

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

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

It 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

²⁵ For a reproduction of the full apology, see page 154 of this issue.

Police, Jack Ewatski, on television and of course it piqued my curiosity. I was surprised when I heard him exonerate Tom Sophonow; I had no idea that this announcement was coming down.

I did not know Tom Sophonow, but I felt very happy for him. I was getting ready for my flight home, when as I always do, I called my office for messages. There was a message from Bruce McFarlane, the Deputy Attorney General, but did not necessarily connect the message to the Sophonow matter. I phoned Bruce, and he asked me if I would consider being Commission Counsel to Peter Cory in the public inquiry into the wrongful conviction of Tom Sophonow. It took me about two seconds to answer in the affirmative. The adrenaline started flowing again. As I flew home that night, without any intoxicants, I think I was higher than the airplane. For a criminal lawyer (and I've practiced criminal law since 1973), to do a post mortem, if you will, on a murder case or a series of murder cases – to find out what went wrong and even in a small way to be a part of recommendations for change is an awesome task. I could not have been happier.

I met with Peter Cory in Vancouver a few weeks later. I knew Peter Cory, as he and I were part of a teaching faculty, but I did not know him well. I had dinner with him and I was awestruck. He regaled me with his many stories of flying bombing missions in WWII. He is just an unbelievable person. I knew him to be a great judge, but I did not know of the kind of person he was. A gentle man, kind, caring, compassionate; such a decent person. He asked me that evening if I would formally become his counsel, his Commission Counsel, and of course I readily accepted.

In Peter I thought I hit the jackpot. I did not know then, that in 2009 I would hit the jackpot again with Jeff Oliphant as my Commissioner in the Mulroney-Schreiber Inquiry.²⁶ I can only say that Jeff Oliphant and Peter Cory are equally wonderful people, and great judges. I have had the honour then of working with two of Canada's very best.

As for my colleague on this panel Jeff Oliphant, I could go on about Jeff, but let me say his conduct as commissioner at the Mulroney-Schreiber Inquiry should be a model for any future commission presiding over a public inquiry. He was brilliant as commissioner. His report is classic.

Now, I want to say something about my other two colleagues here today. Bruce MacFarlane is a very humble man, but I would say that he is one of the big players in this country in the exposition of, and education on, wrongful

²⁶ *Oliphant Commission, supra* note 7.

convictions. He led in the organization of an international conference on wrongful convictions.

John Burchill, my fellow panelist – I would say that if it had not been for John there never would have been a Sophonow Inquiry. Imagine a police officer investigating other police officers or investigating an investigation of other police officers. Consider the courage that that action took. Without question, I would say if it had not been for John, this Inquiry would never have taken place.

When I began my term as Commission Counsel, I wanted to meet Tom Sophonow. I went out to Vancouver and met with both Mr. Sophonow and his counsel. I asked his counsel if he would mind if I had a few minutes alone with Tom. The one thing I must tell you is that, from the time I met him in Vancouver until very recently, he was a fractured man; he was tormented. I took him aside on that first meeting and said, “Tom, what is this about for you? Is it about vindication or compensation?” He gave me an answer that was music to my ears – he said that it was not about either of those things. It was about working to ensure that there is not another Tom Sophonow. I knew his intentions were honourable. It was a meeting I would not forget.

As Commission Counsel, I would learn many of the things that John Burchill has told you about the murder of this young, beautiful girl, just 16 years of age, days before Christmas. I would learn that there were four eyewitnesses who testified at Sophonow’s trials. I would know about the identification they made of a large man – certainly fitting Tom’s description – wearing cowboy boots and a cowboy hat, with a pitted face, and dark glasses. I heard how the killer left the donut shop and was accosted by the witness John Doerkson, who wrestled with him on a nearby bridge. That he saw the killer throw articles over the side of the bridge (that later turned out to be gloves and twine). I would learn that the police came to the Ideal Donut Shop to find Barbara Stoppel in a washroom with a ligature made of twine around her neck. I learned that she would die a few days later in the hospital. I also learned that a man came to the hospital asking about Barbara Stoppel’s condition on the 28th of December. I will speak of that man later. I learned that Sophonow was in Winnipeg to visit his daughter. While he never actually connected with her, he visited other family. He intended to drive back to Vancouver. He had some car trouble and went to the Canadian Tire on Pembina Highway. While there, he struck up a conversation with some people. He made a long distance call to his mother in Vancouver that ended

some minutes before eight o'clock. Keep in mind, of course, that the critical time was about 8:30 pm or so, as that was the time that Barbara was attacked.

I learned that Mr. Sophonow, because of his own difficult childhood, had a practice at Christmas time of taking candies to sick kids in hospitals. In fact, he had done that at around the very time that Barbara was attacked. He had gone, we learned, to the Safeway in close proximity to the Canadian Tire and bought some mesh stockings full of candies. He then distributed them at local hospitals. I learned that a composite drawing of the killer had been circulated. Mr. Sophonow had gone back to Vancouver but he was later arrested there by Winnipeg police.

My task as Commission Counsel was to gather the evidence, to review it, disclose it, and to put witnesses before Commissioner Cory. I took the position that I would cross-examine these witnesses in search of the truth. Not because I had an interest one way or the other, but because my task as Counsel was to put all the evidence before Commissioner Cory in a fair and impartial way. I was mindful that we were dealing with peoples' reputations. The reputations of the prosecutors, the investigating police officers, and the witnesses who would appear before Commissioner Cory.

Systemically, when you look at wrongful convictions there are a number of factors, and most, if not all of them were present in Sophonow's case. I learned quickly that, from start to finish, the Sophonow case was the perfect storm for wrongful conviction. It had all the ingredients, the recipe was there, and the outcome could have been predicted.

A. Eyewitness Identification

Keep in mind that the murder of Barbara Stoppel rocked the city of Winnipeg. The killer had to be arrested. The police did everything within their power to solve this crime.

So there was this perfect storm. Eyewitness identification, I can tell you as a criminal defence lawyer, that if you have somebody come forward to say "I saw the fellow leave the scene of the crime, and that's the man sitting in the prisoners dock" – that is devastating evidence against the accused. In this case, there were four of them. Four eyewitnesses – that is the kind of evidence that would give you grey hair prematurely as a defence lawyer – it is devastating.

Studies have shown that systemically in about 81% of wrongful convictions, mistaken eyewitness identification plays a significant role.²⁷

Now of the four eyewitnesses that John Burchill talked about, I will look more closely at John Doerkson because he had the greatest interaction with the killer. He had gone to the donut shop for coffee sometime after 8:15. When he arrived, the door was locked. He saw a large man inside the shop. The man left, and Doerkson followed him to the nearby Norwood bridge, where he struggled with that man. The killer dropped a package over the side of the bridge that was later picked up by the Winnipeg Police Service. John Doerkson was shown a line up, but he could not pick out Tom Sophonow. This is after Tom was arrested in March in Vancouver and brought back to Winnipeg. The same John Doerkson called the Winnipeg Police about 10 days following the murder and said that the killer was in the Norwood Hotel. The police went to the hotel and investigated that person, and right away they exonerated the man. Doerkson said that if that were not the killer, it was his twin brother. A few days later John Doerkson picked out a Winnipeg Sun newspaper reporter as being the killer. The police went to that person, and right away he was exonerated. Doerkson would later say that that every tall person he saw might have been the killer. Now, the true significance of these misidentifications is that they were never disclosed to the defence. It got worse; Doerkson was arrested for unpaid fines. He was put in the Remand Centre where Sophonow was being held. He caught a glimpse of Sophonow (he had seen his picture in the newspaper). He asked if he could see that person again, and after he did, Doerkson tells the police that he's 90% certain that was the man he saw on the bridge. Somehow, when it came to the preliminary hearing and over the course of the three trials he claimed to be 100% certain that Sophonow was the man. A skeptic might argue that Doerkson had seen the pictures of Sophonow in the newspapers, and been influenced by them.

Evidence at the inquiry revealed that John Doerkson in 1982 had eye trouble. He required glasses, and he had trouble with his eyes at night, and in

²⁷ See *Sophonow Inquiry*, *supra* note 9 at 27 (81%). See also Garry Wells & Elizabeth Olson, "Eyewitness Testimony" (2003) 54 *Ann Rev Psychol* 277, online: Iowa State University <http://psychology.iastate.edu/~glwells/annual_review_2003.pdf> (75%); Innocence Project, *supra* note 10, online: Innocence Project <http://www.innocenceproject.org/Content/Eyewitness_Identification_Reform.php> (around 75%); Barry Scheck, Peter Neufeld & Jim Dwyer, *Actual Innocence: When Justice Goes Wrong and How to Make it Right* (New York: New American Library, 2003) at 246 (84%).

poor lighting conditions.²⁸ This was never disclosed to the defence at the trials.

Further evidence at the inquiry disclosed that Mr. Doerkson had developed a relationship with a member of the Stoppel family. Did that influence him in picking out Tom Sophonow as the killer of Barbara Stoppel?

Now, I am not going to get into all the difficulties with eye witness identification, save to give this one example: when I was preparing for the inquiry, I interviewed one of the witnesses who had made a positive identification of Sophonow at trial. I had pictures of both Tom Sophonow and the new suspect of the Winnipeg Police Service, Terry Arnold. The witness said "there is Tom Sophonow," pointing to Terry Arnold. At the Inquiry, one of the four eyewitnesses testified that when they saw the picture of Terry Arnold in the newspaper, they not only thought it was the killer, but they thought it looked more like the killer than Sophonow did. The evidence of the four eyewitnesses was devastating to Tom Sophonow. None of these witnesses made positive identifications at the beginning, but all of them, by the time of the preliminary hearing, were positive that the person they saw leaving the donut shop was Tom Sophonow. It is not difficult to see why eye witness identification has been described as frail at the best of times, in the best of cases.

There is no question that eyewitness evidence played a significant role in the wrongful conviction of Tom Sophonow. Commissioner Cory, in his report, made a series of recommendations regarding eyewitness evidence.

B. Jail House Informants

Jail house informants also played a prominent role in the conviction of Tom Sophonow. By the time of his third trial, there were three informants who testified that Sophonow had confessed to each of them at separate times. The first informant, Thomas Cheng, told the court at trial that Sophonow confessed to him. He said that Sophonow told him that he was in the donut shop. That he went there to rob it, and that when the young girl in the donut shop was not cooperating, he got mad and took her into the washroom and used the rope to kill her. From the defence perspective it does not get worse than a confession from the accused. When you look, however, at the jail house informants in this case, they had all lied for their individual reasons.

²⁸ *Sophonow Inquiry*, *supra* note 9 at 22-54.

When Cheng testified at the trial of Tom Sophonow, it was suggested by defence counsel in cross examination, that Cheng had made a bargain with the police in exchange for his testimony.²⁹ He denied this suggestion. When the prosecutor re-examined Mr. Cheng, he stated that he did not ask for any consideration for his evidence. While he hoped for favourable treatment, the fundamental reason he came forward was that it bothered him to see a murderer on the street. Consider however, what Cheng told a police polygrapher prior to trial. That the most important reason for him to come forward was to get his 26 charges of fraud dropped. The latter was never disclosed to the defence.³⁰

The second jailhouse informant, Adrian McQuade, was a known informant for the Winnipeg Police Service. He had often bargained information for some kind of compensation. He was arrested on break and enter charges. He told the police that he would give them information on some drug matters, but they were not interested. So he asked them to put him in a cell with Tom Sophonow. He went in with Sophonow and when he came out he told the officer that made the arrangement, that Sophonow did not say anything to him about the homicide. Later though, he told the police that, in fact, Sophonow did confess. At Mr. Sophonow's third trial, when McQuade was about to be called as a witness, (the only trial in which he testified), he told the police that if they put him on the stand, he was going to sabotage their case. He told them that he did not wish to testify. The police told him that they would publically disclose the fact that he was an informant. In doing so, McQuade feared, the disclosure of him as informant would jeopardize his life. McQuade cooperated, and testified that Sophonow confessed to him. Defence counsel testified at the public inquiry that he was not told of McQuade's initial position that Sophonow had said nothing about the homicide. Further, defence counsel testified that it was not disclosed that McQuade changed his mind about testifying, and only did so after he (McQuade) was threatened.

The third informant, Douglas Martin, was the best example of the danger of jailhouse informants. He had testified nine times in Canadian courts as an informant. He had previously been convicted of perjury. He too testified that Sophonow confessed to him.

²⁹ *Ibid* at 64.

³⁰ *Ibid* at 75-6. Commissioner Cory found that the non-disclosure was not deliberate yet had a significant impact on the outcome of the trial.

To say that Commissioner Cory was not impressed with jailhouse informants is an understatement. Regarding Martin, Commissioner Cory said he seems to have heard more confessions in his life than the most dedicated priest.³¹ He talked of informants this way: “[t]hey rush to testify like vultures to rotting flesh or sharks to blood.”³² As a result, Commissioner Cory made recommendations on jail house informants. He recommended that jail house informants should not be allowed except in the rarest occasions, and only then with certain guarantees of trustworthiness.³³

C. Terry Arnold

Well, as mentioned above, a gentleman came to the hospital to find out about Barbara’s condition after she was taken there. The gentleman was a fellow by the name of Terry Arnold, and at the time of the announcement of the Inquiry, was considered to be the number one suspect, by the Winnipeg Police, in the murder of Barbara Stoppel. As John Burchill said, he went on to have a life committing horrible crimes. He had been charged with murder in another province, and was also investigated in the States for other murders.³⁴ He was never brought to justice as he died of an overdose. He is the fellow that went to St. Boniface Hospital right around, I believe, the 28th of December, several days after Barbara had been taken to the hospital (she was on life support) to inquire as to her condition.³⁵

Terry Arnold lived just a short distance away from the scene of the murder. One could see the donut shop from his apartment. He had a cowboy hat and cowboy boots, and his face was pitted (matching the composite drawing). He knew Barbara Stoppel, and he told the police that he had a

³¹ *Ibid* at 69.

³² *Ibid* at 63.

³³ *Ibid* at 73; Commissioner Cory recommended that only in rare case such as kidnapping where the location of the victim is revealed and only where the information obtained could not have been obtained by any other source should jail house informant testimony be admissible.

³⁴ Arnold had been convicted of sexually assaulting four girls in Newfoundland, the murder of a fifteen year old girl in BC and was the prime suspect in the murder of Denise Lapierre in Calgary: “Convicted killer suspect in two old murders”, *CBC News* (10 November 2000) online: CBC News <http://www.cbc.ca/news/canada/story/2000/06/14/stoppel_suspect000614.html>.

³⁵ Terry Arnold visited St Boniface Hospital on December 28th, *Sophonow Inquiry, supra* note 9 at 35.

crush on her. He did not have an alibi for the critical time. Yet somehow, while he had been interviewed by the WPS, he slipped through cracks. The police ultimately focused on Tom Sophonow to the exclusion of anyone else. They became satisfied that Mr. Sophonow was the killer, and that they had their man. Commissioner Cory found that the Winnipeg Police Service investigation was flawed by tunnel vision, that is, they focused on Sophonow exclusively. The commissioner made a number of recommendations regarding tunnel vision.

D. Interview of Tom Sophonow in Vancouver

In March, after receiving some information about Mr. Sophonow, two Winnipeg homicide detectives went out to Vancouver, where he was living, to interview him. Initially, a Vancouver police officer interviewed Sophonow when certain matters came to light,³⁶ which prompted Winnipeg detectives to interview him. The Winnipeg detectives interviewed him over a four hour period, in five different sessions. These interviews amounted to a cross examination of Mr. Sophonow. Sophonow initially denied any involvement. Then something happened between the second and third session. The detectives decided that they would strip search him; conduct a cavity search for no reason. Sophonow ultimately testified at the inquiry that this had the effect of taking his dignity from him, of shaking him to the core.³⁷ The interview, the Commissioner noted, was hardly fair and crossed the line in several instances.³⁸ The commissioner found that the officers were not taking verbatim notes of the interview, and it was not audio or video recorded. One of the officers recorded the following comments attributed to Tom Sophonow, "I stopped for coffee where that chick got killed between eight and nine o'clock." As noted earlier, the commissioner had grave concerns both in the manner of interview, and the failure to record accurately. He further found that he had grave concerns about the conduct of the Winnipeg detectives. Sophonow testified that this interview haunted him to the very day of his testimony at the inquiry. He testified that they broke his will. He told his psychiatrist that at the end of this interview he thought for a while he

³⁶ *Ibid* at 13; the Vancouver police officer who initially interviewed Sophonow recorded Sophonow as saying that he could have been at Ideal Donut, although Sophonow later testified that it should have stated I could not have been in Ideal Donut.

³⁷ *Ibid* at 17.

³⁸ *Ibid* at 17-18.

might have committed this crime, even though he knew that he had not. The police did not charge and caution him, they did not give him the right to a lawyer even though Sophonow asked for one, they lied to him, and they told him he was lying. They strip searched him, as I noted, and traumatized him. It ended up in a veiled confession of sorts. Well, add everything up: four eye witness identifications, three jail house informants, and the comments purportedly made by Sophonow, all strongly suggestive of Sophonow's guilt.

E. The Twine, Crown Misconduct

I discussed earlier that when Barbara Stoppel was discovered in the bathroom of the donut shop there was a twine ligature around her neck. The origin of that twine became a significant issue at Mr. Sophonow's three trials. The prosecution argued that the twine was manufactured on the west coast, and it was used by BC hydro on a number of sites in Vancouver. Mr. Sophonow was living in Vancouver. This Vancouver connection was an indicator that Sophonow was the killer. The twine was never tested, even though the cost for such testing was only \$100. By such tests, its origin could have been determined conclusively. To compound matters, in advance of the initial trial of Mr. Sophonow, a witness from the west coast twine company, the night before he was to testify, met with the junior Crown attorney here in Winnipeg. As they were talking the witness said, "I have to tell you that this twine is also produced in Portage-la-Prairie, Manitoba." This statement by the witness as to a second source of the twine was never disclosed to the defence. Had it been disclosed, the connection to the west coast and Tom Sophonow would have been destroyed.

F. Alibi

Alibi evidence was put forward by Tom Sophonow through his counsel. He was at the Canadian Tire on Pembina highway at around 8:00 pm on the night in question. He had car trouble. He had phoned his mother from the Canadian Tire, to her home in BC. He had purchased these mesh stockings full of candy from the Safeway store near the Canadian Tire. He had taken the candies to hospitals for sick kids. He had talked to a nurse at one of the hospitals. The prosecution argued that the alibi was unreliable, in that it was late in coming (the alibi had been presented to the prosecution prior to the first trial). The prosecution further argued that there was no mention of it to the detectives who interviewed Sophonow in Vancouver. They argued that the alibi was not true. While this evidence did indeed establish Mr.

Sophonow's innocence, the prosecution argued that Mr. Sophonow, accepting that he was at the Canadian Tire around 8 o'clock, had sufficient time to drive to the murder scene and commit the crime. Detectives testified that it took them 14 minutes to drive that distance. I have driven that distance on a number of occasions. It took me longer than 14 minutes. Consider too, that this was around Christmas time, when traffic would have been heavier. Consider as well, that Sophonow's vehicle was not located at or near the murder scene. For the prosecution to be correct in their argument, Mr. Sophonow would have had to have parked his vehicle and walked to the donut shop. There was not time to do so. Evidence disclosed at the inquiry that a man had attended at the Saint Boniface hospital on the night in question, and delivered these red mesh stockings with candy. The police had seized such a stocking from the hospital, but never disclosed this fact to the defence. Had disclosure been made, surely the alibi would have been given great consideration by the jury. Commissioner Cory made recommendations regarding alibi evidence.

G. Aftermath

Commissioner Cory was a perfect fit for this inquiry. He is a very compassionate man. Sophonow, who had justifiable trust issues, did, however, trust Peter Cory. I have to tell you, as I said before, that the anguish that I could see when I first met Tom followed through to the inquiry, where I saw him absolutely fractured. There were days where he could not come to the inquiry because he was in a terrible state. He was depressed beyond description. He was, of course, reliving his whole nightmare publicly. But now I can jump ahead because there is, I think, somewhat of a happier ending. I was at the Driskell Inquiry,³⁹ the opening day, and as I walked into the inquiry to commence that day, I saw Tom Sophonow. He came to support James Driskell. I walked up to him, and I saw him smiling – I had never seen that before. I asked him how he was, he gave me his hand and told me he was doing great. I could see on his face that he has some sense of peace. It made my day. At the first break I phoned Peter Cory, and told him about Tom. I

³⁹ James Driskell was charged and convicted of first-degree murder in 1991. By 2003, it was accepted that Driskell had been wrongfully convicted. In December 2005, the Government of Manitoba called a public inquiry which reported in January 2007, *Driskell Inquiry*, *supra* note 6.

could hear the relief in his voice; Commissioner Cory had felt so much for this man who was truly a victim of wrongful conviction.

The tragedy of this event is the depth of harm it created: a family lost their child; an innocent man went to jail and was haunted for years; the real perpetrator, Terry Arnold, was free, and had the opportunity to kill again.

Commissioner Cory made a series of recommendations. I am happy to say many of them were accepted and adopted both in Manitoba and across Canada. I am extremely proud to have been a small part in the process. I will leave you with this small thought, that if we are not diligent, it could happen again. Thank you.

VI. JUSTICE JEFFREY OLIPHANT

Thank you very much Bruce. I have never conducted an inquiry into a wrongful conviction but I have been exposed to several lectures and listened to people who have talked about what has happened. As my friend Richard said, with Thomas Sophonow it was a perfect storm. Just about every contributing factor to wrongful convictions that you can think of could be found there. I should tell you that although I have never done a public inquiry on a wrongful conviction, I played a small role in the James Driskell matter because prior to any inquiry being called, I made an order on the application of Mr. Driskell's lawyer that compelled the Winnipeg Police Service to disclose a report that had been secret for many years. It was a report that was done very much like the one that John did on Sophonow. Mr. Driskell had been convicted of murder, and the report that I had in my possession disclosed to me, to my horror, that James Driskell was probably innocent.⁴⁰ I ordered the disclosure of the report, and opened the Pandora's Box with the result that there was a public inquiry; he was wrongly convicted and the inquiry demonstrated that.

A. Wrongful Convictions

My first exposure to wrongful convictions was when I was at Cambridge University in the UK attending a conference of lawyers, judges, and other interested people, where I had the benefit of hearing from a man by the name

⁴⁰ *Ibid* at 89-91; in September 2003 the *Hall/Ewatski Report* was completed which suggested several key witnesses in the Driskell trial had exchanged testimony for compensation and one witness was threatening to recant.