and they have a conversation. Sophonow shares a number of characteristics with the suspect: Sophonow has a cowboy hat, the suspect had a cowboy hat; Sophonow has glasses, the suspect had glasses; Sophonow has a mustache, the suspect had mustache; Sophonow is tall, the suspect was tall; and Sophonow was in Winnipeg at the relevant time. The police officer asked if he could take Sophonow's picture and Sophonow allowed him to. The officer used a Polaroid camera and took two pictures: a front view and a side view. The picture is taken outside, so Thomas Sophonow's car is in the background; there is a tree on the right, a tree on the left, and the sun is setting behind his right shoulder. The Vancouver Police ship that picture off to the Winnipeg Police. In the picture Sophonow looks just like the composite drawing.

E. The Line-ups

The Winnipeg Police take that picture from Vancouver and place it in their photo line-up with seven other pictures. When you look at the photo line-up that was shown, and which was tendered in Queen's Bench as an exhibit at all the trials, Thomas Sophonow's picture is the only one that was taken outside. Everyone else has a white wall as a backdrop, but Thomas

Sophonow has two trees, a setting sun, and a car in the picture. The Polaroid paper they happen to use out in Vancouver was also bigger than the paper the Winnipeg Police were using to take their Polaroids. Everyone has their name written on the bottom except for Thomas Sophonow. This was because the police were trying to keep track of whom they had taken pictures of, since everybody seemed to wear a cowboy hat in those days, and the police were taking pictures of hundreds of people with cowboy hats. Thomas Sophonow was the only one wearing a sheepskin coat, while at least four others were just wearing shirts. Only two were wearing the cowboy hat, glasses, and had a mustache – distinguishing features of the killer – in both the side and the front views. The pictures were not shown individually either. They were shown as a photo array so the witnesses had to make a value choice about which picture looked most like the suspect by comparing them to one another, as opposed to testing their credibility one at a time with each different picture.

So basically all of the other pictures in the photo array are ‘pointing’ to Thomas Sophonow’s picture – saying ‘look at me I am different’ – and that is what likely happened. They show the pictures to Lorraine and Norman Janower who had very good observations of the killer. They were both right there in front of the store when the killer came out. They show it to Lorraine Janower and she says, “well if anything I think it’s number seven. If anything, he seems to be the closest.” Norman Janower says, “I know that guy from somewhere. I don’t know why. Can’t be certain though.”

So the Winnipeg Police fly out to Vancouver and they arrest Thomas Sophonow on March 12th and bring him back to Winnipeg. They now prepare a live line-up. They return on the 12th, and by the 13th they are in the Remand Centre. The Remand Centre used to be in the Public Safety Building (and run by the police), so it was very easy for the police to bring out the prisoners and put them in a line-up. They just bring the prisoners right from the jail, which was above the Crime Division, and stand them in line with Thomas Sophonow. And that is what the police do on March 13th. The only witness available that day is John Doerkson, and he cannot make a positive identification. While still flawed, the live line-up is better than the photo line-up, as everyone is against the same backdrop and Thomas Sophonow is not wearing his cowboy hat – one of the distinguishing features of the killer. Yet Sophonow is still one of only four people wearing glasses, and he is by far the tallest person in the group. He still stood out from the rest of the line-up, but it was certainly fairer than the photo pack.

John Doerkson, though, cannot pick Thomas Sophonow out from the line-up. After viewing the line-up Doerkson tells this to a newspaper reporter and is quoted the following day as saying "I'm not sure if Thomas Sophonow is the killer." Basically he does not know who Thomas Sophonow is, he just knows that he could not pick anybody out and he tells the paper that. The same day the story runs, which is March 15th, 1982, John Doerkson is arrested on an outstanding warrant. While Doerkson is detained in the Remand Centre he either asks or he is shown who the suspect is in the Barbara Stoppel murder. At this time he now recognizes Thomas Sophonow. He is positive from that day forward that Thomas Sophonow is the person he saw in the donut shop, even though Sophonow looks exactly the same as he did two days earlier when Doerkson could not pick him out of the live line-up at the police station.

Also on March 15th, the Winnipeg Free Press and other newspapers report that Thomas Sophonow had been arrested and charged with the first degree murder of Barbara Stoppel. That evening, the rest of the witnesses are brought in to view the same live line-up. These witnesses likely already knew from the news reports that someone had been arrested and charged with murder, and this person's name was in the paper. So the remaining witnesses come into the police station that night – Norman Janower, Marcel Gloux (from the bridge), and Mildred King (who slipped and fell at the feet of the angry cowboy in the parking lot). These three witnesses view the line-up at 8 o'clock and 8:20 that night.

Mr. Janower goes first – remember it was only seven days earlier that Mr. Janower saw the picture of Thomas Sophonow in the photo line-up – and he says "well from what I can see I'd say it's number seven," which was Thomas Sophonow. When asked why, Janower says that it is because Sophonow seems to be about the right height (he is also the tallest person in the whole line-up). So this brings up the question of whether Janower is making a value judgement because he is looking for a tall person, and that is why he picks Sophonow (notwithstanding he had seen his picture only seven days earlier in the photo line-up). After Janower is done he asks if he picked the right person and the policeman tells him that he has picked the person they are investigating as a suspect. But the newspapers have already said the police arrested and charged somebody with first degree murder, so the fact that Janower is told that he picked the right person could have tainted any further identifications he might make. In fact Mr. Janower is quite certain at every

single trial that Thomas Sophonow is the gentleman that he saw in the donut shop that night.

The question on reflection is, if at the trials Janower was identifying the person who looked like the composite, which does look like Thomas Sophonow, was he identifying the person who he saw just a couple days earlier in the photo line-up that looked exactly like the person he saw in the live line-up? Or was he identifying the person that the policeman told him was the suspect? Certainly the Court of Appeal had problems with that. The Court said the identification of the accused in the line-up may have seriously been impaired by Janower's viewing of the photo array only four days earlier.¹⁶

Marcel Gloux, who saw the struggle on the bridge, said the person he saw on the bridge struggling with John Doerkson was not in the lineup.

Mildred King, when she sees the line-up originally, says "Nope. Person's not there." As they are starting to leave she asks to see the line-up again, at which time she says, "No, I can't swear. Number seven is the closest from the side view." Mildred King was one of the witnesses that was not involved in making the original composite drawing. She did provide a description that matched everybody else's description, but she was not involved in the making of that composite which ran in the paper showing what the suspect looked like. So, does she pick the person that matches the composite, or her own independent recollection of the suspect?

Now I told you about two people that were involved in the making of the composite that were in fact not eyewitnesses. They had seen this identical person during the day. In fact, there were 10 different people that saw a similar person in the afternoon on the day Barbara Stoppel was attacked. Most of these witnesses were from the McDonald's across the parking lot - they said that there was a similar guy in the McDonald's that day, who was just sitting there drinking coffee and looking out towards the donut shop. Even though two assisted in the creation of the composite, there were 10 that all seemed to say there was an identical person around the mall that afternoon.

¹⁶ *Sophonow Trial*, *supra* note 9 at 513.

F. The Other Cowboy

Thomas Sophonow had an alibi that he gave to his lawyer. It was about an eight page statement. In it he related that he had gone to the Canadian Tire, which is now a Giant Tiger on Pembina Highway, just across from the University of Manitoba. His alibi was that he was getting his car fixed and that he had gone to visit some relatives. He told most of that story at his preliminary hearing, which was only two months after his arrest. The police went out and verified that Sophonow was at the Canadian Tire, as he said, and that there were receipts on file showing he had his car fixed. There was also a long distance phone call to his mother back in BC from the payphone inside the Canadian Tire. That phone call lasted from 7:52 to 7:56 pm. However, we know that there was nobody inside the donut shop strangling Barbara Stoppel until at least 8:15pm. So the police do some time trials and determined that it took 14 minutes to drive from the Canadian Tire to the donut shop. This was used to show that there was plenty of time for Sophonow to hang up the phone, get his car, and drive to the donut shop and kill Barbara Stoppel.

So Thomas Sophonow is getting his car fixed at the Canadian Tire in south Fort Garry, but he is also visiting his in-laws, which he said he did during the day. The police verify that Sophonow was visiting at his in-laws from 3:00 to 5:00 in the afternoon. As he also phoned home while visiting his in-laws, there is an additional independent phone record of the time he was there – and not at the McDonald's on Goulet.

So if everybody is accurate with their times, from 3:00pm to 5:00pm Sophonow is visiting his relatives, and he cannot be at the shopping mall at the same time the police are confident that the other witnesses saw the killer. So it is either not Thomas Sophonow that the witnesses see during the day (meaning that by coincidence there was another, identical person there earlier, and Sophonow arrived in the evening) or there was another, similar looking person there throughout the day, and Sophonow was not involved at all.

So I talked about the time trials already. My Google Maps tells me that it takes 16 minutes to travel between the Canadian Tire on Pembina (now a Giant Tiger) and the donut shop, and when W5, who looked at this case (back in 1985) and the Defence Counsel looked at this, their time trials took about 19 minutes. So there is some flexibility in the time. The other interesting thing is that if you were to drive straight from the Canadian Tire, whether it takes you 14 minutes or 19 minutes to get to the donut shop,

where does Thomas Sophonow park his car? There is no time to walk. You are parking that car and going straight into the donut shop. We know Thomas Sophonow's licence plate number, and the make and model of his car because he had it in for repairs and it is recorded on the Canadian Tire invoice. The police wrote down every single licence plate in the parking lot but Thomas Sophonow's car was not on the police list.

If John Doerkson follows the killer over the bridge and the killer is actually Thomas Sophonow, where did Thomas Sophonow park his car? There is a little problem here. Even if the time works, where does Thomas Sophonow leave his car? The police did not see the car in the parking lot. Nor does anybody see Sophonow come back to collect his car and sneak out of the parking lot before anyone has a chance to write down the licence plate numbers.

So if there is another person involved in this case, and it is not Thomas Sophonow, who would it be? In this case there were probably 700 different tips. The police went around and took Polaroid photographs of a lot of the people that seemed to match the suspect description. As it turned out, there was a number of people in Winnipeg that had glasses, a mustache, and a cowboy hat.

During my review, to filter through the vast number of tips, I looked for somebody that lived in Winnipeg at the time, looked similar to the composite, and may have had a shaky alibi. Was somebody the subject of more than one tip? What had their lifestyle been like in the intervening 20 years? Had they assaulted, sexually assaulted, or molested anybody of the same age? Did they have a violent temper? I looked at those kinds of things and before I get too far ahead, one thing that I'm sure Mr. Wolson will point out was that before John Doerkson identified Thomas Sophonow in the Remand Centre on March 15th, he had identified another man as the suspect less than two weeks after the incident.

Doerkson called the police to say the suspect was in the Norwood Hotel (across from the donut shop) at that very moment. He said if it was not the killer then "it is his twin." So that was only ten days later, after the composite had been released and was still fresh in people's memory. The police went down to see the gentleman, took his picture and then eliminated him as a suspect. He was quite confident within 10 days that he knows who the suspect is, and Doerkson had incredible difficulties identifying Tom Sophonow, so there should have been some concern with his ability to recognize the suspect at all.

Another concern relates to hypnosis. As the police were having a hard time finding a suspect in the first couple of months, the four main witnesses were all put under hypnosis. Unfortunately, there was no record made of what was said during the hypnosis that could have influenced their memory or changed their memory. In 2007, the Supreme Court of Canada in *Trochym*¹⁷ said that it is inappropriate to use hypnotically refreshed testimony at trial because of the possibility of undue influence. Could that have happened here? (We don't know as the recordings of those sessions were missing).

Those were some of the issues regarding eyewitness identification in this case – many of them similar to the first DNA exonerations identified by the Innocence Project.¹⁸ In hindsight, the suspect pool could have been narrowed by looking at things like the tips, looking more closely at the jail house informants, and at how they came about and how or why they testified, and looking at the eyewitness identification procedures that were used. Certainly somebody that lived across the street, with a bird's eye view of the donut shop, who looked similar to the composite, who had a future life of violence against young women, and who was (in 1999) charged with murdering a young girl in British Columbia, made a viable suspect. The fact that such a person was the subject of several tips within days of the composite being released, and had phoned the hospital after Barbara Stoppel was taken in, inquiring if she was okay, is also compelling.

Basically, within a day of the attack, a gentleman who lives across the street, who looks like the composite, and who has a 'future' inclination to assault young girls, shows up at the hospital inquiring after her. He may be a much more viable suspect in this particular case than Thomas Sophonow. Based on that information, I prepared a report up to that date, indicating that there might be a much more viable suspect. Because of the report, the Chief of Police assigned a number of investigators to continue following up on that case.

¹⁷ *R v Trochym*, 2007 SCC 6 at paras 24-66, (2007) 1 SCR 239.

¹⁸ See Innocence Project, *supra* note 10. A list of cases in which eyewitness misidentification has been identified as a contributing factor can be found online at: <<http://www.innocenceproject.org/know/Search-Profiles.php?check=check&title=&yearConviction=&yearExoneration=&jurisdiction=&cause=Eyewitness+Misidentification&perpetrator=&compensation=&conviction=&x=35&y=2>>.

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.¹⁹ 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

¹⁹ *Sophonow Inquiry*, *supra* note 9 at 60.